FIDUCIARIES: IDENTIFICATION AND REMEDIES

by

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In *Hospital Products Ltd.* v. *United States Surgical Corporation and Others*[1] (hereinafter *Hospital Products*) Dawson J. said:[2]

> Notwithstanding the existence of clear examples, no satisfactory, single test has emerged which will serve to identify a relationship which is fiduciary.

In *Consul Development Pty. Ltd.* v. *D.P.C. Estates Pty. Ltd.*[3] (hereinafter *Consul*) Gibbs J. said:[4]

> The question whether the remedy which the person to whom the duty is owed may obtain against the person who has violated the duty is proprietary or personal may sometimes be one of some difficulty. In some cases the fiduciary has been declared a trustee of the property which he has gained by his breach; in others he has been called upon to account for his profits and sometimes the distinction between the two remedies has not, it appears, been kept clearly in mind.

Dawson J. in *Hospital Products* called attention to the difficulty inherent in the identification of the fiduciary. Gibbs J. in *Consul* adverted to the difficulty of awarding an appropriate remedy for a breach of fiduciary duty.

The identification of the fiduciary and the identification of the appropriate remedy against a fiduciary are matters of fundamental importance, yet these two fundamental matters are not untrammelled by uncertainty. This article is an attempt to mitigate that uncertainty.

A. *Identication of Fiduciaries.*

Hospital Products raises acutely the issue of who is a fiduciary. This particular issue in the case will be examined at the three levels of judicial decision: the trial,[5] the Court of Appeal[6] of New South Wales and the High Court.[7] In this case, the defendant[8] had agreed with the Plaintiff (a company incorporated in the United States of America) to become the latter's sole distributor in Australia of its surgical staples

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1 (1984) 58 A.L.J.R. 587.
2 Ibid, at p. 628.
3 (1975) 132 C.L.R. 373.
4 Ibid, at p. 395.
5 [1982] 2 N.S.W.L.R. 766.
6 [1983] 2 N.S.W.L.R. 157.
7 (1984) 58 A.L.J.R. 587.
8 By novation — [1982] 2 N.S.W.L.R. 766, at p. 802, the corporate defendant was substituted for the natural defendant. Thus it will be convenient to refer to both these corporate and natural entities as the defendant.

and disposable loading units. The duration of the agreement was terminable by either party with reasonable notice.[9] An express term of the contract[10] was that the Defendant should devote its 'best efforts'[11] to build up a market for the Plaintiff's products. The primary judge (McLelland J.) also *implied* the term that the Defendant would not during the distributorship do anything inimical to the market in Australia for the Plaintiff's products.[12]

McLelland J. then posed the question whether the Defendant was in a fiduciary relationship to the Plaintiff for the purpose of the rule requiring fiduciaries not to profit from a position of trust.[13] His Honour answered the question thus:[14]

> In what circumstances will a court recognize the existence of a fiduciary duty for the purpose? There are two matters of importance here. First, the paradigm of the fiduciary relationship is the trust. A trust imposes obligations relating to property vested in the trustee, but an analogy is recognized in the position of a person who is obliged, or undertakes, to act in relation to a particular matter in the interests of another . . . and is entrusted with the power to affect those interests in a legal or practical sense. The second matter is that the reason for the principle is to be found in the special opportunities which a trustee (or a person in an analogous position) has to *abuse that position* and the special difficulties which proof of such abuse would present in situations where there was a conflict or possible conflict between interest and duty. In other words *the special degree of vulnerability* of those whose interests are entrusted to the power of another, to abuse of that power, justifies *a special protective rule.*
>
> In my opinion HPI's [the Defendant's] position of power and its contractual obligations, in relation to such of USSC's [the Plaintiff's] interests as were represented by the market for its products in Australia, made the circumstances of the present case *sufficiently analogous to a trust,* and rendered those interests *sufficiently vulnerable to abuse of that power,* to make HPI [the Defendant] for the purpose of the relevant principle a fiduciary in respect of that matter. In effect, HPI [the Defendant] was for the duration of the distributorship entrusted by USSC [the Plaintiff] with the development and servicing of the market for USSC [the Plaintiff's] surgical stapling products in Australia. HPI's [the Defendant's] fiduciary position must be taken to have terminated however with the termination of the distributorship . . .

A few preliminary remarks will be made before the examination of the judicial observation just cited.

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9 [1982] 2 N.S.W.L.R. 766, at p. 803.

10 The contract was partly written and partly oral: ibid, at p. 801.

11 Ibid, at p. 802.

12 Ibid, at p. 807. The existence of this *implied* term (as distinct from the 'best efforts' term) was, after its acceptance by the Court of Appeal — [1983] 2 N.S.W.L.R. 157, at p. 198, unanimously rejected by the High Court: (1984) 58 A.L.J.R. 587, at p. 595 (per Gibbs C.J.); at p. 608 (per Mason J.); at p. 617 (per Wilson J.); at p. 619 (per Deane J.); and at pp. 626-627 (per Dawson J.).

13 Ibid, at p. 809.

14 Ibid, at pp. 810-811. Emphasis added and writer's interpolations.

It is crucial to note that the uniqueness of the fiduciary's duty is not to be found in the duty to avoid a conflict (*i.e.*, an actual conflict) between his duty and his personal interest. A preference of personal interest over duty is no more than an example of a breach of any duty because no duty, fiduciary or otherwise, is permitted to be breached — by conflict with personal interest or otherwise. In other words, no person who has a duty to perform, whether that duty be fiduciary or not, is allowed to create a conflict between duty and personal interest, or indeed, to create a conflict between duty and inconsistent conduct other than incompatible personal interest. It is true that the fiduciary, in common with all other obligors (legal as well as equitable, criminal as well as civil), must not do anything (of which the promotion of an inconsistent personal interest is but an example) to breach his duty. But this common obligation fails to distinguish the fiduciary from other obligors. What then is the obligation that is unique to, and thus definitive of, the fiduciary? It is suggested that this unique obligation is the duty to avoid situations of *possible*[15] conflict between his specific duties (whatever these may be in particular cases) and his personal interest. In short, the fiduciary does not only have the common duty not to create conflict between his duty (whatever this may be in a particular case) and his conduct (including any inconsistent personal interest): the fiduciary also has the unique[16] duty to avoid *possible* conflict between his duty (whatever this may be in a particular case) and his conduct (including any inconsistent personal interest). If the duty common to all obligors (including fiduciaries) is regarded as a common duty and the additional duty of the fiduciary is regarded as the fiduciary's unique duty, then breaches of fiduciary duty will comprise those in which the fiduciary breached his common duty (namely, cases of *actual* conflict between duty and conduct) and those in which the fiduciary breached his unique duty only (namely, cases of *possible* conflict between duty and conduct).

Thus the fiduciary is different from all other obligors because he is liable not only for creating an *actual* conflict between duty and personal interest but also for creating a *possible* conflict between duty and personal interest.

The decision in *Keech* v. *Sandford*[17] was an example of a fiduciary having breached his unique duty only. In that case the trustee of a lease had unsuccessfully attempted to renew the lease for the trust. Having thus failed, the trustee then renewed the lease for himself. Lord King

15 *Possible* conflict means *a real sensible possibility of conflicts*: *Boardman and Another* v. *Phipps* [1967] 2 A.C. 46 at p. 124 (per Lord Upjohn); *Consul Development Pty. Ltd.* v. *D.P.C. Estates Pty. Ltd.* (1975) 132 C.L.R. 373, at p. 394 (per Gibbs J.); *Queensland Mines Ltd.* v. *Hudson and Others* (1978) 52 A.L.J.R. 399, at p. 400 (per Lord Scarman delivering the judgment of the Privy Council; *Green and Clara Pty. Ltd.* v. *Bestobell Industries Pty. Ltd.* [1982] W.A.R. 1 at p. 11 (per Wickham J.).

16 '... liability to account does not depend on proof of an actual conflict of duty and self-interest.' *Canadian Aero Service Ltd.* v. *O'Malley et al.* (1973) 40 D.L.R. (3d.) 371, at p. 384 (per Laskin J., delivering the judgment of the Supreme Court of Canada).

17 (1726) Sel. Cas. T. King, 61, 25 E.R. 223.

L.C., agreed that the trustee held the renewed lease on (constructive) trust for the beneficiary of the original (express) trust.[18] That the trustee had breached only his unique duty (namely, had created only a *possibility* of conflict between duty and personal interest) is borne out in the following remarks of the Lord Chancellor:[19]

> I must consider this as a trust for the infant; for I very well see, *if a trustee, on the refusal to renew, might have a lease to himself, few trust-estates would be renewed to cestui que use*; though *I do not say there is fraud in this case*, yet he should rather have let it run out, than to have had the lease to himself. This may seem hard, that the trustee is the only person of all mankind who might not have the lease: but it is very proper that rule should be strictly pursued, and not in the least relaxed; *for it is very obvious what would be the consequence of letting trustees have the lease, on refusal to renew to cestui qui use.*

Thus the Lord Chancellor thought that it was 'very obvious'[20] that if there were no unique duty to avoid situations of *possible* conflict between duty and interest, then trustees would be greatly tempted not to do their best for their beneficiaries with the probability that they might yield to such temptation and thereby create an *actual* conflict between duty and personal interest. Thus the fiduciary's unique duty has been designed by courts of equity to discourage fiduciaries from actually breaching their particular duties — the particular duty in *Keech* v. *Sandford* being to do the trustee's best to renew the lease for the beneficiary. If the common duty to avoid an actual conflict is represented as a circle, then the unique duty to avoid a possible conflict will be represented by a larger concentric circle — the latter representing the additional and unique protection afforded to those persons (hereinafter beneficiaries) to whom the fiduciary duty is owed. The principle in *Keech* v. *Sandford* has been extended to fiduciaries who were not trustees.[21]

Because the duty to avoid *possible* conflicts between duty and personal interest — unique to the fiduciary — stems from *Keech* v. *Sandford* (a case of an express trust), it is suggested that unless the *essential element* in that express trust which *created* the fiduciary's unique duty (as distinct from the unique duty itself) is identified, it will not be possible to identify the fiduciary conceptually. In short, the fiduciary's unique duty, being merely the *consequence* of the status of a fiduciary, cannot logically be used to *create* that status. What then was that essential element in *Keech* v. *Sandford* which created the fiduciary's unique duty?

As cited,[22] McLelland J. in *Hospital Products* tried to identify the fiduciary by way of *analogy* with the trust. His Honour discovered that

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18 Ibid, at pp. 62 and 223 respectively.
19 Ibid. Emphasis added.
20 Ibid.
21 For example, see *Aberdeen Railway Company* v. *Blakie Brothers* (1854) 1 Macq. 461 (the fiduciary was a company director); *Regal (Hastings) Ltd.* v. *Gulliver and Others* (1942) [1967] 2 A.C. 134 n., [1942] 1 All E.R. 378 (the fiduciaries were company directors); and *Boardman and Another* v. *Phipps* [1967] 2 A.C. 46 (the relevant fiduciary was the solicitor to the trust).
22 See n. 14.

analogy in any person who is obliged, or undertakes, to act in relation to a particular matter in the interests of another and is entrusted with the power to affect those interests in a legal or practical sense.[23] With respect, to argue by analogy is to proceed by way of similarity between the trust and other fiduciary duties. The analogy, because it concentrates on mere similarity, fails to identify any element *common to*, and thus *definitive of*, all those situations which produce the fiduciary. Just as the fiduciary duty itself is unique, so the element creating such a duty must likewise be unique. It is suggested that the element creating the fiduciary duty in *Keech* v. *Sandford*, and common to all fiduciary situations, is that of *implicit dependency*, objectively expected, by one person upon another in the latter's execution of a specific task or specific tasks for the former. The mere execution of a task by one person for another is not sufficient for the establishment of a fiduciary relationship: the task must be such that, in its execution, the beneficiary is objectively expected to depend implicitly on the conduct of the fiduciary. In *Keech* v. *Sandford* the beneficiary was objectively expected to depend implicitly on the trustee in the execution of the express trust.

There are, of course, different *degrees* of implicit dependency. It is suggested that the higher the degree of implicit dependency necessitated by the nature of the task the wider will be the area of possible conflict, so that the area of protection for the beneficiary is correlative to the degree of supervision which the beneficiary is expected to exercise. In a situation which objectively requires the beneficiary to place a high degree of implicit dependency on the fiduciary, the beneficiary will be expected to exercise a correspondingly low degree of supervision over the conduct of the fiduciary who in turn would be prevented from abusing that low degree of supervision by being excluded from a correspondingly large area of possible conflict between duty and personal interest. That there are different degrees of implicit dependency calling for corresponding degrees of strictness in the fiduciary's execution of his duty appears lucidly from the following statement of Fletcher Moulton L.J. in *In re Coomber*:[24]

> Fiduciary relations are of many different types; they extend from the relation of myself to an *errand boy* who is bound to bring me back my change up to the *most intimate and confidential relations* which can possibly exist between one party and another where the one is wholly in the hands of the other because of his *infinite trust* in him. All these are cases of fiduciary relations, and the Courts have again and again, in cases where there has been a fiduciary relation, interfered and set aside acts which, between persons in a *wholly independent*[25] position, would have been perfectly valid. Thereupon in some minds there arises the idea that if there is any fiduciary relation whatever any of these types of interference is

23 See n. 14.

24 [1911] 1 Ch. 723, at pp. 728-729. Emphasis added.

25 His Lordship's contrast between fiduciary relationships and *wholly independent* relationships strongly suggests that it is the beneficiary's implicit dependency on the fiduciary which creates the fiduciary relationship.

> warranted by it. They conclude that every kind of fiduciary relation justifies every kind of interference. Of course that is absurd. The nature of the fiduciary relation must be such that it justifies the interference.

The question can now be put: in *Hospital Products* was the Plaintiff objectively expected to be implicitly dependent on the Defendant in the latter's execution of its relevant specific task (namely, the task of using its best efforts to promote in Australia a market for the Plaintiff's products)? In other words, was the Defendant a fiduciary to the Plaintiff?

McLelland J.[26] and the Court of Appeal[27] answered this question in the affirmative. It is suggested that both McLelland J. and the Court of Appeal applied the test of implicit dependency but, erroneously, all too easily found that the test had been satisfied. It is therefore suggested that McLelland J. and the Court of Appeal were correctly reversed by the High Court[28] for purportedly finding a relationship of implicit dependency where none existed.

The following test of the existence of a fiduciary relationship was propounded by the Court of Appeal:[29]

> We are of the opinion, therefore, that the principle which we should apply is that a fiduciary relationship exists where the facts of the case in hand establish that in a particular matter a person has undertaken to act in the interest of another and not in his own. This 'representative' element is essential and it is from the fiduciary's undertaking to subordinate his interest that the beneficiary's expectation, or his trust and confidence, that the fiduciary will act accordingly arises.

The Court of Appeal thus asserted that the beneficiary's 'trust and confidence'[30] would only arise whenever a person undertook in a particular matter to act in the interest of another and not in his own interest. With respect, it is perfectly possible for one person (X) to have another person (Y) act in a matter exclusively in his (X's) interest without him (X) being implicitly dependent on that other person (Y). The Court of Appeal mistook a merely *necessary* condition (namely, one party acting solely in the interests of another) for a *necessary and sufficient* condition (namely, one party acting solely in the interests of another *and* the latter's implicit dependency on the former) in its attempt to identify a fiduciary relationship. For example, in a contract to repair a house, the builder, in making the repairs to the house, would be acting solely in the interest of the owner, but the owner would not be implicitly dependent on the builder because the owner could rely adequately on his contract with the builder in case of faulty workmanship. On the other hand, in the case of a trust, a beneficiary is implicitly dependent on his trustee because the trustee possesses powers over the trust property

26 [1982] 2 N.S.W.L.R. 766, at p. 811.
27 [1983] 2 N.S.W.L.R. 157, at pp. 208-209.
28 (1984) 58 A.L.J.R. 587, at p. 631 (High Court's Orders).
29 [1983] 2 N.S.W.L.R. 157, at p. 208.
30 Ibid.

the exercise of which cannot, in all circumstances, be protected from abuse by contract between the trustee and the person establishing the trust. The builder's task of making the repairs would require him to repair the house exclusively for the owner, just as the trustee would be required to use the trust property exclusively for the beneficiary. However, the element of implicit dependency would be absent in the builder-owner relationship (because of the *adequacy* of contractual protection) but present in the trustee-beneficiary relationship (because of the *inadequacy* of contractual protection). The requirement of exclusive devotion to another's interest is only the first hurdle to the existence of a fiduciary relationship. The second (and final) hurdle (and the more substantial of the two) is the requirement of the presence of a relationship of implicit dependency. With respect, the error of McLelland J. and the Court of Appeal lay in their view that the first hurdle necessarily included the second.

In *Hospital Products*, the High Court, by a majority of four[31] Justices to one,[32] decided that the Defendant was not a fiduciary to the Plaintiff. Beginning with the Justices who comprised the majority, the view of each of the Justices on this aspect of the case will now be examined.

Gibbs C.J., in rejecting the existence of a fiduciary relationship, thought that Asquith L.J. in *Reading* v. *The King*[33] had stated the position too broadly when his Lordship asserted that there was a fiduciary relationship whenever one person entrusted to another a job to be performed.[34] The Chief Justice took the view that as a general rule contractual duties created by ordinary commercial contracts did not impose fiduciary obligations.[35] It is suggested that this view of the Chief Justice is founded upon the usual absence of any element of implicit dependency in commercial transactions where the parties rely on their contractual remedies to safeguard themselves against the consequences of contractual breaches. However, Gibbs C.J. did proceed to say that even if he were to adopt the Court of Appeal's definition of a fiduciary relationship as a situation where one person agreed with another to act solely in the interest of the latter, that definition was not satisfied on the facts of the case.[36] The Court of Appeal's test would not be satisfied because the contract envisaged that the Defendant (and not the Plaintiff only) would be making profits from the distributorship, and thus the Defendant had not agreed to act solely in the Plaintiff's interest.[37] Indeed, there might even be situations where the contract itself would allow the Defendant to make a profit to the Plaintiff's detriment.[38] Finally, there was no part of the distributorship in which the Defendant was precluded from making a

31 (1984) 58 A.L.J.R. 587: per Gibbs C.J. at p. 598; per Wilson J. at p. 618; per Deane J. at p. 620; and per Dawson J. a pp. 629-630.
32 (1984) 58 A.L.J.R. 587: per Mason J. at p. 610.
33 [1949] 2 K.B. 232.
34 (1984) 58 A.L.J.R. 587, at p. 597.
35 Ibid.
36 (1984) 58 A.L.J.R. 587, at p. 598.
37 Ibid.
38 Ibid.

profit for itself, so that it could not even be concluded that there was a fiduciary relationship in respect of at least a part of the distributorship.[39]

Although Gibbs C.J. held that the Court of Appeal's test of fiduciary relationship was not satisfied on the facts of the case, his Honour did describe that test as 'not inappropriate *in the circumstances*'.[40] It is unfortunate that the Chief Justice did not even attempt to identify these distinguishing circumstances when, it is suggested, his Honour should not only have identified them but should also have explained why these circumstances would possess the quality of making the test 'not inappropriate'.[41] Perhaps it was the fact that the Chief Justice was to conclude that the Court of Appeal's test was in any event not satisfied on the facts which dissuaded his Honour from a more sustained justification of the contextual appropriateness of that test. Nevertheless, such a compact judicial approach might lead lower courts in the future to apply this test in circumstances which the Chief Justice would not consider to be at all appropriate.

However, the emphasis placed by the Chief Justice on the availability to the Plaintiff of the option to safeguard its interest more closely by suitable contractual provisions[42] is a clear indication that, in his Honour's view, the Plaintiff was not in a position of implicit dependency upon the Defendant. Thus the approach of the Chief Justice tends to support the view that the test of the existence of a fiduciary relationship is whether or not the relationship between the parties is such that it is necessary for one party to become implicitly dependent on the other in the latter's execution of a task for the benefit of the former. In other words, the nature of the situation must be such that the party who is implicitly dependent must only be so dependent because the legal safeguards available to him (*e.g.*, contractual provisions) are insufficient to make the dependency gratuitous. The point made by the Chief Justice in *Hospital Products* was that such dependency as the Plaintiff might have placed on the Defendant would have been entirely gratuitous because the Plaintiff could have suitably protected itself by contractual terms apt for the purpose.[43]

Wilson J., in a short judgment, decided that because the Plaintiff and the Defendant had treated with each other at arm's length in a commercial transaction of manufacturer and sole dlistributor there was no fiduciary relationship between them.[44] Wilson J.'s accent on the parties having dealt with each other at arm's length in a commercial transaction would appear to suggest, as does the reasoning of Gibbs C.J., that there was no necessity for the Plaintiff to be implicitly dependent on the Defendant because the Plaintiff could have obtained the desired protection by way of contract. The *situation* (objectively appraised) did not call

39 Ibid.
40 (1984) 58 A.L.J.R. 587, at p. 597. Emphasis added.
41 Ibid.
42 (1984) 58 A.L.J.R. 587, at p. 598.
43 Ibid.
44 (1984) 58 A.L.J.R. 587, at pp. 617-618.

for the Plaintiff to become implicitly dependent on the Defendant. Whether the Plaintiff was actually so dependent on the Defendant was legally irrelevant. Equally irrelevant was whether, given the actual terms of the contract, the Plaintiff had thereby pushed itself into a position of implicit dependency on the Defendant. The critical issue was whether the situation, before the making of the contract, was such as to leave the Plaintiff without the legal means to avoid its occupation of a position of implicit dependency in the event of the parties concluding a contract with each other. An affirmative answer would have identified a fiduciary relationship in the contract. A negative answer would have precluded such a relationship in the contract. A negative answer was returned by a majority of the Justices of the High Court, and therefore there was no fiduciary relationship between the Plaintiff and the Defendant.

Deane J., who also rejected the existence of a fiduciary relationship between the parties, stated that the relationship between a manufacturer and a distributor (even a sole distributor) was not ordinarily[45] a fiduciary one, and furthermore there was nothing in this particular contract which required the Defendant distributor to subordinate its interests to those of the Plaintiff manufacturer.[46]

Dawson J., the last of the four majority Justices to reject the existence of a fiduciary relationship between the parties, reiterated that a distributorship agreement did not ordinarily[47] give rise to a fiduciary relationship, and that the contract in issue would on occasions even allow the Defendant to prefer its own interests to those of the Plaintiff.[48] In expounding the fiduciary rtlationship, Dawson J. said:[49]

> There is, however, the notion underlying *all* the cases of fiduciary obligation that *inherent* in the nature of the relationship itself is a *position of disadvantage or vulnerability* on the part of one of the parties which causes him to place *reliance* upon the other and requires the protection of equity acting upon the conscience of that other.

Dawson J. is emphatic on a very important point. The position of disadvantage or vulnerability causing the reliance of the beneficiary must *not* be produced by the beneficiary's omission to use available legal means (*e.g.*, the obtaining of appropriate contractual terms). The beneficiary's implicit dependency upon the fiduciary must be no less than '*inherent* in the nature of the relationship itself'.[50]

On the issue of whether a fiduciary relationship existed between the parties, Mason J. dissented.[51] His Honour held that the Defendant

45 (1984) 58 A.L.J.R. 587, at p. 619.
46 (1984) 58 A.L.J.R. 587, at p. 620.
47 (1984) 58 A.L.J.R. 587, at p. 628.
48 (1984) 58 A.L.J.R. 587, at p. 629.
49 (1984) 58 A.L.J.R. 587, at p. 628. Emphasis added.
59 Ibid.
51 (1984) 58 A.L.J.R. 587, at p. 610.

distributor was the custodian of the Plaintiff manufacturer's produce goodwill in Australia and that it was the Defendant's duty to promote that goodwill.[52] Without the citation of any authority on the point, Mason J. advanced the curious proposition that a person may become the fiduciary of another notwithstanding that the first-named person is under no obligation to subordinate his interest to that of the other person. His Honour said:[53]

> In engaging in the activities which I have mentioned, activities related to the production and promotion of USSC's [the Plaintiff's] goodwill, HPI [the Defendant] was acting in its own interests *as well as* in the separate interests of USSC [the Plaintiff]. Although, as we have seen, it was entitled to prefer its own interests to the interests of USSC [the Plaintiff] in some situations where those interests might come into conflict, this entitlement was necessarily subject to the requirement that HPI [the Defendant] act bona fide and reasonably with due regard to the interests of USSC [the Plaintiff]. In no circumstance could it act solely in its own interests without reference to the interests of USSC [the Plaintiff]. This, as it seems to me, fixed HPI [the Defendant] with the character of a fiduciary in relation to those activities mentioned, *notwithstanding that in pursuing them HPI* [the Defendant] *was also acting in its own interests* and that it was carrying on the distributorship business *generally for its own benefit* and in no sense as a trustee for USSC [the Plaintiff].

Because the above statement was made in dissent it does not represent the law. Furthermore, Mason J.'s view is also difficult to reconcile with basic principle. Why would a person who, *ex hypothesi,* is entitled to balance his interest against that of another be made to occupy the uniquely onerous position of a fiduciary, namely, the position of someone who must avoid situations of *possible* conflict between his interest and that of the other person? It is respectfully suggested that Mason J.'s proposition is self-contradictory, because the specific duty of the fiduciary cannot be performed without the subordination of the fiduciary's interest to that of the beneficiary. Why would the fiduciary have to avoid *possible* conflict when *actual* conflict may, depending on circumstances, be permitted by contract? Again, in using the law of *contract* to measure the extent of a *fiduciary* duty, Mason J. appears to have overlooked that the law of contract is expressed in terms of contractual breach or contractual observance, so that there is no contractual concept of liability for a *possible* breach of duty, whereas, in contradistinction, the unique duty to avoid a *possible* breach of particular duties is the quintessence of the fiduciary's burden.

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52 Ibid.

53 Ibid. Emphasis added and writer's interpolations.

B. *Remedies against Fiduciaries who make improper gains otherwise than through improperly transacting with their beneficiaries.*

If a fiduciary makes an improper gain which is *not* the result of his having transacted improperly with the beneficiary,[54] what remedy does the beneficiary possess against the fiduciary? In *Keech* v. *Sandford*[55] where it was held that a trustee of a lease should not have renewed the lease for his own benefit notwithstanding that the lessor had refused to renew the lease for the benefit of the beneficiary, the succinct decree of Lord King L.C. embodied *three* orders. Two of these three orders were made against the trustee and the remaining order was made against the beneficiary. The first order against the trustee was that he should *assign* the renewed lease to the beneficiary. The renewed lease was clearly held on constructive trust, but because the constructive trustee did not know until the decree of the order that the renewed lease (as distinct from the original lease) was trust property, he would not have kept the money representing the profits from the renewed lease separate from his own money. The imposition of the constructive trust on the renewed lease meant that not only was there a breach of the express trust of the *original* lease when the trustee renewed it for himself, but that there was *also* a *retrospective* breach of the *constructive* trust of the renewed lease when the trustee (constructive) mixed trust (constructive) funds (money representing profits from the renewed lease) with his own money. The constructive trust was retrospective because otherwise the trustee would have been the beneficial owner of the lease between the date of the renewal and that of the decree, which he most certainly was not. Hence the *second* order against the trustee. The trustee was directed to account to the beneficiary for the profits made by him since the renewal of the lease.[56] The term profits is apt to denote the monetary *value* of a benefit gained, but is inapt to denote money *in specie* (whether the money comprises chattels — namely, notes and coins — or choses in action as, for instance, bank accounts[57]). For example, when it is stated that X has improperly earned a profit of $100,000 the import of this statement is that the property improperly gained by X has a monetary *value* of $100,000. The profit is the value of the property obtained, not the obtained property itself. Thus the profit represented by the property may *fluctuate* whereas the property itself remains constant. The statement that X has made a profit of $100,000 is only an abbreviation of the statement that X has made a nett gain of a property the *value* of which

54 In cases where the fiduciary transacts with his beneficiary — a subject *not* examined in this article — the transaction with the beneficiary will be set aside (avoided) in equity unless the material circumstances of the transaction had been fully disclosed to the beneficiary before the transaction. See, for example, *Aberdeen Railway Company* v. *Blakie Brothers* (1854) 1 Macq. 461; *Tate* v. *Williamson* [1866] 2 Ch. App. 55; and *Tracy* v. *Mandalay Pty. Ltd.* (1953) 88 C.L.R. 215.

55 (1726) Sel. Cas. T. King 61; 25 E.R. 223.

56 Ibid, at pp. 62 and 224, respectively.

57 It is clear that money that can be followed *in specie* comprises not only the notes and coins of currency but also *specific choses in action in debt*: *In re Diplock* [1948] 1 Ch. 465, at pp. 521-523.

is $100,000. If X is then ordered to account for the profit, which, *ex hypothesi*, is the monetary value of $100,000, he satisfies that order by transferring to the beneficiary a sum of $100,000 (plus interest). So, when the constructive trustee (of the renewed lease) in *Keech* v. *Sandford* was ordered to account for profits he was *not* ordered to transfer to the beneficiary the actual items of property (*e.g.*, particular notes and coins) which he had received as putative owner of the renewed lease, but the monetary value of those items of property. In short, the trustee was ordered to pay to the beneficiary a sum of money equivalent to the value of the items of property he had received as constructive trustee of the renewed lease. Thus the *second* order (the order to account for profits) against the trustee was an order to pay over a particular *sum* of money, and *not* an order to pay over a particular *fund* of money (the latter order, if it had been made, would have imposed a constructive trust on the profits which, on the facts, would not have been possible as there was no evidence that the money received by the trustee of the *renewed* lease was still identifiable *in specie*).

Finally, the order against the beneficiary was that he should *indemnify the trustee* against the covenants in the renewed lease.[58]

Thus as far back as *Keech* v. *Sandford* the remedial dichotomy between the constructive trust and the account for profits was evident in actions against trustees who profit and, by extension, other fiduciaries who profit. In what circumstances is the one remedy more appropriate than the other ? It is suggested that the answer to this question may be discovered in *Keech* v. *Sandford* itself. Where the benefit obtained has resulted from the unauthorized use of the beneficiary's property *and* the benefit can be identified *in specie* then, and only then, will the benefit be held on constructive trust by the fiduciary. The renewed lease in *Keech* v. *Sandford* satisfied both these conditions as the trustee of the original lease had used his common law ownership of that lease — and hence the equitable ownership thereof of the beneficiary — to obtain for himself a new term of the lease, *and* the renewed lease was identifiable *in specie*. By way of contrast, the profits earned by the trustee were *not* held on constructive trust. Although these profits did result from an unauthorized use of trust property (the original lease) they were no longer identifiable *in specie*. It is suggested that a fiduciary should *not be* made a constructive trustee unless he has improperly used trust property to gain a benefit *and* that benefit remains identifiable *in specie* or has been converted into a product that is traceable[59] *in specie* from the original benefit. Benefits derived by the fiduciary where these two conditions are not both satisfied should result in an account of profits only. It remains to ascertain whether this view is supported by the principal authorities.

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58 Ibid.

59 *Taylor* v. *Plumer* (1815) 3 M. & S. 562; 105 E.R. 721 and *In re Hallett's Estate* (1880) 13 Ch. D. 696.

In *Cook* v. *Deeks and Others*[60] (hereinafter *Cook*) three directors of a railway company (the Toronto Company) made profits[61] by diverting a construction contract from the company to themselves. The Privy Council held that they could not, in the circumstances, retain the benefit[62] of such contract for themselves. The remedial question: did their Lordships impose a constructive trust on the profits made or was there an order to account for such profits as a money payment? Their Lordships held that the benefit of the contract '*belonged in equity to the company* and ought to have been dealt with as an asset of the company'.[63] This statement at first sight suggests that a constructive trust was imposed. However, on the next page of the judgment their Lordships said:[64]

> It follows that the defendants *must account to* the Toronto Company *for the profits* which they have made out of the transaction.

It is suggested that no constructive trust was imposed in *Cook*. Firstly, the company's equitable asset mentioned by their Lordships might well have been a reference to the equitable *chose in action* giving the company a right to an account of profits made by the directors, and not a reference to a trust of the actual items of currency received by the directors. Secondly, as noted, their Lordships specifically ordered an account of profits. Neither the term 'trust' nor 'constructive trust' appears in any part of their Lordships' judgment. Thirdly, there was no evidence that the money obtained by the directors or its product was identifiable *in specie*. Fourthly, assuming the amount of profits was subsequently ascertained to be $X, could it be sensibly supposed that the directors would have *breached* the Order in Council enforcing their Lordships' advice if they had paid to the Toronto Company $X (plus interest) instead of the specific items of currency they had actually received on the contract? In *Consul Development Pty. Ltd.* v. *D.P.C. Estates Pty. Ltd.*[65] (hereinafter *Consul*) Gibbs J. was clearly of the view that in *Cook* an account of profits, and not a constructive trust, was the remedy awarded. His Honour said:[66]

> Although their Lordships spoke of the directors holding the contract on behalf of the Toronto Company, *this was not a case of the misuse by trustees of trust property*, but one in which persons in a fiduciary position obtained for themselves something which they ought to have got for the company, *and no order declaring any of the defendants to be constructive trustees was ever made.*

Gibbs J. based his conclusion on the circumstance that the directors (fiduciaries) had *not* misused trust property, namely, there had not been an improper use of the company's (*i.e.* the beneficiary's) property. There

60 [1916] A.C. 554.
61 Ibid, at p. 561.
62 [1916] A.C. 554, at pp. 563 and 564.
63 [1916] A.C. 554, at p. 564. Emphasis added.
64 [1916] A.C. 554, at p. 565. Emphasis added.
65 (1975) 132 C.L.R. 373.
66 Ibid, at p. 398. Emphasis added.

had not been such misuse because the directors had not used the company's property at all in making their profits.

In *Regal (Hastings) Ltd.* v. *Gulliver and Others*[67] (hereinafter *Regal*) four of the five directors of the Plaintiff company had, in breach of their fiduciary duty to the company, purchased shares in another company when the Plaintiff company initially considered purchasing, but ultimately could not afford to purchase, those shares. The directors later sold these shares at a profit. The Plaintiff company sued, *inter alia,* these directors for the recovery of the profits. The House of Lords upheld the claim for the profits. The Defendant directors were ordered to pay over specific *sums*[68] of money (with interest) to the Plaintiff company, namely, they were ordered to pay specific *amounts* of money. No constructive trust was imposed in *Regal.* In *Regal* there was no improper(or, indeed, any) use of the company's (*i.e.,* the beneficiary's) property — just as there was no such use in *Cook* — nor was there any evidence that the directors still retained *in specie* the actual items of currency (or any traceable product thereof) from which their profits were reflected — just as there was no such evidence in *Cook.*

In *Boardman and Another* v. *Phipps*[69] (hereinafter *Boardman*), the Defendants were a solicitor to a trust which held a substantial minority of shares in a private company, and a beneficiary of the trust who was his co-adventurer and whose liability was, in the litigation, treated as identical to that of the Defendant solicitor.[70] The case was first tried by Wilberforce J.,[71] who found that the Defendants had purportedly acted for the trust by using the trust shareholding[72] (*i.e.,* they had *used* trust property without authority to do so) to extract information from the directors of the private company who otherwise would not have given them this information. The Defendants then used this information to obtain for themselves — without the consent of the beneficiaries[73] — a controlling shareholding in the company.[74] The Defendants subsequently used their control of the company to sell off certain of its assets, and were thus able to cause the company to make two capital distributions per share.[75] As majority shareholders, these capital distributions greatly

67 (1942) [1967] 2 A.C. 134 n.; [1942] 1 All E.R. 378.

68 Ibid, at pp. 152 and 391, respectively. Although Viscount Sankey had indicated, in an earlier part of his speech (at pp. 137 and 381, respectively), that the remedy lay in trust, his Lordship was *ultimately* to agree expressly (at pp. 140 and 383, respectively) with the *money* judgment proposed by Lord Russell of Killowen (at pp. 152 and 391, respectively). Thus, Viscount Sankey was ultimately *against* the imposition of a constructive trust.

69 [1967] 2 A.C. 46.

70 Ibid, at p. 94 (per Viscount Dilhorne); at p. 106 (per Lord Hodson); at p. 114 (per Lord Guest); and at p. 125 (per Lord Upjohn).

71 [1964] 1 L.W.R. 993.

72 Ibid, at p. 1008.

73 [1964] 1 W.L.R. 993, at pp. 1012-1013 and 1016-1017.

74 [1964] 1 W.L.R. 993, at p. 1004.

75 [1964] 1 W.L.R. 993, at pp. 1004-1005.

benefited the Defendants although, of course, the trust was also benefited to the extent of its minority shareholding. The shares retained a substantial residual value.[76]

The Plaintiff, who was one[77] of the beneficiaries of the trust, claimed that the shares acquired by the Defendants were held by them on constructive trust and that the Defendants were also liable to account for the profits made by them, and that consequently the Defendants should be ordered to transfer to the Plaintiff his proportion of the shares and to pay to the Plaintiff his proportion of the profits.[78]

Applying the *Keech* v. *Sandford* principle, Wilberforce J. upheld the Plaintiff's claims.[79] It is not uninstructive to note that, with one exception[80] (justified by special circumstances), the orders made by Wilberforce J.[81] were identical to those made in *Keech* v. *Sandford*[82] itself by Lord King L.C. It was stated in the judgment of Wilberforce J. that in the account for profits the defendants had to be indemnified against their expenditure[83] in acquiring their profits. This approach was inevitable as the profits could not be ascertained without considering the relevant expenditure. No doubt the order in *Keech* v. *Sandford* to account for profits would also have indemnified the trustee against his expenditure. Pending the taking of the account for profits, Wilberforce J. adjourned[84] the proceedings regarding the orders proposed by his Lordship to transfer the shares, and pay the profits, to the Plaintiff — just as the Defendant trustee in *Keech* v. *Sandford* was ordered to transfer the lease, and account for the profits, to the beneficiary. The dichotomy between the constructive trust and the account for profits in *Keech* v. *Sandford* was thus reproduced by Wilberforce J. in *Boardman*. The judgment of Wilberforce J. was unanimously upheld by the Court of Appeal[85] and, by a majority of three to two, in the House of Lords.[86]

In terms of remedies, an important distinction between *Regal* and *Boardman* was that in *Regal* the shares had been *sold*[87] by the fiduciaries whereas in *Boardman* they were still being held by the fiduciaries *in specie*. Hence, a constructive trust of the shares in *Boardman* was possible, but no such constructive trust of the shares in *Regal* was

76 [1964] 1 W.L.R. 993, at p. 1006.
77 [1964] 1 W.L.R. 993, at p. 995.
78 [1964] 1 W.L.R. 993, at p. 1005.
79 [1964] 1 W.L.R. 993, at pp. 1017-1018.
80 His Lordship directed that the Defendants be awarded an allowance on a liberal scale for the Defendant solicitor's skill and labour which produced the profits: [1964] 1 W.L.R. 993, at p. 1018.
81 [1964] 1 W.L.R. 993, at p. 1018.
82 (1726) Sel. Cas. T. King 61, at p. 62; 25 E.R. 223, at pp. 223-224.
83 [1964] 1 W.L.R. 993, at p. 1018.
84 Ibid.
85 [1965] 1 Ch. 992.
86 [1967] 2 A.C. 46. The majority comprised Lord Cohen, Lord Hodson and Lord Guest. The dissentients were Viscount Dilhorne and Lord Upjohn.
87 A similar situation to that in *Regal arose in Parker* v. *McKenna* (1874) 10 Ch. App. 96, where four of the directors of a joint stock bank had, in breach of their fiduciary duty, acquired shares in the company which they later *sold* at a *profit*. The Court of Appeal in Chancery ordered them to *account for the profits* that they had thus made.

feasible because any such purported trust in *Regal* would have lacked identifiable property to serve as subject-matter, as there was no evidence that the money improperly earned by the *Regal* directors was still identifiable either in its original or specifically substituted form.

A second point of distinction between *Regal* and *Boardman* was that whereas the directors in *Regal* did *not* use, and thus did *not* misuse, the property of their company to acquire their profits, the fiduciaries in *Boardman*, by contrast, *did* misuse trust property because they used their purported representation of the substantial minority shareholding (*i.e.*, trust property) to obtain for themselves information which enabled them to make their profits.

The remedies awarded by the High Court in *Furs Ltd.* v. *Tomkies and Others*[88] (hereinafter *Furs*) appear to support the line of reasoning in the authorities examined. In *Furs*, the Defendant managing director of the Plaintiff company was in charge of negotiating a sale of a branch of the company's business. In concluding the sale, the Defendant obtained for himself a benefit (without the Plaintiff's knowledge) which was part of the consideration for the Defendant's separate service contract with the purchaser company, which he was proposing to work for after leaving the Plaintiff. The High Court found that the Defendant had created an obvious and actual conflict between his duty to the Plaintiff and his private interest,[89] in that whilst acting for the Plaintiff company he had, by virtue of obtaining his secret benefit, 'greatly diminished the price obtainable by the company'.[90] The benefit received by the Defendant from the purchaser company comprised shares and promissory notes[91] payable over four years. It appears from the remedies claimed[92] by the Plaintiff, which the High Court granted,[93] that part of the money payable on the promissory notes had already been paid to the Defendant by the date of the commencement of the suit. Thus the Plaintiff claimed a *transfer* of the shares *and* of the promissory notes (*i.e.*, those not yet payable), as well as *payment* of the *money* already received on the past promissory notes. The remedial dichotomy of constructive trust (shares and promissory notes) and account of profits (money payment) was thus again reproduced. It is emphasised that in *Furs*, as in *Keech* v. *Sandford* and *Boardman*, but not in *Cook* and *Regal*, the Defendant fiduciary had in fact misused the beneficiary's (*i.e.*, the company's) property, in that, apart from using such knowledge as he was permitted to use, he had, in the negotiation of the sale, also used without authority '*secret information to which that company alone was entitled*'.[94]

Thus the constructive trust was only imposed in respect of the shares and promissory notes (*i.e.*, those not yet payable) because they had been

88 (1936) 54 C.L.R. 583.
89 Ibid, at p. 598.
90 Ibid.
91 (1936) 54 C.L.R. 583, at p. 594.
92 (1936) 54 C.L.R. 583, at p. 584.
93 (1936) 54 C.L.R. 583, at p. 600.
94 (1936) 54 C.L.R. 583, at pp. 597-598. Emphasis added.

obtained by misuse of the beneficiary's property *and* because they were still identifiable in the Defendant's hands *in specie*. But, in marked contrast, there was no constructive trust imposed in respect of the money actually received by the Defendant because, although that money was also obtained (through the payment of the promissory notes previously payable) by misuse of the beneficiary's property, such money was no longer identifiable *in specie* in the hands of the Defendant who, therefore, had to be ordered to pay an amount equal to the value of the money actually received by him.

In *Timber Engineering Co. Pty. Ltd. and Others* v. *Anderson and Others*[95] (hereinafter *Timber Engineering*) two of the five Defendants were respectively the manager and sales representative of the Plaintiff company. The two Defendants, together with their wives (also Defendants) successively[96] formed and controlled two companies (the fourth and fifth Defendants) which fraudulently[97] misused the resources (including the property) of the Plaintiff to promote their business to the crippling[98] detriment of the Plaintiff's business. The Defendants submitted that, in contradistinction to the imposition of a constructive trust in respect of the business of the two Defendant companies, there should only be a liability on the Defendants to account for the profits made by them.[99] In rejecting the contention that there was no additional liability of constructive trusteeship in respect of the business of the two Defendant companies, Kearney J. stressed two points. The first point was that the 'whole substance'[100] of the business in question 'stemmed from the resources'[101] of the Plaintiff which were 'utilized'[102] by the relevant Defendant company. The business of this Defendant company had been 'carved out'[103] of the business of the Plaintiff. The point made by Kearney J. was that the Defendants had *misused* the *property* of the Plaintiff to produce their business. The second point emphasized by Kearney J. was that the property in issue was *still identifiable*. His Honour said:[104]

> The business, as a trading enterprise, continued to subsist as *an identifiable item of property.*

In summary, his Honour's view was that property which was identifiable *and* which was derived from the misuse of another person's property should be held on constructive trust for the person whose property had been misused. This dual emphasis on the misuse of property and the

95 [1980] 2 N.S.W.L.R. 488.
96 The second Defendant company to be formed was designed to take over gradually the business of the first Defendant company to be formed, so that no distinction was drawn between them in terms of liability. See [1980] 2 N.S.W.L.R. 488, at p. 497.
97 Ibid, at p. 497.
98 [1980] 2 N.S.W.L.R. 488, at p. 496.
99 [1980] 2 N.S.W.L.R. 488, at pp. 494 and 497.
100 [1980] 2 N.S.W.L.R. 488, at p. 496.
101 Ibid.
102 Ibid.
103 Ibid.
104 [1980] 2 N.S.W.L.R. 488 at p. 498. Emphasis added.

identifiability of property derived from such misuse indicates that in *other situations* the fiduciary would only be liable to account for profits by way of money payments. In reaching his conclusion, Kearney J. relied[105] upon the view expressed by Upjohn J. in *In re Jarvis, Decd.*[106] that a constructive trust of the business was the appropriate remedy where the business had been simply '*reincarnated*'[107] from the Plaintiff's business and was still identifiable as such. *Timber Engineering* stands in stark contrast to *Cook* and *Regal* where the respective directors merely used their knowledge of an opportunity (*such* knowledge not being property) and the opportunity itself (again, not an item of property) to make profits for themselves, and such profits were no longer identifiable *in specie* in their hands.

In *Industrial Development Consultants Ltd.* v. *Cooley*,[108] Roskill J. ordered a managing director of a company to account to that company for profits made when the managing director had improperly diverted to himself (as had the directors in *Cook*) a contract in which his company was interested. The two Declarations[109] made by Roskill J. respectively referred, somewhat inconsistently, to the Defendant being a trustee of profits and being liable to account for such profits. However, the actual Order[110] made by his Lordship was for *payment* by the Defendant managing director of the *amounts* certified to be such profits, with interest. It is thus evident that Roskill J. did not impose a constructive trust, but only created a personal liability in the Defendant to account in terms of monetary payments from the general assets of the Defendant, and not from any particular fund of money. His Lordship's judgment is consistent with the view[111] that a fiduciary who has not misused property should not be liable as constructive trustee for profits made. The instant case is thus another illustration of the remedial approach taken in *Cook* and *Regal*.

In the light of the foregoing authorities, it is suggested that the *obiter dictum* in *Keith Henry and Co. Pty. Ltd.* v. *Stuart Walker and Co. Pty. Ltd.*[112] (hereinafter *Keith Henry*) which indicates that every fiduciary who misuses his position to make a personal gain must inflexibly be made a constructive trustee thereof is an oversimplification of the law.

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105 [1980] 2 N.S.W.L.R. 488, at pp. 498-499.
106 [1958] 1 W.L.R. 815.
107 [1958] 1 W.L.R. 815, at p. 820. Emphasis added.
108 [1972] 1 W.L.R. 443.
109 [1972] 1 W.L.R. 443, at p. 454.
110 Ibid.
111 This view is further supported by the *account of profits* ordered by the Full Court of the Supreme Court of Western Australia in *Green and Clara Pty. Ltd.* v. *Bestobell Industries Pty. Ltd.* [1982] W.A.R. 1.
112 (1958) 100 C.L.R. 342, at p. 350. Their Honours (Dixon C.J., McTiernan and Fullagar J.J.) said (ibid, omitting citation for *Keech* v. *Sandford*):
'The doctrine of *Keech* v. *Sandford* is shortly stated by saying that a trustee must not use his position as trustee to make a gain for himself: any property acquired, or profit made, by him in breach of this rule is held by him in trust for his *cestui que trust*. The rule is not confined to cases of express trusts. It applies to all cases in which one person stands in a fiduciary relation to another: . . .'

The remedial approach in *Keech* v. *Sandford* has again been followed by the High Court in *Chan* v. *Zacharia*[113] (hereinafter *Zacharia*). In this case the Plaintiff and the Defendant were partners in a medical practice. After the dissolution of the partnership, but before distribution of the partnership assets, the Defendant, without the consent of the Plaintiff, obtained for himself an informal (but written) *agreement*[114] to be granted a lease of the partnership premises upon the expiry of the partnership's lease thereof. The formal agreement for the lease was awaiting[115] execution by the lessor when the Plaintiff brought his suit. The High Court[116] held that the Defendant had misused partnership property (*i.e.*, the partnership lease) and had also breached his fiduciary duty as a former partner, and that any interest he obtained under the (informal) agreement for the new lease would be held by him as constructive trustee for the partnership.[117] Because the formal lease had not yet been executed, the Defendant had not yet made any profits therefrom, and so the constructive trust was appropriately imposed on the future (formal) lease and any future profits thereof. On the facts, a separate order to account for the (current) profits of the future lease would have lacked subject-matter, and thus no such separate order was made. In *Zacharia*, the constructive trust was apt because the fiduciary had misused partnership property *and* the product of that misuse was identifiable *in specie* — that product being the informal (but written and thus enforceable) agreement of lease creating an equitable estate in land.

On the aspect of remedies, it is now proposed to return to *Hospital Products*. In that case, the majority of the High Court held that there was no equitable[118] remedy (as distinct from damages for breach of contract) available to the Plaintiff. However, a minority[119] of the High Court, the Court of Appeal[120] of New South Wales (unanimously in a joint judgment) as well as the primary judge[121] (McLelland J.) did support the view (which, of course, was ultimately rejected) that the Plaintiff was entitled to relief in equity as an alternative to damages for breach of contract.

McLelland J. did not impose a constructive trust, but only ordered an account of profits (reinforced by a lien), because his Honour thought that a constructive trust should only be imposed where the fiduciary's gain was one which he was under a duty to pursue for his beneficiary.[122] His Honour said:[123]

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113 (1984) 53 A.L.R. 417.
114 Ibid, at p. 427.
115 Ibid.
116 Gibbs C.J., Brennan, Deane and Dawson J.J.; Murphy J. dissenting.
117 (1984) 53 A.L.R. 417: at p. 421 (per Gibbs C.J.); at p. 423 (per Brennan J.); at p. 438 (per Deane J.); and at p. 439 (per Dawson J.).
118 (1984) 58 A.L.J.R. 587: per Gibbs C.J. (at p. 598); per Wilson J. (at p. 618); and per Dawson J. (at p. 631).
119 (1984) 58 A.L.J.R. 587: per Mason J. (at p. 617); and per Deane J. (at p. 621).
120 [1983] 2 N.S.W.L.R. 157, at p. 267.
121 [1982] 2 N.S.W.L.R. 766, at p. 821.
122 [1982] 2 N.S.W.L.R. 766, at pp. 813-815.
123 Ibid, at p. 813. Emphasis added.

> ... the *critical* matter is that the property to which the constructive trust attaches should be property the obtaining or pursuing of which was or ought to have been in all the circumstances *an incident of the relevant fiduciary duty* (regardless of whether in fact it could have been obtained for the benefit of the beneficiary).

McLelland J. then took the view that the Defendant's gain in the present case was not one which it had a duty to pursue for the benefit of the Plaintiff, and on this remarkable ground[124] held that a constructive trust was not appropriate. With respect, his Honour's proposition would exclude the constructive trust in a situation where the fiduciary has misused the beneficiary's property to acquire an asset which he was under no duty to obtain for the beneficiary. His Honour's proposition would have *precluded* the constructive trusts which were in fact imposed in *Boardman*,[125] *Furs*[126] and *Zacharia*,[127] for in none of these cases had the fiduciary been under any duty to obtain for the beneficiary what was in fact obtained — albeit improperly — by the fiduciary.

The Court of Appeal imposed a constructive trust on the improperly derived business of the Defendant. It is suggested that, *if* the Court of Appeal had been upheld in its conclusion that there was a fiduciary relationship between the parties (which did *not happen*) then that Court would have been justified in imposing the constructive trust.[128] The Defendant had misused the Plaintiff's property to produce its own business[129] which was also identifiable.

In the High Court, Mason J. rejected McLelland J.'s reason for not imposing a constructive trust. Mason J. said:[130]

> Neither principle nor authority provide [*sic*] any support for the proposition that relief by way of constructive trust is available only in the case where a profit or benefit obtained by the fiduciary was one which it was an incident of his duty to obtain for the person to whom he owed the fiduciary duty.

It is respectfully suggested that, on this point, Mason J. was correct. However, it is respectfully suggested that Mason J. was inaccurate when, following the *obiter dictum* in *Keith Henry*,[131] his Honour endorsed the very broad view[132] that any benefit obtained by a fiduciary in breach of his duty was to be held by him on constructive trust for the person to whom such a duty was owed.[133] His Honour also appears to be in error in suggesting[134] that in *Regal* the remedy awarded was a construc-

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124 [1982] 2 N.S.W.L.R. 766, at p. 814.
125 [1964] 1 W.L.R. 993. Successively affirmed in [1965] 1 Ch. 992 and [1967] 2 A.C. 46.
126 (1936) 54 C.L.R. 583.
127 (1984) 53 A.L.R. 417.
128 [1983] 2 N.S.W.L.R. 157, at pp. 266-267.
129 [1983] 2 N.S.W.L.R. 157, at p. 209.
130 (1984) 58 A.L.J.R. 587, at p. 613.
131 (1958) 100 C.L.R. 342, at p. 350.
132 (1984) 58 A.L.J.R. 587, at pp. 613-614.
133 Of course, this is not to suggest that, *independently* of Mason J.'s excessively broad proposition, the particular circumstances in *Hospital Products*, *if* there had been (as there was *not*) a fiduciary relationship between the parties, would not have justified the imposition of a constructive trust.
134 (1984) 58 A.L.J.R. 587, at p. 613.

tive trust — as distinct from a mere monetary liability which the order proposed by Lord Russell of Killowen[135] (concurred in by, *inter alia,* Viscount Sankel[136]) so obviously directed. Finally, Mason J., somewhat inconsistently with his own view that some form of constructive trust should always be imposed on the fiduciary's gain (pursuant to the *obiter dictum* in *Keith Henry*), made it clear that he would *restore*[138] the orders made by McLelland J., notwithstanding the fact that the latter had specifically rejected[139] the appropriateness of the constructive trust to the circumstances of the case.

Although Deane J. rejected the existence of any fiduciary relationship between the parties, his Honour expressed agreement with the orders proposed by Mason J. and also, inconsistently with this agreement, held that there was a constructive trust.[140] Thus Deane J. was in favour of granting 'equitable relief',[141] but, having rejected the existence of any fiduciary relationship between the parties as a basis for that relief, declined to identify any equitable principle on which the equitable relief he favoured was to be based, on the grounds that his judgment was a dissenting one and that the point his Honour had in mind had not been argued in the proceedings.

Conclusion

On the issue of the identification of fiduciaries, the decision of the High Court in *Hospital Products* means that it is necessary, but not sufficient, for the creation of a fiduciary relationship for one party to act solely in the interests of another in the performance of a specific task or specific tasks. The undertaking so to act must, *additionally,* be given (whether contractually or otherwise) in a situation which is such that, apart from the imposition of fiduciary duty, the recipient of the undertaking would be without adequate legal redress because of his implicit dependency upon the conduct of the person giving that undertaking.

On the issue of remedies, where a fiduciary makes an improper gain otherwise than in improperly transacting with his beneficiary, a constructive trust for the beneficiary should only be imposed on that gain where the gain is the product of the misuse of the beneficiary's property, *and* is identifiable *in specie* in its original or converted form in the hands of the fiduciary. Where these two conditions are not both satisfied the remedy against the fiduciary should be a liability to repay to the beneficiary the monetary *value* (*i.e.,* the monetary *equivalent*) of his improper gain.

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135 See n. 68.

136 See n. 68.

137 See n. 131.

138 (1984) 58 A.L.J.R. 587, at p. 617.

139 [1982] 2 N.S.W.L.R. 766, at pp. 814 and 821.

140 [1984] 58 A.L.J.R. 587, at pp. 620-621.

141 Ibid, at p. 620.

This issue of the appropriate remedy is critically important in two respects. Firstly, the imposition of a constructive trust on an item of property relieves the beneficiary of the need to prove exactly the monetary value of the fiduciary's gain for the purpose of receiving a money payment. No exact calculation is required in the case of a constructive trust imposed on an item of property because the property itself and all its derivative profits belong to the beneficiary as his property. Secondly, where the peccant fiduciary becomes bankrupt a constructive trust protects[143] the beneficiary from the consequences of the fiduciary's bankruptcy, whereas a mere liability on the fiduciary to pay the beneficiary the monetary equivalent of the improper gain would place the beneficiary among the ranks of the fiduciary's unsecured creditors[144] to obtain for himself, in competition with those creditors, a mere proportion of the monetary equivalent of that gain.

143 *Bankruptcy Act* 1966 (Cth.), s. 116 (2) (a). See *Re Goode* (1974) 24 F.L.R. 61.

144 *Bankruptcy Act* 1966 (Cth.), s. 116 (1).