SUPREME COURT OF QUEENSLAND

CITATION:	*Mantonella P/L v Thompson* [2009] QCA 80
PARTIES:	**MANTONELLA PTY LTD** ACN 069 012 531 (appellant/appellant) **v** **MYLES THOMPSON** (respondent)
FILE NO/S:	Appeal No 5067 of 2008 DC No 288 of 2007
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Cairns
DELIVERED ON:	7 April 2009
DELIVERED AT:	Brisbane
HEARING DATE:	14 November 2008
JUDGES:	McMurdo P, Muir JA and Fryberg J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs.**
CATCHWORDS:	PROFESSIONS AND TRADES – LAWYERS – DUTIES AND LIABILITIES – SOLICITOR AND CLIENT – NEGLIGENCE – GENERALLY – where the appellant appealed against a decision of a District Court judge dismissing the appellant's appeal from a Magistrates Court decision – where the respondent, a solicitor, acted for both an estate as vendor and the appellant as purchaser of a restaurant business – where the business premises was subject to a lease – where a clause in the sale and purchase agreement required the lessors' consent to the assignment of the lease – where the lessors required a $25,000 bank guarantee from the appellant – where the bank guarantee was not executed – where the lessors' consent to the assignment was not obtained – where the appellant executed the sale and purchase agreement without formal assignment of the lease – whether the respondent was negligent in failing to advise the appellant that it was not contractually obliged to settle until the clause in relation to the assignment of the lease was satisfied CONVEYANCING – THE CONTRACT AND CONDITIONS OF SALE – SALE OF BUSINESSES –

LEASES – where the appellant executed the sale and purchase agreement without executing the requisite bank guarantee and obtaining a formal assignment of the lease – where there was evidence that the appellant went into possession of the premises – where the appellant recovered damages from the lessors for conversion of chattels of the business – whether settlement was effected and if so, when

PROFESSIONS AND TRADES – LAWYERS – DUTIES AND LIABILITIES – SOLICITOR AND CLIENT – FIDUCIARY DUTY – where the respondent solicitor acted for both parties to a transaction for the sale and purchase of a restaurant business – where the respondent was in a fiduciary relationship with the appellant – where a conflict of duties owed by respondent existed – whether the respondent obtained the fully informed consent of the appellant to act despite the conflict – whether a breach of fiduciary duty was causative of the loss sustained by the appellant, entitling the appellant to damages

Cheques Act 1986 (Cth)

Aberdeen Railway Co v Blaikie Brothers (1854) 1 Macq 461, cited
Attorney–General v Blake [1998] Ch 439, cited
Barnes v Hay (1988) 12 NSWLR 337, cited
Beach Petroleum NL v Kennedy & Ors (1999) 48 NSWLR 1; [1999] NSWCA 408, considered
Bray v Ford [1896] AC 44, cited
Brickenden v London Loan and Savings Co of Canada [1934] 3 DLR 465, distinguished
Bristol & West Building Society v Mothew [1998] Ch 1, cited
Butcher v Port (1985) 3 ANZ Ins Cas 60–638, cited
Chan v Zacharia (1984) 154 CLR 178; [1984] HCA 36, cited
Clark Boyce v Mouat [1994] 1 AC 428, considered
Colley v Overseas Exporters [1921] 3 KB 302, considered
Commonwealth Bank v Smith (1991) 42 FCR 390; [1991] FCA 375, cited
East London Union v The Metropolitan Railway Company (1869) LR 4 Ex 309, cited
Environment Agency v Empress Car Co (Abertillery) Ltd [1999] 2 AC 22; [1998] UKHL 5, cited
Gemstone Corporation of Australia Ltd v Grasso & Anor (1994) 62 SASR 239, cited
GPI Leisure Corporation Ltd v Yuill & Ors [1997] NSWSC 292, cited
Gray v New Augarita Porcupine Mines Ltd [1952] 3 DLR 1, cited
Hospital Products Ltd v United States Surgical Corporation (1984) 156 CLR 41; [1984] HCA 64, cited
In re Coomber; Coomber v Coomber [1911] 1 Ch 723, cited

Laird v Pim (1841) 171 ER 852; (1841) M & W 474, cited
Mackay v Dick [1881] 6 AC 251, cited
Maguire v Makaronis (1997) 188 CLR 449; [1997] HCA 23, considered
Moody v Cox and Hatt [1917] 2 Ch 71, cited
New Zealand Shipping Company Limited v Société des Ateliers et Chantiers de France [1919] AC 1, cited
Nocton v Lord Ashburton [1914] AC 932, cited
O'Halloran v RT Thomas & Family Pty Ltd (1998) 45 NSWLR 262, cited
Phipps v Boardman [1967] 2 AC 46, cited
Pilmer v Duke Group Limited (In liq) (2001) 207 CLR 165; [2001] HCA 31, cited
Rigg v Sheridan [2008] NSWCA 79, cited
Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd (1979) 144 CLR 596; [1979] HCA 51, cited
Swindle v Harrison [1997] 4 All ER 705, considered
Target Holdings Ltd v Redferns [1996] 1 AC 421; [1995] UKHL 10, cited
Tresize v National Australia Bank Limited [1999] FCA 28, considered
Warman International Ltd v Dwyer (1995) 182 CLR 544; [1995] HCA 18, cited
Webb v Stenton (1883) 55 LJQB 584, cited
Youyang Pty Ltd v Minter Ellison Morris Fletcher (2003) 212 CLR 484; [2003] HCA 15, applied

COUNSEL: A Jorgensen appeared in his capacity as director of Mantonella Pty Ltd, on behalf of the appellant
M P Sumner-Potts for the respondent

SOLICITORS: A Jorgensen appeared in his capacity as director of Mantonella Pty Ltd, on behalf of the appellant
Myles Thompson Lawyers for the respondent

McMURDO P:

[1] I would dismiss this appeal with costs.

[2] Muir JA has set out the facts and issues so that my reasons, which are largely in agreement with his Honour's, can be briefly stated.

[3] It is common ground that Freeway Management Pty Ltd was the predecessor of the appellant, Mantonella Pty Ltd. For clarity, when referring to either, I will use the expression "the appellant". The appellant commenced an action against the respondent, Myles Thompson, a Cairns solicitor, in the Magistrates Court in Cairns claiming damages for negligence and for breach of fiduciary duty. The claim arose from the appellant's retainer of the respondent in August 1994 to act for it in the $15,000 purchase of a leasehold restaurant from another of the respondent's clients.

[4] The following facts relevant to the appellant's claim are established on the evidence at trial. The appellant had already signed the contract of sale for the restaurant before retaining the respondent to act for it in the matter. The contract obliged the vendor to arrange for the assignment of the lease of the restaurant premises to the appellant (cl 7). The lessor, unsurprisingly, was not prepared to assign the lease to the appellant without an acceptable guarantee. The appellant was aware of the guarantee requirement before it entered into the contract to purchase the restaurant and before it retained the respondent. The appellant failed to provide the guarantee to the lessor so that the vendor was never able to assign the lease to the appellant. Meanwhile, the appellant, which was keen to finalise the purchase, paid the vendor the full sale price of $15,000. In return, the appellant ultimately received only the chattels associated with the restaurant. It subsequently entered into separate litigation against the lessor.

[5] The respondent defended the appellant's claim and counterclaimed for $1,660. This amount comprised the proceeds of two cheques made payable and delivered to the respondent by the appellant for $660 and $1,000 dated 2 May 1995 and 11 May 1995 respectively. In return, the respondent handed to the appellant copies of the appellant's files. The appellant subsequently stopped payment on the cheques. The respondent pleaded that by tendering the cheques the appellant warranted that they would be honoured on presentation; that the appellant admitted owing him the amounts endorsed on the cheques; and that the appellant fraudulently induced him to surrender his lien on the appellant's papers in reliance on the appellant's promise that the cheques would be honoured. The respondent claimed $1,660 for money due and owing together with interest under the "*Cheque and Payment Orders Act* 1986." It seems this was intended to be a reference to the *Cheques Act* 1986 (Cth).[1] In its reply, the appellant simply denied every allegation in the counterclaim and also claimed to be entitled to set off against any such indebtedness the amount of his claim.

[6] The trial took place over five days in March and May 2007 with further written submissions made by the parties on 25 May and 4 June 2007. Alan Jorgensen is the controlling mind of the appellant. He conducted all dealings on behalf of the appellant with the respondent. He is not a lawyer but he began to represent the appellant on the third day of the trial and has continued to represent it.

[7] In respect of the counterclaim, the respondent gave the following evidence. Before he acted for the appellant in August 1994 in relation to the purchase of the restaurant, he had acted either for it through Mr Jorgensen, or directly for Mr Jorgensen, in the purchase of a house at Clifton Beach, Cairns. His relationship with Mr Jorgensen had deteriorated by the beginning of May 1995. Mr Jorgensen had by then instructed another solicitor to act for the appellant in disputes arising from the purchase of the restaurant. Mr Jorgensen wanted the respondent's files pertaining to the appellant's purchase of the restaurant. The respondent agreed to provide the files when his outstanding fees were paid. He told Mr Jorgensen:

> "Well, you owe me some money. You've got to pay me the money that you owe me. You owe me money on the Petricola Street,

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1 The *Cheques and Payment Orders Act* 1986 (Cth) was amended by s 1 *Cheques and Payment Orders Amendment Act* 1998 (Cth) to become the *Cheques Act* 1986 (Cth).

> Clifton Beach, deal and you owe me some money on this deal as well for the work that I've done on it."

Mr Jorgensen then came to his office with two cheques. One was back-dated to 2 May 1995 and was for $660. The other was for $1,000. On receipt of the cheques, the respondent released copies of the appellant's files to him. Mr Jorgensen subsequently stopped payment on both cheques before they were cleared.

[8] Mr Jorgensen's evidence in respect of the counterclaim was that he cancelled payment on the cheques because the respondent did not keep up "his end of the bargain" in ensuring that the vendor assigned the lease of the restaurant to the appellant. The magistrate found in respect of the counterclaim that the appellant presented the cheques to obtain the files and very soon after stopped payment on them. The magistrate noted that if the appellant disputed its liability to pay the amounts endorsed on the cheques, it should not have presented the cheques but rather contested its liability to pay these amounts.

[9] Neither the oral evidence, nor the exhibits tendered before the magistrate with which this Court has been supplied, clarify what part of the $1660, if any, related to the respondent's earlier work for the purchase of premises at Clifton Beach, and what part related to his work for the purchase of the restaurant. It is clear from the evidence that at least some of the $1,660 the subject of the counterclaim related to the respondent's work in respect of the appellant's purchase of the restaurant.

[10] The magistrate gave reasons on 18 September 2007 and pronounced orders that judgment be given for the respondent in the appellant's action and for the respondent in his counterclaim.[2] The appellant appealed from the magistrate's decision to the District Court. That appeal was dismissed.[3]

[11] The appellant applied to this Court for leave to appeal. Leave was granted, but limited to the following grounds concerning the magistrate's findings:

> "… that [the respondent] was not negligent in failing to advise [the appellant] it was not contractually obliged to and should not settle until clause 7 of the contract relating to the assignment of the lease was satisfied; that settlement occurred on 26 August 2004; and that [the respondent] was not in breach of any duty in failing to advise of his conflict of interest in acting for both parties and the advisability of separate representation."[4]

[12] I agree with Muir JA's reasons for concluding that it is immaterial whether settlement occurred on 26 August 1994 or at all, and that the appellant did not establish any negligence on the part of the respondent.

[13] The respondent was plainly in a fiduciary relationship with the appellant once he accepted instructions to act as its solicitor in the purchase of the restaurant from another of the respondent's clients. The respondent breached that duty by acting for

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2 *Freeway Management Pty Ltd and Mantonella Pty Ltd v Myles Thompson*, unreported, Magistrate Brassington, Claim No 1207 of 1997, 18 September 2007.

3 *Mantonella Pty Ltd v Thompson* [2008] QDC 92.

4 *Mantonella Pty Ltd v Thompson* [2008] QCA 241, Holmes JA, Muir JA and Philippides J.

both the vendor and the appellant in the purchase without the informed consent of both parties: *Clark Boyce v Mouat*.[5] The appellant was acting at all times through Mr Jorgensen, an experienced, forceful and persuasive businessman, who was familiar with the sorts of obligations imposed by leases and other contracts. That did not absolve the respondent from his duty to inform the appellant of his conflict and to advise it to take independent legal advice. His failure to do so breached his fiduciary duty.

[14] I agree with Muir JA and Fryberg J that, in the end, this is of no assistance to the appellant in its action against the respondent. It entered into the contract for the purchase of the restaurant before it instructed the respondent to act on its behalf and it then knew the lessor would not agree to assign the lease of the restaurant premises to it without an acceptable guarantee. It did not provide that guarantee. Any loss it suffered from the time it instructed the respondent as its solicitor was caused by its failure to provide the guarantee required by the lessor. Had it provided the guarantee, the vendor would have assigned the lease to it and the purchase of the restaurant could have been satisfactorily completed. The appellant did not demonstrate that its loss was because of the respondent's profit from his breach of fiduciary duty or that the respondent acted fraudulently. In the circumstances pertaining here, the appellant's failure to prove that its loss was caused by the respondent's breach of duty means that the magistrate was ultimately correct in giving judgment for the respondent on the appellant's claim against him. The District Court judge was also right to uphold that part of the magistrate's decision and order.

[15] Although the counterclaim did not feature in argument in the District Court appeal, or in this appeal, I was initially concerned about that part of the magistrate's order giving judgment for the respondent on the counterclaim. The counterclaim was for the respondent's fees, at least some of which related to work done on the appellant's behalf when the respondent was in breach of his fiduciary duty to the appellant. Like many other aspects of this matter, the evidence at trial relevant to the counterclaim (summarised earlier in these reasons) was most unsatisfactory. It was clear that some of the respondent's counterclaim related to his work for the appellant while in breach of his fiduciary duty although it was unclear how much. Depending on the circumstances, a solicitor may not be entitled to claim fees from a client for work done in breach of his fiduciary duty. This is consistent with the basic equitable principle that a fiduciary who breaches a fiduciary duty is liable to account for any profits derived from acting in that fiduciary capacity: *Nocton v Lord Ashburton*[6] and *Warman International Ltd v Dwyer*.[7]

[16] The forfeiture of fees by a solicitor who performs work in breach of a fiduciary duty is not, however, inevitable. In *Tresize v National Australia Bank Limited*,[8] French J (as he then was) noted that no case had been cited to support the applicants' proposition that a solicitor's professional fees earned for services rendered should be disgorged on an account of profits as a result of a breach of the solicitor's fiduciary duty.[9] French J noted that the applicants continued to seek and obtain the benefit of

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5 [1994] 1 AC 428.

6 [1914] AC 932 at 956 - 957.

7 (1995) 182 CLR 544, Mason CJ, Brennan, Deane, Dawson, Gaudron JJ at 556 - 565.

8 [1999] FCA 28.

9 [1999] FCA 28 at [26]. See, however, where the Supreme Court of Texas considered the principles relating to the forfeiture of fees by a solicitor for services when acting in breach of fiduciary duties in

the legal work the subject of the fees and disbursements: their trial had continued over some days and they had received a substantial discount on the fees rendered. His Honour concluded that fees paid for professional services in the circumstances of that case did not constitute a profit of the kind for which an account should be ordered.[10]

[17] The cardinal principle of equity is that the remedy must be fashioned to fit the nature and facts of each case: see *In re Coomber; Coomber v Coomber*[11] and *Warman International*.[12] The present circumstances appear easily distinguishable from those in *Tresize*: the appellant ultimately seemed to receive little or no benefit from the respondent's work done in breach of fiduciary duties. Had the counterclaim been for fees for the respondent's services performed when in breach of his fiduciary duty, it would have been well arguable that the counterclaim was not made out in whole or in part. But the respondent's counterclaim was, as the magistrate appreciated, a claim under the *Cheques Act* for the amount stated in the dishonoured cheques presented by the appellant in return for which it obtained a copy of his files over which the respondent had a lien. On the pleadings and in the way the case was conducted at trial, the respondent was entitled to succeed on his counterclaim.

[18] It follows that I agree with Muir JA that the appeal should be dismissed with costs.

[19] **MUIR JA:** The appellant, a successor of Freeway Management Pty Ltd, having obtained leave to appeal, appeals from an order of a judge of the District Court dismissing the appellant's appeal from the Magistrates Court decision. Freeway commenced proceedings in the Magistrates Court in Cairns in June 1997 claiming against the respondent unspecified damages for breach of a duty of care.

The pleadings

[20] The original statement of claim contained these allegations:

(a) The respondent, a solicitor, acted for the estate of Dunbar as vendor and the appellant as purchaser of a business named "Royce's Restaurant";

(b) In breach of the duty of care arising from his retainer the respondent negligently failed to properly complete a schedule of the plant, equipment and chattels the subject of the agreement;

(c) Although the respondent accepted instructions from Freeway to "act as solicitor on the settlement and completion of the contract", because the respondent was otherwise acting for Freeway at the time the agreement was entered into, he had a duty to advise generally in relation to the transaction.

[21] In breach of his duty, the respondent failed to advise Freeway that it would be required to provide the lessors of the premises in which the business was carried out a $20,000 bond required "under the terms of the lease of the premises".

Burrow v Arce 997 SW 2d 299 (Tex, 1999). I am grateful for the research of my Associate, Jodi Gardner, who referred me to both these cases.

10 [1999] FCA 28 at [30].

11 [1911] 1 Ch 723, Fletcher Moulton LJ at 728 - 729.

12 (1995) 182 CLR 544 at 559.

[22] An amended statement of claim filed in September 1998 added the following allegations:

(a) In 1994 the respondent was retained by Bradley Jorgensen, a secretary of Freeway, to act on his behalf in relation to the purchase of a property at Clifton Beach.

(b) In breach of his duty to Freeway the respondent failed to advise Freeway that under the agreement the Estate was obliged to procure the lessors' consent at the Estate's own expense and advised Freeway to join in litigation with the Estate to procure the consent.

(c) Also in breach of his duty, the respondent failed to advise Freeway that it was under no obligation to pay the purchase price until the lessors' consent to the assignment of lease to Freeway had been obtained and that it should not pay the purchase price until this requirement was satisfied.

(d) The respondent should have advised Freeway to obtain separate legal advice, "given he acted for the Estate";

(e) The respondent by virtue of his retainer owed Freeway a fiduciary duty in breach of which he failed to advise Freeway that it was likely that the interests of vendor and purchaser could diverge because of the lessors' attitude to consenting to the assignment of lease and that, in consequence, the respondent "had a conflict of interest and [Freeway] therefore should obtain independent legal advice";

(f) If properly advised, Freeway would have sought separate legal advice and such advice would have been to the effect that Freeway not pay the purchase price for the business.

[23] The defence is an unsophisticated document. It "does not admit any allegation made by the plaintiff", denies any breach of duty and denies that the plaintiff suffered loss.

History of the proceeding

[24] Mantonella Pty Ltd was added as a plaintiff in October 1998 on the basis that Freeway had contracted and sued in its capacity as trustee of a discretionary trust and that Mantonella had replaced Freeway as trustee. Also in 1998, leave was given for the appellant to amend the statement of claim.

[25] No steps in the proceeding were taken from about mid 2001 until 2 June 2005 when the appellant applied for leave to proceed. The proceeding was dismissed for want of prosecution on the respondent's cross application but the decision was set aside by a judge of the District Court in May 2006. The trial of the proceeding took place in the Magistrates Court in March, May and June 2007. An application to amend the plaint to "specify further particulars of loss and damage of some $28,014" was refused. A foreshadowed application to claim equitable damages for breach of fiduciary duties was not pursued.

[26] Judgment in favour of the respondent was given in the Magistrates Court on 18 September 2007. The appeal to a judge of the District Court was dismissed on 2 May 2008. As is discussed later, the Magistrate found Mr Jorgensen to be

uncreditworthy. She found the respondent "vague as to the details of the transaction" and that this was "unsurprising … given the time frame."[13]

The relevant facts

[27] The following account of the facts is extracted, for the most part, from the Magistrate's reasons and from documents in evidence at first instance. The respondent, a sole legal practitioner, had acted for the estate of Dunbar and was owed fees by the Estate. He had also assumed some of the duties of executor owing to the residence of the executor in the Northern Territory.

[28] One of the assets of the Estate was a restaurant business conducted in leased premises. The respondent had been attempting to sell it for some time when Mr Jorgensen, the person in effective control of Freeway and Mantonella, approached him with a view to its purchase by Freeway. Mr Jorgensen, after inspecting the premises, offered to pay $15,000 for the goodwill of the business, the Estate's interest in the lease and all plant and equipment.

[29] The respondent prepared an agreement of sale and purchase which Jorgensen executed on behalf of Freeway on 5 August 1994. The sole special condition in the agreement was an acknowledgement by the purchaser that the agreement was signed by the respondent as the Estate's solicitor and was subject to ratification by the executor.

[30] At one point in his evidence Mr Jorgensen swore that the respondent agreed to act for both parties on 4 August 1994. Elsewhere in his evidence he swore to the effect that although he did not ask the respondent to act for Freeway he assumed that the respondent was his solicitor and would act for him, having acted in the purchase of his Clifton Beach house property. The respondent's evidence was that he was first asked to act for Freeway after the agreement was entered into on 5 August 1994.

[31] That day, Mr Jorgensen gave the respondent a cheque for $5,000 on account of the deposit, a cheque for $500 on account of fees or outlays and a cheque for $10,000 for the balance purchase price. The latter cheque was post-dated to 26 August 1994. Trust account receipts were issued for the larger cheques. The Estate was credited with the sum of $5,000 in the trust account ledger on 5 August 1994 and the sum of $10,000 was entered as a credit to the account of the Estate in the trust account ledger on 26 August 1994.

[32] Also, on 5 August 1994, as part of the sale documentation, the respondent had Mr Jorgensen sign on behalf of one of his companies, Mytack Holdings Pty Ltd, an irrevocable charge and authority in respect of the prospective proceeds of sale of a parcel of real property in Melbourne being sold by Mytack.

[33] On 8 August 1994, a Monday, the respondent wrote to the lessors' solicitors informing them:

> "… It is proposed that settlement occur this week. … For the purpose of this sale, I am acting for the purchaser as well as the vendor."

[34] Obviously, the respondent was acting for Freeway when the letter was sent.

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13 *Freeway Management Pty Ltd and Mantonella Pty Ltd v Myles Thompson*, unreported, Magistrate Brassington, Claim No 1207 of 1997, 18 September 2007, at [65].

[35] The transaction did not proceed smoothly. The lease, a copy of which is not in the appeal record, required the lessee to provide the lessors with a bank guarantee of $25,000 as surety for the performance of the lessee's obligations under the lease. Clause 6 of the agreement provided for delivery of possession by the Estate on the date specified in clause 4 in return for the balance purchase price but clause 4 didn't specify a date.

[36] Clause 7 required the Estate, on or before the date of settlement under clause 6, to obtain, at its expense, the lessors' consent to the assignment of the lease provided that the cost of any Deed of Covenant required by the lessors was to be borne by Freeway.

[37] The Magistrate's reasons record relevant events after 8 August 1994 as follows:

> "69. On 10 August 1994 MacDonnells [14] wrote, and sent by facsimile, to the Defendant a draft Deed of Consent to Assignment of Lease. The requirements for Freeway Management and Mr. Jorgensen to comply with were set out in the facsimile. They were not onerous and indeed would appear to provide the solicitors and the landlord the information necessary to determine if Freeway Management was a *'respectable, responsible and financial person.'* If this information had been provided the effect of the s 11 of the lease and s. 121 of the Property Law Act 1974 would have meant the landlord could not have arbitrarily and capriciously withheld their consent. Indeed all the evidence of the correspondence on 8 and 10th August 2004 was that an uncontentious assignment was anticipated.
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> 70. The letter of 10 August 1994 (exhibit 14) also includes a reference to the requirement that Freeway Management will be *'required to provide a substitute Bank Guarantee which complies with the requirements of Clause 21 of the lease*'." (footnotes deleted)

[38] It was found that before Freeway entered into the agreement, Mr Jorgensen was aware: of the existence of the lease; that he was acquiring an interest in the lease and that he was required to provide a bank guarantee. It was found also that Mr Jorgensen was anxious to complete the transaction despite a warning by Mr Thompson "of the consequences of proceeding … without the formal assignment having been effected." The reasons refer to "Mr. Jorgensen's urging and assurances" in respect of the provision of the $25,000 bank guarantee and his wish to proceed with the transaction. It was found that the deposit monies of $5,000 were dispersed on 12 August 1994. That finding accords with the trust account ledger which also shows that on 26 August 1994 $10,000 was transferred out of the respondent's trust account. The evidence is that it was deposited into his general account. The Magistrate concluded that these transfers were not "evidence of dishonesty or fraud but rather confusion as to when completion took place."

[39] A diary note of the respondent of 26 August 1994 stated that the solicitors for the lessors had given the lessors the instrument of guarantee and that they had "quite improperly" obtained payment from the bank. The diary note recorded the respondent's opinion that the landlords had an entitlement to about $7,500 or

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[14] The lessors' solicitors.

$8,000. It was explained that "we" attempted to negotiate a result under which the lessors' solicitors held the balance of the guaranteed sum, presumably approximately $17,000, and that Mr Jorgensen would provide the outstanding sum pending provision by him of a bank guarantee for $25,000 on the same terms as the Estate's guarantee. The diary note further recorded that the lessors would not give their consent until the new bank guarantee was provided. The diary note concludes:

> "We have got to make this settlement work even if we have to give away a fair bit because if we don't then we take the risk of loosing [sic] first of all the bank guarantee and secondly the sale and we can't afford to loose [sic] either because there is just too much hanging on it. Try and effect the settlement on Monday, you can see there that it is pretty simple, all we have to do is swap some cheques and the bank guarantee for a consent to the lease and they can go in and operate from there."

[40] On the same day the respondent rendered to Freeway a fee note for $500 for professional services in the purchase plus outlays of $225 on account of stamp duty.

[41] The matter dragged on. The lessors, with justification, declined to consent to an assignment of the lease unless satisfied of Freeway's financial standing and without the provision of the new guarantee. Freeway was unable to provide the guarantee. The lessors, in reliance on a breach or breaches of the lease, terminated it. On 1 November 1994 a judge of the Supreme Court granted relief against forfeiture. Freeway and the Estate were ordered to pay the costs of the applications before the Court. On that day the respondent wrote to Mr Jorgensen pressing him to provide the bank guarantee and "a verified statement of assets and liabilities". He warned that continued failure to obtain a transfer of the lease could result in "loss of this business and proceedings being instituted between yourself and the Estate."

[42] Two days later the respondent issued a fee note to Mr Jorgensen and the Estate for $3,000 on account of negotiations "in an attempt to avoid the prospect of litigation, originating summons, lengthy affidavits … conference … and appearance in court…". On 9 November 1994 the respondent wrote again to Mr Jorgensen pointing out the risk that the landlord would terminate the lease. The letter asserted that if the lease was terminated Freeway would be in breach of its agreement with the Estate and that that would place "[the appellant] in a position where [the appellant] would have to reimburse the Estate for any losses which it incurs as a result of that breach." A letter from the respondent to Mr Jorgensen of 15 November 1994 includes the following:

> "I note that the purchase of the restaurant was due to be settled on 1 September 1994. Because settlement did not occur on that date te [sic] estate of Royce Dunbar has suffered losses. In the event that these losses are not reimbursed and the settlement effected by you taking over the lease, I shall have no alternative than to institute proceedings against you and Freeway Management Pty Ltd to cover those losses.

[43] A letter to Mr Jorgensen of 6 February 1995 complained that Mr Jorgensen had not performed despite prompting by the respondent "on numerous occasions". The

letter asserted "that settlement has not occurred" and that the failure to settle had cost the Estate:

> "1. Rent between September and now.
>
> 2. Costs of an initial application in the District Court.
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> 3. Costs in a further application in the District Court."

[44] The letter further stated:

> "Further, as a result of one of your agents attaching a sign to the front window of the restaurant, it was ordered that the costs of repair to that sign in the sum of $578.00 be met from the estate, that is from funds held in trust at MacDonnells from the estate."

The letter demanded payment of $19,704.05 "to set the books right" and required settlement by 8 February 1995, failing which the agreement would be rescinded. The respondent failed to act on his threat and the matter staggered on. The reasons take up the further history of the matter as follows:

> "82. … Jorgensen faxed a response to this letter on the same day agreeing to some payments on a 'without prejudice' basis, agreeing to pay outgoings from the 6 February 1994 and saying *'I will expect your full cooperation in providing information to my solicitors to ensure my claim is given every success. I also advise that due to the obvious conflict of interest that exists with you representing both the estate and Freeway that I will be engaging another solicitor to further this whole affair'*. The claim Mr. Jorgensen is referring to is proposed litigation against the Softas. He also says *'In the meantime I will be putting in place the $25k g'tee as required and will endeavour to have the restaurant operating by 15 Feb ... Finally I will have my daughter if not myself call in today or Tues AM to pick up the funds that currently rest in your account ($21,690).'*
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> 83. By 23 March 1995, after further notices of breach of covenants had been served, Mr. Thompson wrote to Mr. Jorgensen and noted there had been no contact between them since 8 February 2005. He noted that he did not act for him and he would not be responsible for his inactivity.
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> 84. On 20 April 1995 the Softas[15] wrote to Mr. Jorgensen and noted that as a first step to assignment they required compliance with the orders of the Supreme Court and the information on the financial position of Freeway Management requested in the correspondence of 8 December 1994. " (footnotes deleted)

[45] The lessors' consent was never obtained. In 1995 Freeway, represented by other solicitors, successfully sued the lessors for conversion of some of the chattels the

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15 The lessors.

subject of the agreement, obtaining judgment in the sum of $6,300. The record does not disclose the make-up of the $21,690 referred to in paragraph 82 of the reasons or whether the monies were collected as foreshadowed.

Grounds of Appeal

[46] The appellant was given leave to appeal the following findings of the Magistrate:

(1) The respondent was not negligent in failing to advise Freeway that it was not contractually obliged to and should not settle until clause 7 of the agreement relating to the assignment of the lease was satisfied;

(2) That settlement occurred on 26 August 1994; and

(3) The respondent was not in breach of any duty in failing to advise of his conflict of interest in acting for both parties and the advisability of separate representation.

The findings and evidence relating to grounds 1 and 2

[47] The Magistrate did not accept that Mr Jorgensen was a witness of credit. She remarked in that regard:

> "I was not impressed by Mr. Jorgensen as a witness. I have rejected his evidence on a number of specific points. … His history of business and Court dealings shows, at the least, a cavalier regard to obligations and standards of behaviour."

[48] Having perused the transcript of Mr Jorgensen's evidence-in-chief, cross-examination and Mr Jorgensen's cross-examination of the respondent, as well as the documentary evidence in the record, I find no reason to doubt that her Honour's conclusions in this regard were justified. In any event the notice of appeal did not challenge the Magistrate's findings on credit or the District Court judge's implicit upholding of those findings.

[49] The Magistrate found that the respondent did warn Mr Jorgensen "of the consequences of proceeding and that Mr Jorgensen nevertheless wished settlement to proceed without the formal assignment having been effected."[16] Later in her reasons her Honour said, "However, I have found as a matter of fact that the plaintiff had give [sic] instructions to complete despite [the respondents] warnings."[17] There was a subsequent finding that:[18]

> "Mr Jorgensen … was advised of the dangerousness of proceeding to settle without the lease being assigned. He chose to proceed."

[50] These findings are supported by the evidence of the respondent. That evidence, relevantly, did not condescend to detail, but as the trial was some 13 years after the events in question, that is hardly surprising.

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16 *Freeway Management Pty Ltd and Mantonella Pty Ltd v Myles Thompson*, unreported, Magistrate Brassington, Claim No 1207 of 1997, 18 September 2007 at [105].

17 *Freeway Management Pty Ltd and Mantonella Pty Ltd v Myles Thompson (Supra)* at [113].

18 *Freeway Management Pty Ltd and Mantonella Pty Ltd v Myles Thompson (Supra)* at [126].

[51] Her Honour, no doubt because of the way in which the case was pleaded and argued, found it necessary to determine a settlement date under the agreement. She found that settlement must have occurred because of the evidence that Freeway had gone into possession and had brought proceedings for conversion against the lessors in respect of chattels in the premises.

[52] After noting that the respondent's diary note of 26 August 1994 showed the respondent's belief that settlement had not been effected, her Honour nevertheless found that completion took place on or about 26 August. The reasons equate completion with settlement. The conclusion appears to have been based on the receipt by the respondent of Mr Jorgensen's unconditional personal assurance that the bank guarantee would be provided within seven days and on the tenor of correspondence between the parties after 26 August. Much of that correspondence was not in the appeal record and it is necessary to exercise considerable caution when questioning findings made on the basis of a larger body of material. Nevertheless, the matters now discussed make it doubtful that the Magistrate's finding that settlement took place on or about 26 August is correct, at least if what is meant is the form of settlement contemplated by the agreement.

[53] The respondent's letters of 15 November and 6 February 1995, quoted in part earlier, reveal an understanding on the part of the respondent that settlement had not taken place. He, acting as solicitor for the Estate, at least in part, was pressing for settlement. The evidence establishes however that at some unidentified time Freeway took physical possession of the leased premises and of the fixtures, fittings and chattels of the business but it does not establish that possession of the premises and of the fixtures, fittings and chattels was given, at least initially, in return for payment of the balance purchase price.

[54] Clauses 6 and 7 of the agreement, properly construed, made the purchaser's obligation to pay the balance purchase price and its right to possession interdependent with the vendor's obligation to obtain the lessors' consent to the assignment of the vendor's interest in the lease. That interest was part of the property to be sold and purchased and "full and complete delivery of possession of the property" could not be given without the lessors' consent.

[55] However, determination of the appellant's right, if any, to recover damages for the respondent's breach of duty requires more than a determination of whether settlement was effected under the agreement in accordance with its terms and if so, on what date.

Consideration of the settlement date issue

[56] Although clause 7 imposed on the Estate an obligation to obtain the lessors' consent at its own expense, the Estate was unable to comply with the obligation only because Freeway failed to provide the requisite guarantee and, it might be added, failed to provide the lessors with adequate evidence that Freeway was a "respectable, responsible and financial" prospective lessee.

[57] Clauses 6 and 7 make no express mention of the $25,000 bond but, in my view, it is implicit that the Estate was entitled to be released from its obligations under the bond or that Freeway was required to provide a replacement bond. Alternatively, it was implicit in clause 7 that if the lessors required a Deed of Covenant from the appellant, the appellant was obliged to provide it and that it could encompass a requirement to provide a substitute $25,000 bond. It was never contended in this

proceeding, or previously so far as the record shows, that Freeway was not contractually bound to provide the bond.

[58] The agreement imposed an implied obligation on Freeway to do all that was reasonably necessary "to secure performance of the contract".[19]

[59] In *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd*, Mason J said in respect of this principle:[20]

> "As Lord Blackburn said in *Mackay v Dick*:
>
> > 'as a general rule ... where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect.'
>
> It is not to be thought that this rule of construction is confined to the imposition of an obligation on one contracting party to co-operate in doing all that is necessary to be done for the performance by the other party of his obligations under the contract. As Griffith CJ said in *Butt v M'Donald*:
>
> > 'It is a general rule applicable to every contract that each party agrees, by implication, to do all such things as are necessary on his part to enable the other party to have the benefit of the contract.'" (footnotes deleted)

[60] The failure by Freeway to provide the evidence of its suitability as a tenant and its failure to provide the guarantee both constituted breaches of the implied obligations discussed in the above passage. Freeway's conduct was repudiatory in nature and the Estate, in reliance on it, could have terminated the agreement, forfeited the deposit and exercised the other rights available to the Estate under the agreement. Those rights included the "option to sue … for breach of contract or … to re-sell the property by public auction or by private contract" and recover "the deficiency (if any) in price occasioned by such re-sale … together with all expenses …".

[61] The Estate did not take this course but instead retained the deposit and the balance purchase price. The Estate had no such entitlement unless it had fulfilled the terms of the agreement or was relieved of its obligations in that regard. I consider it probable that the Estate was not able to obtain the benefit of the principle referred to by Lord Finlay LC in *New Zealand Shipping Company Limited v Société des Ateliers et Chantiers de France*:[21]

> "… that noone can in such case take advantage of the existence of a state of things which he himself produced."

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19 *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596, per Mason J at 607.

20 (1979) 144 CLR 596 at 607.

21 [1919] AC 1 at 6.

[62] Cooke J, as he then was, expressed the principle as follows in *Butcher v Port*:[22]

> "For present purposes a clause such as this is not materially distinguishable from one making the certificate of a party's engineer or other appointee a condition precedent to action. The principle that a party cannot insist on a condition if non-fulfilment is his own fault is basic in contract law: see for instance *New Zealand Shipping Company v Société des Ateliers et Chantiers de France* [1919] AC 1, 6, per Lord Finlay LC."

[63] The principle was referred to by Young J in *GPI Leisure Corp Ltd v Yuill*[23] but as appears from *Colley v Overseas Exporters*,[24] the principle is not one capable of universal application. In that case the principle was held by McCardie J not to apply so as to enable the seller of goods to recover their price from the defaulting buyer. The seller had sent the goods to the appropriate port of shipment but was prevented from loading them through the failure of the buyer to name a ship capable of taking the goods. It was held that the buyer's default did not place the seller in the same position as if he had put the goods on board and that, in the absence of agreement that the price should be payable on a day certain irrespective of delivery, the seller could not sue for the price. McCardie J was of the view that *Mackay v Dick*[25] was a case in which the property in the subject goods actually passed to the buyer and concluded that:[26]

> "A clear distinction exists between cases where the default of the buyer has occurred after the property has passed and in cases where that default has been before the property has passed … The rule which applies to sales of goods seems also to apply to sales of land. If the vendor has conveyed the property in land to the purchaser he can recover the price. If not he can get damages only: *Leake on Contracts*;[27] *Laird v Pim*;[28] *East London Union v Metropolitan Ry. Co.*[29]"

[64] *Laird v Pim* and *East London Union v The Metropolitan Railway Company* are authority for the proposition that, at least as a general rule, the vendor of an interest in land who has not given title to the purchaser is not entitled to sue for the purchase money as a debt in the absence of provision to the contrary in the contract. The vendor's right is to sue for specific performance or for damages for loss of the bargain. And, as the vendor retains the interest in the land, the amount of the purchase monies is not the measure of the vendor's damages.[30]

[65] Although the principle just discussed does not assist the respondent, the facts show that the parties, at some time which cannot be identified precisely on the evidence before this Court, accepted that the Estate had done all it could to perform its obligations under the agreement and was entitled to the balance purchase price,

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22 [1985] 1 NZLR 491 at 469.
23 [1997] NSWSC 292.
24 [1921] 3 KB 302.
25 (1881) 6 App Cas 251.
26 [1921] 3 KB 302, 310 – 311.
27 6th ed., p 469.
28 (1841) 7 M&W 474; 151 ER 852.
29 (1869) LR 4 Ex 309.
30 R M Stonham, *The Law of Vendor and Purchaser* (1964) at [1395].

Freeway having gone into possession. There is a finding in paragraph [82] of the Magistrate's reasons that Freeway agreed to pay outgoings in respect of the premises from 6 February 1994. Other evidence that Freeway went into possession is referred to in the reasons.[31] There is no evidence of any claim for the return of the deposit or balance purchase monies after Freeway obtained separate representation. The first statement of claim[32] claimed damages for negligence and breach of a contractual duty. The amended statement of claim added a claim for breach of fiduciary duty. Neither statement of claim alleged that the purchase monies should not have been paid to the Estate or that any such payment was unlawful.

[66] Freeway's proceeding against the lessors was on the basis that it had title to the chattels of the business in the lessors' possession and was successful in recovering damages. It is thus implicit that Freeway accepted that the agreement had been performed; at least to the extent that title to the chattels to be sold and purchased had passed. Her Honour found also that Mr Jorgensen instructed the respondent that "he assumed the risk of assignment". In these circumstances, Freeway waived the necessity for the Estate to obtain the lessors' consent or by necessary implication accepted the Estate had performed its part of the bargain and the Estate became entitled to retain the purchase monies. It is immaterial whether "settlement" occurred on 26 August 1994 or at all.

Was negligence established?

[67] I now turn to the ground of appeal challenging the Magistrate's finding that the respondent was not negligent in failing to advise Freeway that it should not settle until clause 7 of the agreement was satisfied.

[68] A solicitor's duty to advise his client in respect of a transaction is determined by the scope of the solicitor's retainer in respect of the transaction, at least where the client is "in full command of his faculties and apparently aware of what he is doing."[33] The solicitor has no duty to go beyond those instructions "by proffering unsought advice on the wisdom of the transaction."[34]

[69] Contrary to the appellant's contentions, the respondent, initially at least, had no duty to advise Freeway concerning the terms of the agreement. Freeway decided to enter into the agreement, and entered into it, before the respondent was requested to act on its behalf. Freeway did not seek advice concerning its obligations under the agreement and there is no reason to doubt the correctness of the Magistrate's finding that the extent of the initial retainer was to act for Freeway "on settlement". The original statement of claim alleged that the respondent "accepted instructions from [Freeway] … to act as solicitor on the settlement and completion of the contract." Moreover, the evidence revealed that Mr Jorgensen was a headstrong individual, firm in his own opinions, who had determined by 5 August 1994 to proceed with the transaction and obtain possession of the premises in the shortest possible time. He was not deflected from this course even by the respondent's strong advice.

[70] It was, however, within the scope of the retainer that the respondent inform Freeway of those things required of Freeway and the Estate under the agreement to bring the

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31 *Freeway Management Pty Ltd and Mantonella Pty Ltd v Myles Thompson*, 1207 of 1997, 18 September 2007 at [98], [100], [105] and [106].

32 Dated 4 June 1997.

33 *Clark Boyce v Mouat* [1994] 1 AC 428 at 436 - 437.

34 *Clark Boyce v Mouat* at 436 - 437.

transaction of sale and purchase to a conclusion. Included within the scope of such information or advice was advice to the effect that Freeway's obligations to pay the balance purchase price and the Estate's obligation to give possession were interdependent and that performance of those obligations was conditional on the Estate's obtaining the consent of the lessors.

[71] As appears from the above discussion, Mr Jorgensen was advised, in substance, that the balance purchase price should not be paid until the lessors' consent was obtained and was warned against proceeding without the consent. Even if he had not been so advised I would have inferred from the evidence that Mr Jorgensen would have understood, without the benefit of any such advice, that he had no obligation to pay the balance purchase price and that, in the absence of good reason to the contrary, it would be inadvisable to make payment before the lessors' consent was obtained. There was good reason, however, for Mr Jorgensen to consent to or acquiesce in the payment of the balance purchase price: unless he did so, it is unlikely that he would have obtained possession of the premises or of the chattels of the business.

[72] In the course of his submissions on appeal, Mr Jorgensen contended that he should have been advised that, as the lessors' consent had not been obtained, he was entitled to terminate the agreement and have the monies paid under it refunded. This contention must be rejected. As explained above, Freeway had engaged in repudiatory conduct. The Estate was not in breach of contract and could have terminated the agreement in reliance on Freeway's wrongful conduct. Freeway, however, had no right to terminate and its waiver of any obligation on the Estate's part to procure the lessors' consent extinguished any rights it may have had in respect of the purchase price.

[73] Subject to the claim based on breach of fiduciary duty, the appellant, for the reasons given above, had no sustainable claim against the respondent. Even if the appellant had established the alleged negligent conduct, it would not have established that it was causative of any loss. If it be assumed for the purposes of argument that there was a failure to advise as alleged, the probabilities are that, for reasons which emerge from the foregoing discussion, Mr Jorgensen would have proceeded with the transaction as he in fact did.

The existence of fiduciary duties

[74] The respondent, once he accepted Mr Jorgensen's instructions to act on behalf of Freeway, was in a fiduciary relationship with Freeway.[35]

[75] In *Bray v Ford* [36] Lord Herschell discussed the principle that a fiduciary must not place himself in a position in which his duty conflicted with his interest as follows:

> "It is an inflexible rule of a Court of Equity that a person in a fiduciary position, such as the respondent's, is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict. It does not appear to me that this rule is, as has been said, founded upon principles of morality. I regard it rather as based on the consideration that, human nature being what it is, there is danger, in

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35 *Maguire v Makaronis* (1997) 188 CLR 449 at 463, *Clark Boyce v Mouat* [1994] 1 AC 428; *Nocton v Lord Ashburton* [1914] AC 932.

36 [1896] AC 44 at 51 – 52.

> such circumstances, of the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect. It has, therefore, been deemed expedient to lay down this positive rule. But I am satisfied that it might be departed from in many cases, without any breach of morality, without any wrong being inflicted, and without any consciousness of wrong-doing. Indeed, it is obvious that it might sometimes be to the advantage of the beneficiaries that their trustee should act for them professionally rather than a stranger, even though the trustee were paid for his services."

[76] In quoting the above passage, Lord Upjohn in *Phipps v Boardman*[37] described it as a rule that "a trustee must not place himself in a position where his duty and his interest may conflict."

[77] Lord Cranworth LC described the rule in the following often quoted passage from his reasons in *Aberdeen Railway Co v Blaikie Brothers*:[38]

> "And it is a rule of universal application, that no one, having such duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect."

[78] Circumstances in which a fiduciary's liability has arisen have been identified as: "circumstances in which a conflict or significant possibility of conflict existed between his fiduciary duty and his personal interest";[39] "when there was a conflict or possible conflict between his fiduciary duty and his personal interests";[40] and "a conflict or a real or substantial possibility of a conflict".[41]

[79] McHugh, Gummow, Hayne and Callinan JJ in their joint reasons in *Pilmer v Duke Group Limited (In Liquidation)*[42] confirmed that "similar reasoning applies where the alleged conflict is between competing duties, for example, where a solicitor acts on both sides of a transaction."[43]

Breach of Fiduciary Duty

[80] There may well not have been a "real or substantial possibility of conflict" between the respondent's duty to the Estate on the one hand and to Freeway on the other when he commenced acting for both parties.[44] The scope of the respondent's instructions was limited to the performance of largely clerical functions and Mr Jorgensen appeared to be, and in fact was, astute and experienced in commercial and property transactions. However, "a real or substantial possibility of conflict"

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37 [1967] 2 AC 46 at 123.

38 (1854) 1 Macq 461 at 471 (HL).

39 *Chan v Zacharia* (1984) 154 CLR 178 per Deane J at 198 - 199.

40 *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 557.

41 *Pilmer v Duke Group Limited (In liq)* (2001) 207 CLR 165 at 199; adopting Mason J's formulation in *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 104.

42 (2001) 207 CLR 165 at 199; *Hospital Products Ltd v United States Surgical Corporation (Supra)* at 104.

43 In that regard see also *Beach Petroleum NL v Kennedy* (1999) 48 NSWLR 1 at [202].

44 This conclusion does not have regard to the respondent's role in relation to the administration of the Estate. No allegation in that regard was pleaded or argued below.

soon emerged. Before 26 August 1994 the Estate, which had an obligation under the agreement to obtain the lessors' consent, had become embroiled in a dispute with the lessors about the bank guarantee provided by the deceased to the lessors. The respondent unsuccessfully attempted to negotiate a settlement under which Freeway would "top up" the amount the lessors were claiming out of the existing bank guarantee.

[81] Mr Jorgensen was anxious to proceed with the transaction forthwith and enter into possession. In that regard Freeway's interests were not aligned with the Estate's and it was, or ought to have been, apparent that a dispute may well arise between the parties over matters such as: when, if at all, the balance purchase price was payable; the obtaining of the lessors' consent; the provision by Freeway of a bank guarantee; the return of the deposit; and the remedying of default under the lease. When, on 26 August, the respondent paid the balance purchase monies out of his trust account, as a step preparatory to treating the money as having been paid by Freeway to the Estate, he was in a position of actual conflict.

[82] If on 26 August 1994 the respondent was not in a position in which he could not fulfil his obligations to Freeway without breaching his duty to the Estate or vice versa, he was shortly in that position and in breach of his fiduciary duty by continuing to act in the matter.[45]

[83] There is a finding to the effect that Mr Jorgensen was advised of the existence of a conflict of interests[46] but the substance of such advice was not identified. The respondent in evidence-in-chief and in cross-examination did not suggest that he had given careful, comprehensive advice to Mr Jorgensen about the possible consequences of and disadvantages arising from his acting for both parties. It is argued on behalf of the respondent that as Mr Jorgensen was aware that the respondent was acting for the Estate when retained by Freeway, Freeway consented to the respondent's acting notwithstanding his conflict of interests. The argument fails to recognise that what is required to permit a solicitor fiduciary to act in a position of conflict is a fully informed consent.

[84] The respondent was not prohibited by law from acting for Freeway whilst his duty to Freeway conflicted with his duty to the Estate. The relevant principle is stated as follows in *Clark Boyce v Mouat*:[47]

> "There is no general rule of law to the effect that a solicitor should never act for both parties in a transaction where their interests may conflict. Rather is the position that he may act provided that he has obtained the informed consent of both to his acting. Informed consent means consent given in the knowledge that there is a conflict between the parties and that as a result the solicitor may be disabled from disclosing to each party the full knowledge which he possesses as to the transaction or may be disabled from giving advice to one party which conflicts with the interests of the other. If the parties are content to proceed upon this basis the solicitor may properly act. In

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45 *Bristol & West Building Society v Mothew* [1998] Ch 1 at 19.

46 *Freeway Management Pty Ltd and Mantonella Pty Ltd v Myles Thompson*, unreported, Magistrate Brassington, Claim No 1207 of 1997, 18 September 2007, at [126].

47 [1994] 1 AC 428 at 435 – 436.

> *Boulting v Association of Cinematograph, Television and Allied Technicians* [1963] 2 QB 606, 636, Upjohn LJ said:
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> > 'the client is entitled to the services of his solicitor who may not charge more than he is legally entitled to, and must not put himself into a position where he may owe conflicting duties to different clients (see, for example, *In re Haslam and Hier-Evans* [1902] 1 Ch. 765). But the person entitled to the benefit of the rule may relax it, provided he is of full age and sui juris and fully understands not only what he is doing but also what his legal rights are, and that he is in part surrendering them.' "

[85] According to *Clark Boyce*, at least as a general proposition, an informed consent requires the client's knowledge that a conflict exists and that "as a result the solicitor may be disabled from disclosing to each party the full knowledge which he possesses as to the transaction or may be disabled from giving advice to one party which conflicts with the interests of the other." The requisites for a fully informed consent must be determined on the circumstances of each case. One such circumstance may be "the importance of obtaining independent and skilled advice from a third party." [48]

[86] In *Moody v Cox and Hatt*,[49] a case in which a solicitor trustee acted for the vendor trustee and for the purchaser, Lord Cozens-Hardy MR considered that before putting himself in a position of conflict, the solicitor was obliged to "inform the client of his conflicting duties."

[87] Relevant to whether Freeway's consent was fully informed are the Magistrate's findings that Mr Jorgensen was "clearly in no way a stranger to business affairs, instructing solicitors or indeed civil litigation. Over a period of 10 years he was directly involved with fifteen to twenty companies. Part of that experience involved dealing with leases and being the guarantor for leases"[50] and that he "was extremely experienced in dealing with contracts and leases and obligations under contracts."[51]

[88] Notwithstanding these matters, however, I do not accept that there was a fully informed consent by Freeway in the absence of advice by the respondent as to; his divided loyalties, the problems to which such divided loyalties could give rise and the importance of obtaining independent and skilled advice.[52]

Did any loss flow from the respondent's breach of fiduciary duty

[89] Counsel for the respondent sought to dispose of the appellant's claim for damages arising out of the respondent's breach of fiduciary duty by asserting that the appellant had failed to show that any such breach was causative of any loss to the appellant. It was argued that the appellant's own conduct, principally in failing to provide the bank guarantee, had been the cause of any damages suffered by him. The submissions proceeded on the erroneous assumption that common law principles of causation applicable to causes of action in contract or negligence were equally applicable to claims for breach of fiduciary duty.

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48 *Maguire v Makaronis* (1997) 188 CLR 449 at 466, 467.

49 [1917] 2 Ch 71 at 88.

50 Reasons, para [51].

51 Reasons, para [65].

52 *Maguire v Makaronis* (1997) 188 CLR 449 at 466, 467.

[90] The following passage from the advice of the Privy Council, delivered by Lord Thankerton in *Brickenden v London Loan and Savings Co of Canada*[53] was referred to with approval in the reasons of the Court in *Commonwealth Bank of Australia v Smith*:[54]

> "When a party, holding a fiduciary relationship, commits a breach of his duty by non-disclosure of material facts, which his constituent is entitled to know in connection with the transaction, he cannot be heard to maintain that disclosure would not have altered the decision to proceed with the transaction, because the constituent's action would be solely determined by some other factor, such as the valuation by another of the property proposed to be mortgaged. Once the Court has determined that the non-disclosed facts were material, speculation as to what course the constituent, on disclosure, would have taken is not relevant."

[91] Also with apparent approval, the reasons referred to similar observations by the Privy Council in *Gray v New Augarita Porcupine Mines Ltd.*[55] It was there said in respect of the failure on the part of the appellant Chairman of Directors, to inform the Board of Directors of a material matter:

> "It is said that it would have made no difference if he had told them. They had decided on the basis of settlement that they were going to impose upon him, they did not think that they could get any more out of him, and their main concern for the Company was to recover for it some cash that would keep it running and to achieve an agreement that would regularize its disordered affairs. There may be an element of truth in all this, but in fact it constitutes an irrelevant speculation. If a trustee has placed himself in a position in which his interest conflicts with his duty and has not discharged himself from responsibility to account for the profits that his interest has secured for him, it is neither here nor there to speculate whether, if he had done his duty, he would not have been left in possession of the same amount of profit."[56]

[92] It was noted in the reasons of Spigelman CJ, with whose reasons Priestley and Meagher JJA agreed, in *O'Halloran v RT Thomas & Family Pty Ltd*,[57] that the approach in *Brickenden* has been applied or referred to without disapproval on many occasions, including in *Gemstone Corporation of Australia Ltd v Grasso*.[58]

[93] In the course of a discussion of *Brickenden* in the joint reasons in *Maguire v Makaronis*, [59] in which it was noted that *Brickenden* had been applied by intermediate appellate courts in Australia and by the Court of Appeal in New Zealand,[60] it was observed that the appeal "does not provide any occasion for

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53 [1934] 3 DLR 465 at 469.
54 (1991) 42 FCR 390 at 394.
55 [1952] 3 DLR 1.
56 [1952] 3 DLR 1 at 15.
57 (1998) 45 NSWLR 262 at 276.
58 (1994) 62 SASR 239.
59 (1997) 188 CLR 449 at 470 – 474.
60 *Maguire v Makaronis* (1997) 188 CLR 449 at 471.

testing the reasoning in *Brickenden.*" At the end of the discussion, their Honours, after referring to the relaxation of the strictness of the principles governing liability for breach of trust effected by the *Judicial Trustees Act* [61] and noting that there was no such general power in respect of non-trustee fiduciaries, said:[62]

> "Yet the policy of the law to hold the trustee up to the obligation to perform the trust is strongly manifested in cases where loss is occasioned upon breach arising from conflict between duty and interest. What one might call that heightened concern is manifested also, as we have sought to indicate earlier in these reasons, in the treatment of disloyalty by non-trustee fiduciaries. It may be that concern with respect to the apparent rigour of the reasoning in *Brickenden* reflects what has been seen as a tendency apparent in some recent decisions too readily to classify as fiduciary in nature relationships which might better be seen as purely contractual or as giving rise to tortious liability. Whilst that be so, it is not self-evident that the response should rest in a general denial of the applicability of the reasoning in *Brickenden* to delinquent fiduciaries, particularly solicitors and other professional advisers."

[94] Earlier in their reasons, their Honours had referred to the need to establish "a sufficient connection … between breach of duty and … the loss sustained" as follows:

> "Different considerations arise where the plaintiff seeks one or other of the further remedies referred to by the Lord Chancellor in *Nocton v Lord Ashburton*, namely an account of profits, as a personal rather than proprietary remedy, or, as another personal remedy, compensation for that which the plaintiff has lost "by [the fiduciary] acting", to use the Lord Chancellor's phrase, in breach of duty. Likewise where what is sought is a proprietary remedy in the nature of a constructive trust. **In these instances, there directly arises a need to specify criteria for a sufficient connection (or "causation") between breach of duty and the profit derived, the loss sustained, or the asset held**."[63] (emphasis added) (footnotes deleted)

[95] The question of whether and, to what extent, it was necessary for a plaintiff claiming an equitable remedy for breach of duty, to prove that the breach of duty was causative of the loss claimed, was considered in *O'Halloran*. Spigelman CJ, with whose reasons the other members of the Court agreed, quoted the following passage from the reasons of Lord Browne-Wilkinson in *Target Holdings Ltd v Redferns (a firm)*[64] with approval:

> " 'If specific restitution of the trust property is not possible, then the liability of the trustee is to pay sufficient compensation to the trust estate to put it back to what it would have been had the breach not been committed … Even if the immediate cause of the loss is the

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61 (1896 UK).

62 *Maguire v Makaronis* (1997) 188 CLR 449 at 474.

63 *Maguire v Makaronis* at 468.

64 [1996] AC 421 at 434.

> dishonesty or failure of a third party, **the trustee is liable to make good that loss to the trust estate if, but for the breach, such loss would not have occurred.** ... Thus the common law rules of remoteness of damage and causation do not apply. However, there does have to be some causal connection between the breach of trust and the loss to the trust estate for which compensation is recoverable, viz. the fact that the loss would not have occurred but for the breach.' " (emphasis added)

The first part of the above passage was quoted with approval in the joint reasons in *Makaronis*.[65]

[96] Subsequently, in *Beach Petroleum NL v Kennedy & Ors*,[66] the Court said that the law in Australia was held in *O'Halloran* to be that as stated by Lord Browne-Wilkinson in *Target Holdings*,[67] namely:

> " '…Equitable compensation for breach of trust is designed to achieve exactly what the word compensation suggests: to make good a loss in fact suffered by the beneficiaries and which, using hindsight and common-sense, can be seen to have been caused by the breach';
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> and by McLachlin J in *Canson Enterprises Ltd v Boughton & Co* (1991) 85 DLR (4th) 129 at 163:
>
> '… it is essential that the losses made good are only those which, on a common sense view of causation, were caused by the breach.' "

[97] These statements of principle by Lord Browne-Wilkinson were directed to claims for compensation for breach of trust and the "but for" test does not necessarily apply to claims for breach of fiduciary duty against a fiduciary who is not relevantly acting as trustee.

[98] In *Beach* the Court concluded[68] that *Brickenden* was not authority for the general proposition that:

> "… in no case involving breach of fiduciary duty, may the Court consider what would have happened if the duty had been performed. The reasoning in *Brickenden* must now be understood in the light of the House of Lords decision in *Target Holdings* and the cases which have applied it."

[99] Applying principles previously discussed to the facts of the case, the Court said:

> "[446] The actions of a third party may impinge on a fiduciary's responsibility as a matter of causation. *Brickenden* was concerned with a chain of events in which the alleged default of the fiduciary was a necessary component. The information which the solicitor was obliged to disclose was the very information upon which the

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65 (1997) 188 CLR 449 at 470.
66 (1999) 48 NSWLR 1 at [432].
67 [1996] AC 421 at 439.
68 (1999) 48 NSWLR 1 at [444].

> third party had to act. It was such an act, necessarily linked to the performance of the fiduciary duty, about which 'speculation' was said to be inappropriate.
>
> [447] The findings by Rolfe J in the present case are not of this character. His Honour was not concerned with what the directors of Beach would have done if Abbott Tout had declined to act or had given particular advice. Rather, his Honour concluded that the loss would have occurred irrespective of anything Abbott Tout did. This is not speculating on what the directors would have done if Abbott Tout had performed their alleged duty. It is a finding that loss would have occurred whether or not any such duty as alleged had been performed.
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> …
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> [449] A fiduciary, including a solicitor, is not an insurer. In *O'Halloran v R T Thomas*, this Court considered and, in the event, applied a stringent test for causation in the case of a breach of duty by a trustee of a traditional trust. The formulation most frequently cited is from Street J in *Re Dawson; Union Fidelity Trustee Co Ltd v Perpetual Trustee Co Ltd* (1966) 84 WN (Pt 1) (NSW) 399 at 405; [1966] 2 NSWR 211 at 215: '… the inquiry in each instance would appear to be whether the loss would have happened if there had been no breach.' "

[100] The substance of paragraphs [444], [447] and [449] of the reasons in *Beach* were referred to with approval by Handley AJA, with whose reasons the other members of the Court agreed, in *Rigg v Sheridan.*[69]

[101] The Court of Appeal in *Swindle v Harrison*[70] considered the question of causation in respect of a claim against a solicitor by a client. The solicitor had acted for the client in the purchase of a hotel. She experienced difficulty in obtaining finance and was given a bridging loan secured by a first charge on the hotel by the solicitor. There was a failure to disclose that the solicitor was making a hidden profit on the loan. The restaurant business was unsuccessful. The client defaulted on her mortgage and the mortgagee took possession of her house, which was then worth less than the money secured by the mortgage. The client transferred the hotel to her son, subject to the charge in favour of the solicitor, who then claimed against the client and her son for full possession of the hotel and was met with a claim by the client for breach of duty and damages of equitable compensation.

[102] It was held that the loss suffered by the client did not flow from the solicitor's breach of fiduciary duty in relation to the loan, but from the client's own decision to take the risk involved in mortgaging her home, since she would have accepted the loan and completed the purchase of the hotel even if full disclosure had been made.

[103] It was argued on behalf of the client, by reference to *Brickenden*, that it was not relevant to inquire whether or not the client would have completed the purchase in any event, but that it was sufficient that she did in fact do so and was enabled to do so by the solicitor's loan. Evans LJ said in this regard:[71]

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69 [2008] NSWCA 79 at [56].

70 [1997] 4 All ER 705.

71 [1997] 4 All ER 705 at 717.

> "I would reject this argument, because the authorities also show, in my judgment, that what I have called the stringent rule of causation or measure of damages does not apply as regards breaches of equitable duties unless the breach can properly be regarded as the equivalent of fraud. In other cases the plaintiff is entitled to be placed in the same position financially as he would have been in if the breach of duty had not occurred--not necessarily the same as he was in before it occurred."

[104] He subsequently referred to the passages from the reasons of Lord Browne-Wilkinson in *Target Holdings* quoted in paragraphs [95] and [96] above and observed:[72]

> "This summarises, in my judgment, what is essentially the common law rule, in the absence of fraud. Moreover, Lord Browne-Wilkinson approved the view of the majority of the Supreme Court of Canada in *Canson Enterprises Ltd v Boughton & Co* (1991) 85 DLR. (4th) 129 which held that 'damages for breach of fiduciary duty fell to be measured by analogy with common law rules of remoteness'. **Even when the stringent test applies, the chain of causation can be broken by some independent and untoward event, as in the *Canson* case. The test of causation remains one of common sense, on whatever basis it has to be applied.**
>
> The concept of compensation which has the effect of restoring the plaintiff to the position he occupied before the wrong was done to him, rather than place him in the same present situation as if the breach had not occurred, appears consistent with the basic principle that equity permitted the innocent party to rescind a contract when sufficient grounds, eg misrepresentation were shown, but it would be beyond the scope of this judgment to pursue that aspect further." (emphasis added) (footnotes deleted)

[105] The observations relating to the chain of causation may be inconsistent with those of the plurality in *Makaronis* who remarked in respect of this passage from the reasons of Lord Browne-Wilkinson, "Thus, there is no translation into this field of discourse of the doctrine of *novus actus interveniens*."[73]

[106] Hobhouse LJ expressed the view[74] that:

> "Breach of fiduciary duty is not to be equated with common law deceit. It simply gives rise to a personal equity which is to be recognised by a court having Chancery jurisdiction so as to lead to a grant of an equitable remedy. It does not itself give rise to a right to damages. It relates to the transaction between the fiduciary and the person to whom he owes the duty. The remedy is essentially restitutionary in its character. The fiduciary may be restrained from enforcing the transaction. It may be rescinded. Accounts and restitution may be ordered. **But, if a plaintiff seeks to recover**

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72 [1997] 4 All ER 705 at 718.

73 *Maguire v Makaronis* (1997) 188 CLR 449 at 470.

74 [1997] 4 All ER 705 at 726.

> **common law damages, he must discharge the same burden of proof as would be required by a court applying the common law.**
>
> This leads on to the reliance by Mr Bannister upon what Lord Thankerton said in the *Brickenden*'s case. Once there has been a breach of a fiduciary duty in relation to a transaction, the fiduciary is not allowed to enforce that transaction. Equity does not allow him to benefit from the improper transaction and can require him to rescind the transaction and make restitution (*Armstrong v Jackson* [1917] 2 KB 822). It is no answer for the fiduciary to say that the other party would still have entered into the transaction had he made full disclosure. One can see the same reasoning being adopted in relation to the doctrine of *uberrimae fidei (*eg s 17 of the Marine Insurance Act 1906); the transaction is voidable. The principle is not a principle relating to the recovery of damages nor does it give rise to common law rights. It is essentially a principle which precludes the fiduciary from enforcing his common law rights. It will thus be seen that this principle cannot be used to enable a claimant to recover common law damages without establishing a causal connection between the relevant loss and the relevant wrong. (See also *Bristol and West Building Society v May May & Merrimans (a firm)* [1996] 2 All ER 801.)" (emphasis added)

[107] Mummery LJ, the remaining member of the Court, also referred to the reasons of Lord Browne-Wilkinson in *Target Holdings*. In considering the extent of a fiduciary's liability for breach of fiduciary duty, he observed:[75]

> "Foreseeability and remoteness of damage are, in general, irrelevant to restitutionary remedies for breach of trust or breach of fiduciary duty. The liability is to make good the loss suffered by the beneficiary of the duty. It is, however, necessary to address the issue of causation. Although equitable compensation, whether awarded in lieu of rescission or specific restitution or whether simply awarded as monetary compensation, is not damages, it is still necessary for Mrs Harrison to show that the loss suffered has been caused by the relevant breach of fiduciary duty. Liability is not unlimited. **There is no equitable by-pass of the need to establish causation …**
>
> A wrongdoer is only liable for the consequences of his being wrong and not for all the consequences of a course of action." [76]

[108] In his opinion, there was no fiduciary duty on the solicitor to abstain from lending money to the client or to prevent her from completing the purchase of the hotel. The solicitor's duty was to make full disclosure of material facts relevant to the bridging loan and he had breached that duty. But, as the client would still have obtained the bridging loan even if the breach of duty had not occurred, even if she had independently got advice, her loss did not flow from the breach of fiduciary duties; it flowed from her own decision to take the risk involved in mortgaging her own home. His Lordship found that the solicitors "were not under a duty to decline

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75 [1997] 4 All ER 705 at 733.

76 [1997] 4 All ER 705 at 735.

to act for [the client] on the purchase or to stop her from going ahead with the purchase, if that is what she wanted to do."

[109] In order to determine the requisite causal connection between a breach of duty and loss, it has been said, variously, that it is necessary to: "identify the scope of the relevant rule";[77] perform "a functional evaluation of the relationship and purposes or policy of the relevant part of the law";[78] "identify the purpose of the particular rule";[79] "specify criteria for a sufficient connection (or 'causation') between breach of duty and … the loss sustained";[80] "to look at the policy behind compensation for breach of fiduciary duty and to determine what remedies will further that policy"; or to identify "the scope of the duty breached and the purpose of the rule imposing the duty".[81]

[110] In *O'Halloran*, a director's breach of duty case, it was concluded that "Policy favours a stringent test … It is the vulnerability of a company which places its property in the power of directors, that makes it appropriate to adopt the approach to causation applicable to the trustee of a traditional trust in deciding issues of causation for the contravention by a company director of his or her duty not to exercise the power to dispose of property for an improper purpose".[82] The test applied was "would loss have occurred if there had been no breach."[83] In *Beach* the Court assumed, without deciding, that this test applied.

[111] There is little reason to suppose that courts should take a less strict approach in relation to breaches of solicitors' fiduciary duties. In *Makaronis*[84] it was said in the joint reasons:

> "Equity intervenes, particularly where the fiduciary is a solicitor, not so much to recoup a loss suffered by the plaintiff as to hold the fiduciary to, and vindicate, the high duty owed the [sic] plaintiff." (footnote deleted)

[112] It is necessary now to consider the application of those principles to the facts. The pleaded allegations are that in breach of his fiduciary duty the respondent failed to advise that the interests of the Estate and Freeway could diverge because of the attitude of the lessors to consenting to the assignment of the Estate's interest in the lease and that, in consequence, Freeway should obtain independent legal advice (amended statement of claim, paragraph 11B. That advice, it is alleged, would have been to the effect that Freeway should not pay the purchase price which would have been recovered by Freeway (paragraph 11C). Had such advice been given, it would have assisted the respondent to argue that he had the fully informed consent of Freeway to continue to act for both parties and was therefore not in breach of his fiduciary duty.

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77 *Environment Agency (formerly National Rivers Authority) v Empress Car Co (Abertillery) Ltd* [1999] 2 AC 22, per Lord Hoffmann at 31.

78 *Barnes v Hay* (1988) 12 NSWLR 337 at 353.

79 *O'Halloran v RT Thomas & Family Pty Ltd* (1998) 45 NSWLR 262, per Spigelman CJ at 275.

80 *Maguire v Makaronis* (1997) 188 CLR 449 at 468.

81 *Swindle & Ors v Harrison* [1997] 4 All ER 705 at 734.

82 *O'Halloran v RT Thomas & Family Pty Ltd* (1998) 45 NSWLR 262 at 277.

83 *O'Halloran v RT Thomas & Family Pty Ltd* at 279.

84 (1997) 188 CLR 449 at 465.

[113] No authority was cited in support of the proposition that there was a duty on the respondent arising out of the fiduciary relationship to advise of the existence of the conflict and to advise that Freeway should obtain independent skilled advice. The following passage from the reasons of Brennan CJ, Gaudron, McHugh and Gummow JJ in *Makaronis*[85] suggests that no such duty existed:

> "... it should be noted that, contrary to what appeared to be suggested by the respondents in argument, there was no duty as such on the appellants to obtain an informed consent from the respondents. Rather, the existence of an informed consent would have gone to negate what otherwise was a breach of duty."

[114] In *Pilmer v Duke Group Limited (In Liquidation)*,[86] after stating: "... that fiduciary obligations are proscriptive rather than prescriptive in nature; there is not imposed upon fiduciaries a quasi-tortious duty to act solely in the best interests of their principals", McHugh, Gummow, Hayne and Callinan JJ referred with approval to the following passage from the reasons of Gaudron and McHugh JJ in *Breen v Williams*:[87]

> "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."[88] (emphasis added)

Similar principles were stated in *Attorney-General v Blake*.[89]

[115] It seems probable that advice was given about the divergence of interests. But, as discussed earlier, nothing was said about the desirability of independent legal advice on or after 26 August 1994. The failure to advise that the respondent had a conflict of interest and that Freeway should obtain independent legal advice did not constitute a breach of fiduciary duty.

[116] The allegations in paragraph 11C are dependent for their operation on the allegations in paragraph 11B being made out. Paragraph 11C alleges the result which would have ensued from the failures to advise alleged in paragraph 11B.

[117] The evidence shows that the probabilities are that, having regard to the personality of Mr Jorgensen which emerges from the Magistrate's reasons, the exhibits and the oral evidence, it is more probable than not that any advice in terms of paragraph 11B would have had no effect. Mr Jorgensen is revealed as a person who ignored warnings of danger and who was determined to press on regardless.

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85 *Maguire v Makaronis* (1997) 188 CLR 449 at 467.
86 (2001) 207 CLR 165 at 198.
87 (1986) 186 CLR 71 at 113.
88 *Pilmer v Duke Group Ltd (In liq)* (2001) 207 CLR 165 at 198.
89 [1998] Ch 439 at 455.

[118] Plainly, the respondent is not liable in respect of the deposit. That was paid before it was shown that any conflict of interest had arisen. Any advice by the respondent would not have secured the return of the deposit. It was held by the respondent as stakeholder and could not have been returned lawfully to Freeway. It was forfeitable on termination of the agreement or ceased to be refundable once the agreement was regarded as concluded.

[119] The balance purchase price, however, was not required to be paid under the terms of the agreement, absent the lessors' consent. Its payment was made when, at best for the respondent, there was a substantial possibility of conflict. If Freeway had refused to pay the balance purchase price, it would have been liable to the Estate for damages for breach of the agreement. The evidence, however, shows that Freeway, most probably, would have pressed on with the transaction and paid the balance purchase price even if it had been advised that other solicitors should be retained to act for it.

[120] Both before and after other solicitors were retained by Freeway, Freeway elected to proceed on the basis that the Estate had performed its obligations under the agreement. Moreover, Freeway failed to obtain an assignment of the Estate's interest in the lease only through its own default. Had Freeway performed its obligations under the agreement, the agreement would have been fully performed and Freeway, in return for the balance purchase price, would have acquired the Estate's interest in the lease as well as its title to the assets and goodwill of the business.

[121] Freeway also has the difficulty that it has failed to quantify its loss. Freeway acquired the goodwill, plant, equipment and other chattels the subject of the agreement. Their value was not established and the evidence does not disclose how matters were finally resolved between the Estate and the appellant. It is therefore only possible to speculate about the appellant's loss, if any. And that is before regard is had to the contractual and, perhaps, other claims the Estate would have had against Freeway if the balance purchase price had not been paid.

[122] *Brickenden* is distinguishable as this case is not one of non-disclosure by a fiduciary of a material fact, and, moreover, a material fact which, if disclosed, may have deterred the beneficiary from entering into the transaction which gave rise to a loss. Here, there is no sustainable pleaded breach of duty, apart from the conflict between the respondent's separate duties to his respective clients. That breach, although not pleaded in an unqualified way, is sufficiently raised by the pleadings.

[123] However, assuming for present purposes that the appellant proved that it suffered loss, the loss is not one "which, using hindsight and common sense can be said to have been caused by the breach."[90] Nor can it be said that but for the respondent's breach of fiduciary duty, the loss would not have occurred.

[124] The agreement was already entered into and Freeway's contractual obligation had arisen by the time any breaches of duty occurred. Mr Jorgensen was determined that the transaction would proceed and ignored strong advice against going further before obtaining the lessors' consent. Freeway's conduct in breach of contract, and only that conduct, ensured that the consent was not obtained. Mr Jorgensen nevertheless, insisted on going into possession and obtaining title to the personal

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90 *Target Holdings Ltd v Redferns* [1996] AC 421 at 439.

property the subject of the agreement. Independently advised, he maintained his title to that property and did not claim an entitlement to the balance purchase price. Any loss was caused by Freeway's proceeding with the transaction against the respondent's advice and by its own failure to provide the bank guarantee.

[125] There is evidence that the respondent was in an actual position of conflict between his own interests and his duty to Freeway once he commenced to act for Freeway. The Estate owed him for fees rendered. He thus stood to benefit personally from the successful completion of the transaction of sale and purchase. He made no disclosure of his interest to Freeway. These matters, however, were never pleaded and were not raised on the trial of the proceeding. Nor was it alleged that the payment of the balance purchase monies was a breach of trust and that, in consequence, they should be restored to the beneficiary. The circumstances in which the balance purchase price came to be disbursed were not dealt with in the pleadings at all or in the evidence except peripherally.

[126] The original statement of claim claimed damages for negligence. The breach of fiduciary duty claim was added by an amendment to the statement of claim for which leave was given in 1998. The history of the proceedings is set out above. It suffices for present purposes to say that by the time of trial, much of the oral communications between the respondent and Mr Jorgensen would have been forgotten or but vaguely remembered. Likewise, the reasons why relevant things were done or omitted to be done were likely to have been forgotten.

[127] After the lapse of so many years it would be inappropriate and, indeed quite unfair to the respondent, to stray outside the pleaded case.

[128] It is even questionable that the appellant has a claim for equitable damages or compensation. An amendment to make such a claim was foreshadowed in the Magistrates Court but never pursued. If the claim is to be regarded as one for common law damages, assuming that such a claim can be made for breach of fiduciary duty,[91] more onerous common law tests of causation would apply.[92]

The counter-claim

[129] The respondent counter-claimed for $1,660, being the total amount of two cheques drawn by Freeway in favour of the respondent. It was alleged that Freeway represented to the respondent that it would pay the respondent for legal work performed by the respondent for Freeway by means of the cheques; that Freeway gave the cheques to the respondent knowing they would be dishonoured and that the cheques were subsequently dishonoured. It is further alleged that in return for the cheques the respondent handed to Freeway certain papers over which the respondent had a solicitor's lien and that the lien was thereby extinguished.

[130] The Magistrate found that the provision of the cheques was to secure the files and that payment was stopped almost immediately once Freeway obtained them. She held that the sum of $1,660 was payable by Mantonella to the respondent and gave judgment in favour of the respondent on the counter-claim in that sum, together with interest from 2 May 1995. Mantonella appealed against the whole of the decision of the Magistrate.

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91 *Swindle & Ors v Harrison* [1997] 4 All ER 705.

92 *Swindle & Ors v Harrison* [1997] 4 All ER 705.

[131] The notice of appeal did not make mention of the counter-claim or contain any grounds which related expressly or directly to the counter-claim. It does not appear from the reasons of the Judge who heard the appeal from the Magistrate's decision that any argument concerning the counter-claim was advanced on the hearing before him.

[132] The leave to appeal to this Court given to the appellant was limited to three matters. One was to challenge the finding that the respondent "was not in breach of any duty in failing to advise of a conflict of interest in acting for both parties and the advisability of separate representation." That was the only one of the three permitted grounds which could conceivably bear on the counter-claim.

[133] The grounds of appeal do not advert to the counter-claim either directly or indirectly and it was not the subject of argument on the hearing of the appeal in this Court. No issue in relation to the counter-claim therefore arises for consideration by this Court. If it did, the appellant would have failed. In its counter-claim the respondent sued on two cheques. The reply and answer denied or did not admit paragraphs 1 to 10 inclusive of the defence or counter-claim: there were only 11 paragraphs containing substantive allegations or material facts. The reply and answer then alleged that:

(a) The respondent had a duty to Freeway to advise it of the terms of the sale agreement that required the estate of Dunbar to provide at its own expense an assignment of the lease;

(b) The respondent induced Freeway to meet the expense of pursuing the assignment;

(c) Such conduct was in breach of the respondent's duty to Freeway; and

(d) As a result of the respondent's negligence, Freeway suffered loss and damage.

[134] After these allegations, the pleadings concluded with a denial of liability and an allegation that Freeway was entitled to set off against any indebtedness to the respondent the amounts claimed by the appellant in the proceedings.

[135] The Magistrate found, in the respondent's favour, the facts necessary to sustain the respondent's claims in respect of the cheques. No error in those findings was identified to the District Court Judge or this Court. Allegation (a) cannot succeed. Freeway was aware of the relevant contractual terms and even if it is concluded that advice of the nature in question was not given, the evidence does not show that the failure had any causative effect. As for (b), Freeway, against the advice of the respondent, insisted on going into possession and proceeding with the transaction without obtaining the assignment. The cause of the failure of the lease to be assigned was Freeway's own default. Finally, no equitable principle has been identified, the operation of which would prevent a payee of a cheque in breach of a fiduciary duty to the drawer from suing on and recovering the value of the cheque in the event of its dishonour. I do not suggest, of course, that, there may not be circumstances in which the drawer would have a claim against the payee and a right of set off.

[136] The appellant has failed to demonstrate any material error at first instance or on appeal to the District Court. For the above reasons, I would dismiss the appeal with costs.

FRYBERG J:

[137] I agree with Muir JA that the appellant's predecessor in title waived the obtaining of the lessor's consent and accepted that the vendor had done all that was necessary to perform his or her part of the bargain. I agree with his Honour's reasons for those conclusions.

[138] I also agree that in the circumstances there is no point in endeavouring to identify whether and to what extent settlement of the contract occurred on 26 August 1994.

[139] For the reasons given by his Honour, the respondent was not guilty of negligence toward Mr Jorgensen's company. Mr Jorgensen was a strong-minded individual with substantial experience as a businessman (or so he claimed). He was the author of the appellant's misfortune.

[140] I agree with what Muir JA has written in relation to the counterclaim. The counterclaim was not mentioned in the outlines of argument for or during the hearing of the appeal to this Court, nor, it seems, during the appeal to the District Court. There is no reason to interfere with the magistrate's order.

Breach of fiduciary duty

[141] After pleading the existence of a fiduciary duty by virtue of the retainer, the plaintiff alleged:

> "11B. In breach of the fiduciary duty, the Defendant failed to advise the Plaintiff: -
>
> a) that it was likely or possible that the interests of the Plaintiff as purchaser, and the Estate of Roy Stuart Dunbar, whom the Defendant also represented, could diverge because of the attitude of the Landlord to the grant of a consent to the assignment of lease to the Plaintiff;
>
> b) that as a result thereof, the Defendant had a conflict of interest and the Plaintiff therefore should obtain independent legal advice.
>
> 11C. If properly advised: -
>
> a) the Plaintiff would have sought separate legal advice;
>
> b) that advice would have been to the effect the Plaintiff should not pay over the purchase price for the business; and
>
> c) as such moneys were held on trust by the Defendant for the Plaintiff, they would have been recovered."[93]

[142] The magistrate found that there was no breach of fiduciary duty as pleaded. Dodds DCJ resolved the appeal against that finding in this way:

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[93] Plaintiff's Amended Statement of Particulars, AR 529.

> "[32] The Magistrate's reasons show she recognised the fiduciary relationship which exists between solicitor and client. She found that the respondent, not unreasonably in the circumstances was of the view Jorgensen was a wealthy person, easily able to meet the requirements of the landlord for assignment of the lease, a person who was keen to acquire the restaurant business and would honour his undertakings. Nothing was told to the respondent or came to his notice until later in the piece to suggest that Freeway and/or Jorgensen financial position in truth was not as he had believed and that Freeway may not be in a position to meet the landlord's requirements. The Magistrate found that at about the time of the failure to provide the bank guarantee, the respondent recognised there could be a conflict, but kept acting as he accepted Jorgensen's assurances that the guarantee would be provided. Jorgensen knew that the respondent acted for the estate from the outset and was aware he could seek legal advice elsewhere. She found that in truth, the reason the lease was never assigned, was because Freeway and/or Jorgensen never provided, apparently were never able to provide the bank guarantee required under the lease, nor satisfy the lessor of the potential lessee's financial standing.
>
> [33] The Magistrate recognised that with the benefit of hindsight, it would have been wiser for the respondent to have refused to act any further for Jorgensen and Freeway in the matter once it became mired in dispute with the lessor about assignment of the lease. However she concluded that the respondent had been of the view and for quite a long time continued of the view from what he knew or thought he knew of Jorgensen from his earlier dealing with him, and from his assurances, that he was financially successful and eager to acquire and operate the restaurant.
>
> [34] The Magistrate concluded that there was no breach of fiduciary duty as pleaded. Given the evidence she accepted, it has not been shown the conclusion was not reasonably open on the evidence. I am not persuaded I should reach a different view."[94]

[143] On this point I have reached a different conclusion from the learned District Court judge. By 26 August 1994 at the latest, the respondent was in a position of conflict of duty and duty, the respective duties being those owed to his two clients. There is no reason to doubt the magistrate's finding that Mr Jorgensen was aware of that conflict. Mr Jorgensen had Melbourne solicitors who acted for him, as the respondent well knew. As the magistrate found, he was not relying solely on the respondent. But he was relying on the respondent to some extent; and the respondent neither advised him to seek separate legal representation nor obtained his informed consent to his continuing to act for both parties.[95] It is one thing for a client to know that he can seek separate legal advice; it is another for him to be told that he should do this. The respondent's failure so to advise amounted to a breach of fiduciary duty.

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94 *Mantonella Pty Ltd v Thompson* [2008] QDC 92.

95 Assuming that the latter course would have satisfied the duty.

[144] However that does not mean that the appeal should succeed. The plaintiffs claimed damages, presumably equitable damages, and no other relief apart from interest; but this appeal does not turn upon the form of the relief claimed in the first instance.[96] The plaintiffs ran their case on the basis that they would show that they would have recovered the $15,000 held on trust by the respondent and would not have been obliged to spend a further $1,000 on the services of other solicitors "to further pursue the acquisition of the restaurant".[97] Their pleading accepted the need to prove that their loss was caused by the breach of fiduciary duty. Even assuming in their favour that the breach gave rise to a cause of action, the claim fails on causation.

Causation

[145] *Youyang Pty Ltd v Minter Ellison Morris Fletcher*[98] was:

> "… not an instance, of which the decisions of the House of Lords and Privy Council respectively in *Nocton v Lord Ashburton* and *Brickenden v London Loan and Savings Co* are the most celebrated examples, of a solicitor who has had financial transactions with a client, getting the client to prefer the personal interests of the solicitor. … In these cases, as Viscount Haldane put it, a court of equity may order the solicitor to replace the property improperly acquired from a client or to make compensation if that property has been lost."[99]

The High Court described the essence of the plaintiff's complaint by adapting what was said by Fry LJ in *Webb v Stenton*:[100] "Minters has made itself 'personally liable to pay money to [Youyang] *by reason of* some breach of trust or default in the performance of [its] duties as trustee' (emphasis added)."[101] Their Honours wrote:

> " 44. This appeal turns upon the significance for the facts of the causal requirement expressed by Fry LJ in the phrase 'by reason of'. That serves to remind, as Mummery LJ recently put it, that '[t]here is no equitable by-pass of the need to establish causation' and that '[i]n questions of causation it is important to focus on the relevant equitable duty'. This raises considerations having an affinity to those which determined the outcome in *Target Holdings*."[102]

[146] The High Court further wrote:

> "50. These considerations in turn lend force to the application here of the proposition expressed as follows by Lord Browne-Wilkinson in *Target Holdings*:

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96 See *Maguire v Makaronis* (1997) 188 CLR 449 at 468ff.
97 Plaintiff's Amended Statement of Particulars, AR 529.
98 (2003) 212 CLR 484; [2003] HCA 15.
99 *Ibid*, at p 501 (citations omitted).
100 (1883) 55 LJQB 584; (1883) 49 LT 432; (1883) 11 QBD 518; [1881-5] All ER Rep 312.
101 *Youyang*, at 501-502.
102 *Ibid*, at 502.

> '[T]he fact that there is an accrued cause of action as soon as the breach is committed does not in my judgment mean that the quantum of the compensation payable is ultimately fixed as at the date when the breach occurred. The quantum is fixed at the date of judgment at which date, according to the circumstances then pertaining, the compensation is assessed at the figure then necessary to put the trust estate or the beneficiary back into the position it would have been in had there been no breach. I can see no justification for 'stopping the clock' immediately in some cases but not in others: to do so may, as in this case, lead to compensating the trust estate or the beneficiary for a loss which, on the facts known at trial, it has never suffered'."[103]

[147] In my judgment that proposition should be applied in the present case. None of the considerations of general public policy referred to in *Maguire v Makaronis*[104] inhibits that conclusion. I see no justification for awarding the appellant damages for a loss which he would have suffered in any event, and regardless of whether the respondent breached his fiduciary duty.

[148] I need not repeat the facts. They are fully set out in the reasons for judgment of Muir JA. They demonstrate that this case is another which is "not an instance … of a solicitor who has had financial transactions with a client, getting the client to prefer the personal interests of the solicitor".[105] On the contrary, the respondent gave the advice which would have been given by an independent solicitor had one been consulted: the purchaser should act expeditiously to comply with the landlord's reasonable requirements to enable the contract to be completed.

[149] Contrary to the appellant's argument, the purchaser would not have recovered the money paid to the respondent. On one view the contract for the sale of the business was completed, the purchaser having waived the requirement in cl 7 for the vendor to obtain the lessors' consent to the assignment of the lease (or, perhaps, having impliedly agreed to substitute for it a requirement to co-operate in litigating against the lessors). If that view is rejected, the correct view must be that the contract remained on foot. The purchaser was in breach, but on the evidence and on the magistrate's finding, there was no possibility that the vendor would terminate the contract by reason of that breach. The purchaser was always going to be held to its contract. And there can be little doubt that Mr Jorgensen was so anxious to obtain possession that he would not have followed any advice from an independent solicitor not to pay the vendor without an assignment of the lease, just as he ignored the respondent's advice "of the dangerousness of proceeding to settle without the lease being assigned".[106]

[150] The appeal should be dismissed with costs.

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103 *Youyang*, at 504.
104 (1997) 188 CLR 449 at 465.
105 *Youang*, at 501.
106 Magistrate's reasons for judgment, para [126], AR 618A.