Practical Justice and Appropriate Relief: Grimaldi v Chameleon Mining NL (No 2)

NYUK YIN NAHAN NEE CHIN*

The Full Federal Court decision in *Grimaldi v Chameleon Mining NL (No 2*)[1] is a sumptuous case for teachers and students of fiduciary law. Its facts give rise to the whole range of issues associated with breaches of fiduciary obligations.This note considers the question of 'appropriate' relief in the pursuit of 'practical justice' which is reviewed at length in the case by the Federal Court. There is apparently 'a level of predictability to the award of remedy in routine cases' obtained from the 'mixture of learning, intuition and experience' in light of the 'purpose of a doctrine.'[2] Although there are no rights to particular remedies, it is 'the case that, in many instances and for many types of equitable wrong, the remedy that is the most appropriate will self-select absent unusual circumstances.'[3]

FACTS

At the heart of the case was the acquisition of mining tenements in Western Australia (Iron Jacks) by Murchison Metals Ltd (Murchison) through Crosslands Resources Ltd, previously, Winterfall Pty Ltd (Winterfall).[4] Winterfall had an agreement with the vendors of Iron Jacks to buy mining tenements for $1 million to be paid in instalments and royalties for ore extracted. Winterfall was unable to meet the second instalment of the purchase price. Murchison agreed to provide $350,000 towards the second instalment and Winterfall was to effect a reverse take-over by Murchison. Both Murchison and Winterfall were strapped for funds to meet their respective commitments. Grimaldi was a director and the 'controlling mind' of Murchison.[5] Barnes was a director of Chameleon and Grimaldi, a de facto one.[6] They were to receive a spotter's fee if Iron Jacks was acquired. Barnes

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* Associate Professor, Faculty of Law, UWA

1 [2012] FCAFC 6 (Finn, Stone and Perram JJ), *Grimaldi*.

2 Ibid [503].

3 Ibid [503].

4 Annexure 1 to the decision tables the name changes of all the main corporate players.

5 Ibid [503]

6 Ibid [141]–[143]. Grimaldi was also an officer for the purposes of the *Corporations Act 2001 Cth.*

and Grimaldi procured the issue of Chameleon's shares to raise capital for the stated purpose of acquiring gold tenements. Of these shares, five million were issued to Murchison. They were in effect a commission payable to Grimaldi or at his direction, without consideration, and without Chameleon's informed consent. The shares issued to Murchison were sold by Grimaldi to provide the funds that Murchison had committed to provide for Winterfall's purchase of Iron Jacks. Additionally, Barnes drew cheques on Chameleon payable to Iron Jacks' vendor, thereby contributing to Murchison's commitment to Winterfall. This was a dishonest diversion of funds ostensibly raised for Chameleon's purposes, to Murchison for Murchison's benefit and for Barnes' and Grimaldi's personal gain, namely, their expectation of obtaining a spotters' fee should Winterfall acquire Iron Jacks. Winterfall used the moneys from the shares and the cheques together with other monies to buy Iron Jacks. The reverse takeover was subsequently effected and 10 million Murchison shares and 12 million options were allotted to Barnes and Grimaldi in exchange for the Winterfall shares allotted to them as their spotters' fee. At the time of the trial, Iron Jacks was estimated to be worth $1 billion. Chameleon derived no benefit throughout.

On appeal, Chameleon's claim[7] was, in effect, to entitlement to an interest in the Iron Jacks Project itself. Specifically, the appeal was against the trial judge's refusal to grant a constructive or resulting trust for a proportionate interest in the Iron Jacks Tenements, and proprietary relief against Murchison in respect of its shares in Winterfall.

Liability of Grimaldi, Barnes[8], Murchison and Winterfall

Grimaldi was found to be a fiduciary to Chameleon[9] who breached his fiduciary duties and statutory duties under the Corporations Act.[10] Grimaldi and Barnes acted 'in concert', misusing their fiduciary positions to misapply Chameleon's cheques. They also had an undisclosed interest in the 'hoped-for possible benefit' of deriving the spotters' fee in conflict with their fiduciary duties to Chameleon.[11] Their conduct offended both the 'conflicts rule' and the 'secret profits rule'. They were jointly and severally liable with Barnes's nominee, Pinnacle, for the spotter's fee in the form of Winterfall shares and hence the Murchison shares, received as a distinct benefit in breach, without Chameleon's consent. Grimaldi was also liable to account for Chameleon's shares, issued without consent to Murchison and which in reality was a secret commission to him.

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7 Ibid [461]. The Winterfall-Iron Jacks agreement provided for cash, shares in Murchison and royalty from the tenements. The trial judge was of the view that the royalty stream was irrelevant to the relief sought by Chameleon and there was no appeal against it.

8 The claims against Barnes were settled without admission of liability.

9 For 'certain purposes, see *Grimaldi*, above n 1, [8].

10 Ibid. *Corporations Act* ss 181 and 182 were contavened.

11 Ibid [606]

Murchison was personally liable under both limbs of the rule in *Barnes v Addy*;[12] having knowingly received (i) Chameleon's cheques which 'in form passed through' Murchison and then used by Winterfall as part of a mixed fund to pay for Iron Jacks; and (ii) Chameleon shares which were sold and the proceeds used to help fund Winterfall's purchase of Iron Jacks. Murchison was imputed with Grimaldi's and Barnes's actual knowledge and found to have also knowingly assisted Grimaldi's and Barnes's breaches of fiduciary duties.[13] Its liability to restore by way of equitable compensation was no less tha Grimaldi's.

However, the court found that Murchison did not acquire an asset into which Chameleon's cheques could be traced but instead had become a co-adventurer with Winterfall.

Winterfall was personally liable to account for knowing receipt of Chameleon's cheques. Its director's knowledge[14] which 'straddled' categories (ii), (iii) and (iv) on the Baden scale was imputed to Winterfall.

Deterrence: blurring the differentiation

A fiduciary's liability is strict while a third party's personal liability under the rule in *Barnes v Addy* is fault-based requiring 'want of probity'.[15] The justification appears to be that the deterrent purpose of fiduciary law is less relevant to a more remote party who, by reason of that remoteness, should not be subject to the same scrutiny as a fiduciary. This differentiated deterrence is reflected ordinarily in the several liabilities of the parties. Thus a knowing recipient's liability to pay equitable compensation for the principal's asset which is no longer returnable in original or substituted form appears to be several only.[16] Fiduciaries and third parties are similarly severally liable for the profits and benefits each actually makes and the losses each inflicts.[17]However, the differentiation is blurred whenever the fiduciary and the third party are jointly and severally liable as when (i) the third party is the alter ego, 'vehicle' or nominee of the fiduciary,[18] and (ii) the third party acts 'in concert' with the fiduciary to obtain a mutual advantage.[19] This in turn

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12 (1874) LR 9 Ch App 244.

13 It was also liable for aiding and abetting B's contraventions of ss 181 and 182 of the Corporations Act 2001.

14 Zuks, the director of Winterfall knew that B was a director of Chameleon and Grimaldi of Murchison, and that B was in a conflict of duty and interest arising from the arrangement for the spotters' fee. See *Grimaldi,* above n 1, [22]

15 Ibid [392]. There was no finding of dishonesty or fraud.

16 Ibid [559]. The issue did not arise for determination.

17 Ibid [557].

18 Ibid [556] citing *Green & Clara Pty Ltd v Bestobell Industries Pty Ltd (No 2)* [1984] WAR 32; *Gencor ACP Ltd v Dalby* [2000]2 BCLC 734.

19 Ibid [558]. Joint and several liabilities between fiduciaries for profits made by one and enjoyed by the others can also arise. Thus If a partner obtains a secret profit from a dealing involving the partnership, and the profit is shared with the other partners who are aware of the dealing, all the partners are jointly and severally liable to account for the profit: *Imperial Mercantile Credit Association v Coleman* (18) LR 6 HL 189, discussed at ibid [534].

raises the question whether the liability of these third parties is properly described as arising under the 'rule' in *Barnes v Addy*.[20]

Choosing between personal and proprietary remedies: 'learning, intuition and experience'

The manner of breach determines the range of remedies, from which the most appropriate is chosen. Thus, the misappropriation of trust property potentially leads to a larger menu of remedies than, for example, a conflict of interest that causes loss to the principal.[21] Personal remedies are more self-selecting and considerations of 'appropriateness' more relevant to the choice between personal and proprietary relief.

There are several considerations: some are legal and others, policy-driven. Most are uncontentious but some are less so, at least in the way they are explained in the case.

Where rescission may be a prerequisite

In *Grimaldi*, the court agreed that the money in the cheques advanced was not a loan.[22] The nature of loans was considered in *Greater Pacific Investments Pty Ltd (in liq) v Australian National Industries Ltd*[23] where it was said that, in light of the decision in *Daly v Sydney Stock Exchange Ltd*,[24] loans and, by an extension of it, 'advancements', have to be rescinded before there could be a *grant of a proprietary remedy*. In *Grimaldi* itself, the court was content to reject Chameleon's claim that it was entitled *as a matter of right* to a constructive trust over the cheque money.[25] Even though it did not address the issue, the court indicated that rescission 'had little to do with the question whether... that person should be entitled to a constructive trust over the property in question'.[26] It is submitted that this is correct.

Daly v Sydney Stock Exchange Ltd[27] is not authority for the view that a loan must be rescinded before proprietary relief can be granted. In that case, Daly sought investment advice from a firm of stockbrokers which, in breach of its fiduciary duty, advised him to lend the money to the firm. The firm ceased to trade and was unable to repay the loan. Mrs Daly, to whom the debt was assigned, sought to recover compensation from the fidelity fund established under statute for the 'defalcation' committed by the fiduciary. Brennan J explained that the loan to the delinquent fiduciary could have been rescinded and Mrs Daly's rights 'might have

20 *Barnes,* above n 10. The Federal Court in *Grimaldi* touched on this question with respect to the corporate alter ego [243].

21 *Grimaldi,* above n 1, [513].

22 Ibid [273].

23 (1996) 39 NSWLR 145, 153E-154.

24 [1985–1986] 160 CLR 371.

25 *Grimaldi*, above n 1, [668].

26 Ibid [281].

27 [1985-1986] 160 CLR 371.

been determined *as though* the firm had from the beginning held the money lent on a constructive trust for' her.[28] In other words the fiduciary had an imperfect equitable title that could be divested by relation back had the loan been avoided.[29] The equitable interest arose before and independently of the court's decree. The loan not having been rescinded, there was no defalcation as one cannot commit a defalcation with one's own money. Additionally, the High Court refused to grant proprietary relief by imposing a constructive trust because it would have been excessive and unnecessary to prevent the unjust enrichment of the borrower. As *Grimaldi* puts it, to impose a constructive trust by way of relief on the money lent was to transform the loan into a trust. [30]

The two strands in Daly's reasoning should not be confused. Generally, a lender who seeks to recover the money lent, in its traceable substitute, on the strength of his property, needs to rescind the loan. This is because the transfer of money, as currency, uniquely passes legal title to a transferee in good faith. Unless the loan is rescinded, it cannot be recovered in property as there is no proprietary base to follow or trace it. Restitutio in integrum does not require the counter-restitution of money in kind upon rescission and for that reason, rescission is always possible in the absence of other barriers. But why would failure to rescind prevent the grant of proprietary relief? Conversely, why would proprietary relief be necessary where a loan is rescinded and the lender has an equitable interest by relation back and a constructive trust is a consequence of rescission? If the money is dissipated and there is no traceable substitute, the impediment to the imposition of a constructive trust is the absence of an asset over which the trust can attach.

Innocent third parties' interests and expectations

The High Court has repeatedly stressed the need to be mindful of the impact of proprietary relief on interests, expectations and rights of innocent third parties.[31] The scales seem to have tipped in favour of protecting these interests and expectations. *Grimaldi* reaffirms that a constructive trust ought not to be imposed at the expense of innocent third parties even if the principal has otherwise no 'useful remedy' against the fiduciary. [32]This must be equally true in the case of a third party's personal, fault-based liability for which, according to *Warman International Ltd v Dwyer*,[33] a proprietary remedy may be granted.
In *Grimaldi*, not all the shares given to Grimaldi and Barnes by way of the spotter's fee were held by Grimaldi and Barnes in their own right. Some had been directed by the nominee, Pinnacle, to others. In the circumstances, Grimaldi

28 Ibid 390 (emphasis in the original).
29 Ibid.
30 *Grimaldi*, above n 1, [580].
31 Not just those of innocent unsecured creditors: [510]. See too, *Giumelli v Giumelli* (1999) 196 CLR 101; *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 LR 1.
32 *Grimaldi*, above n 1, [508].
33 (1995) 182 CLR 544.

was ordered to hold on a constructive trust only the shares he received. He was personally liable to account for the value of or profits derived from the rest of the shares.[34]

An adequate personal remedy

Where a personal remedy is adequate, the imposition of a constructive trust would be an excessive response unless justified on other grounds.[35] Indeed the High Court has said in *Giumelli v Giumelli* that the imposition of a constructive trust,

even if not injurious to the interests of third parties, ought to be a last resort.[36]

This is, prima facie, inconsistent with Mason J's view in *Hospital Products Ltd v United States Surgical Corp*[37] that a delinquent fiduciary who has obtained benefits from his breach 'must account for it and in equity the appropriate remedy is by means of a constructive trust'.[38] In embracing both views, *Grimaldi* calls the latter a 'presumptive rule'. This is unhelpful because (i) the label casts no light on why, in the first instance, the personal remedy of an account of profits entails proprietary relief where an asset is acquired, and (ii) it does not reconcile the two views as to when it is appropriate to grant a constructive trust.

The so-called 'presumptive rule' apparently does not have a counterpart in cases of knowing assistance even though it is 'ordinarily' the appropriate response against a knowing recipient.[39] Two observations may be made. First, where a third party assistor is jointly and severally liable with the fiduciary, the 'presumptive rule' is, effectively, equally applicable to the knowing assistor. Second, it is an overstatement to say that 'ordinarily' the imposition of a constructive trust is the appropriate remedy against a knowing recipient of another's property. This is because where the knowing recipient has to return the property in its original form or its traceable substitute, it may be simply a matter of vindication; its return is not dependent on the imposition of a constructive trust. However, where personal property is concerned the grant of a constructive trust may secure the return of the asset in specie.

Changing constitutions of artificial legal persons

Changes in the governance and capital base of companies have a mitigating influence on the choice between personal and proprietary relief.

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34 The trial judge's reference to G's liability as 'accessorial' was an 'immaterial error' according to the Federal Court: see *Grimaldi,* above n 1, [613.] G was also liable to compensate Chameleon under s1317H of the Corporations Act for the amount of profits obtained resulting from his contravention of ss181 and 182 of the Corporations Act: [19]

35 See below: 'Inducements received for breach of duty'.

36 *Giumelli,* above n 31, [10]

37 (1984) 156 CLR 41.

38 Ibid [108]

39 *Grimaldi*, above n 1,[510].

The state of mind or knowledge of a corporate third party can change. After all, directors do come and go. Indeed, in *Grimaldi*, Grimaldi was made to resign after the reverse takeover and the new directors of Murchison were found to have had a different, less damning state of mind after Murchison's involvement in Grimaldi's and Barnes's breaches of fiduciary duty. They were 'not knowingly' seeking to derive the most from the wrongdoing of which they were put on notice by Chameleon's letter.[40] This change in the state of mind or knowledge after liability arises is relevant to the question of appropriate relief. Similarly, changes in the 'capital base' of corporate third parties are important considerations.

What weight such constitutional changes have must depend on the circumstances. It is significant that they are relevant because of concerns for the interests and expectations of innocent parties. In *Grimaldi,* the court was particularly mindful that Murchison and Winterfall had become rather different companies. The tenements were originally mere applications for licences to explore under the *Mining Act 1978* (WA). Some had come to nothing while others had led to a major enterprise. Some of the complexities involved in the companies' growth included a significant capital injection by a third party at arms' length, new placements of shares, volatile share prices, and major risks inherent in and typical of high-risk speculative mining ventures. In the circumstances, the court concluded that it would be punitive to impose a constructive trust on a proportionate interest in the mining tenements.[41]

The kind of benefits made in consequence of the breach

The kind of benefits attained by the fiduciary or third party is an important consideration in the choice between a personal or proprietary remedy. A distinction has already been made between an asset and a business acquired for an account of profits.[42] Experience shows that a business is often more complicated and likely to require sensitive adjustments for complex interests and relationships.

In *Grimaldi* itself, the court found that the objects of the dealings between Murchison and Winterfall and the terms of the Winterfall-Iron Jacks agreement show that Murchison was not acquiring an asset but a contingent right to have Winterfall's shareholders swap shares with Murchison with a view to becoming co-adventurers in a highly speculative venture.[43] Huge expenses had also been incurred in exploration, on feasibility studies, the development and working of the Iron Jacks Project from tenements. The court heeded the caution in *Warman International Ltd v Dwyer* and was disinclined to thrust the parties into a continuing relationship when it is 'clear there is not confidence or comity between them.'[44]

40 Ibid [487]
41 Ibid [672]–[681]
42 Eg, "*Warman International Ltd v Dwyer* (1995) 182 CLR 544".
43 *Grimaldi,* above n 1, [448], [452]–[457].
44 Ibid [510].

Inducements received for breach of duty

Bribes and secret commissions attract very particular disapprobation. In *Furs Ltd v Tomkies*, Rich, Dixon and Evatt JJ explained that what matters is not the 'precise complexion of the payment but the circumstances in which it is derived'.[45] *Attorney-General for Hong Kong v Reid*[46] is preferred over *Lister v Stubbs*[47] but the constructive trust is to be imposed remedially. The obiter dictum[48] reserves in the court the discretion and ability to resort to the less intrusive lien if and as warranted by particular circumstances. It is a sensible response to a policy-driven issue.[49] In *Grimaldi*, the spotter's fee paid to Grimaldi and Barnes was not a bribe or secret commission offered to induce the cheque transaction or an incident of it. It was agreed to, separately, in a dealing between Murchison and Waterfall before the matter of the advancement surfaced.[50]

Taking an account of profits: the practical justice of deterrence and unjust enrichment

Ordinarily, a delinquent fiduciary or a third party has to account for what is actually received in breach of duty. More precisely, the court is concerned with the 'true measure' of his profits obtained in breach.[51] A corollary of this is that an account of profits can be continuing, for a limited period or at the date of judgment.[52] Appropriate adjustments for the inputs of persons not involved in the breach or breaches in question, whether of capital, skill, time or exertion, are uncontroversial. Even attributions to and adjustments for the inputs of the delinquent fiduciary and third party recipients and assistors, while not a matter of right, reflect the non-punitive purpose of fiduciary law. The apportionment of profits is, as a rule, not done in the absence of an antecedent arrangement for profit sharing.[53] The necessary restraint is reflected in the High Court's caution that an account of profits over a business and its profits should not become the 'vehicle' of unjust enrichment.[54] In the 2007 edition of Goff's and Jones', *The*

45 (1936) 54 CLR 583, 597. See *Grimaldi's* review, above n 1, [190]–[194].

46 [1994] 1 All ER 1, reflecting the law in Singapore, Canada and some United States jurisdictions.

47 (1890) 45 Ch D 1; followed in *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd (In administration)* [2011] 3 WLR 1153, *Cadogan Petroleum Plc v Tolley* [2011] EWHC 2286 (ch).

48 Cf *Norilya Minerals v Commissioner of State Taxation (WA)* (1995) 16 WAR 266 and *Western Areas Exploration v Streeter (No 3)* (2009) 234 FLR 265 which followed *Attorney General of Hong Kong v Reid*. The latter was reversed on the basis of laches without a consideration of the case.

49 'Bribery at its most naked breeds the crudest form of fiduciary infidelity. To privilege the dishonest fiduciary [by withholding proprietary relief] is to create an incentive which should not be tolerated', *Grimaldi* above n 1, [576]

50 Ibid [604]

51 Ibid [514], [533].

52 Ibid [546].

53 *Warman*, above n 33, 562. Even where mixed funds are used for a business, the apportionment of profits depends on the circumstances: *Grimaldi*, above n 1 [526].

54 Ibid 561.

Law of Restitution, Gareth Jones observed that, the delinquent fiduciary having no restitutionary claim, it must be that, implicitly, an account of profits is intended to prevent unjust enrichment of the fiduciary.[55]

The orthodoxy is that neither a fiduciary's state of mind or propriety is relevant to the availability of an account of profits. *Grimaldi* suggests that an improvement in a corporate third party recipient's or assistor's state of mind or knowledge or motivation, after liability has been established, in pursuing the profits or benefits may be relevant to the grant of relief. It would, foreseeably, be relevant to the apportionment of profits or the determination of appropriate allowances for the inputs, but only as one of many considerations in the mix. Thus, it may not be amenable to further refinement as it seems more related to intuitive response than learning or experience.

Tracing

Tracing has a key role as it is neither claim nor remedy. *Grimaldi* embraces tracing as explained in *Foskett v McKeown*[56] but considers the tracing of corporate property rather more complicated. According to *Belmont Finance Corp v Williams Furniture Ltd (No 2),*[57] a limited company is the beneficial owner of its own funds and its director 'is treated as if' he were a trustee of the company's funds in his control and he commits a breach of trust when he misapplies it. A recipient of the company's funds, with knowledge of the director's breach of fiduciary duty, cannot conscientiously retain it. He 'becomes a constructive trustee' for the company of its funds.[58]

However, in *City Evans v European Bank Ltd,*[59] it was said that the recipient is 'turn[ed] into a constructive trustee' *by that knowledge* and "*thus give the company its proprietary base justifying both following its property into the recipient's hand and tracing into its substitutes…*" The constructive trusteeship envisaged here is what Lord Selbourne in *Barnes v Addy* described as that of a person who receives and becomes chargeable with the 'trust property.[60]

Grimaldi, does not question the foregoing. Instead it brings it to the following focal point: if a 'proprietary base sufficient to justify following and tracing corporate property turns critically on the court imposing a constructive trust on the property received then the fundamental question becomes whether the court has any discretion not to do so.'[61] It concludes that it did on 'binding authority' and 'proper principle'.

55 7th ed (London, Sweet & Maxwell), at 725, footnote 49.
56 [2001] 1 AC 102.
57 [1980] 1 All ER 393, 405 (Buckley J).
58 Ibid.
59 (2004) 61 NSWLR 75, [159-160]
60 *Grimaldi,* above n 1, [564] (emphasis added). Cf the better explanation at [700].
61 Ibid [566]–[567]

The need to impose a constructive trust for tracing is baffling. If, according to *Belmont Finance Corp v Williams Furniture Ltd (No 2)*, a corporate principal is the beneficial owner, it has antecedent property to recover its property misapplied by its fiduciary or its traceable substitute in the hands of a knowing recipient. Unless the recipient is minded to defeat the claimant's title, there is no issue of his notice/knowledge. The proprietary base needed for tracing is in existence from the outset and recovery in property does not depend on the knowing recipient being a 'constructive trustee'. If at all, any constructive trusteeship may only indicate personal obligations that the law imposes on him for the property in question and where personal property is concerned, facilitate its return in specie. Besides, it must be considered settled that liability under the two limbs of the rule in *Barnes v Addy* is personal in spite of the language of constructive trusteeship.

Happily, the actual claims by Chameleon were addressed without the need to be embroiled in the foregoing. On the first claim in property, the court agreed that neither Chameleon's cheques nor its misapplied shares could be traced into the shares acquired by Murchison after the reverse take-over. Murchison had a right to bid for Winterfall's shares, not a contractual right to them. Neither cheques nor shares were used by Murchison to acquire Winterfall's shares.

On the second claim to the shares that Murchison acquired in the reverse take-over, as profits from the misused cheques and shares, the issue arises as to how benefits and profits are to be characterised. The court found there was no sufficient connection between Murchison's breaches and the acquisition of Winterfall's shares in the reverse takeover. The benefit Murchison received was that 'of the investment of the fund as a pool of working capital, comprising debt and equity.'[62] On the other hand, there was sufficient connection between Winterfall's wrong and its acquisition of Iron Jacks and the benefits received were the ownership in the tenements and attendant rights.[63]

Conclusion

According to *Grimaldi*, equitable relief must serve the purpose of each individual doctrine and it is predictable in unexceptional circumstances. The aim of fiduciary law is deterrence, not punishment. From a remedial point of view, that signature deterrence is tempered with concerns for unjust enrichment *inter partes* and concerns for the interests and expectations of other innocent parties more removed than the litigants.

In *Grimaldi* we see the concerns in the mix of learning, intuition and experience. Lord Nicholls once said, pithily, that a right is only as valuable as the remedies.[64] For the average plaintiff this must be a universal truth which provides the most pressing practical reason to heed the range of considerations reviewed in *Grimaldi*

62 Ibid [725].

63 Ibid [726].

64 In the 'Forward' of A Burrows and E Peel (eds*), Commercial Remedies: Current Issues and Problems*, (Oxford Univeristy Press, 2003).

v Chameleon Mining NL (No 2). This is especially so when, after *Grimaldi v Chameleon Mining NL (No 2*), we are no wiser on a guiding principle for the imposition of a remedial constructive trust in breaches of fiduciary duty.[65]

65 As urged by Deane J in *Muschinski v Dodds* (1985) 160 CLR 583.