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CONFLICTS OF INTEREST, CONFLICTS OF DUTY AND THE INFORMATION PROFESSIONAL

ABSTRACT

'Professionals' who supply information services are particularly affected by the conflicts of interest wrong. Under fiduciary law, duties that professionals owe clients cannot be influenced or subverted by the professionals' personal interests, or duties that they owe to other clients. It is a strict code. Trust and confidence protected is vital to the functioning of business in a modern economy. At the same time, the rise of mega-firms and interdisciplinary practices and contemporary work practices of professionals are inconsistent with the 'fraud' which fiduciary law proscribes. Community expectations, the ethical rules of professional associations and differing judicial opinions in the *Pilmer v Duke Group Ltd* litigation are examined in this light. A taxonomy of the conflicts wrong is suggested. Rules prohibiting professionals' conflicts of interest and duty and conflicts of duty and duty are explained at length. Significant sub-rules are seen to be implied.

Conflicts of interest occur with surprising frequency in the common law world. The forensic imagination seems to have been captured by the idea.[1] Changes in the productive process and expansion in the role of the professional service provider may have occurred. Business expertise is now increasingly outsourced.[2]

Trading alone, or in partnerships or companies, professionals characteristically supply their services to clients on a non-exclusive basis. No restriction prevents professionals from providing services to enterprises with conflicting interests. Consequent problems of loyalty and confidentiality might be expected. However, to

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1 See, for example, the list of conflicts alleged in UK higher court pleadings between 1998 and 2000 in C Hollander and S Salzedo, *Conflicts of Interest & Chinese Walls* (2000) 1–3.

2 See M Castels and Y Aoyama, 'Paths Towards The Informational Society: Employment Structure in G-7 Countries, 1920–90' (1994) 133 *International Labour Review* 5, 20–3; S Domberger and P Jensen, 'Gaining From Outsourcing' (1997) 4 *New Economy* 159, 162–3; P Finn, 'Professional Responsibility' (paper presented at the Legal Research Seminar, University of Auckland, 29 May 1987).

a degree, the scale and diversity of the market for business services has enabled conflicting duty problems to be avoided.[3] Competing clients ordinarily obtain business services through independent provider entities.

Lately, the workability of these arrangements has been threatened. The emergence of mega-firms and multi-disciplinary practices, together with an increased rate of professionals migrating between firms, has meant that the number of independent provider-entities for some service types is now substantially reduced.[4] Preoccupation with conflicts has reached the point of obsession, on one view.[5]

Equity's 'conflicts rule' is the 'default law' in this context. It applies to professionals who owe duties of loyalty to their clients. The conflicts rule prohibits professionals from acting or entering undertakings where their interests conflict, or might possibly conflict, with the duties that they owe. 'Conflicts of interest' connote corruption. Illicit personal advantages or gains are thereby usually obtained. Professionals acting in conflict of interest ignore their duties of loyalty, or are tempted to ignore them, because of corrupt influences that are brought to bear.

Even harbouring a subversive interest is disallowed by the rule's pre-emptive force. It is attracted by the mere possibility of conflict between interest and duty. Exposing one's self to temptation is made wrongful in itself. Professionals, as it were, are not given the chance to be dishonest. Much attention has been paid to the reach of the words 'possibly might' conflict.[6] For it is exceptional, in the law of obligations, that persons can be made liable for harm which is only apprehended. To a lesser degree, the word 'interest' has caused doubt.

This paper will consider how and to what degree the conflicts of interest rule should apply to Australian 'information professionals'. It will review the High Court's

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3 See below n 100 and accompanying text.

4 See R Prentice, 'The SEC and the MDP: Implications of the Self-Governing Bias For Independent Auditing' (2000) 61 *Ohio State Law Journal* 1597, 1667–71; A Shulenburger, 'Would You Like Fries With That? The Future of Multidisciplinary Practices' (2001) *87 Iowa Law Review* 327, 350; P Finn, 'Fiduciary Law and the Modern Commercial World' in E McKendrick (ed), *Commercial Aspects of Trusts and Fiduciary Obligations* (1992), 7, 10; D Coull, 'Typhoid Marys: The Ethical Dilemmas of Lawyers Who Switch Firms' (1998) 28 *Victoria University of Wellington Law Review* 41; L Collins, 'Andersen's Enron Man Rolls Over', *Australian Financial Review* (Sydney), 10 April 2002, 1.

5 See C Hollander and S Salzedo, above n 1, 1; G Bullock, 'Perils In Wearing Too Many Hats', *Australian Financial Review* (Sydney), 6 March 2002, 9 (supp).

6 See, for example, P Birks, *Introduction to the Law of Restitution* (1989) 338–43; A Burrows, *The Law of Restitution* (1993) 408–9; K Mason and J Carter, *Restitution Law in Australia* (1995) 664–7.

decision in *Pilmer v Duke Group Ltd (in liq)*[7] and advance a taxonomy of 'interests' which trigger the rule's operation.

I COMMUNITY EXPECTATIONS

The *Australian Standard Classification of Occupations* includes the following occupational types within the classification of 'business and information professionals':

> [A]ccountants, auditors and corporate treasurers; sales, marketing and advertising professionals; computing professionals; and miscellaneous business and information professionals . . . [specifically] human resource professionals; librarians; mathematicians, statisticians and actuaries; business and organisation analysts; property professionals and other information managers.[8]

The *genus* describes a person who acquires, creates, uses, stores, or disseminates information to facilitate the decision-making of others.[9] Information professionals use specialised knowledge strategically, in the interests of the clients who retain them. Credit bureaux, banks, insurance companies, health care institutions and government agencies are entities which have an institutional correspondence with this role.[10]

Varying moral significance in the community is ascribed to the relation between 'business and information professionals' and the 'clients' who retain them. For clients bring differing interests into the various species of the relation and are vulnerable, then, to a corresponding degree.

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7 (2001) 180 ALR 249.

8 Australian Bureau of Statistics (2nd ed) (Canberra, AGPS, 1999), 129.

9 See R Mason, F Mason and M Culnan, *Ethics of Information Management* (1995) 155; A Stein, H Bull, and S Burgess, 'Organisation Skills Sets For The Information Professional' (paper presented to *America's Conference on Information Systems*, Pittsburgh, March 1995),

10 See Association Francaise de Intermediaires en Information and Deutsche Gesellschaft fur Dokumentation 'European Information Researchers Network EIRENE Introduction' <www.eirene.com> 7 February 2002; R Biddiscombe, 'Introduction: The End-User Revolution And The Information Professional' in Richard Biddiscombe (ed), *The End-User Revolution* (1996) 1, 2–3; M Burns, 'Has s 52 of the TPA Rendered Negligent Misstatement Irrelevant to Australian Professional Indemnity Insurance for "Advice Professionals"?' (2001) 12 *Insurance Law Journal* 1.

Professionals at a basic level supply simple information to and perform ministerial tasks for their clients. Share brokers, for example, advise on market movements and deal with their clients' securities. Travel agents arrange holidays. Low-level work of bankers and stock brokers is comparable. Few or no discretions may be involved. Professionals at this level are paid to use the business practices that the community regards as acceptable. Accountants, valuers, engineers, architects, surveyors, lawyers and others who execute simple, transactional tasks are expected to be honest, competent and reach an appropriate standard of client service in their performance.

Assume, as an example, that you instruct a share broker to purchase a certain number of shares for you in a certain corporation at a certain price. On the same day, you go to your local newsagent and take out a 12-month subscription to a certain magazine. Exchange is the dominant characteristic feature of each transaction. Your interest is in receiving a return for the value that you transfer — one dictated, in the case of the shares, by the prevailing state of the market.

Further assume that you were ignorant, at the time of the transactions, about the solvency, of either the corporation whose shares you acquired, or the entity to which you paid the subscription in advance.

If the shares that you acquired subsequently fall in value, or the magazine proprietor ceases business and is wound up, your losses should arguably be borne by you alone. Neither the broker nor the newsagent was consulted on the wisdom or value of the exchange choices that you made. Your ignorance of the markets for share-trading and magazine subscriptions is irrelevant to the justice of this outcome. Even though you lose the entire value that you transferred in each exchange, neither the broker nor the newsagent should be obliged to assume any responsibility for these events. Honesty and competence in facilitation of exchange may be as much as you are reasonably entitled to expect.[11]

Adding vulnerability or reliance on the client's part may or may not alter these expectations. Analysis passes to a higher level, where professionals assist their clients with representational and advisory work — often of a confidential nature.

Varying the share purchase example, assume that you disclose your ignorance about the share-market to the broker at the outset. Your funds are placed in the share broker's hands with an instruction to invest the same in shares and maximise the overall return. Decisions about the number of shares to buy, in which corporations and at what prices are made matters for the broker's discretion. The broker has

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11 See P Finn, 'The Fiduciary Principle' in T Youdan (ed), *Equity, Fiduciaries and Trusts* (1989) 1, 31; cf. A Duggan, M Bryan and F Hanks, *Contractual Non-Disclosure* (1994), 54–5.

undertaken to use their best efforts on your behalf. Your interest is now not in the execution of an individual transaction, but the level of overall return on the invested sum.

Assume that the previous share losses are made. If the broker has acted honestly and competently and your loss is such that no reasonable broker could have foreseen it, you arguably still do not have the right to compel them to restore your loss. The broker did not cause the fall in value and has not assumed the risk of it. Though you are now reliant on the broker, and vulnerable to a much larger degree, your interests have arguably still been treated in conformity with your reasonable expectations.

A further element is needed before equity will intervene. Add the fact that the broker has received secret benefits through conduct of your business. Whilst using their best endeavors to promote your discretionary account, the broker has been paid secret commissions on account of investments that they recommended. Your investment business now serves the broker's undisclosed private interest, in addition to your concern about the level of return. This private interest is inconsistent with the responsibilities that the broker assumed. If the same market loss is incurred as before, not caused by the broker and unforeseeable by them, your reasonable expectation has now been denied. Exclusive attention was not paid to maximising your level of return. Another secret interest has been served in addition to, and perhaps in advance of, yours. The broker has acted outside the terms of the undertaking that they gave. In consequence, you may have a right to avoid the loss and compel the broker to restore the whole of the sum that you paid them to invest. The sum was not dealt with as you were entitled to expect before it was exposed to the market risk.

The social and economic importance of a share broker's advisory function may be another factor leading to this somewhat punitive liability for their self-interested acts. Corresponding secret interests of the newsagent are unlikely to be sanctioned beyond the common law standard of honesty and competence. Without a recognised form of reliance, or vulnerability, equity may be reluctant to intervene.[12]

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12 See P Finn, above n 11, 50–1.

II FRAUD

The share broker has engaged in fraudulent behaviour, on one view. Fraudulent entry into conflicts of interest (and cognate acts) by some persons classified as 'professionals' is proscribed by statute, both criminally[13] and civilly.[14] This is a public dimension of the wrong. It is of limited relevance for two reasons. First, professionals are not responsible for most of the frauds committed in Australia. Persons within and/or employed by their victims are much more likely to be perpetrate frauds than external persons, like professionals, who trade independently and on their own account.[15] Secondly, 'frauds' committed by information professionals are normally neither dishonest, nor criminal nature in nature. This must be explained at some length. A combination of these factors focuses the inquiry on the non-statutory, civil consequences of the wrong.

Dishonesty or an intention to deceive is not always present when a professional acts fraudulently.[16] Viscount Haldane LC, giving the leading judgment of the House of Lords in *Nocton v Lord Ashburton, (Nocton's* case*)*[17] described as a species of 'fraud' at general law, something which 'fell short of deceit, but which imported breach of a duty to which equity had attached its sanction'.

The facts of *Nocton's* case were in some ways similar to the position of the share broker in the example. Nocton was Lord Ashburton's solicitor. In that capacity, he gave Ashburton bad advice on managing his portfolio of investments. Ashburton was told that he might safely release part of a first mortgage security that he held over a building development, to facilitate the sale of the development's first stage. Not long after, the developer became insolvent and a substantial shortfall was incurred when Ashburton realised the balance of his security. Nocton had obtained

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13 For example, *Corporations Act* 2001 (Cth) ss 184(2), (3), 1311(1) – corporate directors, other officers and employees – *dishonest* use of position and information with an intent to gain an advantage for themselves or someone else; *Criminal Code Act 1995* (Cth) Part 7.3 Fraudulent Conduct.

14 For example, *Corporations Act* 2001 (Cth) ss 182(1), 183(1), 1317G, 1317H, 1317HA – corporate directors, other officers and employees – *improper* use of position or information with an intent to gain an advantage for themselves or someone else.

15 See KPMG, *1999 Fraud Survey* (Sydney, KPMG, 1999); Ernst & Young, *Fraud: The Unmanaged Risk* (London, Ernst & Young, 1998); R Smith, 'Organisations as Victims of Fraud, and How They Deal With It' (1999) 127 *Trends and Issues in Crime and Criminal Justice* <www.aic.gov.au> at 15 February 2002.

16 In the analysis of civil fraud by Millett LJ in *Armitage v Nurse* [1998] Ch 241, 250 (CA); cf. P Gillies *Criminal Law* (4th ed) (1997) 776 – 'The words 'fraudulently' and 'dishonestly', which are synonyms ...'; see also C Williams, *Property Offences* (3rd ed) (1999) 311–2.

17 [1914] AC 932, 953.

a collateral benefit through the advice which he gave. The value of Nocton's subsequent mortgage over the same property was enhanced upon the release of Ashburton's prior encumbrance. Nocton had thereby served a secret interest, which Ashburton, as his client, was entitled not to expect. Though Nocton was not found to be dishonest, nevertheless, a fraud and equitable liability was inferred. Nocton had committed a breach of fiduciary duty and was obliged to compensate Ashburton for the full measure of the borrower's default.[18]

Another example of civil fraud affecting professionals involves a subordination of clients' interests to the professional's career advancement. Solicitors or brokers may see an advantage for themselves in simultaneously representing other, and perhaps more prestigious, clients in addition to the client who instructs them. Real estate agents retained by property vendors may secretly promote the interests of purchasers who have the ability to provide them with a stream of future work. A vendor's secret reserve price may be intimated. Such cheating, or overreaching, expropriates a client's interests in breach of the fiduciary conflicts rule.[19] Professionals act in their own self-interest in preferring the interests of third parties to the interests of the clients whom they have undertaken to represent — though this merger of professionals' duty and interest conflicts is often hard to prove.[20]

Acting for a client when one's duties conflict with duties owed to another client is sometimes fraudulent only in a strict sense.[21] Consider the collapse of Ansett Airways in September 2001. A member of the accounting firm PricewaterhouseCoopers was forced to resign shortly after being appointed as administrator of the Ansett group. Apparently he believed that Ansett should be liquidated and took preliminary steps to implement this view. Airline trade unions were dismayed. They prevented the administrator from acting further by alleging that he and his firm were disqualified by a conflict of interest in the nature of a conflict of duty and duty. In 'deeply embarrassing' circumstances, it was said, PwC admitted that its 'sister firm' had undertaken work for Ansett's parent company in New Zealand.[22] A small possibility of litigation between Ansett and its parent

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18 Overruling the courts below, the fraud claim succeeded, despite alternative proceedings for lack of due care and misrepresentation being barred by the *Statute of Limitations* and acquiescence: see [1914] AC 932, 958–9 (Viscount Haldane LC, Lords Dunedin, Shaw and Parmoor agreeing).

19 Compare the 'overreaching, some form of cheating' dealt with in *Allcard v Skinner* (1887) 36 Ch D 145,181 (Lindley LJ) – undue influence.

20 See discussion of *Arklow Investments Ltd v Maclean* [2000] 1 WLR 594 (PC), below n 86.

21 Discussed in *Armitage v Nurse* [1997] 3 WLR 1046, 1056–7 (Millett LJ).

22 See 'Ansett Administrator Quits, Planes Still Grounded', *Australian Financial Review* (Sydney), 18 September 2001, 1, 3; 'Embarrassment for PwC as Union Forces Resignation', 66.

company did exist. This was a professional's blameless 'former client' conflict — in strictness, a 'fraud' — in the absence of any suggestion that there was any dishonesty, deception or impropriety, actual or impending.

III ETHICAL RULES OF PROFESSIONAL ASSOCIATIONS

Ethical rules of professional associations are a reflex of the market forces which affect professionals. Professionals organise themselves and compete in markets for similar services. Association rules are primary data on what is expected by the fee-paying public. Voluntary rules adopted by professional associations are, in this way, a 'reliable and important indicator of . . . accepted opinion' as to how the misconduct of member professionals should be judged.[23] Assessing the ethics implied by professional association rules may involve taking a view of the proprieties of profit-making in a capitalist social order.[24]

Exhortations to avoid conflicts of interest are common in professional association rules. The CPA *Code of Professional Conduct*,[25] for example, under the heading 'Resolution of Ethical Conflicts', warns accountants that 'conflicts may arise in a variety of ways, ranging from the relatively trivial dilemma to extreme cases of fraud . . . the facts and circumstances of each case need careful consideration'.

A list of interest and duty conflicts is given. If conflict is, in the final resort, 'unavoidable', the rule is strict. Certified Practising Accountants in Australia must not accept retainers where they are affected by rival personal interests. If rival duties are owed to clients in dispute, the preservation of confidences may require that neither client be represented. 'Serious matters' are to be reported to the authorities and 'legal requirements' are to be observed.

The Australian Institute of Internal Auditors has both a *Code of Ethics* and a *Professional Practices Framework* for the guidance of internal auditors. The *Code* applies to both individuals and entities that provide internal auditing services. By rule 2, it instructs internal auditors to avoid participating in

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23 See *Chamberlain v Law Society (ACT)* (1993) 43 FCR 148, 154.

24 See E Weinrib, 'The Fiduciary Obligation' (1975) 25 *University of Toronto Law Review* 1, 2.

25 CPA Australia *Code of Professional Conduct* December 2001, <www.cpaaustralia.com.au/05_about_cpa_aust/5_0_0_2_what_is_cpa.asp> at 3 December 2002, [A.6] and [21].

> any activity or relationship that may impair or be presumed to impair their unbiased assessment. This participation includes those activities or relationships that may be in conflict with the interests of the organisation.[26]

Auditors must not accept anything that may impair or appear likely to impair their professional judgement.[27] Comparatively, the Institute of Internal Auditors for the United Kingdom and Ireland instructs its members to 'avoid any relationship that is or appears to be not in the best interest of [their employer] organisation'. 'Conflicts of interest', in particular, are said to 'prejudice an [auditor's] ability to perform his or her duties and responsibilities objectively'.[28]

Real estate agents are required to 'promote and encourage a high standard of ethical practice by members and their employees … and members of the public'. They must 'not accept an engagement to act, or continue to act, where to do so would place the member's interest in conflict with that of the client'.[29]
The *Corporations Act 2001* treats 'conflicts of interest' for corporate officers consequentially and in somewhat general terms. Specific statutory prohibition of 'improper use of position' and 'improper use of information' apply to corporate officers who have yielded to a conflicting interest. There is no sanction for corporate officers who have breached the conflicts rule by simply entering a prohibited conflict of interest and their duty.[30] Equitable wrongs have already occurred, despite the tenor of Pt 2D.1 of the *Corporations Act 2001*. Also in an ancillary way, the Act requires a director, with a material personal interest in a matter that relates to the affairs of the company, to give other directors notice of that

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26 *Code of Ethics,* Institute of Internal Auditors [2.1], <www.iia.asn.au/ethics2000.asp> at 11 February 2002.

27 Ibid [2.2].

28 See Institute of Internal Auditors UK and Ireland, *Standards for the Professional Practice of Internal Audit* (2001).

29 *Code of Practice*, Real Estate Institute of Australia [1.2], [2.11] <www.reiaustralia.com.au> at 11 February 2002; cf. the UK Residential Estate Agency, *Code of Practice*, Ombudsman for Estate Agents [8a], [8b], <www.oea.co.uk/Codeprac.htm> at 11 February 2002 — specific disclosure requirements where 'your firm is instructed to [sell or buy] a property and you, an employee or an associate . . . is intending to [buy or sell] it'; cf. NZ instruction that agents 'consider and identify any actual or potential conflicts of interest when carrying out their professional duties', *Code of Ethics* (2000) New Zealand Property Institute [4], <www.property.org.nz> at 11 February 2002.

30 See *Corporations Act 2001* (Cth) s 182, Use of position – civil obligations; s 183, Use of information – civil obligations (to gain a personal advantage or cause detriment to the corporation). Under s 184, where a director or other officer of a corporation, with either recklessness or intentional dishonesty, breaches these provisions, he or she will additionally be guilty of a criminal offence.

interest — save in 11 specified situations.[31] The resultant criminal offence is of the pre-emptive kind. Directors are prohibited to vote or be present whilst having a 'material personal interest' in a matter.[32] Fairness of a deal is irrelevant after a director's self-interest has been established.[33]

IV FIDUCIARY REGULATION OF INFORMATION PROFESSIONALS

Tort[34] and contract law[35] regulate professionals' primary duties to their clients. Honesty and competence are mandated. These are the obligations which obtain at the basic level of the share-broker and news agent example. The service of professionals must be rendered with reasonable care according to prevailing community standards. Possession of a special expertise, or a special means of acquiring it not available to the client, has been said to be the basis of liability in contract or in tort.[36]

Cautious professionals may exclude a large measure of tortious and contractual liability from their contracts of retainer. Imposition of these liabilities may, in effect, be bargained away. Nevertheless, a higher set of fiduciary 'default rules' on honesty and competence are difficult to exclude.[37]

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31 The *Corporations Act 2001* (Cth) s 191(2) provides that a director does not need to give notice of an interest under s 191(1) if it arises in certain ways, the director has already given standing notice of the interest, or the directors 'are aware of its nature and extent'.

32 See s 195 (1) Restrictions on voting and being present – A director of a public company who has a material personal interest in a matter that is being considered at a directors' meeting must not:

(a) be present while the matter is being considered at the meeting; or
(b) vote on the matter;
unless
(c) . . . ; or
(d) the interest does not need to be disclosed under section 191.

Offence punishable pursuant to *Corporations Act 2001* (Cth) ss 1311(1), (2).

33 See, for example, *Combulk Pty Ltd v TNT Management Pty Ltd* (1992) 37 FCR 45, 52–3 (Einfeld J); and *De Bussche v Alt* (1878) 8 Ch D 286.

34 See *Hawkins v Clayton* (1988) 164 CLR 539; see also *Bryan v Maloney* (1995) 182 CLR 609, 619–22 (Mason CJ, Deane and Gaudron JJ); S Warne, 'Legal Professional Liability – Part 2' (2001) 9 *Torts Law Journal* 29.

35 Such a term will be implied, if not express, as an 'incident of contracts of that class': see *Astley v Austrust* (1999) 197 CLR 1; at [47].

36 See J Swanton and D McDonald, 'Reach of the Tort of Negligence' (1997) 71 *Australian Law Journal* 822.

37 See P Finn, above n 4, 10–11.

Application of fiduciary rules to the facts is matter which is in each case context-specific, proceeding from the law's assessment of the nature and purpose of a relationship.[38] Uncontroversially, the *nature* of relationship between professional and client is the provision of services by the professional. The *purpose* of professional-client relationships is to promote a client's interest in a subject over which the professional has expertise.[39] Equity infers rights appropriate to these relational expectations. At the first level of the share broker and newsagent example, a client has an interest in the fulfillment of an exchange and can expect intervention to do no more than implement market outcomes.[40] A client with a result-oriented interest at the second stage of the example will sometimes be entitled to more. Policing the integrity of the professional's result-oriented discretion will sometimes have the effect of reversing market outcomes. Disloyal or self-interested professionals may be obliged to restore their clients to pre-contractual positions — disgorging gains or remedying losses, as the case might be.

The provision of medical services is an instructive comparison. Medically qualified information professionals are entrusted with the physical wellbeing of their patients. Delicate and intrusive procedures may be performed by these professionals, in life-threatening circumstances. Patients will be concerned with the level of skill and care that the medical practitioner exercises. Sometimes patients will be totally vulnerable to the judgements made by the medical practitioner. Justices Dawson and Toohey in *Breen v Williams*[41] characterised a doctor's liability to his patients and contrasted the nature and extent of fiduciary duty with duties in contract and tort. They observed that:

> A doctor is bound to exercise reasonable skill and care in treating and advising a patient, but in so doing is acting, not as a representative of the patient, but simply in the exercise of his or her professional responsibilities. No doubt the patient places trust and confidence in the doctor, but it is not because the doctor acts on behalf of the patient; it is because the patient is entitled to expect the observance of professional standards by the doctor in matters of treatment and advice and is afforded remedies in contract and tort if those standards are not observed and the patient suffers damage.

Maintenance of professional standards is, in the first place, the province of contract law and tort. It is an objective matter. There is little room for equity's code of individuated and context-specific norms. Where, however, the information professional *acts for, advises* or *represents* a client in providing a service, on this view, new elements are introduced into the equation. A further interest is exposed to

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38 See P Finn, above n 11, 5.

39 Ibid.

40 See accompanying text, above n 11.

41 (1996) 186 CLR 71, 93–4.

the professional and a different type of wrongdoing is apprehended. The Justices continued:

> Equity requires that a person under a fiduciary obligation should not put himself or herself in a position where interest and duty conflict or, if conflict is unavoidable, should resolve it in favour of duty and, except by special arrangement, should not make a profit out of the position . . . The application of that requirement is quite inappropriate in the treatment of a patient by a doctor or in the giving of associated advice. There the duty of the doctor is established both in contract and in tort and is appropriately described in terms of the observance of a standard of care and skill rather than, inappropriately, in terms of the avoidance of a conflict of interest.

Wrong defines remedy in this way. 'Conflicts of interest' demarcate a separate realm in the sphere of obligations. They describe a class of engagements and influences which must be avoided, if a professional is to act in good conscience and with appropriate 'integrity and fairness'.[42] Conduct is evaluated in terms of its potential effect rather than the effect which is in the end produced.

Consider again the provision of investment advice at the basic stage. The client is knowledgeable and always maintains the power and ability to make independent investment choices. Compared to the patient who trusts his bodily welfare to a surgeon's ministrations, there are few signs of reliance or vulnerability on the client's part. Yet the Supreme Court of Canada in 1994 allowed a comparable claim that an adviser was in breach of fiduciary duty. '[V]ulnerability', the *Hodgkinson v Simms*[43] majority judgment said, 'is not the hallmark of a fiduciary relationship'.[44] Although the client was not vulnerable and could not be shown to have relied, the important thing was that the adviser purported to relinquish his self-interest and agreed to act on the client's behalf.[45]

The nature of the wrong may have been of some importance in this characterisation. *Hodgkinson v Simms*[46] was concerned with an accountant who provided general tax shelter advice. The client was a successful stock broker who had only 'limited' investment experience. Units in a townhouse development were the investment recommended by the adviser. Shortly after the advice was implemented, the real estate market heavily declined. It emerged that the adviser had failed to disclose that at material times he was also acting for the townhouse developer. A secret bonus was paid to the adviser for each unit sold to the adviser's clients.

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42 See *In Re Beloved Wilkes' Charity* (1851) 3 Mac & G 440; 42 ER 330, 333 (Truro LC).

43 [1994] 3 SCR 377.

44 Ibid 405 (La Forest, L'Heureux-Dube and Gonthier JJ).

45 Ibid 409–10 (La Forest, L'Heureux-Dube and Gonthier JJ).

46 Ibid.

Fiduciary characterisation cannot be based on the nature of the wrong alone. 'Merely to say that a person is in a situation of conflict of interest', as the Supreme Court of South Australia observed in *Duke Group Ltd v Pilmer,*[47] '... does not in itself give rise to a fiduciary relationship'.

> The building tradesman who has an undisclosed interest in a building supplies company from which he purchases materials for use in a building, and through which he participates in the profit on sales, is not in breach of any duty in not disclosing that fact in submitting his tender for the building work to be performed.

Only a fiduciary can breach the fiduciary conflicts rule. Fiduciary status is not imported because a person, when attributed with fiduciary status, would be in breach of a fiduciary rule. This is a *petito principii.* Nor does the assumption of status define who fiduciaries are. Justice Dawson noted these things in *Hospital Products Ltd v United States Surgical Corporation.*[48]

> If there is a fiduciary duty, the equitable rules about self-dealing apply: but self-dealing does not impose the duty. Equity bases its rules about self-dealing upon some pre-existing fiduciary duty: it is a disregard of this pre-existing duty that subjects the self-dealer to the consequences of the self-dealing rules. I do not think that one can take a person who is subject to no pre-existing fiduciary duty and then say that because he self-deals he is thereupon subjected to a fiduciary duty.

In *Duke Group Ltd v Pilmer,* the Full Court of the South Australian Supreme Court attempted to identify 'in analogous situations' the 'recurring underlying features' of fiduciary relationships.[49] One of the issues in the case was whether a firm of chartered accountants owed fiduciary obligations to a client in some dealings that the parties had. A company named Kia Ora Gold Corporation made a take-over bid for the issued shares in Western United Ltd. Accountants were retained by Kia Ora to prepare a report to be tabled at a meeting of its shareholders, as required by ASX rule 3J(3).[50] Relevantly, the rule provided that

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47 (1999) 73 SASR 64, 217 (FC), curiam, reversed by *Pilmer v Duke Group Ltd* (2001) 180 ALR 249 (HC) (Kirby J dissenting).

48 (1984) 156 CLR 41, 142, quoting Megarry V-C in *Tito v Waddell [No 2]* [1977] 1 Ch 106, 230; see also *Indata Equipment Supplies Ltd v ACL Ltd* (1998) 25 FSR 248, 255–6 (Otton LJ, other LJJ agreeing) – a finance house did not 'unlawfully invade' the business of a finance broker in disclosing the broker's commission to its client, where the 'underlying relationship' was not of a fiduciary nature.

49 (1999) 73 SASR 64, 218.

50 Pursuant to the Main Board Listing Rules of the Australian Stock Exchange Ltd (1987). See now ASX Listing Rule 10.1.

> (3)(a) A listed company ... shall not acquire or dispose of any assets including securities ... without the prior approval of its shareholders in general meeting [if the vendor is a director or is associated with the company and the assets are valued at in excess of 5% of issued capital] ...
>
> (b) Notice of any meeting of shareholders to approve any such acquisition or disposal is to be accompanied by copies of reports, valuations and other material from independent qualified persons sufficient to establish that the purchase or sale price of such assets is a fair price.

The contract of retainer was oral. Mullighan J assumed that the agreement came into existence as a consequence of conversations between one of the directors of Kia Ora and Pilmer, a partner in the accountancy firm.[51] The only written record of the terms was contained in the report itself. It was addressed to the Kia Ora directors and commenced as follows.

> We report at your request on the value of the company Western United Limited. The valuation has been prepared for the Directors of Kia Ora Gold Corporation NL for use in connection with a Stock Exchange Section [sic] 3J(3) notice to shareholders for approval to acquire all of the issued capital of Western United Ltd.

The report went through three drafts. An annexure to its final form included the additional words:

> The report has been prepared solely for the benefit of the Directors and those persons who are entitled to receive notice of the meeting to approve the proposed acquisition and represents [the accountants'] opinion on the value of the issued capital of Western United Ltd.
> [The accountants] hereby consent[s] to the inclusion of this report with the notice of meeting of shareholders to approve the acquisition.

Then, in the body of the document, the accountants offered the view that

> ... from the point of view of Kia Ora, the price proposed to be offered is fair and reasonable in all of the circumstances.

Kia Ora shareholders resolved that the take-over should proceed on the terms proposed. Within a matter of days after this, the Australian share market fell dramatically. It was evident that Western United had been considerably over-valued

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51 See the first instance judgment at (1998) 27 ACSR 1, 65–73, 264–5.

in the accountants' report and that Kia Ora was advised to pay an excessive price.[52] Shortly after, Kia Ora was placed in liquidation and its liquidator claimed compensation from the accountants for the loss that the company had incurred. It was alleged, amongst other things, that the accountants had been fiduciaries in relation to the company, and, in this capacity were acting in an undisclosed conflict of interest when they offered a report on Western United to Kia Ora and its shareholders. The accountants were said to have served 'various masters' on the facts which gave rise to both the existence and the breach of the fiduciary duty alleged in the case.[53] For at that same time as the report was offered, the accountants maintained close personal and commercial relationships, or an 'alignment',[54] with the directors of Kia Ora. All bar two of these persons were also substantial shareholders in Western United. Large personal gains from the transaction would have been made — if the share crash had not supervened.

Duke Group litigation elicited conflicting responses on the issue of whether the accountants owed fiduciary duties to Kia Ora. The trial judge was pressed with the analogy between the accountants and financial advisers who owed fiduciary obligations to their clients.[55] Authorities in the area, he noted 'do not stand for the proposition that if a person is a financial adviser then, ipso facto, fiduciary obligation to the customer exists'.[56]

Rather, 'the particular circumstances' of each case should be consulted. Whilst here the accountants undertook financial advisory work for other clients at the time, 'the evidence', the trial judge said, 'does not justify a finding that they acted in that capacity for Kia Ora'. It did not appear that the accountants

> gave any advice, or made any representation to, Kia Ora about the efficacy or the wisdom of the takeover. Indeed, there is no evidence to suggest that [the accountants] advised, or even suggested to Kia Ora, that the take-over of Western United be undertaken . . . those controlling Kia Ora were determined that Kia Ora take over Western United and [the accountants] were required to undertake the valuation and having done so were to give a report under the listing rule.[57]

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52 The accountants valued Western United at $112,000,000. In expert evidence accepted at first instance, and on appeal, the true pre-crash value of the company was less by about $98,000,000: see (1999) 73 SASR 64, 163–4.

53 (1998) 27 ACSR 1, 368.

54 As argued before the High Court on appeal: see (2001) 180 ALR 249, [81] (McHugh, Gummow, Hayne and Callinan JJ).

55 (1998) 27 ACSR 1, 371–3 (Mullighan J).

56 Ibid 376.

57 Ibid, 376–7, relying on *Commonwealth Bank v Smith* (1991) 42 FCR 390 and *Daly v Sydney Stock Exchange* (1986) 160 CLR 371.

On this view, it may follow that the accountants had no relevant ascendancy or influence over Kia Ora to justify a finding of fiduciary liability.[58] The relation between the accountants and the company was comparable to that between the doctor and his patients in *Breen v Williams*.[59] If their trust and confidence in a doctor were disappointed, patients had remedies in contract law and tort, but not fiduciary law.

The Full Court of the South Australian Supreme Court accepted the facts found at first instance and, at the same time, the fiduciaries characterisation was reversed.

Fiduciary relationships extended only to particular purposes and things and were context-specific where they existed outside of established categories, the Full Court emphasised.[60] In the case of 'professional advisers', like the accountants, the characterisation exercise was expressed in a specifically contractual way:

> [T]he nature of the [fiduciary] duty will be defined largely by the particular terms of the retainer and the nature of the instructions given by the client, on the one hand, and the other relevant circumstances external to the client in which the adviser finds himself, on the other.[61]

Whilst '[c]ontractual and tortious duties regulate the relationship', the Court continued, '... the potential is there for fiduciary obligations to arise [in addition]'.[62] A professional valuer example was given. Facts were said to indicate whether only a bare valuation was sought, or whether the client also desired to be informed of an appropriate price at which to buy or sell. Additional elements, such as requested advice, indicate that a given valuer must act in the client's behalf, as well as justify the client's competency expectations. In this case, the accountants did not advise on the Western United shares 'in a vacuum'. The ASX rule 3J(3) context of the retainer made it clear that their 'opinion' was sought as to the 'fairness' of a proposed take-over price. Judgement, as well as expertise, was required. Both the ASX rule and the preamble to the report indicated that the report was prepared in the interests of the shareholders. The point of the rule was plain. Independent valuation was to enable shareholders to control the self-interest of directors and their associates.

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58 (1998) 27 ACSR 1, 376.

59 (1996) 186 CLR 71, 93 (Dawson and Toohey JJ): see (1999) 71 SASR 64, 216–7, curiam for discussion of the first instance judgment.

60 (1999) 73 SASR 64, 218–9.

61 Ibid 220.

62 Ibid 222.

Fiduciary characterisation of the advisory function followed what the accountants knew about conflicting interests which affected directors of the company.[63] First, directors of Kia Ora had a duty to act solely in the interests of the company. Secondly, some Kia Ora directors were personally interested in the transaction and might be tempted to prefer their own interests to those of the company. In the light of these things, the Full Court said, it was 'perfectly obvious' that Kia Ora had a 'necessary expectation' that the accountants would act as its fiduciaries and the report would be prepared in the interests of the company as a whole: '[i]f there arose any conflict between the interests of the directors and those of the company, the obligation of [the accountants] was clear: it was to act solely in the interests of the company'.[64]

The accountants took the question of their fiduciary liability on appeal to the High Court. A majority constituted by Justices McHugh, Gummow, Hayne and Callinan found that the Full Court had erred on the fiduciaries point. They reinstated the determination of the judge at first instance to the effect that the accountants owed Kia Ora 'no relevant fiduciary duty'.[65] Denial of fiduciary liability was justified as consistent with the trial judge's findings of fact. These included that the report was only an 'expression of an opinion given pursuant to the contract of retainer' and the accountants gave no advice on the 'efficacy or wisdom' of the take-over.[66] Breaches of tortious and/or contractual duties were confirmed as the appropriate sanction for incompetence involved.[67]

A minimalist solution was adopted by the majority of Justices determining the *Duke Group* appeal to the High Court. No inferences were drawn from the circumstances in which the accountants were retained. In the words of the Full Court below, the accountants' (initial) instructions were 'purely to value Western United — as if in a vacuum ... unrelated to any intended takeover'.[68] It was a ministerial service. In form comparable to obtaining a magazine subscription or satisfying a non-discretionary purchase of shares, no element of trusting or confidentiality was involved.

The South Australian Full Court had gone on to find that the retainer 'changed', after initial stages, and became highly significant in the take-over of Western United. The accountants were charged to give the report of an 'independent qualified person', as required by listing rule 3J(3). The report as given described the

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63 The chairman and all directors bar the two appointed to facilitate the transaction were each shareholders in Western United: ibid 223.

64 Ibid 224.

65 (2001) 180 ALR 249, [69]–[84].

66 Ibid [72]–[75].

67 See orders disposing of the appeal: ibid [88].

68 (1999) 73 SASR 64, 222–3.

purchase price for the Western United shares as 'fair'. Though this 'independent' view was used to persuade Kia Ora's uncommitted shareholders to accept the takeover plan,[69] in reality, the accountants were far from independent. An unquestionable alignment existed between them and the persons to whom millions of dollars passed as a consequence of the rule 3J(3) report.

Justice Kirby wrote a persuasive dissenting judgment. Consistently with the Full Court, he viewed the question of whether the accountants acted as fiduciaries as related to the purpose of the listing rule. The accountants had undertaken to safeguard the interests of the shareholders.[70]

The reporting function envisaged by ASX rule 3J(3) imposes on chartered accountants, who accept that duty, fiduciary obligations owed to those who reasonably expect that the function will be carried out with selfless loyalty to the client which commissions the report. In the present case, this means loyalty and integrity with respect to Kia Ora, the company, as distinct from its committed directors who were able to send a lot of business, as they had in the past, in the direction of [the accountants'] firm.

Breen v Williams,[71] in the view of Kirby J, had no controlling influence on the case.[72] Nothing 'prescriptive' was implied about the fiduciary obligation when the liquidator alleged that the accountants had breached the conflicts rule. Their wrong was to serve two masters. Specific action was not required. Nor did this case require the Australian law to 'expand fiduciary obligations beyond what might be called proprietary interests into the more nebulous field of personal rights'.
For this was a 'classic case' involving the proprietary interests of the directors and the shareholders. Money was the thing at stake.[73]

Justice Kirby connected fiduciary liability and 'proper professional standards', when he observed that the purpose of ASX rule 3J(3) was to give the shareholders the protection of a report from an 'independent, qualified person'. Receipt of 'incomplete information and a biased opinion' made the shareholders particularly vulnerable.[74] The opposite would have been reasonably expected. For Kirby, it followed that accountants who undertake ASX rule 3J(3) duties are not information professionals of the minimal type — the sort who perform contracted services subject only to honesty and competence standards. Rather, professionals who

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69 Pursuant to listing rule 3J(3), above n 50.

70 (2001) 180 ALR 249, [140], noting at [138] that 'there is no error in the analysis by the Full Court or the criteria which it applied'.

71 (1996) 186 CLR 71, 113.

72 (2001) 180 ALR 249, [126].

73 Ibid [131].

74 Ibid [135].

undertake to advise in accordance with ASX rule 3J(3) accept a duty to act solely in the interests of the shareholder clients to the exclusion of their own interests. Any hopes which the accountants had of maximising future work opportunities had to be abandoned whilst the duty lasts.[75]

> [T]his court should not, by its decision in this case, send a signal that chartered accountants in the position of [the accountants] were merely the contracted agents of their client or simply a tortfeasor liable under the law of negligence. The duty they assumed, by providing their report under ASX rule 3J(3), was of a higher quality. It was a fiduciary duty.[76]

V A TAXONOMY OF 'INTERESTS' WHICH MAY CONFLICT

Duties of loyalty owed by professionals to their clients can conflict with their interests in two principal ways.

In the first place, the interest which conflicts with fiduciary duty may be a private advantage or gain. A corporate example of this classic fiduciary wrong was discussed at the penultimate stage of the *Duke Group* litigation.[77] The Full Court of the South Australian Supreme Court confirmed that the chairman and directors of Kia Ora were liable to the company for participating in the company's purchase of the directors' Western United shares for an excessive price.[78] Professionals and other fiduciaries who sell property to their clients have personal interests in receiving the highest prices for what they sell. At the same time they are under a duty to safeguard their clients' interests and ensure that clients pay the lowest prices for what they acquire. The 'interest', in each case, is personal advantage or gain.

In the second place, professionals and other fiduciaries may be swayed from their duty by the interests of other persons whom they are under an obligation to serve.[79] 'Conflicts of interest' include 'conflicts of duty' in this way. Another species of 'conflict' arises where persons owing duties to one person are subjected to the influence of duties which they owe to others. Personal interests are not involved.

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75 Ibid [140].

76 Ibid [144].

77 See *Duke Group Ltd v Pilmer* (1998) 27 ACSR 1, 380, which confirmed (1999) 73 SASR 64, 201–12; not appealed to the High Court.

78 Not including two 'independent' directors appointed just before commencement of the take-over: see *Farrar v Farrars Ltd* (1888) 40 Ch D 395. A corresponding conflict is exemplified by directors buying *from* their company: *Estate Realties Ltd v Wignall* [1992] 2 NZLR 615.

79 See, for example, *Australian Breeders Co-operative Society v Jones* (1997) 150 ALR 488.

Persons may act fraudulently and in breach of the conflicts rule even though, at all times, their conduct is entirely selfless and disinterested. Conflict of duty and duty occurs where professionals put duty to one client before duty to another, or put themselves in a position where duties owed to either are likely to conflict.

Both of the 'conflicts of interest' and 'conflicts of duty' aspects of conflicting interests, to a degree, are reflected in the facts of the final *Duke Group* appeal.[80] Partners in the accountancy firm, on the one hand, were arguably swayed by their *personal interests* in maintaining a stream of remunerative work associated with the vendor directors. This was the 'alignment' for which Kia Ora contended in the High Court.[81] On the other hand, the accountancy firm had previously known the vendor directors of Kia Ora in the capacity of persons to whom *fiduciary duties* were owed. This was either as client representatives, or the directors as clients in their own right. Duty, or former duty, to these individuals as clients conflicted with the duty of loyalty owed to Kia Ora in its own right.

The 'conflict of interest' and 'conflict of duty' dichotomy is apt to the regulation of information professionals. Merchant bankers, accountants, lawyers and others are subject to restraint if they act for one client whilst being subjected to the contrary influence, either, of personal advantage, or duty to another client.

Independent advisers' conflicts of duty and duty is a field which has expanded considerably in the last 20 years. Duty and duty conflicts frequently occur for information professionals in firms which act for competing clients. Even where firms do not accept new business from clients whose interests conflict with the interests of other clients, information professionals may still be disallowed from acting. Confidences cannot be erased.

The breach of confidence wrong occupies adjoining ground. Confidential information is separately protected if it is passed from clients to professionals whilst an adviser and client relationship existed. An actionable breach of confidence may occur when professionals disclose what their previous clients once disclosed to them.[82] Conflicts of interest and breach of confidence rules combined are a particularly restrictive code for the fiduciary professional.

A *Conflicting Interests: Personal Interest in Conflict With Duty*

Professionals cannot enter transactions where they have a personal interest which conflicts or might possibly conflict with duties of loyalty owed to clients. This 'rule

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80 To the High Court: see (2001) 180 ALR 249 and above discussion at n 65.

81 Ibid 81 (McHugh, Gummow, Hayne and Callinan JJ).

82 Explained in *Arklow Investments Ltd v MacLean* [2000] 1 WLR 594, 597 (Henry J) (PC).

of universal application', described in similar terms by Lord Cranworth in *Aberdeen Railway Co v Blaikie Bros,*[83] prohibited a very obvious conflict in that case. Mr Blaikie was a director of a company which resolved to enter a contract for the purchase of certain 'iron chairs'. His fiduciary duty as director was manifestly inconsistent with his personal interest in receiving a commission from the chairs' manufacturer. A conflict of interest rather than a secret profit was argued because the company wanted to have the purchase contract set aside. Blaikie's commission was not sought. Despite the extremity of its facts, the case directs our attention to the subject of the rule. Control of discretions exercised by fiduciaries in the conduct of their fiduciary offices is what the conflicts rule is about. Personal conflicts occur where fiduciaries' discretions are swayed by private interests.

Ernest Weinrib says that regulation of discretions is the 'primary policy' of the fiduciary obligation. It is, he says, a 'blunt tool' for the control of a person who has a duty to 'bargain and advise, involving judgement and discretion'.[84] Fiduciary professionals must exercise uninfluenced judgement. When professionals resolve to enter contracts on behalf of their clients, agreeing on what to pay and perhaps deciding whether to enforce or to avoid an exchange, their discretions should be influenced only by the client's interests. Identification of conflict of duty and personal interest in their exercise of these discretions attracts the rule. It directs attention to the purpose which the decision maker has and ignores the outcome of the decision taken. Proof of wrongful motive and improper purpose is enough. Occurrence of a professional's conflict of duty and interest must be disclosed to the client without delay.[85]

Members of the New Zealand Court of Appeal in *MacLean v Arklow Investments Ltd*[86] held that a merchant bank's desire for professional remuneration brought it into breach of the personal conflicts rule. Somewhat confusingly, conflicting duties were also apparent. Here the merchant bank's interest in receiving payment from a new client competed with a duty to respect the confidential interests of an earlier client in respect of the same land development.

The conflict of personal interest and duty rule may be too strict for modern conditions. Entry into transactions with a personal interest that conflicts or may possibly conflict with one's duty is no longer a particularly uncommon event. Company directors, for example, now quite properly deal for their companies with

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83 (1854) 1 Macq 461; [1843–60] All ER 249, 252.

84 See above n 24, 4.

85 See *MacDonnell v M & M Developments Ltd* (1998) ACWSJ LEXIS 68080 (Nova Scotia CA).

86 [1998] 3 NZLR 680, 729–731 (Thomas J (diss)), 760, (Banchard J (diss)). The majority, in a decision affirmed by PC, [2000] 1 WLR 594, analysed the case in terms of the first client's right to protect confidential information supplied to it by the bank.

other companies in which they own shares, or of which they are also directors.[87] Or, in 'management buy-outs', directors may legitimately purchase for themselves the enterprises which they were appointed to protect. The conflicts rule functions in parallel with the profits rule. Fiduciaries are prohibited from taking some profit or advantage in a transaction where they are exposed to a conflict of their own interests with their fiduciary duty.[88] Some prohibited personal conflicts for professionals are listed below:

1 *Fiduciary Professionals Cannot Employ Themselves.*

Pursuant to the 'self-employment rule', professionals cannot employ themselves on fiduciary business without their clients' informed consent.[89]

2 *Fiduciary Professionals Cannot Transact Clients' Business with Themselves.*

Professionals who are commissioned to buy or sell on behalf of their clients may not do this by buying from or selling to themselves. This is known as 'self-dealing'. Liability under the rule may be avoided by the fiduciaries obtaining their clients' informed consent to relevant transactions. Self-dealing is normally not a matter for the conflicts rule. Usually, clients attempt to re-direct to themselves whatever secret profits their fiduciary professionals make. However, the conflicts rule will sometimes be invoked. Clients may seek to set aside contracts made between themselves and third parties made through the agency of self-dealing professionals.[90]

In *Combulk Pty Ltd v TNT Management Pty Ltd*[91] Einfeld J applied this rule to the wrong of a TNT 'resources and development manager' who negotiated and entered contracts on behalf of his employer with a small company in which he was a

87 See H Ford, R Austin and I Ramsay, *Ford's Principles of Corporations Law* (10th ed, 2001) [9 100].

88 Expressed in *Keech v Sandford* (1726) Sel Cas T King 61; *York Buildings Co v MacKenzie* (1795) 8 Br P C 42, 3 ER 432 (HL); *Parker v McKenna* (1874) LR 10 Ch App 97, 118 (Lord Cairns LC); *Boardman v Phipps* [1967] 2 AC 47, 106, (Lord Hodson) 129–34, (Lord Upjohn (diss)); *Chan v Zacharia* (1984) 154 CLR 178, 205 (Deane J); *Queensland Mines Ltd v Hudson* (1978) 18 ALR 1, 3 (PC); *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373, 393 (Gibbs J); *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 103–4 (Mason J (diss)); *Avtex Airservices Pty Ltd v Bartsch* (1992) 107 ALR 539 (FC), 561 (Hill J).

89 *Bray v Ford* [1896] AC 44; *Bath v Standard Land Co* [1910] 2 Ch 408 affd [1911] 1 Ch 618.

90 Discussed by Donaldson J in *North & South Co v Berkeley* [1971] 1 WLR 470, 485.

91 (1992) 37 FCR 45, 52–3 – a s52 'misleading and deceptive conduct' case. See also *De Bussche v Alt* (1878) 8 Ch D 286.

substantial shareholder. The conflict was not disclosed to TNT. Or the principal may seek to redirect a non-monetary advantage that the fiduciary obtained whilst engaged on the principal's business. *Soulos v Korkontzilas*[92] was such a case. It concerned a real estate agent who caused his wife to purchase a commercial property which he had been instructed to obtain for his client. Although the property had declined in value by the time of the trial, the land had special significance for the client and a constructive trust over it in the client's favour was ordered for breach of this fiduciary rule.

Self-dealing causing the client loss without any identifiable profit for the professional is sanctioned by the rule. Conflict must be real and substantial in the absence of any profit to implicate the fiduciary professional. An impugned self-dealing will not attract sanction if it is 'independent' of the fiduciaries' conflicting interests, in the sense discussed by Aickin J in *Australia and New Zealand Banking Group Ltd v Bangadilly Pastoral Co Pty Ltd.*[93] A mortgagee's sale through an assignee was set aside in that case upon it being shown that the purchaser was a related company of the assignee.

Restrainable conflict will not arise if the extent of the fiduciary's conflict is only minor. Assume a transaction where a fiduciary director causes a small company to open a trading account with a national bank. At the time the director owns 100 ordinary shares in the bank. If he or she fails to disclose that interest, the conflict is clearly too small to attract the rule.[94] Fiduciaries should only be restrained if they have control of the conflicting interest. The director would need a majority or controlling shareholding in the bank. Short of that, her interest is not sufficiently adverse to her fiduciary responsibilities to be in conflict with them. In *Farrar v Farrars Ltd*[95] it was held that a trustee who sold land to a large public company in which he owned shares was not liable — he had not, after all, sold it to a small company that he substantially controlled, and the conflict was seen as too small. Although, Lindley LJ added, a large shareholding in a public company giving effective control in general meeting might well be a sufficient interest to attract the rule.[96]

3 *Purchase of the Client's Property.*

Fiduciary professionals will only be permitted to purchase the property of their clients if a fair price is agreed, no improper influence has been exerted and there is full disclosure of all relevant information which the professionals possess. A

92 (1997) 146 DLR (4th) 214.
93 (1978) 139 CLR 195, 225–7.
94 See Ford et al, above n 87, [9 100]
95 (1888) 40 Ch D 395 (CA).
96 (1888) 40 Ch D 395, 410 (CA).

purchase may be set aside or an order for compensation may be made unless each of these conditions is satisfied. *Ex parte James*[97] is a classic authority in this area. Purchase at auction of a bankrupt's estate was disallowed. The purchaser was the solicitor to the bankruptcy administration who had not made a full disclosure to the creditors and obtained their consent to the dealing. It was treated as irrelevant that a proper price was paid. The same wrong was found in *Estate Realities Ltd v Wignall.*[98] Share brokers had purchased certain of their client's shares and options as part of a scheme to obtain control of a company and on-sell its shares at a considerable profit. Intervention came at a later stage in *Pando v Brockway.*[99] An estate agent had purchased from his vendor principal and on-sold a house which he had been retained to sell. In the circumstances, he was obliged to compensate the vendor for an insufficiency in the price that she received.

4 *Competition with the Client*

Fiduciary professionals cannot enter into transactions with third parties which conflict, or possibly might conflict, with fiduciary duties owed to their clients.[100]

B *Conflicting Interests: Conflicts of Duty and Duty*

Clients are entitled to receive a professional's loyalty, unimpaired by the pressure of duty owed to clients with conflicting interests.[101] All clients' interests in conflict with a professional's duty are within this reach of the rule. Professionals are in 'conflict of interest' by owing duties to clients whose interests, in turn, conflict, or possibly might do so. This is the disinterested species of the wrong. Analysed by Millet LJ in *Bristol and West v Mothew*,[102] it can arise in the following three ways.

1 *Conflicts Before or in the Absence of Consent: The* Double Employment *Rule*

Fiduciary professionals may not be 'doubly employed'. They act in restrainable conflict of interest when they represent clients with actually or potentially

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97 (1803) 8 Ves Jun 338; 32 ER 385, 389 (Eldon, LC); discussed further in J Glover and J Duns, 'Insolvency Administrations At General Law: Fiduciary Obligations of Company Receivers, Voluntary Administrators and Liquidators' (2001) 9 *Insolvency Law Journal* 130, 135.

98 [1992] 2 NZLR 615 (HC) (Tipping J).

99 (1998) 20 SC (WA) 1, 51–2 (Viol J).

100 *Re Thompson* [1930] 1 Ch 203, 215–6, Clausen J and *Hivac Ltd v Park Royal Scientific Instruments Ltd* [1946] Ch 169, 178 (Lord Greene MR) (CA).

101 Note 'Developments in the law: conflicts of interest in the legal profession' 94 *Harvard Law Review* 1244 (1981), 1293.

102 [1998] Ch 1, 18–21 (Staughton and Otton LJJ agreeing).

competing interests.[103] Until informed consent is given, the fact that a professional's duty to one client *may possibly* conflict with duty owed to another client is sufficient to contravene the rule.[104] Conflict of duties may occur without the professionals personally profiting, or abusing the client's confidential information or opportunities in any way.

Obviously a professional cannot, in the absence of consent, act for opposing parties in contentious matters. Nor can a professional act for clients whose interests are likely to conflict. As Lord Millet said in *Bolkiah v KPMG,*[105] there is 'an inescapable conflict of interest' inherent in such situations. Serving two masters in a single matter is a wrongdoing enjoined in the bible.[106]

Double employment which offends this aspect of the conflicts rule is one of the hazards of a modern professional's life. Professionals need to avoid the potentiality of conflict which attracts the double employment prohibition. It is generally permissible in Australia for professionals to represent consenting clients in respect of the same matter, before either conflict or the reasonable prospect of it arises. Many cases have involved solicitors — though the following illustration is an application of the rule to chartered accountants.[107]

Australian Breeders' Cooperative Society v Jones[108] concerned 18 investors in a thoroughbred horse breeding syndicate. Together they claimed that advising accountants and the syndicate's promoters were in breach of fiduciary duty owed to them. Bloodstock prices fell considerably the year after the investors joined the syndicate. For the first time, the investors became aware that the value of the syndicate's stock of breeding horses had been grossly inflated when the syndicate was promoted, despite supposed 'at valuation' prices referred to in a memorandum accompanying invitations to subscribe. The document had been negligently prepared. A small-firm accountant was partly responsible — though he relied on the representations of a large-firm accountant who acted for the syndicate's promoter. In fact, the large-firm accountant expressly declined to advise the small-

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103 *Clark Boyce v Mouat* [1994] 1 AC 428, 435 (Lord Jauncey (PC)); *Boulting v Association of Cinematograph Television and Allied Technicians* [1963] 2 QB 606, 636 (Upjohn J).

104 See *Lintrose Nominees Pty Ltd v King* (1994) V ConvR 54–502 (Vic SC FC).

105 [1999] 2 AC 222, 235.

106 Matthew 6:24

107 See, in the US, *Woodruff v Tomlin* 616 F 2d 924 (6th Circ 1980); *United States Fidelity & Guarantee Co v Louis Rosner & Co* 585 F 2d 932 (8th Circ 1978); *Jedwabny v Philadelphia Transport Co* 390 P 231, 135 A 2d 252 (1957); in the UK, *Bristol and West Building Society v Mothew* [1998] Ch 1; *Clark Boyce v Mouati* [1994] 1 AC 428 (PC on appeal from NZ).

108 (1997) ALR 488 (Fed Ct FC).

firm accountant on horse prices — by reason of a 'conflict of interest' in his also acting for the syndicate's promoter. The large-firm accountant at the same time concealed the fact that his client had made a 300 per cent profit on horses sold to the syndicate. The Court held that the large-firm accountant owed fiduciary duties to the small-firm accountant and, through him, to people who relied on the memorandum and became syndicate investors. Relevantly, the large-firm accountant was found to be in breach of the double employment rule by acting simultaneously for promoters of the syndicate and for the investors.[109] To the extent that the disclaimer had any effect, it was cancelled out by the large firm accountant's subsequent participation in the syndicate's affairs.

Reported cases of solicitors and other professionals having to be restrained from breaching the double employment rule appear, on the whole, to be relatively uncommon. One reason has already been suggested.[110] Breach of the double employment rule is not often inferred. In *Re Baron Investment (Holdings) Ltd (in liq),*[111] Pumfrey J said that courts should take a 'pragmatic' approach when deciding whether 'a genuine double employment arises'. In this way, there may be no 'sensible' double employment in representing clients who have only a remote chance of developing adverse interests.[112] Professionals should only be debarred from representing clients by conflicts that are likely to arise.

Re Baron[113] involved a claim that a solicitor had offended the double employment rule by acting for both the liquidator of a company and two of its largest creditors. One creditor was a tenant of the company's investment property and the other creditor had a claim liable set-off against a debt owed to the company. Justice Pumfrey refused 'automatically' to prevent the solicitor from keeping the retainers because there was 'no reasonable ground to apprehend bias'. Nothing was shown to countervail the advantage to all creditors in having a solicitor who was familiar with the facts.

2 *Conflicts After Consent: The* No Inhibition *Rule*

Professionals must act *fairly*, where, subsequent to the consent of their clients, they are properly acting for persons who have conflicting interests. Interests of one client cannot then be advanced at the expense of another. Each must be served

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109 (1997) ALR 488, 504–6 (Wilcox and Lindgren JJ).

110 Scale and diversity of the services market: see text at n 4.

111 [2000] 1 BCLC 272, 283–4 (Pumfrey J) – a post-*Bolkiah* decision – following *Re Schuppan (a bankrupt) (No 1)* [1996] 2 All ER 664, 668 (Robert Walker J) and *Re Maxwell Communications Corp plc* [1992] BCLC 465, 468 (Hoffman J). *Re Baron* was confirmed by CA sub nom *Halstuk v Venvil* (26 October 1999).

112 See Hollander & Salzedo, above n 1, 29.

113 [2000] 1 BCLC 272, 284.

faithfully, loyally and with *no inhibition,* as though the client were being represented in the absence of any other.[114]

Sometimes the no inhibition principle will defer to the terms of the retainer by which the professional is employed. *Kelly v Cooper*[115] exemplifies this in relation to an estate agent who acted for the vendors of two adjoining sea-front properties. H. Ross Perot agreed to purchase one property and, shortly after, made an offer to purchase the other. The estate agent did not tell the second vendor that the intending purchaser's offer for the first house had been accepted. The second vendor sold his house, as he alleged, in ignorance of information which would have materially affected its price. Lord Browne-Wilkinson, for the Judicial Committee, found that there was no confusion of duties. Nor was there any subordination of the fiduciary duty to the second vendor by reason of the agent's personal interest in receiving two commissions. A term would be implied in the agent's retainer to the effect that the agent was free to act for competing principals. Such a person, Lord Browne-Wilkinson said, could not 'sensibly' be bound to disclose information to one principal which was confidential to the other. Information about the competing sale could justifiably be withheld.[116]

3 *After Consent: The* Actual Conflicts *Rule*

When an actual conflict of interest arises between two consenting clients, then a professional cannot act for one or other of them and probably not for either.[117] The rule applies when a conflict materialises in fact, after a client has consented to the possibility of conflict. For example, a solicitor or other professional may become aware that one client of his or her clients is defrauding another. One client may have concealed the existence of a secret profit made on the intervening purchase and sale of a property later purchased by another client,[118] or a professional may be unable to offer the client fully independent advice because her partner is the party transacting on the other side.[119] In these situations, professionals are (or should be) placed in an impossible position. Obligations owed to either client cannot be fulfilled because such would entail breach of obligations owed to another client.[120]

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114 See Hollander & Salzedo, above n 1, 24.

115 [1993] AC 205 (PC), on appeal from Bermuda.

116 Ibid 213–4.

117 *Moody v Cox and Hatt* [1917] 2 Ch 71, 81, Cozens-Hardy MR and see Hollander & Salzedo, n 5, 24.

118 A 'flip' in Canadian parlance: see *Ramrakha v Zinner* (1994) 24 Alta L R (3d) 240 (CA).

119 See *Davey v Woolley, Hames, Dale & Dingwell* (1982) 133 DLR (3d) 647 (Ont. CA).

120 See *Bristol and West Building Society v Mothew* [1998] Ch 1, 19 (Millett LJ).

Both retainers should then be declined. Previous consent on the clients' part cannot extend to the professional's exercise of bias, unfairness or fraud.

Breach of this 'actual conflicts rule' was the basis of the Federal Court decision in *Commonwealth Bank v Smith.*[121] A bank's reliant customers were advised by its manager on the merits of purchasing a business from other customers of the bank. The double employment rule was avoided when the manager made a cursory disclosure to the purchasers that the vendors were also customers of the bank. However, in the manager's possession at the time were documents prepared for the vendors' earlier application for a mortgage loan — which indicated that the business was worth considerably less than the vendors' asking price. An actual conflict of interest arose in this event. Carelessly, the manager advised the purchasers that the price of the business was a 'good' one. This was a remark on which the purchasers were found to have relied when they agreed to buy the business. Thereafter the business performed disappointingly. Another valuation, obtained in the following year, disclosed that the value of the business at the time when it was purchased was about half the price which the purchasers had been advised to pay. Proceedings were commenced. The purchasers alleged that the manager had acted in breach of fiduciary duty and caused them loss, for which they should be compensated by the bank. The Federal Court said that the manager had placed himself in an 'impossible position'. Not only had he failed to consider the earlier valuation before advising on the wisdom of paying the price, the manager was also acting in breach of the actual conflict rule. Advice could only be given in the purchasers' interest by making a disclosure contrary to the interest of the vendors.[122] In consequence, the bank was found vicariously liable for the full measure of loss incurred by the purchasers in entering the transaction.[123]

Such are some of the varieties of conflicts which can affect the professional.

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121 (1991) 102 ALR 453 (FC).

122 Ibid, 472–3 (von Doussa J), confirmed by the Full Court.

123 (1991) 102 ALR 453, 478 (FC).