SUPREME COURT OF QUEENSLAND

CITATION:	*Ede v Ede* [2006] QSC 378
PARTIES:	**FRANCIS ROBERT LEWIS EDE by his litigation guardian, THE PUBLIC TRUSTEE OF QUEENSLAND** (plaintiff) **v** **RAYMOND ROBERT EDE** (defendant)
FILE NO/S:	BS10330 of 2005
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	13 December 2006
DELIVERED AT:	Brisbane
HEARING DATE:	29 November 2006
JUDGE:	Muir J
ORDER:	**The defendant is to pay the plaintiff the sum of $36,800**
CATCHWORDS:	EQUITY – TRUSTS AND TRUSTEES – POWERS, DUTIES, RIGHTS AND LIABILITIES OF TRUSTEES – LIABILITY FOR BREACH OF TRUST – RELIEF FROM LIABILITY – IN GENERAL – where respondent was the applicant's attorney – where respondent transferred property belonging to the applicant to the respondent's daughter – where respondent admits transfer in contravention of s 73(1) of the *Powers of Attorney Act* 1998 (Qld) – whether respondent acted honestly and reasonably and ought fairly to be excused for the breach *Companies Act* 1961 (Vic) *Powers of Attorney Act* 1998, s 73, s 105(1), 106(1) *Consul Development Pty Limited v DPC Estates Pty Limited* (1975) 132 CLR 373, applied *Craven-Sands v Koch* (2000) 34 ACSR 341, applied *Marchesi v Barnes* [1970] VR 434, applied *National Trustees Executors & Agency Co of Australasia Ltd v General Finance Co of Australasia Ltd* [1905] AC 373, applied *Re De Clifford* [1900] 2 Ch 707, applied *Re Second East Dulwich 145th Starr-Bowkett Building*

Society, (1899) 68 LJ Ch 196, applied
Re Turner (1897) 1 Ch 356, distinguished

COUNSEL: M Bland for the plaintiff
J M Horton for the defendant

SOLICITORS: Official Solicitor to The Public Trustee for the plaintiff
Hemming & Hart for the defendant

Introduction

[1] The plaintiff, Francis Ede by his litigation guardian The Public Trustee of Queensland, claims against the defendant Robert Ede, the plaintiff's son, compensation pursuant to s 106(1) of the *Powers of Attorney Act* 1998 ("the Act"). The defendant denies liability and counterclaims for an order that he be relieved from personal responsibility pursuant to s 105(1) of the Act. The defendant initially denied breaching his obligations as attorney for the plaintiff under an Enduring Power of Attorney by selling a parcel of real estate owned by the plaintiff to his daughter. But on the hearing, the defendant's counsel admitted that the defendant was in breach of his obligations under s 73 of the Act not to "enter into a conflict transaction" unless authorised by the plaintiff. The issues for determination then became:

(a) Whether the plaintiff had incurred loss as a result of the defendant's breach and should be ordered to pay compensation under s 106 of the Act and, if so, in what amount; and

(b) Whether the defendant should be relieved from all or part of his personal liability for the breach under s 105 of the Act.

Matters antecedent to the impugned transaction

[2] Under an Enduring Power of Attorney dated 3 August 2001, the defendant was appointed by his father as his attorney. In early 2002 the plaintiff was diagnosed as suffering from dementia. He lacked capacity to contract from about that time.

[3] At the time the Power of Attorney was granted, the plaintiff and his spouse resided in their home in Bardon. They also owned a holiday home at 8 Arvon Avenue, Beachmere. The defendant's mother died in April 2002. In November that year, the plaintiff, as a result of his dementia, moved from the defendant's home, where he was being cared for by the defendant and his wife, to a nursing home.

[4] After the defendant became his father's attorney, he attended to the maintenance of the Beachmere property. He described the house on the property as a small holiday house built before 1960 without sewerage, town water, hot water or a laundry. Sewerage was connected about 15 years ago to a small bathroom and mains water was connected only to garden taps and the toilet. Water for the rest of the house was provided by a water tank. The defendant left the property untenanted because he believed that his father would be upset if he heard that it was tenanted. Additionally, the property was not in a fit state to be tenanted without the expenditure of a sum which was not justified by the amount of rent which could be demanded. There were white ants in the garage, the electrical wiring needed replacing, the bathroom required renovation and the kitchen also required replacing.

[5] In early 2003 the applicant was criticised by an officer of the Office of the Adult Guardian who expressed the view that both properties were not being managed correctly and that they ought be tenanted and producing income. In response to this criticism, the defendant decided that the Beachmere property should be sold. He did not intend selling the Bardon property because his father maintained his interest in it and the defendant thought his father would be upset if he heard that strangers were living in it.

[6] In November 2002 Mr Kroll, valuer, had valued the Beachmere property in consequence of a requirement of the Department of Veteran's Affairs. He valued it at $85,000, which he apportioned at $60,000 and $25,000 to land and improvements respectively.

The circumstances surrounding the sale of the Beachmere land

[7] The defendant attempted to contact Mr Kroll without success. In about February 2003 the defendant approached Australian Pacific Valuers Pty Ltd for a valuation. Mr Casagrande of that company provided a valuation to the defendant on 6 May 2003. In it he advised:

> "It is the valuer's opinion that should the house receive the TLC required namely: painting, new floor coverings, connection to water main, yard maintenance and new front fence, then the property could achieve $75,000 on the current market. However, it is estimated that a figure approaching $10,000 could be spent on the above items to bring the residence into a saleable position."

[8] From his experience as a builder, the defendant concluded that the necessary repairs would cost to the order of $15,000 to $20,000. The plaintiff's daughter, who did clerical work for him, saw the valuation and asked her father if she could purchase the property. The defendant saw no objection to this sale but wanted to ensure that he would not breach any of his duties as an attorney. He recalled reading the following advice on the instrument of Power of Attorney:

> "You must not enter into transactions that could or do bring your interests (or those of your relation, business associate or close friend) into conflict with those of the principal. For example, you must not buy the principal's car unless you pay at least its market value …"

[9] The defendant rang the Office of the Adult Guardian and asked an officer there what was meant by "market value". He was told that it meant that he required a certified valuation. He asked his financial planner if it would be acceptable for him to sell the Beachmere house to his daughter at market value and was advised that it probably would be all right but that he should obtain legal advice. The defendant then sought his solicitor's advice and was told that the transaction would be in order if the sale was at a fair market price, but that the defendant would need a current valuation.

[10] The defendant requested and obtained a new valuation from Australian Pacific Valuers Pty Ltd. It was dated 16 October 2003, signed by a Mr Ponticello and was virtually identical in terms to the earlier valuation. The defendant queried Mr Ponticello as to whether he had inspected the property and had "done a full and correct valuation". Mr Ponticello assured him on both counts and explained that the sales figures obtainable by computer search were still the same as when the earlier

valuation had been made. The defendant independently formed the view that little, if anything, had changed through browsing "the listings of properties for sale by real estate agents in Beachmere". The defendant then gave instructions for his solicitor to prepare a contract of sale and transfer documents. A delay was occasioned as a result of the solicitor's inability to locate the title deed and the transfer was not executed until 12 January 2004. The consideration for the transfer was $70,000. The defendant reasoned that if the property was sold in an unrepaired condition it was reasonable to deduct from the valuation figure half the sum which the valuer considered was needed to make the property marketable.

[11] No agent's commission was paid on the sale, resulting a saving of commission of $2,200, assuming a sale price of $70,000.

What was the plaintiff's loss, if any, caused by the defendant's failure to comply with section 73 of the Act?

[12] The plaintiff called a valuer, Mr Harvey, who valued the property as at 5 March 2004 at $140,000 and as at 12 May 2005 at $165,000. Mr Bland, who appeared for the plaintiff, accepted that the relevant date for present purposes was the date of the transfer: 12 January 2004. In a supplementary valuation, Mr Harvey expressed the opinion that the market value as at 12 January 2004 was also $140,000. He said:

> "…this figure is equivalent to our estimation of market value as at 5 March 2004 (sales of properties in the Beachmere township did not indicate any significant variation in values between the two dates) …"

[13] Unlike the other valuers, Mr Harvey had the benefit of hindsight in preparing his valuation. Mr Horton, who appeared for the defendant, points out that Mr Harvey had the benefit of comparable sales which occurred after the date of the other valuations and after the date of the transfer. He also had the benefit of sales which predated the earlier valuations but which, by virtue of delay of up to four to five months in statistics being recorded on the database at the Department of Natural Resources, were not generally available in the marketplace. Mr Harvey also referred in his valuation report to the statutory unimproved value of the land being $150,000 "effective 30 June 2005". He did not refer to the unimproved capital value of the land at the time of the transfer. That value at the time of Mr Kroll's valuation was $40,000, and at the time of Mr Ponticello's valuation $50,000. Mr Harvey was unaware of these earlier valuations.

[14] The use by Mr Harvey of a substantial number of comparable sales which occurred after, and in some cases well after, 12 January 2004 is also a matter of concern. As there was a rising market after the date of sale, those sales had to be treated with extreme caution. Although I accept that Mr Harvey is a careful and competent valuer, I am not satisfied that he fully succeeded in excluding from consideration sales which occurred after the relevant date and the buoyant market conditions which became apparent in early 2004.

[15] Accordingly, I find that the market value of the property as at 12 January 2004 was not $140,000. In my view, the sales evidence available after 16 October 2003 (the date of Mr Ponticello's valuation) supported a higher valuation than his figure of $75,000, or $65,000 in an unrepaired state.

[16] But it is difficult to gauge the true market value was as at 12 January 2004 with any degree of precision, having regard to the lack of detailed information about the relevant comparable sales and the time at which the information became generally available. Regard must be had to the fact that the market was rising from October 2004. The market trend suggests the conclusion that the market value of the property was higher on 12 January 2004 than on 16 October 2003, but lower than on 5 March 2004. Also, the properties in Dixon Court and Apollo Crescent, which Mr Harvey used as comparable sales, were acknowledged by him to be superior to the subject property. Having regard to these considerations, I find that the market value was $110,000. In assessing the plaintiff's loss, $3,200 needs to be deducted for commission which would have been incurred had the sale been on the open market.

Section 105(1) of the *Powers of Attorney Act* 1998

[17] Section 105(1) of the Act provides:

> "(1) If the court considers –
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> (a) an attorney is, or may be, personally liable for a breach of this Act; and
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> (b) the attorney has acted honestly and reasonably and ought fairly to be excused for the breach;
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> the court may relieve the attorney from all or part of the attorney's personal liability for the breach."

The submissions of the plaintiff's counsel on the applicant of section 105(1)

[18] It is submitted, on behalf of the plaintiff, that the court could not be satisfied that the defendant acted honestly or reasonably in transferring the property to his daughter as:

> "(a) he disregarded Mr Kroll's valuation of the property at $85,000 in setting the price;
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> (b) he relied instead on the relatively cursory valuations by Messrs Casagrande and Ponticello;
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> (c) he did not show Mr Kroll's valuation to either Mr Casagrande or Mr Ponticello;
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> (d) he disregarded the advice contained in Messrs Casagrande's and Ponticello's valuations that renovation work was needed on the property to bring it to "a saleable position";
>
> (e) he did not advert to the possibility that the reliability of valuation evidence would be diminished by the apparent lack of sales of comparable property in the area in 2003;
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> (f) he did not consider putting the property to auction so that his daughter could compete with the market for it;
>
> (g) he acted furtively in concealing the transaction from his sister."

Findings on whether the defendant acted honestly and reasonably

[19] I do not accept the criticisms in paragraphs (a), (b) and (c). The Kroll valuation was much earlier in time. The defendant was told that he needed an updated valuation. He obtained one and then had it updated again, consistently with the advice he had been given. There was no particular need reason for the defendant to show the Kroll valuation to either Mr Casagrande or Mr Ponticello. Market conditions change, as

the defendant, a builder, was aware. What he was seeking was a current valuation and there was no reason for him not to rely on either Mr Casagrande or Mr Ponticello, whose valuations were the same. In fact he did not accept Mr Ponticello's valuation at face value. He queried why it was virtually identical to Mr Casagrande's and satisfied himself that Mr Ponticello had done his job.

[20] As for the criticism in paragraph (d), it would not have made much sense for the defendant to attend to the renovation work. On the valuers' advice the defendant would have had to spend $10,000 (or, on his own estimation, between $15,000 and $20,000) to obtain a price of $75,000 when his daughter was prepared to purchase the property for $70,000 without any such expenditure. A sale to his daughter would also save in excess of $2,000 in commission, as well as agent's outlays. The defendant's sale to his daughter thus seemed to be a reasonably attractive proposition from the plaintiff's perspective.

[21] The criticism in paragraph (e) assumes that it was reasonable for the defendant to query the analyses of two registered valuers whose competence he had no reason to doubt. I find that the defendant believed that he was entitled to rely on the recent valuations which provided the comfort of supporting each other. I find also that the applicant acted reasonably in not adopting the Kroll valuation.

[22] Asked in cross-examination if it occurred to him to put the property to auction, he responded that no one told him to do that and that he had never put a thing to auction in his life. He said that he was told to sell on valuation and he then did so. I do not consider that he can be criticised, in the circumstances, for not giving further consideration to auctioning the property or for not undertaking the additional costs and risk inherent in the auction process. There was no evidence that sale by auction was regarded by competent agents or valuers as a desirable method of sale for properties of the nature of the subject property in Beachmere.

[23] The criticism in paragraph (g) is of more substance. The defendant sought advice from his solicitor as to whether he was obliged to tell his sister about the transaction and was told that he was not. In cross-examination, when asked why he was reluctant to inform his sister of the transaction, he answered:

> "I wasn't reluctant. I wanted to know if I had a legal obligation to tell and I was told I didn't have a legal obligation to tell her."

[24] I doubt that that answer was entirely frank. If the defendant was not reluctant to disclose the transaction to his sister, there was little point in obtaining legal advice on the point. He explained in his affidavit his concern about his sister's attitudes and his difficulty in communicating with her "particularly about any issues relating to [his] father". I do not consider, however, that this act of concealment constitutes dishonesty.

[25] The words "honestly" and "reasonably" in s 105 are used in the context of statutory duties and obligations imposed by the Act on attorneys. Section 66 imposes on attorneys an obligation to "exercise power honestly and with reasonable diligence to protect the principal's interests". Section 73 prohibits an attorney from entering into a transaction in which the attorney's interests, or those of a relation, may conflict with the attorney's duties. In this context, an attorney acting honestly would usually be acting bona fide and in the interests of his principal.

[26] In the context of s 124 of the *Companies Act* 1961 (Vic), Gowans J, in *Marchesi v Barnes*,[1] concluded that:

> "A breach of the obligation to act bona fide in the interests of the company involves a consciousness that what is being done is not in the interests of the company, and deliberate conduct in disregard of that knowledge."

[27] In more recent cases the meaning of "honestly" in s 1318(1) of the *Corporations Act* 2001, and in its analogues, has been equated with absence of moral turpitude.[2]

[28] Whilst I accept that acting in conscious disregard of the interests of a person to whom fiduciary duties are owed will normally, if not invariably, constitute dishonesty or moral turpitude, I doubt that consciousness of wrongdoing is a necessary prerequisite to a finding of dishonesty. For example, in *Re Second East Dulwich 145th Starr-Bowkett Building Society*,[3] Kekewich J, with reference to legislation excusing trustees for breach of duty where they acted "honestly and reasonably", observed:

> "In the one sense a trustee is honest if he has not done anything dishonest … But in another sense he is not honest. It seems to me that a man who accepts such a trusteeship, and does nothing, swallows wholesale what is said by his co-trustee, never asks for explanation, and accepts flimsy explanation, is dishonest."

[29] I find that the defendant acted honestly. He endeavoured to "do the right thing": he acted in accordance with legal advice; he was misled by the wording on the Power of Attorney; and he had no understanding that his conduct may not have been in the best interests of the plaintiff.

Did the defendant act reasonably?

[30] The plaintiff relies on the matters addressed earlier to support the submission that the defendant failed to act reasonably. It is also submitted that a reasonable person would have "exacted a price equal to the higher of the valuations obtained". Both the plaintiff's counsel and the defendant's counsel submit that it is relevant to have regard to decisions on the meaning and application of s 76 of the *Trusts Act* 1973 and its analogues. In particular, both counsel referred to *Re Turner*.[4] With reference to *Re Turner* it is submitted, on behalf of the defendant, that the relevant question to ask in order to assess the reasonableness of the conduct of the defendant is whether he was:

> "… acting with such a degree of prudence as a person of ordinary intelligence and diligence may be expected to act with in the conduct of his own affairs: In *re Mackay; Griessemann v Carr* [1911] 1 Ch 286 at 306; *In re Turner* [1897] 1 Ch 536."

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1 [1970] VR 434 at 437.

2 *Commonwealth Bank of Australia v Friedrich* (1991) 5 ACSR 115; *ASIC v Adler* (2002) 42 ACSR 80; *Australian Securities and Investments Commission v Vines* (2005) 65 NSWLR 281 at 292 per Austin J.

3 (1899) 68 LJ Ch 196 at 197, 198. See also *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373 and *ASIC v Edwards (No 3)* (2006) 57 ACSR 209 at 212.

4 [1897] 1 Ch 356.

[31] I accept that the foregoing is one test of reasonableness, but it cannot be substituted for the language of the section, or replace the obligation to assess reasonableness on all the facts and circumstances of the case.

[32] Returning to the facts of this case, it seems to me that the defendant can hardly be said to have acted unreasonably when he acted in accordance with an example provided on the power of attorney instrument, took legal advice and acted in accordance with it. He looked into the merits of the most recent valuation and considered that the sale was at a higher price than the market value disclosed by that valuation. He also had regard to current listings with real estate agents. I find that the applicant acted reasonably.

Should the defendant be excused? The plaintiff's submissions

[33] It does not follow, however, that the defendant "ought fairly to be excused for the breach" and relieved from all or part of his personal liability for the breach. The defendant also asks that his daughter be allowed to retain the whole of the profit resulting from the breach. On no view of the matter could that be regarded as "fair".

[34] Reliance is placed on *Re De Clifford*,[5] in which Farwell J discussed the notion of fairness in the context of Trust's legislation:

> "I have merely to find as a fact that the trustee has acted honestly and reasonably, and ought fairly to be excused; and then I have power to grant relief. It is obvious that the exercise of such a jurisdiction is beset with great difficulty and requires great caution. I must bear in mind on the one hand that this relief is granted at the expense of the cestui que trust, and on the other that the trustee assumes an onerous post without reward, and the real difficulty is to say what is fair and right as between the beneficiary who entrusts his money to the trustee and the trustee who acts gratuitously on his behalf."

[35] In *National Trustees Executors & Agency Co of Australasia Ltd v General Finance Co. of Australasia Ltd*[6], the Privy Council said:

> "It is a very material circumstance that the appellants are a limited joint stock company, formed for the purpose of earning profits for their shareholders; part of their business is to act as trustees and executors; and they are paid for their services in so acting by a commission which the law of the Colony authorizes them to retain out of trust funds administered by them, in addition to their costs. What they now ask the Court to do is allow them to retain a sum of money to which the respondents' title is clear, in order thereby to relieve the trust company of from a loss they have incurred in the course of their business by reason of their having paid a like sum to wrong parties."

[36] In the same case the Privy Council observed[7] that:

> "If trustees do unfortunately lose part of a trust fund by a breach of trust, the least that can be expected of them is that they should use

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5 [1900] 2 Ch 707 at 713.

6 [1905] AC 373 at 381.

7 At pages 381-82.

> their best endeavours to recover the fund, or so much thereof as is practicable, for their cestui que trusts. In the present case there seems to be some ground for thinking that other proceedings were open to the trust company by which any loss to them might have been averted, at any rate to some extent; but it does not appear that the trust company have taken any such steps, or made any attempt whatever to replace the fund or relieve the respondents from loss; nor have they condescended to give the Court any explanation or reason why they have abstained from doing so."

[37] The plaintiff submits that it will never be fair to excuse an attorney where that would not only leave the principal to bear the loss but allow the attorney (or a relation or associate) to retain the profit.

Should the defendant be excused? The defendant's submissions.

[38] The Court has a wide discretion in matters of this kind and must look to the whole circumstances in which the breach took place.[8] The Court should not be hard on a trustee who has tried to act honestly, but it must not encourage laxity of dealing.[9]

[39] In assessing this element of s 105, the Court must look at all the circumstances.

[40] The circumstances outlined above show that the defendant made a decent and reasonable attempt to act lawfully and properly in connection with the sale. He relied on others (as one must who is not himself specially qualified) in determining whether he could lawfully undertake the sale and, if he did, the value he should derive from the sale for the benefit of the estate.

Should the defendant be excused? Conclusions

[41] The fact that an attorney is not acting for reward is a highly relevant consideration.[10] For that reason the above observations in *National Trustee Executors & Agency Co of Australasia Ltd* must be regarded with caution. It was a case concerning a trustee which rendered its services at commercial rates as part of its business. That was said to be "a very material circumstance".[11]

[42] Also highly relevant is the fact that the attorney took and followed legal advice.[12] There is no suggestion that the defendant knew or ought reasonably to have known that the person from whom the advice was taken was lacking in relevant expertise.

[43] These considerations support the defendant's claim for relief. But is it appropriate that the defendant be given relief without making good the loss suffered by the plaintiff through his breach of duty where that loss equates, in effect, to a corresponding benefit to his daughter?

[44] As McTiernan J stated in *Consul Development Pty Limited v DPC Estates Pty Limited*:[13]

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8 *Craven-Sands v Koch* (2000) 34 ACSR 341 at 368.

9 *Craven-Sands v Koch* at 368.

10 *Re De Clifford* [1900] 2 Ch 707 at 713.

11 *National Trustees Executors & Agency Co of Australasia Ltd v General Finance Company of Australasia Ltd* (supra) at 381.

12 Also relevant is the seriousness of the contravention.

> "There is a strict equitable principle that a person occupying a position of confidence in relation to another owes that other a duty not to put himself in a position where his interests and his duty conflict and requires that, if he abuses that confidence and in breach of his duty makes a profit for himself, he must account to that other for the profit so made."

[45] His Honour later observed:[14]

> "For authority for this salutary principle I content myself with citing the opinion of Lord Wilberforce in *New Zealand Netherlands Society 'Oranje' Incorporated v. Kuys* ([1973] 1 WLR 1126).
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> His Lordship said ([1973] 1 WLR, at p 1129):
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> > 'The obligation not to profit from a position of trust, or, as it is sometimes relevant to put it, not to allow a conflict to arise between duty and interest, is one of strictness. The strength, and indeed the severity, of the rule has recently been emphasised by the House of Lords: *Phipps v. Boardman* (1967) 2 AC 46. It retains its vigour in all jurisdictions where the principles of equity are applied."

[46] McTiernan J subsequently referred to the "historic task" of Courts of Equity "of preventing the retention of gains made through disloyalty".[15]

[47] The width of the prohibition against fiduciaries placing themselves in a position of conflict of interests is revealed by the following passage in the reasons of Gibbs J in *Consul Development*:[16]

> "However the rule that a person in a fiduciary position is not entitled to make a profit without the knowledge and assent of the person to whom the fiduciary duty is owed is not limited to cases where the profit arises from the use of the fiduciary position or of the opportunity or knowledge gained from it. The basis of the rule is that a person in a fiduciary position may not place himself in a situation where his duty and his interest conflict. In *Aberdeen Railway Co. v. Blaikie Brothers* ((1854) 1 Macq 461, at p 471), Lord Cranworth L.C. stated the principle so far as it applies to directors in the following wide words:
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> > 'A corporate body can only act by agents, and it is of course the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such agents have duties to discharge of a fiduciary nature towards their principal. 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.'"

[48] Gibbs J discussed the consequences to a fiduciary of placing himself in a position where his interests conflicted with his fiduciary duties as follows:[17]

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13 (1975) 132 CLR 373 at 377.
14 At 377.
15 At 386.
16 At 393, 394.

> "Where the rule applies, the liability of the person in a fiduciary position does not depend on the fact that the person to whom the duty is owed has suffered injury or loss. In *Birtchnell v. Equity Trustees, Executors & Agency Co. Ltd* ((1929) 42 CLR 384, at pp 408-409), Dixon J. said:
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> > 'Moreover, in considering such a matter it is important to remember that, in the language of James L.J., 'the general principle that … no agent in the course of his agency, in the matter of his agency, can be allowed to make any profit without the knowledge and consent of his principal … is an inflexible rule, and must be applied inexorably by the Court, which is not entitled … to receive evidence, or suggestion, or argument as to whether the principal did or did not suffer any injury in fact by reason of the dealing of the agent; for the safety of mankind requires that no agent shall be able to put his principal to the danger of such an inquiry as that' (*Parker v. McKenna* (1874) 'LR 10 Ch App 96, at pp 124-125). Further, and this, perhaps, is a necessary corollary, the partner is responsible to his firm for profits, although his firm could not itself have gained them.'"

[49] Section 105 is a remedial provision and should not be narrowly construed. Nor should its application in any given case be determined simply by the application of pre-existing equitable principles. The section gives the Court a discretion to relieve an attorney who is or may be personally liable for a breach of the Act from all or part of the attorney's personal liability for the breach. The discretion is at large but must be exercised judicially.

[50] A matter of obvious relevance to the exercise of the discretion is whether the attorney (or relative, friend or associate) has benefited from the breach and whether the attorney has accounted for any such benefit to his principal.[18] A consequence of acceding to the defendant's application would be to excuse his breach and also, in effect, avoid application of the "strict equitable principle" that a fiduciary being in breach of his fiduciary duty must account to the person to whom the duty is owed for the profit made in consequence of the breach. In my view, a Court would not readily exercise its discretion to bring about such a result. The equitable principles were developed and have been applied rigorously for good reason. The defendant is now aware that he acted in breach of his fiduciary duty and it has been found that he caused his daughter to profit from the breach. There is no evidence that the defendant will suffer particular hardship if unsuccessful in his claim. It seems to me therefore that the defendant ought not be relieved of his personal liability for the breach unless he accounts for his daughter's gain.

Conclusion

[51] It will be ordered that the defendant pay the plaintiff the sum of $36,800.

[52] I will hear submissions on costs and as to the formal orders to be made. It would normally be expected that an applicant seeking the exercise of a discretion to relieve

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17 At 394.

18 See *In re Barry & Staines Linoleum Ltd* [1934] Ch 227 and *Re International Vending Machines Pty Ltd & Companies Act* [1962] NSWR 1408 at 1424.

him from the consequences of a breach of s 73 of the Act would be ordered to pay the respondent's costs, particularly if unsuccessful. A different result may be warranted in the circumstances of this application however. The defendant was misled by the notation on the instrument of Power of Attorney. It has been found that he acted honestly and reasonably, contrary to the plaintiff's contentions, and he has also had a substantial measure of success in disputing the plaintiff's valuation evidence.