Court of Appeal
Supreme Court
New South Wales

Case Name:	**Murdoch v Mudgee Dolomite & Lime Pty Ltd (in liq)**
Medium Neutral Citation:	[2022] NSWCA 12
Hearing Date(s):	15, 16 November 2021
Date of Decision:	16 February 2022
Before:	Macfarlan JA at [1]; Gleeson JA at [2]; Leeming JA at [3].
Decision:	1. Appeal allowed in part. 2. Vary order 6 made on 24 November 2020 by inserting the words "until 31 October 2011" after the words "at the Cadia mine", so that the order reads in full "6. Declare that, at the election of the Company, by its liquidators, the Company is entitled as against RK Murdoch Pty Limited (RKM) and Tilecote Farm Pty Limited (previously known as Bright Pear Pty Limited) (BPPL) to: "(a) an account of the profits earned by RKM and BPPL from the work done by those companies at the Cadia mine until 31 October 2011, as that term is used in the judgment dated 28 October 2020 (Cadia Work); or (b) compensation for any loss by reason of the Cadia Work." 3. Set aside order 10 made on 24 November 2020. 4. MDL to pay 50% of the appellants' costs of the appeal. 5. Direct the parties to file and serve agreed short minutes of order, or in lieu of agreement, minutes of the orders each proposes and short submissions in support, not exceeding 5 pages, in respect of (a) the quantification of the profit derived by RKM and Bright

Pear at the Cadia mine until 31 October 2011, (b) the form of the order concerning the profits derived by RKM and Bright Pear and (c) the order which should be made as to the costs in the Equity Division, within 14 days of today, with a view to any dispute being resolved on the papers.

6. Grant leave to MDL to file a cross-appeal, confined to grounds 1-8 of the draft cross-appeal in the papers but excluding grounds 2(b), 5(b) and 8(b), and dispense with the need to file and serve such cross-appeal, and otherwise dismiss the notice of motion filed 31 March 2021.

7. Dismiss the cross-appeal, with costs.

Catchwords:

EQUITY – fiduciary obligations – scope of duty – company's contracts to provide crushing services to a mine were performed by a director's and employee's own companies without disclosure – whether constituted a breach of duty – whether inability of company to perform its obligations a defence – whether acquisition of separate quarry in Victoria within scope of duty – scope of fiduciary duty identified by company's actual course of conduct – primary judge correct to hold that performance of company's existing contracts was breach of duty, and acquisition of separate quarry in Victoria not in breach of duty

EQUITY – remedies for breach of fiduciary duty – account of profits – contracts entered into by companies controlled by director and employee in breach of fiduciary and statutory duties – contracts incapable of rescission – whether principles in Peninsular and Oriental Steam Navigation Co v Johnson (1938) 60 CLR 189; [1938] HCA 16 precluded account of profits – consideration of breadth and continuing applicability of principles in Peninsular and Oriental Steam Navigation Company v Johnson – principles only applied to cases where fiduciary acquires property when acting on behalf of principal – principles inapplicable to contracts for the supply of services

EQUITY – remedies for breach of fiduciary duty – account of profits – discretionary withholding of relief – where principal is less than fully informed, but nonetheless "stands by" while fiduciaries continue to derive profits – whether principal had sufficient information to make it inequitable to stand by while

profits continued to be made, and thereafter to obtain an account of those profits – profits made after October 2011 held not to be within account

APPEAL – procedural fairness – complaint that aspects of reasoning at first instance denied procedural fairness – appeal by rehearing – not said that different evidence would have been led – no retrial sought – appellate court empowered and required to make appropriate findings – any denial of procedural fairness incapable of being material – in any event no denial of procedural fairness

EVIDENCE – coincidence evidence – whether primary judge's reasoning contravened coincidence rule – evidence tendered without objection – reasoning concerning company's actual course of conduct not amount to use of evidence contrary to s 95 of Evidence Act 1995 (NSW)

Legislation Cited:

Corporations Act 2001 (Cth), ss 79, 194, 237, 1317H
Evidence Act 1995 (NSW), ss 95, 98
Supreme Court Act 1970 (NSW), s 75A

Cases Cited:

Agricultural Land Management Ltd v Jackson (No 2) (2014) 48 WAR 1; [2014] WASC 102
Alati v Kruger (1955) 94 CLR 216; [1955] HCA 64
Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society Ltd (2018) 265 CLR 1; [2018] HCA 43
Beach Petroleum NL v Kennedy (1999) 48 NSWLR 1; [1999] NSWCA 408
Birtchnell v Equity Trustees, Executors and Agency Co Ltd (1929) 42 CLR 384; [1929] HCA 24
Boardman v Phipps [1967] 2 AC 46
Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd (2001) 117 FCR 424; [2001] FCA 1833
Carpenter v Pioneer Park Pty Ltd (2008) 71 NSWLR 577; [2008] NSWSC 551
Chahwan v Euphoric Pty Ltd [2008] NSWCA 52; 245 ALR 780
Chan v Zacharia (1984) 154 CLR 178; [1984] HCA 36
Colour Control Centre Pty Ltd v Ty [1995] NSWSC 96
Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd (2006) 229 CLR 577; [2006] HCA 55
Cook v Deeks [1916] 1 AC 554
Costa Rica Railway Co Ltd v Forwood [1901] 1 Ch 746
Dart Industries Inc v Decor Corporation Pty Ltd (1993)

179 CLR 101; [1993] HCA 54
Doppstadt Australia Pty Ltd v Lovick & Son Developments Pty Ltd (No 2) [2014] NSWCA 219
Duplate Corporation v Triplex Safety Glass Co 298 US 448 (1936)
Eaton v Rare Nominees Pty Ltd (2019) 2 QR 222; [2019] QCA 190
Edmonds v Donovan (2005) 12 VR 513; [2005] VSCA 27
El-Haddad v R (2015) 88 NSWLR 93; [2015] NSWCCA 10
Erlanger v The New Sombrero Phosphate Company (1878) 3 App Cas 1218
Farah Constructions Pty Ltd v Say-Dee Pty Ltd (2007) 230 CLR 89; [2007] HCA 22
Galati v Deans (No 2) [2018] NSWSC 1813
Garnac Grain Co Inc v H M F Faure & Fairclough Ltd [1968] AC 1130
Grimaldi v Chameleon Mining NL (No 2) (2012) 200 FCR 296; [2012] FCAFC 6
Gunasegaram v Blue Visions Management Pty Ltd [2018] NSWCA 179; 129 ACSR 265
Hamilton v Whitehead (1988) 166 CLR 121; [1988] HCA 65
Hollis v Vabu Pty Ltd (2001) 207 CLR 21; [2001] HCA 44
Howard v Federal Commissioner of Taxation (2014) 253 CLR 83; [2014] HCA 21
In re Cape Breton Company (1885) 29 Ch D 795
In re Coomber [1911] 1 Ch 723
Integrated Computer Services Pty Ltd v Digital Equipment Corp (Aust) Pty Ltd (1988) 5 BPR 11,110
Jacobsen v Jacobsen [2017] NSWSC 1590
James v Surf Road Nominees Pty Ltd (No 2) [2005] NSWCA 296
Jenyns v Public Curator (Qld) (1953) 90 CLR 113; [1953] HCA 2
Maguire v Makaronis (1997) 188 CLR 449; [1997] HCA 23
Manly Fast Ferry Pty Ltd v Wehbe [2021] NSWCA 67
Mudgee Dolomite & Lime Pty Ltd v Robert Francis Murdoch; In the matter of Mudgee Dolomite & Lime Pty Ltd [2020] NSWSC 1510
Muschinski v Dodds (1985) 160 CLR 583; [1985] HCA 78
My Kinda Town Ltd v Soll [1982] FSR 147
Natural Extracts Pty Ltd v Stotter (1997) 24 ACSR 110
New Zealand Shipping Co Ltd v A M Satterthwaite & Co Ltd [1975] AC 154
Noranda Australia Ltd v Lachlan Resources NL (1988)

14 NSWLR 1
Novoship (UK) Ltd v Mikhaylyuk [2012] EWHC 3586 (Comm)
O'Sullivan v Management Agency and Music Ltd [1985] QB 428
Omnilab Media Pty Ltd v Digital Cinema Network Pty Ltd [2011] FCAFC 166; 285 ALR 63
Peninsular and Oriental Steam Navigation Co v Johnson (1938) 60 CLR 189; [1938] HCA 16
Pilmer v Duke Group Ltd (in liq) (2001) 207 CLR 165; [2001] HCA 31
R v Byrnes (1995) 183 CLR 501; [1995] HCA 1
Re Jarvis Deceased [1958] 1 WLR 815; [1958] 2 All ER 336
Re Pauling's Settlement Trusts [1962] 1 WLR 86; [1961] 3 All ER 713
Siddell v Vickers (1892) 9 RPC 152
South Sydney District Rugby League Football Club Ltd v News Ltd [2000] FCA 1541; 177 ALR 611
Spellson v George (1992) 26 NSWLR 666
Streeter v Western Areas Exploration Pty Ltd (No 2) [2011] WASCA 17; 278 ALR 291
Sydney Trains v Batshon [2021] NSWCA 143
Tang Man Sit v Capacious Investments Ltd [1996] AC 514
Tecnicas Reunidas SA v Andrew [2018] NSWCA 192
Tracey v Mandalay Pty Ltd (1953) 88 CLR 215; [1953] HCA 9
Vadasz v Pioneer Concrete (SA) Pty Ltd (1995) 184 CLR 102
Vroon BV v Foster's Brewing Group Ltd [1994] 2 VR 32
Walden Properties Ltd v Beaver Properties Pty Ltd [1973] 2 NSWLR 815
Warman International Ltd v Dwyer (1995) 182 CLR 544; [1995] HCA 18
White v Johnston (2015) 87 NSWLR 779; [2015] NSWCA 18
Windsor v Health Care Complaints Commission [2020] NSWCA 110
Woolworths Ltd v Kelly (1991) 22 NSWLR 189

Texts Cited:

R Austin, H Ford and I Ramsay, *Company Directors: Principles of Law and Corporate Governance* (LexisNexis Butterworths, 2005)
M Conaglen, *Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary Duties* (Hart Publishing, 2010)
J Glister, "Diverting Fiduciary Gains to Companies" (2017) 40(1) *UNSWLJ* 4

	D Kershaw, "Corporate Law's Fiduciary Personas" (2020) 136 *Law Quarterly Review* 454 M Lobban, "*Erlanger v The New Sombrero Phosphate Company* (1878)" in C Mitchell and P Mitchell (eds) *Landmark Cases in the Law of Restitution* (Hart Publishing 2006) D O'Sullivan, S Elliott and R Zakrzewski, *The Law of Rescission* (2nd ed, Oxford University Press, 2014) P Sales, "The Interface between Contract and Equity" (Lehane Memorial Lecture, Sydney, 28 August 2019)
Category:	Principal judgment
Parties:	Robert Francis Murdoch (First Appellant; First Cross-Respondent) Stephen Murdoch (Second Appellant; Second Cross-Respondent) R K Murdoch Pty Ltd (Third Appellant; Third Cross-Respondent) Tilecote Farm Pty Ltd (formerly known as Bright Pear Pty Ltd) (Fourth Appellant; Fifth Cross-Respondent) Mudgee Dolomite & Lime Pty Ltd (in liq) (Respondent; Cross-Appellant) Brian Murdoch (Applicant for leave to bring cross-appeal in name of Mudgee Dolomite & Lime Pty Ltd (in liq)) Rahul Goyal and Jenny Nettleton in their capacity as Liquidators of Mudgee Dolomite & Lime Pty Ltd (in liq) (Second and Third Respondents to Brian Murdoch's motion) Kurdeez Minerals Pty Ltd (ACN 149 390 090) (Fourth Cross-Respondent)
Representation:	Counsel: J C Kelly SC; Dr C Mantziaris (Appellants and Cross-Respondents) V Bedrossian SC; M Jaireth; B Smith (Mudgee Dolomite & Lime Pty Ltd (in liq)) V Bedrossian SC; M Jaireth (Brian Murdoch) B Smith (Liquidators) Solicitors: Hills Solicitors (Appellants and Cross-Respondents) Clayton Utz (Mudgee Dolomite & Lime Pty Ltd (in liq), Brian Murdoch, Liquidators)
File Number(s):	2020/00346991
Publication Restriction:	Nil

Decision under appeal

Court or Tribunal:	Supreme Court of New South Wales
Jurisdiction:	Equity – Corporations List
Medium Neutral Citation:	[2020] NSWSC 1510
Date of Decision:	28 October 2020
Before:	Black J
File Number(s):	2016/00084283

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

HEADNOTE

[This headnote is not to be read as part of the judgment]

Two brothers Robert and Brian Murdoch, and their sons Stephen and Scott, established various companies to operate businesses connected with quarrying and crushing limestone and dolomite. Robert and Brian were directors and equal shareholders of Mudgee Dolomite & Lime Pty Ltd (MDL); Stephen was a senior employee of MDL. Each of the men was director and shareholder of his own separate company: Brian's company was B Murdoch Pty Ltd (BMPL), Scott's was Stoneco Pty Ltd (Stoneco), Robert's was RK Murdoch Pty Ltd (RKM) and Stephen's was Bright Pear Pty Ltd (Bright Pear), now Tilecote Pty Ltd. Stephen was also a director (from 2010) and shareholder (from 2012) of RKM. There were other companies, including Mudgee Stone Co Pty Ltd of which all four men were directors and equal shareholders, and Kurdeez Minerals Pty Ltd. The disputes the subject of these proceedings involved, relevantly, work done at a mine at Cadia near Orange, New South Wales and the acquisition and operation of a quarry at Timboon in Victoria.

From 2007, MDL was contracted by Cadia Valley Operations (CVO) to do works including using mobile crushing plant and earth moving equipment to supply stemming material for use in blast holes and crushed rock as road base. In 2010, a production problem arose at the mine, referred to as the "Cadia emergency", requiring additional crushing services and equipment. RKM and Bright Pear provided machinery and operators to perform work at the mine. In the financial years ending June 2010 and 2011, MDL invoiced CVO for this work and transferred money to RKM and Bright Pear. By October 2011, Brian had been provided with records of MYOB accounts disclosing payments of $1,464,529 from MDL to Bright Pear, and Scott believed Stephen had taken $1.5 million from MDL.

Stephen discovered the opportunity to acquire a pre-existing lime production business at Timboon while searching the internet on behalf of RKM for

quarrying equipment to use or resell. Stephen and Robert inspected the quarry and, ultimately, RKM acquired it. Kurdeez Minerals was incorporated to operate the quarry, with Stephen as sole director and 90% shareholder.

In 2016, Brian brought a derivative proceeding in the name of MDL alleging that Robert and Stephen had breached the fiduciary and statutory duties they owed MDL as director and senior employee. The primary judge found that Robert and Stephen were in breach by causing RKM and Bright Pear to perform work at Cadia, but not in respect of the acquisition by RKM and operation by Kurdeez Minerals of the Timboon Quarry. Orders to wind up MDL, which had been sought in a separate derivative proceeding, were also made.

Robert and Stephen and their companies appealed to the Court of Appeal. Brian sought leave to cross-appeal on behalf of MDL. The principal issues before the Court were:

(i) whether the scope of the fiduciary and statutory duties Robert and Stephen owed MDL extended to precluding Robert and Stephen from:

   a. causing RKM and Bright Pear to perform work at Cadia which MDL had been contracted to do (ground 4);

   b. taking up the opportunity to acquire and operate the Timboon Quarry, through RKM and Kurdeez Minerals (cross-appeal grounds 1-8);

(ii) whether the work at Cadia was done by RKM and Bright Pear pursuant to contracts with MDL which could not be rescinded, such that an account of profits was not available in accordance with the principles in *Peninsular and Oriental Steam Navigation Co v Johnson* (1938) 60 CLR 189; [1938] HCA 16 (grounds 1-3);

(iii) whether Brian "stood by" with sufficient knowledge of the breach of fiduciary duty by Robert and Stephen such that it was inequitable for MDL to obtain an account of profits made thereafter (grounds 5-6).

The Court held (Leeming JA, Macfarlan JA and Gleeson JA agreeing), allowing the appeal in part and dismissing the cross-appeal:

As to issue (i)(a):

1. Any narrowing of the scope of Robert's and Stephen's fiduciary obligations brought about by the earlier establishment of businesses such as Mudgee Stone Co which were in competition with MDL did not extend to entitling Robert and Stephen to cause RKM and Bright Pear to do work at the Cadia mine: at [113]. This was in circumstances where it was not a new business opportunity but involved taking up work which MDL had contracted to do, at the Cadia site where MDL's equipment was already located and to which employees such as Stephen had already been inducted. That MDL was unable to perform its contractual obligations was no defence: at [112], [115].

   Birtchnell v Equity Trustees, Executors and Agency Co Ltd (1929) 42 CLR 384; [1929] HCA 24; *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296; [2012] FCAFC 6; *Howard v Federal Commissioner of Taxation* (2014) 253 CLR 83; [2014] HCA 21 applied.

As to issue (i)(b):

2. There was no error by the primary judge in finding that the Timboon Quarry was outside the scope of the fiduciary obligations owed by Robert and Stephen: at [149]-[150]. This conclusion was based on an assessment of primary facts, including:

   a. the pattern of conduct revealed in a series of acquisitions of quarries in New South Wales by entities other than MDL controlled

by men who owed fiduciary obligations to MDL: at [142]-[143], [147]-[148];

b. the abundance of lime plants in Victoria, the small market for dolomite, and the scale of dolomite sales in Victoria by MDL: at [146].

Discussion of the inutility of alleging denial of procedural fairness where an appeal is by way of rehearing, it is not suggested that different evidence would or could have been led, and no retrial is sought: at [125]-[129].

As to issue (ii):

3. There was an informal contract between RKM or Bright Pear (or both companies) for the hire of RKM's equipment by MDL at Cadia to fulfil MDL's obligations: at [166]-[167].

4. The unavailability of rescission did not stand in the way of an account of profits: at [168], [182]. RKM and Bright Pear were not analogous to an agent who purchased property on its own account and later sold the property to a principal: at [180]. The principles in *Peninsular and Oriental Steam Navigation Co v Johnson* do not apply in the case of a contract for the supply of services which is incapable of rescission: at [181].

   Peninsular and Oriental Steam Navigation Co v Johnson (1938) 60 CLR 189; [1938] HCA 16 considered.

As to issue (iii):

5. The inquiry is as to when Brian had sufficient information for it to become inequitable thereafter for him to obtain an accounting for profits made while he stood by permitting RKM and Bright Pear to continue to make those profits: at [204]. Brian believed no later than by October 2011 that some $1.5 million had been paid out by MDL to Bright Pear: at [211]. From November 2011 it became inequitable for MDL to continue to sit

back and permit RKM and Bright Pear to continue to make profits at Cadia: at [215]. This was so notwithstanding Brian's reluctance to confront Robert: at [216].

Warman International Ltd v Dwyer (1995) 182 CLR 544; [1995] HCA 18 applied.

JUDGMENT

1 **MACFARLAN JA**: I agree with Leeming JA.

2 **GLEESON JA**: I agree with Leeming JA.

3 **LEEMING JA**: This appeal and application for leave to cross-appeal have been brought from orders made following a trial lasting some three weeks in August and September 2020 in the Corporations List, resulting in a large judgment of 301 paragraphs delivered in October 2020: *Mudgee Dolomite & Lime Pty Ltd v Robert Francis Murdoch; In the matter of Mudgee Dolomite & Lime Pty Ltd* [2020] NSWSC 1510. In this Court, the hearing occupied two days. Partly that was because many fewer issues were debated on appeal than at trial. Partly it reflected the tailoring of the parties' oral addresses in light of the parties' comprehensive written submissions, supplemented at the hearing by the respondent's helpful skeleton submissions, which were a model of their kind.

4 The dispute arises out of two brothers and their two sons having established a number of companies to operate businesses connected with the quarrying and crushing of limestone and dolomite. One of the brothers and his son are alleged to have breached the fiduciary and analogous statutory duties owed by them as director and senior employee to their company. However, the issues at the forefront of the litigation in this Court are somewhat removed from the mainstream of such cases. They include the scope of the duties owed by the director and employee, the calculation of the profits for which they are liable to account, and the availability of partial discretionary defences.

5 These reasons take the following form:

Parties

Natural persons

6 The main protagonists are two brothers, Brian William Murdoch and Robert Francis Murdoch, the two sons of the late William John Murdoch, who had founded a business involving quarrying limestone near Mudgee shortly after the conclusion of World War II. Scott William Murdoch is the only son of Brian Murdoch, and Stephen Murdoch is the only son of Robert Murdoch. In the litigation, each son was aligned with his father. I shall refer for concision to the two brothers and their sons as Brian, Robert, Scott and Stephen. For completeness, each of Robert's, Stephen's and Scott's wives is a shareholder in her husband's company, and Scott's wife is also a director, but the evidence suggested that none played any role in the transactions giving rise to the litigation in this Court.

Mudgee Dolomite & Lime Pty Ltd (MDL)

7 Mudgee Dolomite & Lime Pty Ltd (MDL) was incorporated in 1996. At all times, it has had two directors and two equal shareholders, Brian and Robert.

8 In around early 1997, MDL acquired a limestone and dolomite quarry and crushing business from the administrators of Industrial Minerals Australia Pty

Ltd, which became the "Buckaroo Road Quarry". MDL acquired further land at Mudgee later in 1997, and between 1997 and 2002 conducted the "Bara Quarry" extracting rhyolite at that site.

9 For many years, Brian was MDL's Operations Manager and Production Manager, and Robert was its General Manager. Scott had not worked for MDL for some years, although that company paid him until 2015. Stephen was employed by MDL as a Production Manager from at least 2009 until 14 March 2014, and was an officer of MDL throughout that time for the purposes of the *Corporations Act 2001* (Cth).

10 MDL is solvent and (putting to one side the expense and distraction of litigation) profitable. Nonetheless, liquidators were appointed to it in November 2020 on what had become the joint application by Brian and Robert (Brian having abandoned a claim for a buy-out order in oppression proceedings heard simultaneously with Robert's winding up application) following the irretrievable break-down of the relationship between the brothers. No challenge was made to the order that MDL be wound up. The liquidators are the second and third respondents to Brian's application for leave to bring a cross-appeal in MDL's name. They were properly joined, but played no active part in the hearing in this Court.

The "personal" companies BMPL, Stoneco, RKM and Bright Pear

11 Each of Brian, Robert, Scott and Stephen also operated separate companies. Brian was the sole director and shareholder of B Murdoch Pty Ltd (BMPL), Scott and his wife were the sole directors and shareholders of Stoneco Pty Ltd. Robert was until 2010 relevantly the sole director and majority shareholder of RK Murdoch Pty Ltd (RKM) (his wife owning the remaining shares and having been a director between 2003 and 2005); after 2010 Stephen became a director and after 2012 he became a 50% shareholder of RKM. Stephen was the sole director and (aside from his wife) the sole shareholder of Bright Pear Pty Ltd. That company is now known as Tilecote Pty Ltd, but I shall refer to "Bright Pear".

12 As will be seen below, each of Stoneco, RKM and Bright Pear owned or operated crushing equipment which could be used in quarries and mines.

13 The events of greatest importance to the issues giving rise to the appeal and cross-appeal occurred between 2008 and 2012, and both the appeal and the cross-appeal concern the liability of Robert, Stephen, RKM and Bright Pear to account in equity and under statute.

Other companies

14 Each of BMPL, Stoneco, RKM and Bright Pear were 25% shareholders in Mudgee Stone Co Pty Ltd, whose four directors were Brian, Robert, Scott and Stephen. Mudgee Stone Co was incorporated in 2002, and acquired land at Oberon where it developed a business for quarrying, crushing and screening another mineral, alaskalite.

15 From time to time Robert and Brian and their companies RKM and BMPL were involved in other activities, including their acquisition of an interest in Hi-Tech Concrete (which was sold in 2006), and in 2006 and 2007, residential subdivisions.

16 The first proceeding also joined Kurdeez Minerals Pty Ltd (of which Stephen is the sole director) and Stephen's wife, but the proceeding was dismissed against those parties. The proposed cross-appeal joins Kurdeez Minerals.

17 From time to time members of the Murdoch family engaged, through the companies mentioned above, in joint ventures with external interests. This occurred in a variety of ways, as illustrated below.

18 Ezy Lime Pty Ltd was described in the submissions as a "joint venture company". Ezy Lime operated a quarry at Gunningbland near Parkes, some 230 km from Mudgee, as well as holding a 90% interest in the Lachlan Valley lime and magnesium quarry near Forbes (some 260 km from Mudgee). One third of its shares had been held by MDL until around 2005 but thereafter a

one half interest in the company was divided equally between BMPL, RKM, Stoneco and Bright Pear.

19 Similarly, Mid-Coast Lime Pty Ltd seems to have been 50% owned by MDL and 50% by interests associated with another family, but from around 2006, two of the four ordinary shares in Mid-Coast Lime were owned by BMPL and RKM (each company owning a single share). Mid-Coast Lime acquired a limestone deposit near Kempsey on the NSW north coast, some 600 km from Mudgee.

20 Robert travelled to New Zealand in early 2008 for the purpose of a potential limestone quarry joint venture with a Mr Milton. This was ultimately acquired by RK Murdoch New Zealand Pty Ltd, a company associated with Robert and Stephen. There was some cross-examination suggesting that Brian was involved in this, although the primary judge observed that he may have misunderstood the thrust of some the questions (at [49]). His Honour said that the level of disclosure made by Robert and Stephen in respect of the acquisition of the New Zealand quarry "would not have amounted to a narrowing of the scope of the duty or to ratification, had a breach of duty otherwise been established", and so nothing turns on this.

21 Another company, W J Murdoch Pty Ltd, operated a quarry site for many years (pre-dating the incorporation of MDL) on land owned by the Bagnall family.

22 It may readily be seen that each of Brian, Robert, Scott and Stephen was, by dint of the corporate structures established which have been summarised above, placed in a position of possible conflict whenever a new opportunity which "belonged" to MDL arose. That was because a new opportunity could be undertaken by MDL (co-owned by Brian and Robert), or by Mudgee Stone Co (co-owned by Brian, Robert, Scott and Stephen) or by one or more of Stoneco, RKM or Bright Pear, each of whose business operations extended to crushing services in mines and quarries including owning machinery to provide those services. Each of Brian, Robert and Stephen owed fiduciary

duties to MDL as directors (or in the case of Stephen, as an employee). Each also owed fiduciary duties to Mudgee Stone as directors, and each knew that each man was also operating businesses through their own individual companies. Hence the significance of identifying the scope of the duties Brian, Robert and Stephen owed to MDL.

Overview of issues at first instance

23 The primary judge heard and determined four proceedings. The appeal and cross-appeal are brought exclusively from orders made in the first proceeding. No appeal is brought from orders obtained by Robert in proceeding 2016/271516 for the winding up of MDL, or from the dismissal of Brian's oppression suit (2016/355621) which had sought a compulsory buy-out, or from the dismissal of a derivative proceeding brought by Robert (2017/377222), seeking an account of profits or equitable compensation from Brian and Scott (although the issues raised in that proceeding are peripherally relevant to an aspect of the cross-appeal).

24 The first proceeding (2016/84283) was a derivative proceeding brought by Brian in the name of MDL alleging breaches of duty owed to MDL, principally by Robert and Stephen and their companies RKM and Bright Pear. Robert was alleged to have breached duties in equity and pursuant to statute owed by him as a director. Stephen was employed as a senior manager of MDL and was said to have breached duties in equity and under statute.

25 The pleading of accessorial liability was elaborate, but was largely passed over in the parties' submissions in this Court. I do not say that by way of criticism; indeed it may be that nothing ultimately turned on this (for example, if Robert and Stephen are both solvent judgment debtors). It was addressed in some detail by the primary judge at [156]-[164]. Briefly, each of Robert, Stephen, RKM and Bright Pear was said to have been involved in the statutory breaches of each of Robert and Stephen within the meaning of s 79 of the *Corporations Act*. The primary judge said that it was plain that Stephen was involved in Robert's breaches, but that it was not necessary to determine

whether Robert was involved in Stephen's breaches, because it "adds nothing to the direct claims advanced against Robert".

26 Insofar as MDL sued in equity, it was necessary to establish a different basis of accessorial liability. The pleading alleged an elaborate series of claims based on knowing receipt of trust property, which was met by the response that no property of MDL was received. Neither a corporate opportunity nor most forms of confidential information constitute property for the purposes of this form of accessorial liability: *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89; [2007] HCA 22 at [116]-[121]. This in turn seems to have led to MDL invoking the "alter ego" principles stated in *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296; [2012] FCAFC 6 at [243]. This had not been pleaded, but the trial judge accepted the defendants' proper concession that they could point to no prejudice, and concluded at [164]:

> "It seems to me [to] have been established that RKM was Robert's alter ago or vehicle and [Bright Pear] was Stephen's alter ego or vehicle. Mr Bedrossian pointed out that Robert was both the director and major shareholder of RKM at the relevant time, as is accepted by the Robert Murdoch Interests in their Defence; Stephen did not become a shareholder in RKM until about 29 June 2012 and, I interpolate, I have found that Stephen was knowingly involved in the relevant breaches in any event; and there is no suggestion that Robert's wife, who had a minority shareholding in RKM since 2003, took any active role in it, so as to dilute Robert's control over RKM or prevent a finding that RKM is his alter ego."

27 The appeal and cross-appeal were conducted on the basis that throughout that period, RKM was the "alter ego" of Robert and Bright Pear was the "alter ego" of Stephen for the purpose of accessorial liability in the sense stated in *Grimaldi* above. Each man and the company he controlled was in substance treated as the same actor, both for the purpose of knowledge and amenability to orders to account. As it was put in *Hamilton v Whitehead* (1988) 166 CLR 121 at 127; [1988] HCA 65 and *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* at [128], his mind was the mind of the company. The approach of the primary judge resembled what occurred in *Novoship (UK) Ltd v Mikhaylyuk* [2012] EWHC 3586 (Comm) at [529], where it was said:

> "The account must be against Henriot Finance, who were the immediate earners of the profit, and also against Mr Nikitin, who was the architect of the dishonest assistance effected through him and Henriot Finance, which was both his *alter ego* and the company which he chose as the immediate destination of the profits. It is not necessary to determine where, as between those two, the profits have ended up. That does not mean that the Claimants are entitled to recover twice: only that both are accounting parties." (original emphasis)

28 That approach passes over the difficulties as to the conceptual basis of the analysis, as noted in J Glister, "Diverting Fiduciary Gains to Companies" (2017) 40(1) *UNSWLJ* 4. Is the liability based on agency, or piercing the corporate veil, or some other means such as a trust or the appreciation that a gain by the company is a gain by its sole shareholder? As Professor Glister observes at 21 and 26, the term "alter ego" is a term which displays both "elasticity" and "general flexibility", but if anything detracts from the analysis. But I too shall pass over this, the point not being argued, and the parties proceeding on the basis that no distinction should be drawn, for the purpose of liability and remedy, between Robert and RKM, or between Stephen and Bright Pear. However, I note that on no view of RKM and Bright Pear being "alter egos" of their principals is Robert liable in equity for profits derived by Bright Pear.

29 The derivative proceedings brought by Brian on behalf of MDL succeeded in part. The partial success was reflected in an order that Robert, Stephen, RKM and Bright Pear pay 30% of MDL's costs. Many issues of fact were addressed in the evidence and the reasons for judgment which are outside the scope of the appeal and cross-appeal (these include claims based on the acquisition of various "swamped" crushers: at [264]-[268]; a claim based on the acquisition of land at Buckeroo: at [270]-[279]; claims concerning a business name, acquisition of land in New Zealand and various payments: at [280]-[286]).

30 Confining attention to the live issues in this Court, MDL succeeded at first instance in obtaining orders concerning work done at the Cadia mine in Orange in New South Wales, and failed in respect of a claim based on the

acquisition and operation of a quarry at Timboon in Victoria. The factual background of each venture is summarised below.

Appeal re the work done at Cadia

31 The primary judge held that MDL was entitled to elect between (a) an account of the profits earned by RKM and Bright Pear from the work done by those companies at the Cadia mine, or (b) equitable compensation for any loss by reason of that work, and made a corresponding order (order 6 made on 24 November 2020). As was explained in *Tang Man Sit v Capacious Investments Ltd* [1996] AC 514 at 521:

> "Faced with alternative and inconsistent remedies a plaintiff must choose, or elect, between them. He cannot have both. The basic principle governing when a plaintiff must make his choice is simple and clear. He is required to choose when, but not before, judgment is given in his favour and the judge is asked to make orders against the defendant."

32 In the present case, the election between remedies is purely formal. It reflects the fact that liquidators were appointed to MDL on the joint application of Brian and Robert on the same day that judgment was entered, and MDL's election was for its liquidators to make.

33 MDL did not establish any loss in respect of the work done at Cadia. The primary judge found at [169] that MDL had not established the costs of acquiring or hiring the equipment necessary for it to perform the work other than from RKM or Bright Pear or that the amounts paid to them were more than a market rate. There is no notice of contention concerning this. Hence the only valuable remedy is an account of profits.

34 The primary judge also made the following declaration:

> "7. Declare that [MDL] is entitled as against Robert Murdoch and Stephen Murdoch to compensation in a sum equal to the account of profits in Order 6(a) or the compensation in Order 6(b), according to the election in Order 6 to the intent that RKM, [Bright Pear], Robert Murdoch and Stephen Murdoch shall be jointly and severally liable for the same sum."

35 The primary judge quantified the profits at $4,358,106 (at [190]). Those profits were derived in the financial years ended 30 June 2010, 2011, 2012, 2013 and 2014, but more than 98% of the profits were derived in the financial years ended 30 June 2011, 2012 and 2013.

36 The appeal brought by Robert, Stephen, RKM and Bright Pear is as of right. Leave to proceed against MDL in liquidation was granted on 10 February 2021.

37 It is necessary to give a little more detail about the profits quantified by the primary judge. The primary judge found that RKM and Bright Pear together received revenue of $9,169,378 for work performed for Cadia in that five year period. In determining those companies' profits, the parties' accounting evidence was controversial only by the fact that the appellants' accountant Mr Mullins included allowances of some $220,000 for "capital charge" and "economic risk". His Honour dismissed that approach, saying at [190] it was not supported by any disclosed accounting standards or any other established accounting principles. Save for that point, which is challenged by ground 10 of the appeal, the calculation of profits of $4,358,106 was agreed. The present case stands in stark contrast with the contestability of an account of profits, of which Lindley LJ once said:

> "The litigation is enormous, the expense is great and the time consumed is out of all proportion to the advantage ultimately attained ... I believe in almost every case people get tired of it and get disgusted": *Siddell v Vickers* (1892) 9 RPC 152 at 163.

38 Combining the revenues and expenses of RKM and Bright Pear, those profits were calculated by subtracting operating costs, insurance, general overheads, depreciation, interest and income tax. The result was the following profits for each financial year:

(1) FY10 $26,827

(2) FY11 $1,595,912

(3) FY12 $1,579,923

(4) FY13 $1,130,108

(5) FY14 $25,337

39 Grounds 1, 2 and 3 challenge the profits for FY10 and FY11, totalling some $1,622,738. These grounds were based on the principles in *Peninsular and Oriental Steam Navigation Co v Johnson* (1938) 60 CLR 189 at 212-213; [1938] HCA 16 and turn on the proposition that RKM and Bright Pear subcontracted crushing services to MDL over that period.

40 Ground 4 maintained, broadly speaking, that the parties' conduct narrowed the scope of Robert's and Stephen's duties with the result that there was no breach. If accepted, this would lead to the whole judgment being set aside. No oral submissions were made in support of this ground, although it is cognate with the main grounds in the proposed cross-appeal.

41 The gravamen of ground 5 was that the primary judge had erred in dismissing a defence based on Brian having stood by with sufficient knowledge while Robert and Stephen and their companies were making profits following breaches of fiduciary duty. Success on these grounds would curtail the profits the subject of the account so as to exclude much or all of the profits derived in the financial years ended 30 June 2012, 2013 and 2014, and involves this Court making a finding of fact pursuant to s 75A(10) of the *Supreme Court Act 1970* (NSW) as to when Brian's knowledge was sufficient so as to make it inequitable for him to recover an account of profits thereafter. This was the issue which occupied most time when the appeal was heard.

42 Grounds 7 and 8 challenged causation, on the basis that "any loss of opportunity for MDL to hire equipment and carry out work at the Cadia mine would have happened in any event". Grounds 6 and 9 were conclusionary. As noted above, ground 10 maintained that the Court should have accepted Mr Mullins' opinion and made an additional allowance for capital and risk in

the taking of any account of profits, thereby reducing the profits by some $220,000.

Application for leave to cross-appeal re Timboon Quarry

43 Brian sought leave to bring a cross-appeal on behalf of MDL concerning the dismissal by the primary judge of MDL's claim that RKM's acquisition and Kurdeez Minerals' operation of the Timboon Quarry in south western Victoria between Geelong and Warrnambool was in breach of fiduciary duties owed by Robert and Stephen. Pursuant to orders made by Gleeson JA on 20 July 2021, the application for leave was stood over to the hearing of the appeal.

44 The application is in the Court's inherent jurisdiction, in light of dicta to the effect that s 237 of the *Corporations Act* is unavailable where a company is being wound up: *Chahwan v Euphoric Pty Ltd* [2008] NSWCA 52; 245 ALR 780 at [124]-[125]. The principles were summarised by Barrett J in *Carpenter v Pioneer Park Pty Ltd* (2008) 71 NSWLR 577; [2008] NSWSC 551 at [23]-[36]. They include whether the proposed claim has a "solid foundation", such that it is neither vexatious nor oppressive and enjoys reasonable prospects of success. The parties to Brian's motion are different from the parties to the cross-appeal in MDL's name for which the motion seeks a grant of leave. In particular, Brian properly joined the liquidators to the motion, because the liquidators have an interest in the assets of the company not being dissipated by proceedings brought in its name but driven by one shareholder. A regime was put in place to protect the assets of MDL from any adverse costs orders. The five respondents to the cross-appeal which Brian seeks this Court's leave to bring (namely, Robert, Stephen, RKM, Kurdeez Minerals and Bright Pear) are the fourth, fifth, sixth, seventh and eighth respondents to Brian's motion (in order to avoid confusion, the coversheet of this judgment names those companies in their former and not their latter capacity).

45 The proposed grounds of the cross-appeal fell within three categories: (a) whether Timboon Quarry was an opportunity belonging to MDL (grounds 1-5), (b) whether Robert's and Stephen's duties to MDL were narrowed (grounds 6-

8), and (c) whether the trial judge erred in his notional findings concerning pecuniary relief (ground 9).

46 The narrow focus of the appeal and cross-appeal lends itself to a relatively brief summary of the facts and evidence.

Overview of factual background

47 The various companies owned and controlled by Brian, Robert, Scott and Stephen have been summarised above.

Work at Cadia

48 The primary judge found at [83] that MDL first contracted to work for Cadia Holdings Pty Ltd (which traded as Cadia Valley Operations or "CVO") at its mine south west from Orange in June 2007. Starting in 2007, MDL provided stemming material for use in blast holes. The work was described in the contract as "Manufacture of Blast Hole Stemming Material Using Mobile Crushing Plant & Earth Moving Equipment". In addition to the stemming material, MDL subsequently contracted to supply crushed rock for the use as road base for infrastructure works (this was described as the "Fluor contract").

49 The primary judge noted at [22] that Robert accepted in cross-examination that Stephen was the most senior MDL employee on site at the Cadia mine from 2009 until early 2014, although he was not on site for the whole of that period.

50 Significant for present purposes was the "Cadia emergency" which emerged in 2010, described by the primary judge as follows at [85]:

> "A production problem then arose at the Cadia mine between May 2010 and September 2010 (which has been described in the proceedings as [the] 'Cadia emergency') and a further issue in respect of block caving then arose at the Cadia mine. MDL provided additional crushing services to CVO, initially on a short term basis and then on an extended basis, through a series of successive purchase orders, priced by reference to machine hourly hire rates. As will emerge below, a significant amount of equipment was hired from RKM

> and [Bright Pear] in a manner that ultimately diverted a large part of the revenue and profit from that work from MDL to RKM or [Bright Pear]."

51 As his Honour there indicated, at first RKM and Bright Pear provided machinery and operators to perform work at Cadia. In the financial years ended 30 June 2010 and 2011, CVO was invoiced for this work by MDL and money was then transferred from MDL to RKM and Bright Pear. Grounds 1, 2 and 3 maintained that an account of profits was not available, as a matter of law, for work which was done, so it was said, by RKM and Bright Pear as subcontractors. In later years, RKM and Bright Pear invoiced CVO directly for work done by those companies' machines at Cadia. It will be convenient to return to the detail of the evidence bearing upon this when addressing those grounds.

52 Scott marked 30 March 2011 in his diary as "D-Day". He gave evidence that:

> "In or about early March 2011 I was at the point where I believed that Stephen and Robert were acting in their own best interests rather than that of the Company and Brian, and I could not stay there any longer and watch what they were doing. I attempted to get my father to accept that Robert and Stephen were doing the wrong thing by him but he was not willing to confront Robert ..."

53 The primary judge said of Scott's evidence when he was cross-examined about this:

> "He gave more nuanced evidence in cross-examination that his leaving the Group related to 'a matter between the parties' and the ... 'working environment' which I understand to be a reference to difficulties in the working relationship, although he also pointed to his concerns as to the fuel truck that had been acquired by Stephen and then sold and the work that was being done (I interpolate, apparently by Stephen but in fact primarily using RKM equipment) at the Cadia mine."

54 In around April 2011, Scott obtained a USB stick containing MYOB accounts for the group of companies. Brian gave evidence that he did so because "at that time I was worried about where everything was going, and we're starting to search trying to find where everything was". Scott said that he had an appointment to see the accountant Mr Portelli to do his personal accounts, and Brian had asked him to obtain the group accounts while he was there.

He gave evidence that he was "astonished" by what he saw. Precisely what documents were contained on that USB stick is unclear. The documents produced by him in the proceedings include documents which contain references to invoices from May and June 2011, and so either the USB stick was in fact obtained later, or Scott had combined the documents originally obtained with those obtained later.

55 One of the documents said by Scott to have been on the USB stick was a supplier payment register for the period 1 June 2009 to 1 February 2011 which stated that an amount of $1,464,529 had been paid by MDL to Bright Pear. Another document on the USB stick, namely, a supplier payment history for substantially the same period which disclosed some $1.3 million for payments at Cadia, supports the conclusion that the $1,464,529 was for work at Cadia. The date of these documents, and when they came to the attention of Brian and Scott is important for the purposes of the submission about Brian "standing by". In this respect, the supplier payment register is unusual. It has the appearance of being a specially generated summary, rather than an automatically generated page of a ledger. Of all the financial statements said to have been provided on the USB stick, this is the only one which contains a summary, as opposed to individual ledger entries, and the only one for a period which does not end in June. The document bears the date 20 October 2011, but it seems likely – as counsel for Brian acknowledged – that that reflected when it was printed out, not necessarily when it was obtained in electronic form. This date is strikingly close in time to what seems to be the only other contemporaneous document bearing upon this. Stephen kept a diary, and in it he recorded an entry for 18 October 2011:

> "[Scott] thinks I have taken 1.5m out of Company. If he only new [sic]. The only work I have picked up is work that MDL couldn't do and clients would have done if I hadn't. There was no contract & it was only going for 3 weeks didn't think it would go on for 4 months 24 hrs a day."

56 The primary judge addressed this at [67]:

> "It appears that the information made available to Scott in April 2011 included a supplier's payment register which indicated that, by that time, an amount of

> $1,464,529 had already been paid by MDL to [Bright Pear] for work done at the Cadia mine (T201). At about that time, Scott raised that matter with Stephen and suggested that [Bright Pear] had taken $1.5 million out of MDL and that 'we are not happy' (Robert 20.11.17 [403]; Scott 29.3.18 [55]; T201). Although Scott was cross-examined at some length as to whether his comment was intended to suggest that [Bright Pear] had 'taken' $1.5 million as distinct from doing $1.5 million worth of work (T201), it seems to me that Scott had then recognised, correctly, that the opportunity to do work valued at nearly $1.5 million had been diverted from MDL to [Bright Pear]. Scott confirmed in cross-examination that he recalled speaking to Stephen and indicating that he was not happy that that amount of money had been taken from MDL (T205). Scott's evidence is that he and Brian had viewed the supplier's payment ledger at his house and it was Scott and Brian's shared opinion that [Bright Pear] had taken that amount out of MDL (T207). Scott was also cross-examined as to the extent to which he informed Brian of his concerns and his evidence was that Brian was 'fairly understanding of the matters' but was 'lost to know what to do' before advice was sought from solicitors. That evidence seemed to me to be consistent with the probabilities."

57 Brian gave evidence that Scott had not told him the amount of money that had gone missing, only that it was substantial. His testimony included "Scott told me it was a lot of money missing. That's all he told me", and said that Scott had not specified a figure, like $1.5 million, nor had he said that the money had been diverted to RKM and Bright Pear.

58 I interpolate to note that it seems that Brian had a poor understanding of accounting. I did not understand it to be suggested that Brian could, without assistance, have viewed the MYOB files independently and reached any conclusion that amounts had been paid to RKM or Bright Pear. The primary judged referred at [8] to Brian's evidence that he did not complete secondary school and had no formal education thereafter.

59 MDL's profit and loss statement for the financial year ended 30 June 2011 was tendered on the basis that it had been produced as a document provided on the USB stick. (Either that is not so, or the USB stick was provided after April 2011.) The statement records an operating profit of $1.4 million, from total income of just over $10 million. The greatest expense, by far, is $2,840,988.15 said to be "Plant hire". Another document also said to have been contained on the USB stick was a profit and loss statement for the same

period with comparisons for the previous year. "Plant hire" for the previous year was a mere $113,701.

60 MDL's finalised annual accounts for the year ended 30 June 2011 showed slightly different amounts: "Hire of Plant & Equipment" of $2,353,667.41, contrasting with $193,183.64 for the previous year. The accounts were signed off by Brian and Robert as a fair presentation of MDL's financial position, and while their signatures were not dated, Mr Portelli's was dated 16 June 2012, such that it is reasonable to infer that Brian and Robert signed at around the same time.

61 On 16 November 2011, Robert made an offer to Brian described as the "proposed split up of company assets". It was incomplete – it did not ascribe value to any of the assets and in relation to Ezy Lime and Kempsey it simply stated "Too hard basket at this stage". Its significance is principally in the entry made in Robert's diary for the following day, which records Brian rejecting that offer and asking "'Where's all the money' MDL make[s]".

62 It was uncontroversial that Brian and Scott met the accountant Mr Portelli on 24 November 2011. Stephen's diary for 21 November states:

> "Talked to [Brian] re split. He is going to see [Mr Portelli] so he can explain how thing[s] work. Was to come out today to go over things. Doesn't thin[k] the split is fair."

63 Coincidentally, the same note records:

> "Scott starts his new venture today running Clifford basalt quarry employing 4 workers that have worked there before. Leasing off Noel Mitchell for 4 months with option to buy his lease (21 years)."

64 Stoneco took a sublease of the Braeside Quarry in November 2011 from Clifford Quarries Pty Ltd. There was a dispute in the evidence whether Braeside competed with MDL.

65 Scott's affidavit records that:

> "Myself and Brian had a meeting with Peter Portelli on the 24th November 2011 in his office to go through these concerns. It was at this point I had proof which I could show my father which demonstrated that there was something going on and that money was being diverted out of the company to other entities RKM and Bright Pear."

66 On 16 December 2011, Stephen supplied a document to Brian formulating a different split of assets. His document was much more precise than the November proposal, dealing specifically which how Brian and Robert would divide the interests in land (valued at more than $8m) and the crushing and other equipment (valued at some $6.5m).

67 On 16 March 2012 Robert and Brian met with a solicitor concerning the possibility of splitting MDL's assets. A document which has the appearance of a filenote of the meeting states that it is "by Scott from [Brian's] recollection". The appellants relied on the following passage:

> "I discussed with Robert part of my reasons for splitting including the fact I am not being told everything that is happening and not being given bank account balances and that he was signing Cheques without me Agreeing. [I didn't discuss the full details of my knowledge of his activities]." (square brackets in original)

68 Brian agreed in cross-examination that the knowledge he did not discuss was the knowledge he had learned from workers at Cadia.

69 Ultimately, by an 11 page solicitor's letter dated 25 May 2012, Brian expressed concern about Robert's failure to disclose conflict and profits derived by Robert, that there needed to be full disclosure of MDL's assets, which assets were said to "include items such as contractual rights that have been foregone by MDL and other companies in the [group], if those rights have been taken up for the benefit of RKM, [Bright Pear] or members of your family". The letter then asked a series of questions on five topics, commencing with contracts taken up by RKM or Bright Pear at Cadia Mine. It fell short of making a demand that Robert, Stephen and their companies cease doing work which belonged to MDL.

70 Thereafter, Brian commenced proceedings seeking the provision of documents, which were resolved in October 2014 by consent. Documents were produced. In November 2015 a draft statement of claim was sent to Robert's solicitors, and in January 2016 Brian commenced proceedings seeking leave to institute derivative proceedings on behalf of MDL.

The acquisition of the Timboon Quarry

71 The Timboon Quarry opportunity was noticed by Stephen while searching for quarrying equipment to use or resell. Stephen immediately told his father, and agreed in cross-examination that he had been searching the internet for the purposes of RKM.

72 The primary judge recorded at [62] that in January 2011, Stephen and Robert inspected the Timboon Quarry. RKM acquired the Timboon Quarry by contract executed on 17 February 2011, prior to the auction which was advertised for 22 February 2011. The acquisition was of a pre-existing lime production business, together with the land, plant and equipment. Originally RKM obtained an assignment of the lease of the land, but subsequently purchased the reversion and some additional adjoining land.

73 Kurdeez Minerals Pty Ltd was incorporated in February 2011 for the purpose of operating the Timboon Quarry. Stephen was the sole director and 90% shareholder of Kurdeez Minerals. Kurdeez operated the quarry and made "royalty" payments to RKM. The primary judge stated at [221] that it appeared to be common ground that "the 'royalty' payments were not costs of production in respect of the Timboon Quarry's operations but were a means of distributing the income from the venture between Kurdeez Minerals and RKM".

74 MDL also drew attention to the fact that RKM's acquisition of Timboon as a distressed asset from external administration mirrored MDL's original acquisition in around May 1997 of the Buckaroo Road Quarry which it had acquired from the liquidator of Industrial Minerals Australia Pty Ltd.

75 Separately from the above, there was a deal of evidence bearing upon the valuation of the Timboon Quarry. This is relevant to ground 9 which arises if a breach of duty is made out. It will be convenient to defer addressing this until dealing with that ground.

Overview of these reasons for judgment

76 Robert and Stephen owed MDL fiduciary and statutory obligations as senior employees and, in the case of Robert, as a director. But "to say that a man is a fiduciary only begins the analysis", to use Frankfurter J's words quoted by the High Court in *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165; [2001] HCA 31 at [77]. That Robert and Stephen owed fiduciary obligations to MDL was admitted, but their scope was controversial both at trial and on appeal.

77 Ground 4 of the appeal and grounds 1-8 of the cross-appeal challenging the findings as to the scope of the duties owed by Robert and Stephen are, logically, the starting point of the analysis. Depending on the finding of the scope of the fiduciary duties owed by Robert and Stephen, whether or not those duties were breached is uncontroversial. This accords with Dixon J's observation nearly a century ago in *Birtchnell v Equity Trustees, Executors and Agency Co Ltd* (1929) 42 CLR 384 at 408; [1929] HCA 24:

> "Once the subject matter of the mutual confidence is so determined, it ought not to be difficult to apply the clear and inflexible doctrines which determine the accountability of fiduciaries for gains obtained in dealings with third parties."

78 It will then be convenient to address the appellants' submissions that part of the profits cannot be the subject of an account because of the reasoning in *Peninsular and Oriental Steam Navigation Co v Johnson*, the availability of the "standing by" discretionary defence, causation and quantification.

The challenges based on the scope of Robert's and Stephen's fiduciary duties

79 In determining the scope of the duties owed to MDL by its director and employees, only limited assistance is derived from MDL's Constitution. The document does not contain a clear statement delineating the company's

business. Clause 17.4 provided that a director was not disqualified from contracting with MDL, and a contract or arrangement entered into by MDL in which a director was interested would not be avoided. Nor would the director be liable to account to MDL for any profit arising, but the nature of the director's interest must be disclosed by the director. The clause conformed with the replaceable rule in s 194 of the *Corporations Act* and its predecessors, discussed in R Austin, H Ford and I Ramsay, *Company Directors: Principles of Law and Corporate Governance* (LexisNexis Butterworths, 2005), pp 341-44. The primary judge found at [128], and no issue was taken on appeal, that no formal disclosure was required where the other director was already aware of the contract or arrangement, consistently with *Woolworths Ltd v Kelly* (1991) 22 NSWLR 189, but that that did not assist Robert in circumstances where Robert did not make full and fair disclosure of his interest in dealings between RKM and MDL.

80 Neither side pointed to any business plans or provisions in contracts of employment which directly addressed the scope of Robert's and Stephen's fiduciary obligations. (If there was a written contract of employment for Robert, Brian or Stephen in evidence, the Court was not taken to it.) The MDL website, which was in evidence, described the company as "Australian Family Owned & Operated. Processing Limestone, Dolomite, Feldspar, Stonedust and Quarry Products". It does not greatly assist delineating the scope of the company's activities.

81 However, as Dixon J stated in *Birtchnell*, the subject matter over which the fiduciary obligations extend is determined "by the character of the venture or undertaking for which the partnership exists, and this is to be ascertained, not merely from the express agreement of the parties, whether embodied in written instruments or not, but also from the course of dealing actually pursued by the firm." This was reaffirmed by Deane J in *Chan v Zacharia* (1984) 154 CLR 178 at 196; [1984] HCA 36 and by French CJ and Keane J in *Howard v Federal Commissioner of Taxation* (2014) 253 CLR 83; [2014] HCA 21 at [34]:

> "Despite their broad judicial formulations fiduciary duties are not infinitely extensible. That point was made in *Chan v Zacharia*, which concerned the content of the fiduciary duties of members of a partnership inter se. The limits of those duties were to be determined by the character of the venture for which the partnership existed, the express agreement of the parties and the course of dealings actually pursued by the firm. The scope of the fiduciary duty generally in relation to conflicts of interest must accommodate itself to the particulars of the underlying relationship which give rise to the duty so that it is consistent with and conforms to the scope and limits of that relationship. It is to be 'moulded according to the nature of the relationship and the facts of the case'." (footnotes omitted)

82 This Court applied Dixon J's statement in *Beach Petroleum NL v Kennedy* (1999) 48 NSWLR 1; [1999] NSWCA 408, noting at [195] that "a role which was limited when originally assumed may, by reason of conduct in performance of the role, be expanded so as to extend the duty".

83 In *Omnilab Media Pty Ltd v Digital Cinema Network Pty Ltd* [2011] FCAFC 166; 285 ALR 63 at [206], Jacobson J said with the agreement of the other members of the Full Court that:

> "It is fundamental that the scope of the fiduciary duty must be moulded according to the nature of the particular relationship and the facts of the case."

84 In *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296; [2012] FCAFC 6 at [143], Finn, Stone and Perram JJ emphasised the importance of actions taken by Mr Grimaldi without request and on his own initiative in determining the subject matter over which his fiduciary obligations extended. They added at [179], in a passage cited by Gageler J in *Howard v Commissioner of Taxation* at [110]:

> "The concept of 'duty' in the 'conflict of duty and interest' formula of the first of these is convenient shorthand. It refers simply to the function, the responsibility, the fiduciary has assumed or undertaken to perform for, or on behalf of, his or her beneficiary. What that function or responsibility is, is a question of fact. It may be narrow and circumscribed, as is often the case with specific agencies; it may be broad and general, as is characteristically the case with the functions of company directors; its scope may have been antecedently defined or determined; it may have been ordained by past practice; it may be left to the fiduciary's discretion to determine; and it may evolve over time as is commonly the case with partnerships."

85 In *Gunasegaram v Blue Visions Management Pty Ltd* [2018] NSWCA 179; 129 ACSR 265 at [152], Gleeson JA said, citing that passage:

> "it is necessary to focus on the actual functions or responsibilities assumed by the fiduciary to determine the subject matter over which his or her obligations extend, at least for the purposes of deciding whether there is a conflict of interest and duty or a conflict between duties."

86 To the same effect, Lord Upjohn had said in *Boardman v Phipps* [1967] 2 AC 46 at 127 that once a fiduciary relationship was found to have been established,

> "that relationship must be examined to see what duties are thereby imposed upon the agent, to see what is the scope and ambit of the duties charged upon him."

87 The necessity of having regard to the actual course of dealing is so utterly orthodox that it may conceal the complexity of the interrelationship between common law and equity. While contract may be and often is the foundation of a status-based fiduciary relationship (such as a deed of trust, a partnership deed or a solicitor's retainer), and the contract is ordinarily the starting point for identifying the scope of the fiduciary obligation, there are cases where the limits of the area within which the fiduciary is not free to act self-interestedly are delineated not by contract but by conduct. The conduct is apt to fall short of amounting to an informal variation of contract or estoppel or some other legally enforceable right, especially when it is borne in mind that many proposals to vary a contract will themselves give rise to a conflict. A mere course of conduct by a company or partnership expanding into a new area will, without more, prevent a director or partner from taking up an opportunity in his or her own name in that new area. Thus, while the fiduciary relationship must accommodate itself to the terms of the contract so that it is consistent with and conforms to them (as Mason J famously said in *Hospital Products*), not uncommonly a contract which appoints someone as a partner or director may be imprecise about the scope of the person's obligation, leaving that scope to be made certain by the "course of dealing actually pursued". This is one reason for "the danger of trusting to verbal formulae" and why it is important to note that there "is no class of case in which one ought more

carefully to bear in mind the facts of the case ... than cases which relate to fiduciary and confidential relations": *In re Coomber* [1911] 1 Ch 723 at 728-729; *Boardman v Phipps* at 125; *Warman International Ltd v Dwyer* (1995) 182 CLR 544; [1995] HCA 18 at 559-560.

88 Lord Sales succinctly summarised ways in which the scope of fiduciary duties may be expanded and contracted in his 2019 John Lehane lecture "The Interface between Contract and Equity":

> "A person may become subject to fiduciary duties through dealings in precontract negotiations. Fiduciary obligations may come to be expanded by virtue of the pattern of dealings between the parties after the contract is up and running, or conversely may be reduced below the extent of those originally contemplated if during the execution of the contract the conduct of the parties narrows the area in which it can be said that the criteria for fiduciary responsibility are satisfied. And very significantly, fiduciary obligations may survive the termination of the contract, for example when the fiduciary withdraws from a contract in order to take advantage of a corporate opportunity identified while he was a fiduciary."

89 Further, his Lordship noted that a contractual term to the effect that "no fiduciary obligation is created by this contract" will not be effective. The ultimate question is whether the parties have agreed to what in law is a fiduciary relationship: "even if they do not recognise it themselves and even if they have professed to disclaim it": *Garnac Grain Co Inc v H M F Faure & Fairclough Ltd* [1968] AC 1130 at 1137. More generally, the High Court has said that parties cannot deem a relationship between themselves to be something it is not: *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21; [2001] HCA 44 at [58]. That accords with Finn J's observation that "parties cannot by the mere device of labelling, no matter how genuinely intentioned, either confer a particular legal character on a relationship that it does not possess or deny it a character that it does possess": *South Sydney District Rugby League Football Club Ltd v News Ltd* [2000] FCA 1541; 177 ALR 611 at [134], although naturally the terms of their agreement will bear upon the nature of the relationship between them. None of this is to deny that sufficiently clear contractual language can in appropriate cases limit the scope of a fiduciary duty or even exclude it: see for example *Noranda Australia Ltd v Lachlan*

Resources NL (1988) 14 NSWLR 1 at 15 and 17 and *Eaton v Rare Nominees Pty Ltd* (2019) 2 QR 222; [2019] QCA 190 at [66].

90 It would thus be wrong to think that there is some bright line rule sufficient to determine the scope of a fiduciary obligation. In *Howard,* Hayne and Crennan JJ emphasised at [61]:

> "[T]he working out of the application of the rule [against conflicts] to company directors is not achieved by the bare repetition of its terms. Much closer attention must be given to the duties, interests and alleged manner of conflict than is given by simply observing that directors owe fiduciary duties. It is necessary to identify the duties or interests which are said to conflict or present a real possibility of conflict."

91 This accords with, and is an illustration of a more general approach in equity described by Dixon CJ, McTiernan and Kitto JJ in *Jenyns v Public Curator (Qld)* (1953) 90 CLR 113 at 119; [1953] HCA 2 that such cases "do not depend upon legal categories susceptible of clear definition and giving rise to definite issues of fact readily formulated which, when found, automatically determine the validity of the disposition". Rather a court of equity "takes a more comprehensive view, and looks to every connected circumstance that ought to influence its determination upon the real justice of the case".

92 Accordingly, I turn to the course of dealing actually pursued by the firm.

Evidence bearing upon the scope of Robert's and Stephen's fiduciary duties

93 First, it was uncontroversial and the primary judge recorded at [51] that in around October 2009, Brian and Robert acquired a half interest in the Bylong Quarry, doing so for themselves and not for MDL. The primary judge noted that this evidence was "significant, so far as that acquisition did not take place within MDL or indeed in any company in the Murdoch Group".

94 Secondly, the primary judge recorded that at around the same time that Stephen and Robert were inspecting the Timboon Quarry which was bought by RKM and operated by Kurdeez Minerals, Scott was inspecting and causing Stoneco to acquire two other quarries (Braeside and Robinson's Knob). As it

happens, both were geographically much closer to Mudgee than Timboon. There was conflicting evidence as to whether those quarries competed with MDL. Scott maintained that on the whole they did not, although the primary judge recorded that Scott "acknowledges that there was an occasion on which he successfully tendered to supply the Australian Rail Track Corporation from the Braeside quarry, in competition with MDL's Bylong quarry". The primary judge found at [64] that:

> "[Stoneco's acquisition of Braeside] is primarily significant for establishing, consistent with the parties' earlier behaviour, that they, including Scott and Brian, did not then have any understanding that the scope of MDL's activities extended to the acquisition of other quarries or that they were not free to acquire such quarries for themselves or associated companies."

95 Thirdly, a deal of evidence was directed to the Timor Quarry in the Hunter Valley. In October 2007, Scott became aware of the opportunity to acquire this quarry. It was disclosed to MDL. Robert gave evidence that he was of the view that it was too costly, and he and Stephen declined Scott's proposal to cause MDL to acquire it. The quarry was acquired by Scott's company Stoneco, and was thereafter operated, albeit after a delay attributable to litigation in the Land and Environment Court. The primary judge recorded at [45] that:

> "There is no suggestion in these proceedings that Scott breached his duty in respect of that acquisition, although the evidence does not establish that MDL or Robert expressly consented to (as distinct from not objecting to) Scott's acquisition of that quarry."

96 RKM and Bright Pear owned equipment which was used at, inter alia, the Cadia Mine; this was the basis of the account of profits ordered after trial. However, Stoneco's depreciation schedule disclosed a crusher costing $100,000 acquired in July 2009, a jaw crusher costing some $180,000 acquired in October 2010, screening plant costing $170,000 acquired in November 2011 and a range of less expensive equipment and vehicles.

97 Scott purchased a mobile crusher in July 2009 and a second crusher in October 2010. Of the first, there was a dispute at trial, and the primary judge recorded and appears to have accepted Scott's evidence that the crusher was

acquired for the Timor mine rather than to be made available for contracting use. The opportunity for performing crushing work in South Australia had been disclosed to Stephen, who thought it was not worthwhile to send the equipment to South Australia for a relatively small job. The primary judge found at [50] that:

> "I accept that matter had been sufficiently disclosed to MDL, and the fact that Stoneco then took up that opportunity, after MDL rejected it, does not provide any basis for any narrowing of the scope of MDL's crushing business or for RKM or [Bright Pear] to take up other opportunities within the scope of MDL's business without full and fair disclosure."

98 Finally, there was a deal of evidence concerning an "agreement" in November 2009 between Brian, Robert, Scott and Stephen to split their respective interests. In part the parties' varying evidence on this went to the judge's assessment of their reliability, and in part it was relied upon, without success, as a defence to the proceedings at trial. It was addressed at length at [52]-[57]. The primary judge recorded at [52] that:

> "It now appears to be common ground that, on 20 November 2009, Brian, Robert, Scott and Stephen met and agreed, at least in principle, to split their respective interests, although no attempt was made to identify how that would be implemented or who would take particular assets and that split was not later agreed or implemented."

The reasoning challenged by ground 4

99 The primary judge found that Robert and Stephen breached the fiduciary and statutory duties they owed to MDL when they caused their own companies RKM and Bright Pear to perform work at Cadia, but rejected MDL's claim that there was a breach when RKM and Kurdeez Minerals acquired and operated the Timboon Quarry in Victoria. Each finding was challenged.

100 It is not necessary in order to resolve those challenges to identify exhaustively what the scope of the duties owed by Robert and Stephen was. It is sufficient to determine (a) whether working at Cadia, and (b) whether taking up the opportunity at Timboon, was or was not within the scope of the duties owed by Robert and Stephen. Intermediate questions, including the taking up of quarrying and crushing opportunities geographically closer to Mudgee do not

arise. That reflects the ordinary pragmatic approach to the resolution of justiciable controversies, and carries with it a considerable simplification of the analysis.

101 I have also largely passed over the fact that Robert's fiduciary duties were owed both in his capacity as a director and in his capacity as an employee. The parties seem to have followed the same course (at least in this Court). Those duties differed. Professor Kershaw has recently emphasised how a single person can perform multiple and distinct fiduciary obligations, and indeed how common this is: D Kershaw, "Corporate Law's Fiduciary Personas" (2020) 136 *Law Quarterly Review* 454. It seems likely that in relation to MDL's existing contract at the Cadia mine, Robert's duties as employee would be at the forefront, while in relation to the claim concerning the acquisition of Timboon mine, his position as a director would be more prominent. But for present purposes, I follow the parties' approach which did not descend to an analysis of separate duties owed by Robert in those two capacities; the issues in this appeal may be resolved without that added complication.

102 By ground 4 of the appeal, the appellants maintained that by reason of the creation of Mudgee Stone Co and the individual companies established by each of the four men, the scope of the fiduciary obligations owed by Robert and Stephen became narrowed so as to permit them to cause companies other than MDL to perform work at Cadia. The submission and the basis given by the primary judge for rejecting it may be seen in [127]:

> "Mr Kelly submits that the scope of any fiduciary duty owed to MDL by Brian, Robert, Scott and Stephen and the scope of any statutory duty imposed by ss 180-183 of the Act were narrowed by the arrangements made when Scott and Stephen took up interests as shareholders in MSC, giving rise to a suggested 'de facto' family partnership which it is suggested would allow members of the family to 'go their own way'. It seems to me that there was nothing in those arrangements which narrowed the scope of Robert's duties owed to MDL to permit the diversion of work from MDL to his and Stephen's associated entities, or to permit Robert to make decisions for both MDL on the one hand and RKM or [Bright Pear] [on] the other when they were in opposite interests in respect of the terms of any subcontracting or hire arrangement for work and equipment at the Cadia mine."

The parties' submissions

103 The appellants focussed upon what was said to be "a major event in the history of the relationship between Brian, Robert, Scott and Stephen Murdoch", namely, the decision in around 2002 or 2003 to incorporate Mudgee Stone Co to carry on a business operating a quarry at Oberon and deploy its own mobile crushing equipment on that and other sites. Mudgee Stone Co had its own Hyundai Excavator and Chieftain Powerscreen crusher. Each of Stoneco, RKM and Bright Pear acquired and operated its own quarry and mobile equipment. As noted above, at least some of that equipment was "mobile" in the sense that it could (doubtless not without some cost, time and effort) be relocated to other locations – including potentially interstate, as was contemplated in relation to some crushing work in South Australia.

104 The appellants submitted that it followed that each of Brian, Robert, Scott and Stephen was placed in a position of actual or potential conflict between interest and duty once the four of them were participating in Mudgee Stone Co, with Scott, Robert and Stephen operating their own companies as well as MDL. It was put that this:

> "could only be reconciled upon terms that each of Brian, Robert, Scott and Stephen Murdoch and their related corporate entities was free to go their own way and conduct business each for its own profit. If that were not so, the structure put in place would have had the result that every allocation of equipment and work between sites or which affected competing interests would be infected by conflict."

105 The appellants said that the primary judge's reasoning that permitted a "diversion" of work begged the question. If RKM and Bright Pear were at liberty to carry out work self-interestedly, there was no "diversion" of work from MDL and no basis on which MDL was entitled to priority over the other companies. They added that it would have been impossible for MDL to fulfil its Cadia contracts without a narrowing of Robert's duties sufficient to permit him to allocate RKM equipment to carry out the work at Cadia, and that the attenuation provisions in cl 17.4 of the Constitution "inform[ed] the possibility that directors' duties may be attenuated in the manner claimed by the appellants".

106 The appellants submitted that asking whether there was full and fair disclosure when the disputed work items were undertaken was to frame the inquiry at the wrong point of time. Rather, the inquiry should have been made years earlier, when by reason of the incorporation of other corporate entities the possibility of conflict was created. From that time, Robert and Stephen "occupied" a position of conflict. It was said that it was "incorrect to seize upon later transactions (for the purpose of obtaining an account of profits) which flowed from the occupation of the position of conflict to which consent had already been given".

107 MDL complained, first, that this had not been pleaded. Secondly, MDL submitted that there was a world of difference between companies within the Murdoch Group (notably, MDL and Mudgee Stone Co), and companies such as RKM and Bright Pear. It was said that within the "Murdoch Group", companies and assets "were held equally by each of Brian Murdoch (or his side of the family) and Robert Murdoch (or his side of the family)". (The term "Murdoch Group" was confined to the companies which were equally owned by Brian or Brian and Scott on the one hand, and Robert or Robert and Stephen on the other hand, although of course all of the companies were "related" for the purposes s 50 of the *Corporations Act*.) In that way, it did not matter if assets (such as crushing equipment) were moved within the Murdoch Group because "[t]he profits generated by work that fell within the scope of the business of the Murdoch Group flowed through equally to the two sides of the family, irrespective of the corporate entity utilised for such work". Thirdly, MDL submitted that the submissions amount to a circularity of reasoning, to the effect that "the Appellants' difficulties with conflicts of duty and interest are best resolved by relieving the Appellants of any fiduciary obligations". Fourthly, MDL submitted that the obviousness of the conflict did not remove the consequences for a person who acts self-interestedly; to the contrary, it rendered the breach more egregious. Fifthly, MDL submitted that the appellants' failure to challenge the finding that there was no full or fair disclosure disentitled the appellants from contending that the duties were narrowed. Finally, it submitted that the appellants' suggestion "that the temporal point for consideration of the issue of consent to the Cadia Work

(which was undertaken in the period from 2010 to early 2014) was some earlier point in time (perhaps at the time of [Mudgee Stone] being incorporated in 2002)" was "with respect, nonsensical", and that the appellants ran no case at trial that they had "blanket" or "carte blanche" consent to do so.

Consideration of ground 4 of appeal

108 This ground may be resolved quite concisely, in light of the fact that the only question is whether Robert and Stephen were free to cause RKM and Bright Pear to make money doing work at the Cadia mine which had been contracted to MDL.

109 I do not agree with some of the submissions advanced by MDL. Only if a director's or a fiduciary's conduct falls within the scope of his or her fiduciary obligation will there be a breach of fiduciary duty. I incline to the view that, strictly speaking, it is for the plaintiff to plead the scope of the duty which it is alleged has been breached, rather than for the defendant to allege a more circumscribed scope which does not extend to the conduct alleged to constitute the breach. That view is consistent with decisions such as *Jacobsen v Jacobsen* [2017] NSWSC 1590 at [98] ("nor is the scope of any fiduciary obligation adequately pleaded") and *Galati v Deans (No 2)* [2018] NSWSC 1813 at [93] ("The nature and scope of the alleged fiduciary duties need to be clearly articulated ..."). Often the fact that conduct which is alleged to be a breach falls within the scope of a scope of a fiduciary duty is not seriously in issue. But the establishment of separate companies with potentially competing businesses made the present litigation a case where the scope of the various fiduciary obligations was plainly a real issue.

110 In the present case, neither side's pleadings descended to these levels. But the parties proceeded to serve enormous affidavits dealing with their history (for example, Robert's three affidavits comprise 1055 + 210 + 167 = 1432 paragraphs over some 220 pages excluding annexures and exhibits), largely admitted without objection. Much of that history bore on the question of

scope. Brian made two affidavits in response. The appellants provided written opening submissions dated 27 July 2020, three weeks prior to the trial, confirming their denial of liability for the Cadia claims on the basis that "there is no such liability, as they were free to undertake these transactions." MDL's closing written submissions addressed the appellants' submission that fiduciary obligations were moulded to accommodate the relationship giving rise to them, reproduced the passage from *Grimaldi* which itself reproduced the passage from *Birtchnell* mentioned above and then contended that Robert and Stephen each assumed and undertook a wide range of responsibilities for or on behalf of MDL (written submissions 14 September 2020, paras 28-29). In circumstances where it was for the plaintiffs to plead the point, where the evidence extended to scope, and where the issue was contested on the merits at trial and decided on the merits by the primary judge, I would not resolve this issue on a pleading point (noting further that strictly this should have been the subject of a notice of contention). I have addressed the pleading point a little elaborately in light of certain grounds of MDL's proposed cross-appeal.

111 I would also not accept a submission that the difference between MDL and Mudgee Stone Co can be ignored because both are co-owned by the two "sides" of the family. The distinction between a company co-owned by the two fathers, and one owned in equal shares by the two fathers and the two sons is real, and indeed is important in the present case, Scott needing to persuade Brian to take action on behalf of MDL against Robert and Stephen, as addressed in detail in grounds 5 and 6 below. And some of MDL's submissions conflated the defence of consent with the separate and anterior issue of whether conduct is a breach of duty because it was outside the scope of the area within which the fiduciary could not act self-interestedly.

112 Nonetheless, I do not accept the appellants' submissions. First, the fact that MDL was unable to perform its contractual obligations at the Cadia mine is no defence to the claim that Robert and Stephen breached their fiduciary or statutory obligations to it by causing RKM and Bright Pear to do that work. As was said in *Warman International Ltd v Dwyer* at 558:

> "[I]t is no defence that the plaintiff was unwilling, unlikely or unable to make the profits for which an account is taken or that the fiduciary acted honestly and reasonably. So, in *Regal (Hastings) Ltd v Gulliver*, although the directors acted in good faith and in the interests of the company of which they were directors in taking up shares in a subsidiary which the company could not afford to take up, they were held accountable for the profit made on the sale of the shares. And, in *Phipps v Boardman*, the solicitor was held accountable for the profit he made, notwithstanding that he acted bona fide and in the interests of the trust and that the opportunity would not have been availed of but for his skill and knowledge." (footnotes omitted)

113 Secondly, while in principle it is possible that steps such as the establishment of individual companies with businesses which were in competition with MDL altered the scope of Robert's and Stephen's fiduciary obligations to MDL, I do not accept that any narrowing extended to entitling Robert and Stephen to cause RKM and Bright Pear to do work *at the Cadia mine*. Whatever view may be taken of the effect of a corporate structure which exposed all of Brian, Robert, Scott and Stephen to the conflicts between duty and duty, and duty and interest, it did not permit Robert or Stephen to cause their own companies to do work at the Cadia mine which MDL had in fact been doing and had contracted to do.

114 This was not a case of a new business opportunity to provide crushing services. Rather, it involved performing work which MDL had already contracted with CVO to do, at the Cadia mine site where MDL's equipment was already located and to which employees such as Stephen had been inducted. As MDL observed, Robert gave evidence that "you just can't go and get a subcontractor to get on the Cadia site. It takes them probably a month to be inducted to start with". His evidence was directed to the impossibility of MDL performing its obligations without using RKM or Bright Pear resources, but the same evidence confirms the privileged position which RKM and Bright Pear were exploiting when they performed work on behalf of MDL.

115 The duties in equity or their statutory counterparts were not so confined as to permit Robert or Stephen to act self-interestedly in exploiting opportunities at a worksite where MDL had contracted with CVO. I am conscious that the appellants strenuously maintained that MDL could not fulfil its existing contractual obligations at Cadia without RKM and Bright Pear making their

own equipment available. That point is more directly addressed under the grounds concerning causation below. But it is as well to explain at this point why MDL's incapacity did not mean that Robert and Stephen were free to act to cause their own companies to fulfil MDL's obligations. Robert and Stephen as employees should have been acting in MDL's best interests, and preferring MDL's interests to their own. Let it be assumed that, as they maintain, MDL could not fulfil its obligations, and the only companies which could fulfil them were RKM and Bright Pear. Even then it was for the company acting through persons not subject to an obvious conflict between duty to MDL and self-interest to determine whether MDL should breach its contract or seek to renegotiate with CVO or subcontract the work to RKM and Bright Pear. The non-conflicted decision-maker (most likely Brian) might well have chosen to have RKM and Bright Pear perform the work. The negotiation about price might then raise a legally interesting issue. It seems at least arguable that in that negotiation, all parties having participated in the establishment of competing companies, Robert and Stephen were free to act self-interestedly in determining the price at which their companies would subcontract to MDL. That might arguably be a "defined area of conduct" where, of necessity, Robert and Stephen were free to act self-interestedly in negotiating with MDL; cf *Noranda Australia Ltd v Lachlan Resources NL* at 15. But Brian (or some other non-conflicted MDL officer) never had the opportunity to determine how to respond to MDL's incapacity to fulfil its obligations to CVO. In *R v Byrnes* (1995) 183 CLR 501 at 516-517; [1995] HCA 1, Brennan, Deane, Toohey and Gaudron JJ said:

> "A company is entitled to the unbiased and independent judgment of each of its directors. A director of a company who is also a director of another company may owe conflicting fiduciary duties. Being a fiduciary, the director of the first company must not exercise his or her powers for the benefit or gain of the second company without clearly disclosing the second company's interests to the first company and obtaining the first company's consent. Nor, of course, can the director exercise those powers for the director's own benefit or gain without clearly disclosing his or her interest and obtaining the company's consent." (footnotes omitted)

116 This suffices to reject this ground of appeal.

Proposed cross-appeal grounds 1-8

117 The proposed cross-appeal contains nine grounds, eight of which are directed to impugning the finding by the primary judge that Robert and Stephen did not breach any fiduciary obligation owed to MDL when acquiring the Timboon Quarry. Those eight grounds have numerous sub-grounds. In large measure, they were developed collectively in written and oral submissions, and I shall follow the same course.

118 The gravamen of all these grounds is a challenge to the same dispositive reasoning of the primary judge at [211]-[215]. MDL's overarching claim is that the primary judge erred in finding that the acquisition and exploitation of the Timboon Quarry was not a breach of fiduciary duty. The grounds also include some more precise challenges to particular aspects of the reasons.

The reasoning of the primary judge

119 The critical reasoning dispositive of the claim relating to Timboon Quarry is at [211]-[215]. In those paragraphs, the primary judge referred to a series of acquisitions of quarries by members of the Murdoch family other than through MDL. His Honour referred to Stoneco's acquisition of the Timor Quarry, Brian's and Robert's personal acquisition of an interest first of 50% in October 2009 and then 100% in January 2013 in the Bylong Quarry, which was then leased to MDL, Stoneco's acquisition in the Braeside and Robertson's Knob quarries and RKM's and Kurdeez Lime's acquisition of Timboon, and concluded at [211] that:

> "It seems to me that this evidence implicitly, and rightly, recognises that it is not more probable than not that an asset such as the Timboon quarry would have been acquired by MDL, rather than by Brian or Robert personally or by another special purpose company in which they held shares."

120 His Honour then stated at [213]-[214]:

> "The Robert Murdoch Interests in turn rely on the conduct of Scott and Stoneco in the acquisition of quarries, which was known to Brian and to MDL, as conduct that Scott (and Brian and MDL) assumed that Scott was entitled to undertake, consistent with a common assumption of all parties that they were

'free to pursue independent activities including activities such as those at Braeside which were in competition with MDL's business'. While I do not accept that proposition in respect of the whole of MDL's business, and the provision of crushing services in particular, I accept that the evidence of Scott and Stoneco's acquisition of quarries reinforces the view that the acquisition of quarries was not within the scope of any duties owed by Robert and Brian, or Scott and Stephen, to MDL, consistent with the matters to which I have referred above. I also accept that, as Mr Kelly points out, it would be highly unlikely that both Scott and Stephen, with the support of each of Brian and Robert, about the same time each engaged in a significant breach of fiduciary duty owed to MDL, by each acquiring a different quarry that each of them understood should properly have been acquired by MDL.

It seems to me that there was no consistent historical pattern of the acquisition of other limestone mines, still less mines outside the Mudgee area, by MDL and no evidence of any discussion between Robert and Brian of any intended extension of the scope of MDL's business of operating quarries outside the Mudgee area. The business of MDL and associated companies had been conducted for a considerable time on the basis that Brian, Robert and their sons could and did acquire quarrying and other interests outside MDL. The contrary view seems to me to be wholly implausible, where the interest in the Bylong quarry was acquired by Robert and Brian personally rather than MDL, although MDL conducted quarrying activities on it; Stoneco acquired the Timor quarry, without objection by MDL but also without its consent; Stoneco subsequently acquired the Braeside and Robinson's Knobb quarries, again without MDL's consent; and RKM and Kurdeez Minerals subsequently acquired the Timboon quarry; and it is highly unlikely that [each] of Brian, Robert, Scott and Stephen at various times undertook these acquisitions in breach of their respective obligations to MDL or other companies within the Murdoch Group. While I do not accept the Robert Murdoch Interests' claim that the obligations of the parties to MDL had ceased in 2009 by reason of the separation discussion, it seems to me that the parties had not treated the opportunity to undertake quarrying, or lime and dolomite quarrying, or lime quarrying, as available only to MDL. This opportunity also did not come to Robert or Stephen in any capacity associated with MDL."

121 On that basis, his Honour concluded that there was no real and sensible possibility of a conflict between duties to MDL and the personal interests owed by Robert and Stephen in developing the Timboon Quarry and their duties to RKM and Kurdeez Minerals.

122 The central points advanced by MDL on these grounds were as follows:

(1) Robert had almost sole responsibility for identifying and pursuing new business opportunities (including acquiring quarries) for MDL.

(2) MDL was involved in owning and operating limestone quarries and was actively looking for additional quarries at the time. Timboon was such a quarry.

(3) MDL said that it was irrelevant whether MDL was "unwilling, unlikely or unable to make the profits", relying upon *Warman International Ltd v Dwyer*, and so the probabilistic reasoning of the primary judge was irrelevant. MDL said it was irrelevant that it was not Robert's duty to obtain the profit or benefit for MDL, and that it was sufficient that the advantage had accrued to Robert in breach of his fiduciary duty. MDL said that Robert was in a position of "real and sensible possibility of conflict" between his personal interests and at least his duty faithfully to pursue the interests of MDL.

123 These submissions reduce to a question of scope of duty. As it was put in final submissions at trial, and developed in MDL's written submissions on appeal, the question was whether a new lime quarry in Victoria was "sufficiently in the same ball park" as MDL's existing business activities (picking up a metaphor from *Natural Extracts Pty Ltd v Stotter* (1997) 24 ACSR 110 at 139), although the main focus was not so much the similarity of the Timboon Quarry with the existing operations as its distance from the other quarries. It was also said to have been squarely within MDL's existing and anticipated line of business.

124 MDL also raised other narrower complaints about aspects of the reasoning of the primary judge. Two are best addressed immediately.

There was no material denial of natural justice

125 First, MDL complained that it had been denied procedural fairness in three respects. MDL said that the appellants had not pleaded (i) that MDL was not the entity which more likely than not would have acquired the Timboon Quarry (ground 2(b)), (ii) that the opportunity had not "come to" Robert or Stephen in any capacity associated with MDL in circumstances where the appellants had merely pleaded that Stephen discovered the opportunity "in the course of his

own personal research while searching for plant and equipment" (ground 5(b)), and (iii) reliance upon the acquisition of the Bylong Quarry by Brian and Robert in their own names (ground 8(b)).

126 Ordinarily it is appropriate to deal with such a ground of appeal, which involves a serious criticism of the course taken by the court below, at the outset. The reason is that if there has been a material denial of procedural fairness, there will not have been a trial in accordance with law, and a retrial will be necessary: *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd* (2006) 229 CLR 577; [2006] HCA 55 at [2]-[3], [117] and [172]; *Windsor v Health Care Complaints Commission* [2020] NSWCA 110 at [51]. Although this Court divided on whether or not there had been a procedurally fair trial in *Manly Fast Ferry Pty Ltd v Wehbe* [2021] NSWCA 67, it was agreed that that ground of appeal should be determined first: see at [35] and [116]. However, when asked during the hearing by the presiding judge and me, senior counsel confirmed that MDL did not seek a retrial, but rather that this Court was asked to simply to determine the issue:

> "LEEMING JA: But ... do the natural justice grounds add anything to the other grounds? Do you want a retrial?
>
> BEDROSSIAN: No, your Honour.
>
> LEEMING JA: Then does it matter?
>
> BEDROSSIAN: Well, we say that some of the grounds relied upon by the trial judge to reject the Timboon claim relied upon matters that weren't pleaded and his Honour should not have considered them.
>
> LEEMING JA: I understand that.
>
> MACFARLAN JA: But if you're right about that, then we can give effect to our decision on that, can't we?
>
> BEDROSSIAN: Yes, your Honour, and that's what we seek."

127 An appeal to this Court is by way of rehearing, with power to make fresh findings of fact: *Supreme Court Act 1970* (NSW), s 75A(5), (6) and (10). MDL's challenge to the conclusion by the primary judge that Timboon Quarry was outside the scope of the fiduciary duties owed by Robert and Stephen will be determined in light of the evidence at trial and the parties' submissions on

that issue. But in circumstances where it is not suggested that different evidence would or could have been led and a retrial is disavowed, a ground of appeal that a party was denied procedural fairness because a finding was made outside the pleaded case goes nowhere.

128 Such claims that there have been a denial of procedural fairness, on which nothing can turn, recur in this Court. Most recently, in *Sydney Trains v Batshon* [2021] NSWCA 143 at [35]-[37] it was said:

> "But even if there were a denial of procedural fairness, Sydney Trains' appeal to this Court is by way of rehearing, and it can make and has made the same submissions here. As has repeatedly been said in this Court, attention needs to be given, when a complaint is advanced that there has been a denial of procedural fairness, to whether any such denial is material, given the parties' rights of appeal. If the complaint concerning an absence of procedural fairness can be rectified on an appeal which is by way of rehearing, then it is unlikely to be material. See for recent examples *Minister for Education and Early Childhood Learning v Zonnevylle* (2020) 103 NSWLR 91; [2020] NSWCA 232 at [55] and *Hackett (a pseudonym) v Secretary, Department of Communities and Justice* [2020] NSWCA 83; 379 ALR 248 at [139] and [176].
>
> Another way of putting this is that if this Court accepted there had been a denial of procedural fairness, it would only set aside the judgment and remit the proceeding to the Common Law Division if this Court were unable to resolve the substance of the complaint.
>
> For those reasons, these proposed grounds are entirely arid. Either the Panel's determination is attended by reviewable error or it is not. If it was, and the primary judge reached the correct conclusion although in a manner which was procedurally unfair, then there would be no occasion for the grant of leave. Alternatively, if the Panel's determination did not disclose reviewable error, then this Court would intervene irrespective of whether that result had been reached in a way which was procedurally unfair. There is no substance in the grounds concerning the admission and treatment of evidence. I would not grant leave to appeal on proposed grounds 1-3."

129 So too here. Either the primary judge made appellable error in finding that the Timboon Quarry was not within the scope of Robert's and Stephen's fiduciary duties or he did not. If his Honour did so in a way which was procedurally unfair, but nonetheless reached the correct conclusion in circumstances where (a) no further evidence is sought to be adduced, (b) it is not said that cross-examination would have differed and most importantly (c) no retrial is sought because this Court can determine the issue, then any denial of

procedural fairness would be immaterial. I would not grant leave to cross-appeal on grounds 2(b), 5(b) and 8(b).

130 However, because it is (or at least, it should be regarded) as no small matter to allege that the course adopted at trial was procedurally unfair, and lest it be thought there was something in these grounds, I should explain why in any event I am unpersuaded there was any procedural unfairness.

131 It was said that the appellants did not plead that the scope of the business of MDL was confined geographically so as to exclude Timboon. Rather, the appellants had pleaded the 2009 resolution to split up MDL which narrowed the relevant duties, which was rejected by the primary judge (at [54]) and not challenged on appeal. But in contrasting the pleaded defence of the 2009 resolution with the unpleaded dispositive findings as to the scope of the duties owed by Robert and Stephen, MDL conflates two quite different things.

132 The 2009 resolution was a positive defence requiring the appellants/defendants to establish that Brian, Robert, Scott and Stephen consensually agreed to split the business freeing each of them to act self-interestedly even in areas in which they would otherwise have been required to prefer the interests of MDL. The defence raised new and indeed controversial facts, which would have been an answer to MDL's claim for breach of fiduciary duty in the event that breach had been made out. In contrast, MDL would fail unless it established breach of duty, which is to say, conduct which lay within the scope of Robert's and Stephen's fiduciary obligations owed to it. MDL did not address scope in its pleading. I have already mentioned that, strictly speaking, this fell to MDL to allege and establish. The appellants said that the complaints on appeal based on the pleading should be dismissed because they amounted to MDL's failure to make out an element of its claim. I agree.

133 Indeed, during the course of preparing these reasons, I noticed that this had been squarely addressed during the course of oral address. There was the following exchange:

> "HIS HONOUR: Yes. Well, Mr Bedrossian, the way you approached this earlier suggests that you are conscious of this, but just in case there's any submission you wish to make about it, it seems to me that here I must as a necessary analytical step ask questions about scope of duty and consistent with what I understand as to the authorities, I do [not] regard myself as strictly confined by pleadings, in particular if that would lead me to proceed on a false basis, which it seems to me does justice no credit.
>
> I would have to be conscious of procedural fairness and whether any issue that was being raised would deprive a party of procedural fairness. At the moment it seems to me highly unlikely, given the way this case has been run by both parties, that there are likely to be issues of deprivation of procedural fairness because any issue that could have been canvassed once has been canvassed at least three times.
>
> BEDROSSIAN: Your Honour, I understand and accept the force in your Honour's point. I do accept that in ascertaining the scope of duties, your Honour has to look at the evidence in its totality and not just the pleadings."

134 Any complaint about the way in which the Court approached the findings of scope of duty being procedurally unfair is difficult to reconcile with that exchange.

135 In its written submissions in reply, MDL said that the connection between the high level of generality of MDL's pleading and the alleged absence of any substance to MDL's complaint about procedural fairness was unclear. The connection is that normally it is not necessary for a defendant to plead to an element of the plaintiff's case which has not itself been pleaded. In any event, very lengthy affidavits were exchanged on these issues.

136 The distinction between a pleading that Stephen discovered the Timboon Quarry opportunity "in the course of his own personal research" and the finding that the opportunity had not "come to" Robert or Stephen in any capacity associated with MDL, which is the basis of ground 5(b), is illusory. It may be as Brian submits that the defence to the Timboon Quarry claim did not expressly plead the scope of MDL's business, but where the issue of competing quarries owned by other companies was raised in other proceedings and indeed was the subject of a concession (see below), and where the submission was explicitly made at trial, I do not see any substance to a claim that there was a denial of procedural fairness.

137 The issue in ground 8(b) was squarely raised in the second derivative proceeding, which was directed to Scott's purchase of crushing machines from 2009 and Stoneco's acquisition of the Braeside basalt quarry, which was said to be a direct competitor to MDL's business of supplying basalt products from the Bylong Quarry owned by Robert and Brian and operated by MDL. The primary judge summarised this at [250]. Indeed, Brian made a qualified concession at the commencement of the trial, recorded by the primary judge at [257], that in the event that Robert and Stephen were held liable in respect of the Timboon Quarry claims, then he accepted that Scott and Stoneco likewise ought to be held liable in respect of the matters pleaded in the second derivative proceeding. In other words, the ways in which the activities of Robert and Brian and the other companies related to MDL informed the scope of the fiduciary duties were squarely in issue in the proceedings that went to trial.

Impermissible coincidence reasoning?

138 Ground 8(g) of MDL's proposed cross-appeal asserts that parts of the reasoning of the primary judge involved impermissible coincidence reasoning. Thus it was said that:

> "It should also be noted that the [Robert Murdoch interests] never served any 'coincidence notice' for the purposes of section 98 of the *Evidence Act 1995* (NSW). The coincidence rule affects the finding at [214] ('and it is highly likely'). The [Robert Murdoch interests] submitted and his Honour accepted that the existence of those two events was not a coincidence, but rather proved some understanding or agreement. That was an impermissible conclusion." (references omitted)

139 This was not developed in oral submissions. I do not accept that there was any such error. Section 98 of the *Evidence Act* is a rule against the admissibility of evidence, but the documents supporting the (unchallenged) findings of primary fact concerning the acquisitions of other quarries were not objected to. Separately, s 95 of the *Evidence Act* forbids the *use* of evidence to which s 98 applies to prove a particular matter: see *El-Haddad v R* (2015) 88 NSWLR 93; [2015] NSWCCA 10 at [38]-[42]. The gravamen of this subground is that the primary judge contravened s 95. But the mode of

reasoning seen in the dispositive passages (at [211] and, especially, at [214]) does not contravene the "coincidence rule".

140 The issue is not whether two or more events occurred coincidentally. The issue is whether the scope of MDL's business of operating quarries extended outside the Mudgee area. What in fact occurred – the "actual course of conduct" of the parties – was relevant to that issue. Indeed, it was central to that issue. True it is that one way of formulating the mode of reasoning is to ask whether it is a "coincidence" that companies other than MDL acquired interests in the quarries at Timor, Bylong, Braeside, Robertson's Knob as well as Timboon. But that is an artificial reformulation of the mode of reasoning adopted by the primary judge.

141 In its written submissions, MDL sought to rely upon the reasoning in *White v Johnston* (2015) 87 NSWLR 779; [2015] NSWCA 18 at [136]-[139], but there evidence was tendered for no purpose other than to support a reasoning process that the defendant had a tendency to act in a particular way. The tendency was to render bills for dental work without providing such treatment, and there was error in admitting the evidence for a different purpose (namely, whether dental work actually performed on the plaintiff had no therapeutic purpose). That is a very different case. Here the evidence of other acquisitions was directly relevant to an issue: the scope of the fiduciary duties alleged to have been breached, which was informed by the actual course of conduct of the parties.

Did the scope of the duties owed by Robert and Stephen extend to Timboon Quarry?

142 MDL's claims based on the acquisition and operation of Timboon Quarry turn on a conclusion as to the scope of the duties owed by Robert and Stephen. The conclusion is based on a series of primary facts. No challenge is made to the individual findings of fact as to the acquisition of other quarries (notably, the Bylong Quarry acquired by Robert and Brian, the Timor Quarry operated by Stoneco, and the Braeside and Robinson's Knobb Quarries acquired by Stoneco at the same time RKM acquired Timboon Quarry).

143 The primary judge said that it was highly unlikely that each of Brian, Robert, Scott and Stephen was undertaking these acquisitions in breach of their duties to MDL. This reasoning draws upon a pattern of conduct, as revealed in a series of acquisitions of quarries in New South Wales by entities other than MDL controlled by men who owed fiduciary obligations to MDL. It supports the conclusion that the scope of the duties owed by directors and employees of MDL did not extend to the Timboon Quarry in Victoria. The geographical area within which a company's operations extend will largely depend on the nature of those operations. Some companies may and do operate over wide geographical areas, indeed worldwide. But a company which produces large amounts of crushed stone using heavy, expensive equipment is plainly limited in the areas throughout which it can operate.

144 MDL pointed to evidence that in fact it was possible to sell, and MDL did sell, its products interstate. That is so. But on analysis, it supports the conclusion reached by the primary judge.

145 The evidence was given by Robert in cross-examination. No differently from most questions of market delineation, the issue is not black-and-white. It warrants reproduction because of its nuances:

> Q. MDL sells product, that is, agricultural fertiliser product into Victoria. Correct?
>
> A. Wouldn't be much, if it was any.
>
> Q. But it does sell some. Correct?
>
> A. I don't know why it would, given the distance and also there's plenty of lime plants down there.
>
> Q. There may be plenty of lime plants but there aren't many dolomite plants are there.
>
> A. There's abundance of dolomite not too far from Timboon at Mount Gambier. Some of the highest-grade dolomite in Australia probably.
>
> Q. You know that MDL sells dolomite in Victoria. Correct?
>
> A. Yes, by the pallet here and there.

Q. And you know that it is sold in Victoria via the Timboon quarry property. Correct?

A. May have done, yeah.

Q. In other words, MDL packages or puts together dolomite and sends it down to Timboon quarry in Victoria for sale. Correct?

A. It did a little bit of that I think, as I remember, but the market's so small it didn't warrant doing much more of it.

Q. Well, it's done that from the time of the acquisition of Timboon quarry in 2011. Correct?

A. Could you tell me how many tonnes was sent down there? There wouldn't have been more than 50 tonne, I wouldn't think.

Q. But Mr Murdoch, irrespective of the amount involved, you agree that from about the time of the acquisition by RKM, of Timboon quarry, MDL has sent down to the Timboon quarry, dolomite. Correct?

A. Correct."

146 The primary judge enjoyed an advantage this Court does not in evaluating that evidence. It is far from clear whether the exchanges reflect a witness who was being argumentative, or defensive, or rather was merely seeking to correct what (to the witness) were counsel's obvious misunderstandings and simplifications. But noting in particular what was said concerning the abundance of lime plants, the small market for dolomite and the fact that it had been sold by the pallet (rather than by truckload – MDL sales reports distinguish "Dolomite–Bulk", "Dolomite Bulk Bags" and "Dolomite 25KG Bags"), the evidence supports the primary judge's conclusion that the Timboon Quarry was not within the scope of Robert's and Stephen's fiduciary obligations. The judge did not neglect that evidence when reaching the conclusion; to the contrary, his Honour explicitly had regard to it, saying at [215]:

"Where the opportunity to develop the Timboon quarry was not within the scope of MDL's business or any contemplated expansion of it, and not within the scope of Robert's [or] Stephen's fiduciary or statutory duties, there was no real and sensible possibility of a conflict between duties to MDL and their personal interests in developing the Timboon quarry or their respective duties to RKM and Kurdeez Minerals and no breach of their fiduciary or statutory duties is established. I do not neglect the facts that, as Mr Bedrossian points out, the Timboon quarry was later used as a point of sale for dolomite from MDL; or that Robert later used the association with the Murdoch Group

> business, and possibly MDL, to promote the Timboon quarry business and provided contact information for Murdoch Group or MDL staff in respect of the business; or may have later used MDL's assets or staff in respect of the Timboon quarry."

147 Finally, his Honour's reasoning is also supported by the concession made by Brian and the interests associated with him at the commencement of the trial, recorded by the primary judge at [257]-[258], to the effect that if Robert and Stephen were liable in respect of the Timboon Quarry claims, then Scott and Stoneco were liable in respect of the Braeside Quarry and Robertson's Knob Quarry. It was a remarkable fact that in the same month (February 2011) Robert and Stephen were investigating acquiring Timboon Quarry, Brian and Scott were investigating acquiring Braeside and Robinson's Knob quarries. No error is to be discerned in the reasoning of the primary judge that it was more probable that Robert, Stephen and Scott were all acting self-interestedly in an area outside the scope of their fiduciary obligations as opposed to their being in breach.

148 Against that reasoning, MDL submitted that it had in fact contemplated an expansion of its business well beyond New South Wales. This was addressed by the primary judge at [284], where his Honour said that after Robert and Brian visited New Zealand in around 2008 to investigate the land, there was "no evidence that any substantial consideration was then given to purchasing this land within MDL or within other companies in the Murdoch Group or by Brian and Robert personally, prior to the subsequent decision by Robert and Stephen to pursue that property" (which occurred in 2009 and 2010 and was beset with difficulties and was sold in 2018). There were difficulties regarding the evidence concerning the New Zealand visit (addressed by the primary judge at [49]) but there is nothing to cast doubt upon the findings of the primary judge. His Honour's reasoning does not detract from, and indeed tends to confirm, that the geographical scope of MDL's business did not extend to Timboon.

149 Ultimately, the finding by the primary judge that the Timboon Quarry was outside the scope of the fiduciary obligations owed by Robert and Stephen is

an evaluative conclusion, based on an assessment of primary facts. No separate submission was addressed to the scope of the statutory obligations owed by Robert and Stephen.

150 I do not consider that MDL has established appellable error (or indeed any error) in the finding made by the primary judge. It follows that while there should be a grant of leave save for the grounds involving a denial of procedural fairness, grounds 1-8 of the cross-appeal should be dismissed.

The principles in *Peninsular and Oriental Steam Navigation v Johnson* (grounds 1, 2 and 3)

151 These three grounds challenged the inclusion of $1,622,738 within the profits for which RKM and Bright Pear were held liable to account for work "subcontracted" to those companies (I use inverted commas because the appellants maintained that the primary judge had erred in not being persuaded that there was a contract). Those profits constituted "DWI1", being the first disputed work item and which involved payments to RKM and Bright Pear for supplying MDL with equipment and a variety of crushing and loading services during the financial years ended 30 June 2010 and 2011. In that period, following the "emergency" at Cadia, MDL invoiced CVO for a range of work, including work done by machines owned or operated by RKM and Bright Pear. In turn, it seems that payments were made by MDL to RKM and Bright Pear calculated by reference to the number of hours the machines worked and an hourly rate. There was in fact a partially completed written contract between RKM and MDL in evidence, but Mr Kelly SC disavowed any reliance upon it (Mr Bedrossian SC deployed it for a different purpose in connection with the "standing by" defence – see below).

152 These three grounds of appeal are related and were addressed collectively in the parties' written and oral submissions. The submission advanced on appeal is a purely legal one. It takes the following form:

(1) it may be inferred that there was a contract between RKM and MDL, and Bright Pear and MDL, for the hire of machinery on the Cadia site,

despite its not being documented, on the basis of contemporaneous references to "subcontract", the transfer of funds at particular hourly rates, and the way the case was opened and the way the defendants were cross-examined;

(2) that contract was never rescinded and could never have been rescinded;

(3) by application of or analogy with the principles in *Peninsular and Oriental Steam Navigation Co v Johnson* (1938) 60 CLR 189 at 212-213; [1938] HCA 16 it followed that an account of profits was not available and MDL could only sue for compensation for loss;

(4) the statutory claims sounding in orders under s 1317H took the matter no further.

153 The primary judge recorded the submission at [178] and [179] noting at the conclusion of the latter paragraph that:

> "It is not apparent that principle would extend to the position where the parties have not made a contract, although services or equipment have been supplied and paid for as a result of breach of fiduciary duty. There is no obvious necessity to set aside or vary a contract which does not exist, or does not have legal or operative effect in respect of the large majority of transactions, in order to obtain an account of profits in that situation."

154 His Honour then stated at [180]:

> "These principles apply at least where there is a sale of property to a principal without disclosure of the fiduciary's interest and, in that situation, there can be rescission and an account of profits, but no account of profits is available where rescission is impossible and the result would be to make a new contract between the parties. I asked Mr Kelly, in closing submissions, to identify the contractual arrangements on which the Robert Murdoch Interests relied to support the application of this principle in this case. Mr Kelly pointed to Ms Sullivan's evidence as to invoicing arrangements (Sullivan [86]-[95]; [126]-[129]), but those invoices did not involve any contract between MDL and RKM or [Bright Pear], but invoices issued by MDL to CVO. He also referred to Mr Mullins' assessment of the income earned by RKM and [Bright Pear] from the relevant work, but a contract is not required to derive income. It did not seem to me that Mr Kelly adequately articulated how any contract between MDL and RKM came into existence, or any contract between MDL and [Bright

> Pear] prior to the equipment hire agreement which I address below. There was no particular reason for RKM or [Bright Pear] to require a contract with MDL, since Robert's management control of MDL meant that there was no significant risk that RKM or [Bright Pear] would not be paid for the work they undertook for or equipment they supplied to MDL, at whatever rate Robert determined."

155 The dispositive paragraph was [182], which is as follows:

> "It does not seem to me that the principle on which Mr Kelly relied is applicable here. As I noted above, there is no evidence that RKM provided the relevant equipment to MDL under a contract, or that the equipment rental agreement between MDL and [Bright Pear] (Ex J1, B1045) had operative effect, where the term of that agreement was left blank and [Bright Pear] did not own equipment of any substance to lease to MDL under it, and it appears that equipment was made available to MDL on the basis that the hire charges were invoiced at rates determined by Robert rather than established by any contractual arrangement between the parties. The order for an account of profits does not remake any contract between the parties, because there was no operative contract in that respect. I would, if necessary, distinguish the cases on which Mr Kelly relied, where it is here possible to order an account of profits without any inconsistency with any operative contractual arrangement or any risk of double compensation or unjust enrichment to MDL from that account."

156 In oral submissions, Mr Kelly maintained that this was a plain case for a contract between MDL and RKM or Bright Pear. The making of payments at precise hourly rates following the supply of machines to MDL which were then used at Cadia and for which CVO was invoiced by MDL was a very clear case of a contract for hire. "Equipment hire at an hourly rate is a paradigm example of a contract, even in the absence of a documented agreement." The appellants also relied upon allegations in the pleading of subcontracting, which on the present issue were said to amount to admissions, the way the case was opened on behalf of MDL and the fact that Robert's cross-examination proceeded positively on the basis that there was a subcontract ("You caused MDL to subcontract work at Cadia in 2010 and 11. Correct?").

157 The appellants also relied upon the in-house accountant, Ms Sullivan, who prepared summary sheets annexing the documents upon which charges were allocated between the companies. It was said that "[t]here was no issue that RKM and [Bright Pear] had hired the equipment and carried out the work she recorded on behalf of MDL".

158 It was on that basis that Mr Kelly was able to submit that "the case as pleaded, opened, particularised by reference to the workings of Ms Sullivan, and supported by the primary invoices, and, here, squarely put to the witness, is that the equipment was hired by way of subcontract."

159 Against the proposition advanced in MDL's written submissions that the principle applied only for transfers of property which could not be rescinded, and not to the supply of services, Mr Kelly submitted that the distinction was not a crisp one and that the principles on which he relied could apply to the case of a lease, and were not limited to cases of transfer of ownership. He said that the underlying principle was directed to the inequity of "having your cake and eating it, too"; if the company had had the benefit of the hire, it could not simultaneously retain that benefit and strip the profits from the fiduciary who had entered into the transaction in a position of conflict. Mr Kelly accepted that it followed, if his submission were correct, that there could never be an account of profits against a self-dealing fiduciary who provided services to the person to whom the fiduciary duty was owed.

160 In relation to the further submission that the extended definition of "damages" in s 1317H of the *Corporations Act* as including "profits" stood in the way of the argument, Mr Kelly submitted that the generally worded power to order pecuniary remedies should not be understood as undercutting this basic principle. It was said that this was supported by the analysis of the provision by the Federal Court in *Grimaldi* at [631].

161 MDL responded by submitting that the appellants' analysis "by reference to 'sub-contract' involves artificial categorisation, particularly in [the] context of the provision of services", and relied on the proposition that "the Court has the ability in equity to give relief whenever 'it can do what is practically just' (*Vadasz v Pioneer Concrete (SA) Pty Ltd* (1995) 184 CLR 102 at 113-114 ...)". MDL said there was no inequity in an order for an account, that only the profit element was disgorged to MDL, and there was no double recovery. MDL also maintained that its statutory remedy under s 1317H was unaffected by this submission, noting that s 1317H(2) permitted an award of

compensation for damage to include "profits made by any person resulting from the contravention or the offence".

162 By its notice of contention, MDL said that the authorities on which the appellants relied were inapplicable, because they only applied in respect of a voidable transaction involving a contract for the sale of property or the lending of money, and that in any event an account of profits was available both in equity and under s 1317H even though rescission is not possible or has not been sought.

Consideration

163 First, contrary to MDL's submission, the issue is not a generalised one of whether the relief it seeks would be "practically just". The notion that equitable remedies are granted or withheld on some abstraction of fairness or justice was despatched by Deane J in *Muschinski v Dodds* (1985) 160 CLR 583 at 615-616; [1985] HCA 78, noting that centuries before John Selden's writing "undefined notions of 'justice' and what was 'fair' had given way in the law of equity to the rule of ordered principle which is of the essence of any coherent system of rational law". The "practical justice" to which MDL referred was the statement of principle in *Vadasz* concerning the greater power of a court of equity to achieve *restitutio in integrum*, thereby significantly enhancing the cases where rescission was available. This was explained by the High Court in *Alati v Kruger* (1955) 94 CLR 216 at 223-224; [1955] HCA 64. There is no general power, exercised according to ill-defined notions of "practical justice", authorising a court to award equitable relief contrary to or without regard to principle.

164 Secondly, there was no written contract, and the primary judge was correct to infer that given the relationship between MDL and RKM and Bright Pear, no formal contract was required. The primary judge referred to "not made a contract", "contract which does not exist" and "no operative contract". Those terms suggest, at the least, his Honour's view that no formal written contract, and no formally negotiated contract was in existence. The language probably

goes further to extend to the absence of any contractual relation between MDL and RKM and Bright Pear. However, nothing in his Honour's reasons suggests that attention was given to whether there might have been an informal contract inferred principally from conduct (making the machines available and rendering invoices) as is advanced on appeal.

165 As the appellants emphasised when the appeal was heard, the principles in *Peninsular and Oriental Steam Navigation Co v Johnson* do not turn on whether the contract which cannot be rescinded was formal or informal or written or oral or brought about by conduct.

166 The primary judge relied on the justification for the rule, namely, that equity will not "remake" a contract between the parties, and reasoned that it was inapplicable, there being no contract between MDL and RKM or Bright Pear in the first place. I do not agree. I think the appellants are correct to submit that there was a contract, albeit an informal contract, for the hire of equipment by MDL at Cadia to fulfil MDL's obligations. A contract for the sale or hire of a chattel may be brought into existence by informal words and conduct. In *Integrated Computer Services Pty Ltd v Digital Equipment Corp (Aust) Pty Ltd* (1988) 5 BPR 11,110 at 11,117 McHugh JA said that "a contract may be inferred from the acts and conduct of parties as well as or in the absence of their words". The same points were made by Ormiston J in *Vroon BV v Foster's Brewing Group Ltd* [1994] 2 VR 32 at 79-83, and in numerous other authorities collected in *Tecnicas Reunidas SA v Andrew* [2018] NSWCA 192 at [50]. As Allsop J has said, legal analysis as to the formation of contract need not be constricted to mechanical notions of offer and acceptance: *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* (2001) 117 FCR 424; [2001] FCA 1833 at [369]. All this reflects what Lord Wilberforce had earlier observed of the difficulties caused by English law having committed itself to a "rather technical and schematic doctrine of contract" which caused "many situations of daily life" only to "fit uneasily into the marked slots of offer, acceptance and consideration": *New Zealand Shipping Co Ltd v A M Satterthwaite & Co Ltd* [1975] AC 154 at 167.

167 I proceed on the basis, favourably to MDL, that there was an informal contract between RKM or Bright Pear (or both companies) and MDL for the supply and operation of crushing equipment at the Cadia mine.

168 Equity intervenes in a case such as this to take away profits made by a fiduciary in breach of duty. Where the breach amounts to the transfer of property of the person to whom the fiduciary duty is owed, then a plaintiff is not permitted simultaneously to retain the transferred property *and* to take from the fiduciary the profits derived from the transaction. That would be doubly to enrich the person to whom the fiduciary duty is owed. But it does not follow that merely because a contract has not been, or can not be, rescinded that an account of profits is not available. That is not to insist that the principle upon which Mr Kelly relied is confined to cases of transfer of property. In principle, it could apply to a fiduciary who leases land to a beneficiary. It could even apply to a long term hiring contract, say for three years, where after one year the beneficiary becomes aware of the breach of fiduciary duty and seeks pecuniary remedies. The beneficiary cannot simultaneously have the benefit of the remaining two year term of the hire and sue the fiduciary for profits made over the balance of the term. But those cases are far removed from the present. While it is not to the point that there was no written contract, the unavailability of rescission of the informal contract does not stand in the way of an account of profits. In order to explain why, it is necessary to consider the principle on which Mr Kelly relied in some detail and in context.

169 *Peninsular and Oriental Steam Navigation Company v Johnson* was a very different case. Simplifying the facts slightly, Mr Walter Johnson was managing director of Amalgamated Collieries of WA Ltd, and also a director of Johnson & Lynn Ltd. The latter company bought some mining machinery from the receiver of a partnership which had operated a mine at Ravenshorpe, to which Dixon J referred at 244 as "a distant and inaccessible place". The price was £1,500. Dixon J stated that by the time the machinery was resold, the total cost including handling and transportation was some £7,543. Some of the machinery was sold to third parties, but around a year

later, a larger quantity of the machinery was sold by Johnson & Lynn Ltd to Amalgamated Collieries of WA Ltd. Far from distancing himself from the transaction, Mr Johnson conducted the transaction on both sides.

170 Dixon J pointed out at 246 what was left unproven by the evidence:

> "The evidence is very defective upon a number of matters in connection with the machinery, as, for instance, the actual value which it possessed for the Amalgamated Collieries company, the use to which it was put, and, indeed, as to the price which that company paid for it. In January, February and March 1931 the directors passed payments amounting to £10,034 1s 6d to Johnson & Lynn Ltd under the head of 'stores', but there is no distinct proof that these sums all represented the price of the Ravensthorpe machinery. The statement of claim alleges that the total profit made by Johnson & Lynn Ltd from the resale to the Amalgamated Collieries company and to others of the assets bought from the receiver amounted to £6,000, and the defence admits 'a substantial profit', but the amount was not proved."

171 Dixon J also recorded that it was conceded that the machinery could not be restored to Johnson & Lynn Ltd, and thus *restitutio in integrum* was "out of the question" (at 246). This being a plain case of a voidable transaction, the question was in the absence of rescission, whether Johnson & Lynn Ltd could be regarded as buying the machinery on behalf of Amalgamated Collieries of WA Ltd, in which case the firm would be accountable for the profit it made. That was rejected on the basis that Johnson & Lynn Ltd was perfectly at liberty to buy and sell second-hand machinery, and it had not been proven that around a year earlier Mr Johnson had intended that one of his companies was buying with an intention to sell to another (at 247).

172 This latter point is significant. The reason that Dixon J pointed out that Johnson & Lynn Ltd purchased the assets as a speculation with a view to selling them, and not for the definite purpose of selling them to Amalgamated Collieries, appears a page earlier in the report (at 246-247):

> "If at the time when Johnson & Lynn Ltd bought the plant of the Ravensthorpe mine from the receiver the purchase could be considered as made on behalf of the Amalgamated Collieries company or for any other reason the assets bought could be impressed with an equity in favour of the latter company, there would be no difficulty in making Johnson & Lynn Ltd accountable for the profit made upon the transaction. But, in my opinion, no facts have been established which would support the conclusion that Johnson & Lynn Ltd

acquired the assets from the receiver in such circumstances that they became trustees thereof for the Amalgamated Collieries company."

173 Then at 247-248, Dixon J reiterated:

> "Once the view is adopted that Johnson & Lynn Ltd were at liberty to resell the machinery to whomsoever they chose and were not bound to hold it for the benefit of Amalgamated Collieries company, the title of the latter company to call upon the former to account for the profit made on the transaction falls to the ground."

174 McTiernan J agreed with Dixon J. To the same effect, the third member of the Court, Latham CJ explained at 213:

> "It is urged that the learned Chief Justice should have ordered an account of the profits made by Johnson & Lynn Ltd. In order to support such a contention it would be sufficient to show that Johnson & Lynn Ltd bought the machinery on behalf of the colliery company and purported to resell it to the company. Johnson & Lynn Ltd carried on the business of merchants dealing in goods of various kinds, including such machinery &c as was the subject matter of this transaction. There is no evidence to show that the machinery was bought on behalf of the colliery company. The evidence, on the other hand, shows that the machinery was bought as a speculation, with the intention of selling it at a profit to any willing purchasers."

175 The same point was made by a unanimous High Court in *Tracey v Mandalay Pty Ltd* (1953) 88 CLR 215 at 239; [1953] HCA 9:

> "The land and shares sold to the plaintiff were assets owned by the respective vendors at law and in equity. They were not assets which the vendors held on trust for the plaintiff. They were the absolute property of the defendants. The plaintiff could not affirm the contracts of sale and at the same time ask for an account of profits or for damages as this would be, in effect, asking the court to vary the contracts of sale and order the defendants to sell their assets at a lesser price. In *Cook v Deeks* Lord Buckmaster LC delivering the judgment of the Privy Council said: 'In their Lordships' opinion the Supreme Court has insufficiently recognized the distinction between two classes of case and has applied the principles applicable to the case of a director selling to his company property which was in equity as well as at law his own, and which he could dispose of as he thought fit, to the case of a director dealing with property which, though his own at law, in equity belonged to his company.'" (footnotes omitted)

176 The distinction to which Lord Buckmaster referred in *Cook v Deeks* [1916] 1 AC 554, reproduced in the passage from *Tracey v Mandalay Pty Ltd* above, reflected what had been determined in a series of cases involving company promoters in the mid to late nineteenth century, all of which in turn reflected

(a) the perceived absence of a remedy of equitable compensation (b) the inability to claim damages for pure economic loss for negligent misrepresentation, and (c) the absence of any effective statutory regime regulating company prospectuses. Hence the significance of the equitable remedy of account of profits, and the (largely) equitable remedy of rescission.

177 The line that was drawn at the conclusion of the nineteenth century in *Erlanger v The New Sombrero Phosphate Company* (1878) 3 App Cas 1218 and *In re Cape Breton Company* (1885) 29 Ch D 795, over the dissent of Bowen LJ, was that an account was available where there was a sale by a fiduciary of property which had been bought by the fiduciary on behalf of the principal to the principal, but not when the fiduciary had bought property on the fiduciary's own account and later sold it to the principal. Promoters who sold their own property to a newly formed company fell into the latter category. In that case, an account of profits depended upon rescission being available. The decisions are clearly explained in D O'Sullivan, S Elliott and R Zakrzewski, *The Law of Rescission* (2nd ed, Oxford University Press, 2014), at [2.27]-[2.43] and in engaging detail by M Lobban, "*Erlanger v The New Sombrero Phosphate Company* (1878)" in C Mitchell and P Mitchell (eds) *Landmark Cases in the Law of Restitution* (Hart Publishing 2006), 123 esp at 137-143. Professor Lobban states (at 142):

> "In *Erlanger* itself, the House of Lords rejected the line taken by early nineteenth century company cases. The Lords took the view that when the syndicate bought the asset, they were not agents for the New Sombrero Company. They stood in no fiduciary position to anyone, but were free to retain the island, to sell it to another party, or to promote a company to buy it. They were thus considered to be in the position of agents who sold their own property to the company ... This meant that the profit they made was not the money of the company: and therefore no account of profits could be ordered.
>
> ...
>
> However, since they were in a position to exert undue influence at the time of the sale, they were bound 'if they wished to make a valid contract of sale to the company, to nominate independent directors and fully disclose the material facts' to ensure that the purchase had been properly assented to. Nor was it any defence to assert that the price had been fair. In the view of the Lords, the fiduciary duty owed by the syndicate was not fulfilled by the ratification of the purchase by a board dominated by nominees. The contract could thus be vitiated. But since the Lords (who did not consider the position

> hinted at by Romilly in his *obiter* comments in *Great Luxembourg*) felt that no account for profit could be ordered in such situations, the remedy of the firm hinged for the Lords on whether the right to rescind remained."

178 The principle applied by the High Court in *Peninsular and Oriental Steam Navigation Co v Johnson* is unloved and much criticised. It has been said that "the continuing vitality of the rule is in some doubt": D O'Sullivan et al, *The Law of Rescission*, at [2.28], and it is criticised in M Conaglen, *Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary Duties* (Hart Publishing, 2010), pp 87-90. As senior counsel for the appellants appreciated, the principle needed adjustment in light of the subsequent recognition that equitable compensation was available for breach of fiduciary duty by non-custodial fiduciaries, and as adjusted it is decidedly odd that rescission is a prerequisite to an account but not to an order to make equitable compensation. Ultimately, there is no good reason today for the pecuniary remedies available following a breach of fiduciary duty to turn on whether the fiduciary entered into a transaction with the principal's property or with the fiduciary's own property. Yet this Court continues to be bound by *Peninsular and Oriental Steam Navigation Co v Johnson*, as indeed was the court in *Agricultural Land Management Ltd v Jackson (No 2)* (2014) 48 WAR 1; [2014] WASC 102 at [379] and [400]-[404].

179 In light of the above, it may readily be seen that there are two (related) reasons why the principles in *Peninsular and Oriental Steam Navigation Co v Johnson* do not assist the appellants. The first turns on the status of RKM and Bright Pear. The second turns on the nature of the contracts between RKM and Bright Pear, and MDL.

180 First, the rule turns on whether at the time the property was acquired, the fiduciary was acting on behalf of his, her or its principal. This was of the essence of the reasoning in *Erlanger* itself, and as I have sought to emphasise, in the judgments of both Latham CJ and Dixon J. The same point was made in this Court by Hope JA in *Walden Properties Ltd v Beaver Properties Pty Ltd* [1973] 2 NSWLR 815 at 836. In the present case, it is plain that RKM and Bright Pear are in no way analogous to an agent who

purchased property on its own account and later sold the property to a principal. If the analogy of a sale of property is to be stretched so as to apply to the facts in this appeal, RKM and Bright Pear performed crushing work as MDL's agent. They did so in order that MDL might perform MDL's obligations under its contract with CVO. This is far removed from entering into transactions in their own rights.

181 Secondly, applying the rule makes no sense in the case of a contract for the supply of services which is incapable of rescission. There is no property which can be returned to the fiduciary. Mr Kelly conceded, in my view properly, that if his submission were accepted, then one could never get an account of profits from a fiduciary who in breach of duty supplied services to his or her principal; that causes one to doubt the correctness of the submission. This was explained in the course of the hearing by Gleeson JA:

> "I'm still having difficulty seeing how that can extend to the case for supply of services where title doesn't transfer, because the whole underlying rationale is, as I understand the principle, that the transaction where there's a sale of property is voidable, not void, and that's why there's a need for rescission. That's not the case in the case of a supply of services.
>
> The argument, I think, against you is that there's no need to set aside the supply of services. What is sought is an account of the profit which is said to have been made by the Robert Murdoch interests, and they're not encountering the void voidable distinction. They simply say it's a self dealing. The profit made by the fiduciary is to be accounted for and we can identify it."

182 Although crushing and other services were supplied by RKM and Bright Pear to MDL pursuant to contracts, and although those contracts cannot be rescinded, MDL is not thereby precluded from seeking an account for profits. It follows that the primary judge's conclusion rejecting this aspect of the defence was correct.

Did Brian "stand by" thereby disentitling him from some of the profits? (grounds 5 and 6)

183 Ground 5 challenged the rejection of the submission that Brian (as the only unconflicted director of MDL) had "stood by" with sufficient knowledge of the breach of fiduciary duty by Robert and Stephen such that it was inequitable

for MDL to require Robert and Stephen and their companies RKM and Bright Pear to account for profits thereafter made. Ground 6 was conclusionary but was treated in the appellants' written submissions collectively with ground 5.

184 The appellants drew attention to the discretionary nature of the remedy of account of profits, and in particular the statement in *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 599; [1995] HCA 18 that a plaintiff may not "stand by" permitting the fiduciary to make profits and then claim an entitlement to those profits.

185 The appellants distinguished the complete defence which a fiduciary can make out by the giving of fully informed consent to a breach (see *Maguire v Makaronis* (1997) 188 CLR 449; [1997] HCA 23) from cases where, although the beneficiary fell short of consenting in a fully informed way to ongoing breaches of duty which resulted in profits to the fiduciary, nonetheless it may be inequitable for an account of profits to extend over that period. As Mr Kelly put it, "For the purpose of satisfying this requirement of this defence, the bar does not need to rise so high as to amount to being fully informed, and to stand by one doesn't need to consent."

186 The appellants maintained that the only director of MDL not involved in the self-dealing had sufficient knowledge no later than April 2011 to make it inequitable for him not to take steps based on the breaches of duty until, almost a year later, his solicitor wrote in May 2012. I shall deal with the evidence bearing upon this shortly.

187 The primary judge recorded the submission about Brian Murdoch "standing by" at [184] and resolved it at [185] as follows:

> "I do not accept that this submission warrants any limiting of an account of profits. First, it again fails to recognise that Brian did not have full information as to the arrangements under which work was being undertaken at Cadia, and Mr Kelly himself repeats the proposition that Stephen (as distinct from RKM or [Bright Pear]) undertook the work at Cadia; and, second, it gives insufficient weight to the fact that Brian was understandably reluctant to confront Robert over these matters, as Scott's evidence made clear. That reluctance was hardly unreasonable. There is nothing inequitable in allowing

an account of profits, against a fiduciary in breach of duty, in these circumstances."

188 The appellants submitted that that reasoning disclosed error, insofar as it equated the state of mind sufficient to engage the "standing by" discretionary defence with the complete defence of fully informed consent. As it was put:

> "In our respectful submission, that's not the correct test. One doesn't need to have full information. It's sufficient if there is sufficient information to require in this case a director of the company to do something. The error in his Honour's analysis is to apply too high a test by reference to full information as distinct from sufficient information."

189 Secondly, the appellants maintained that Brian's reluctance to confront Robert was no answer to the defence:

> "We would respectfully submit that Brian was not understandably reluctant. He was reluctant but he was unforgivably reluctant, that there is no good reason why the matter was not raised, the amount of money at stake, the language in the conclusions formed, including the concept of crooked and diverting money, and we're talking in excess of a million dollars, demonstrated from materials from the accountant, and no reason why that accountant couldn't provide whatever further information was required from the MDL point of view, Brian was, after all, a director.
>
> There was nothing hardly unreasonable. Quite the opposite. It was entirely unreasonable and a breach of duty as a director and it left RKM and Bright Pear, who were working away and being paid for the value of the work, nothing more. It leaves them in a position where they continue working in a risky environment, this aspect of mining, and they're at risk of working on an uninformed basis, leading to a point when they might be called upon to disgorge any profit that was made."

190 In response, MDL maintained that Brian did not merely stand by. He made it clear that he did not consent to the diversion of Cadia work to Robert and Stephen, and took active steps to protect the company's position. MDL submitted that "the evidence identifies that Brian Murdoch *did not* simply stand by, but rather made appropriate inquiries of the accountant, held a meeting with the accountant in order to obtain further information, and caused solicitors to write to Robert Murdoch regarding those concerns" (references omitted). MDL pointed to the seriousness of the potential allegation as supporting the reasonableness of Brian's concern that he be careful to gather

information. It was said that "[a]ccusing his own brother and nephew of effectively stealing money was plainly a difficult thing for him to do."

191 MDL also complained that the appellants' complaint "rings hollow" because Robert and Stephen persisted in diverting Cadia work away from MDL even after the solicitor's letter of 12 May 2012 and up until 2014, "and did so without any apology or apparent remorse or contrition".

192 Separately, MDL submitted that the defence only operated "if it can be said that Robert Murdoch and Stephen Murdoch were oblivious to there being any complaint regarding their activities and that they therefore were induced (by Brian Murdoch's silence) into acting to their own prejudice in continuing to perform the Cadia Work through their own private corporate interests". Because Robert and Stephen were entirely aware of Scott's and thus Brian's complaint by no later than 18 October 2011, they continued operations at their own risk.

193 Finally, MDL took two very technical points about the notice of appeal. First, MDL said that insofar as the appellants' submissions potentially suggest that an account of profits ought to have been limited to something less than the entire profit flowing from the Cadia Work, no ground of appeal had been directed to such an issue and the argument ought not to be permitted. But ground 5 explicitly contends that the primary judge should have found that MDL stood by with knowledge and permitted RKM and Bright Pear to do work at Cadia at their profit, and the submissions dated 13 January 2021 identified the evidence on which the appellants relied, making it plain that it was only after Brian and Scott became aware that some $1.5 million had been "taken" out of MDL. This objection was not maintained in oral submissions. There is nothing in it.

194 Secondly, MDL submitted that there was no ground of appeal challenging the finding at [145]. Paragraph [145] deals with the application of *Spellson v George* (1992) 26 NSWLR 666 on the defence of consent. Although the primary judge used the language of "standing by", that was in a different

sense. The finding which matters is that at [185] which deals with this defence, and that is squarely challenged by this ground.

Consideration

195 It is as well to recall the operative principles. First, the equitable remedy of an account of profits is discretionary. One aspect of that discretion is that the remedy may be withheld entirely where an equitable defence such as laches or delay or acquiescence is made out. Consent (in the sense described by Wilberforce J in *Re Pauling's Settlement Trusts* [1962] 1 WLR 86 at 108; [1961] 3 All ER 713 at 730 and by this Court in *Spellson v George* at 669E and 673G, namely, insofar as "[t]he court must consider all the circumstances of the case and decide whether it is fair and equitable that the beneficiary should sue the trustee") is another.

196 Secondly, and separately from the above, the court has ample power to fashion the account so as to achieve its purpose of taking from the fiduciary the profit or benefit derived by reason of the breach of duty, but avoiding punishing the fiduciary. This was at the forefront of the reasoning in *Warman International Ltd v Dwyer* itself, where the account of profits was limited to the first two years of operation of the businesses conducted by the errant fiduciary. The High Court set aside the orders made at first instance, where four years' profits had been ordered, on the basis that they "went beyond what is fair and equitable in the circumstances". Instead, "[a]n account of profits in respect of that period would, in our view, clearly cover the whole of the benefits acquired by [the corporate vehicle] through [the fiduciary's] breach of fiduciary duty" (at 567-568).

197 The High Court also identified three other bases upon which the account could be fashioned. One was to make just allowances, reflective of the contribution to the profits by the fiduciary's skill, expertise and related expenses. Another, which the High Court said was not generally available unless there had been an antecedent arrangement for profit-sharing (as in *O'Sullivan v Management Agency and Music Ltd* [1985] QB 428), was to allow

to the fiduciary a proportion of the profits earned. A third was that relied on by the appellants in the present case, namely at 559:

> "The conduct of the plaintiff may be such as to make it inequitable to order an account. Thus a plaintiff may not stand by and permit the defendant to make profits and then claim entitlement to those profits."

198 The discretionary defence of "standing by" leading it to be inequitable to recover profits was applied by Phillips JA, with whom Winneke P and Charles JA agreed, in *Edmonds v Donovan* (2005) 12 VR 513; [2005] VSCA 27 at [77]. There, drawing upon the distinction drawn by Upjohn J in *Re Jarvis Deceased* [1958] 1 WLR 815 at 820-821; [1958] 2 All ER 336 at 341 between usurping a business in breach of fiduciary duty and taking up a specific asset, it was said:

> "There was no warrant for allowing the respondents to stand by for nearly two years and then to obtain a remedy which, in effect, exposed them to none of the risks but gave them all of the rewards of the business having been run in the meantime."

199 Thirdly, mathematical precision in this case is illusory. In a passage endorsed in *Warman* at 558, Slade J said in *My Kinda Town Ltd v Soll* [1982] FSR 147 at 159 that what is required "will not be mathematical exactness but only a reasonable approximation". The High Court added, "What is necessary however is to determine as accurately as possible the true measure of the profit or benefit obtained by the fiduciary in breach of his duty".

200 Fourthly, the onus lies on the fiduciary to make out a case for the partial curtailment of an account. "It is for the defendant to establish that it is inequitable to order an account of the entire profits": *Warman International Ltd v Dwyer* at 561.

201 This Court conducting a review of a question such as this on an appeal by way of rehearing is bound to give deference to the decision of the trial judge. The ways in which an account of profits will be tailored to fit the particular facts of the case (which include the nature of the breach and the manner in which it is said that the plaintiff "stood by") are evaluative judgments as to

which minds might reasonably differ. However, assuming favourably to MDL that it is necessary for the appellants to establish error in accordance with the principles in *House v The King*, I have concluded that such error is made out.

202 I accept the appellants' submission that the primary judge erred at [185] as to a material matter of fact. "Full information" is not the test. If Brian had full information, he might be found to have consented or acquiesced in the course of conduct. If he fell short of having full information, such that Robert and Stephen failed to establish a defence of fully informed consent, he might nonetheless not be entitled to a full recovery of profits, on the basis that it is inequitable to permit the fiduciary – even a fiduciary who is in breach – to take all risks, over a period of some years, only then to be accountable for those profits when and if they turn out to have been made. (Of course, in fact Brian had full information, insofar as in his position as a director he was entitled to all of MDL's books and records; the reference by the primary judge to his not having full information reflected the position in practice, and that was a consequence of his unilateral decision not to be involved in the management of his company.)

203 Nor does Brian's reluctance to confront his brother detract from the inequity in permitting profits to be accounted for years after the event when MDL had knowledge of Robert's and Stephen's activities. I would accept that this is relevant in the assessment of when Brian's standing by led to his subsequent application for an account of profits to become inequitable. But it is far from decisive.

204 I would frame the inquiry this way. When did Brian have *sufficient* information – namely, a belief that large amounts of money were being channelled from MDL into interests associated with Robert and Stephen – for it to become inequitable thereafter for him to obtain an accounting for profits made while he stood by permitting RKM and Bright Pear to continue to make those profits, bearing in mind the family and corporate history and the relationship between the men.

205 At the factual level, it seems that the accountant provided a USB stick with MYOB accounts in April 2011, which disclosed payments of $1,464,529 to Bright Pear. They also relied upon a diary note from October 2011 in which Stephen recorded that Scott believed that Stephen had taken $1.5 million from the company. These matters were addressed at [67] by the primary judge:

> "It appears that the information made available to Scott in April 2011 included a supplier's payment register which indicated that, by that time, an amount of $1,464,529 had already been paid by MDL to [Bright Pear] for work done at the Cadia mine (T201). At about that time, Scott raised that matter with Stephen and suggested that [Bright Pear] had taken $1.5 million out of MDL and that 'we are not happy' (Robert 20.11.17 [403]; Scott 29.3.18 [55]; T201). Although Scott was cross-examined at some length as to whether his comment was intended to suggest that [Bright Pear] had 'taken' $1.5 million as distinct from doing $1.5 million worth of work (T201), it seems to me that Scott had then recognised, correctly, that the opportunity to do work valued at nearly $1.5 million had been diverted from MDL to [Bright Pear]. Scott confirmed in cross-examination that he recalled speaking to Stephen and indicating that he was not happy that that amount of money had been taken from MDL (T205). Scott's evidence is that he and Brian had viewed the supplier's payment ledger at his house and it was Scott and Brian's shared opinion that [Bright Pear] had taken that amount out of MDL (T207). Scott was also cross-examined as to the extent to which he informed Brian of his concerns and his evidence was that Brian was 'fairly understanding of the matters' but was 'lost to know what to do' before advice was sought from solicitors. That evidence seemed to me to be consistent with the probabilities."

206 So far as the evidence disclosed, this was a company whose 50% owner and one of two directors did not receive management accounts or otherwise concern himself with the financial aspects of his company, except on the occasions each year he had to sign the annual statements. Being "at a loss to know what to do" does not excuse doing nothing for months while RKM and Bright Pear continued to perform work which MDL had contracted to perform.

207 It was put orally that after Brian knew that more than a million dollars had been paid to Bright Pear, and did nothing save to see the company accountant in November, that:

> "on those facts, you've got a situation in which the company director, the only other company director, is on sufficient notice, and one is looking for a paradigm example of standing by, this is it."

208 In response, it was said that there had been some deliberate concealment. An instance was the partially completed contract for hire, between MDL and Bright Pear. Robert denied in cross-examination that the contract was placed in the books and records of MDL with the intention of disguising who was really the beneficiary of this work, but even if this Court were in a position to go beyond his denial, little would turn on this given Brian's actual knowledge by no later than October 2011.

209 MDL also maintained that some months thereafter, MDL ceased to invoice CVO for crushing services in fact undertaken by RKM and Bright Pear, and those companies proceeded to invoice CVO directly, such that there ceased to be large payments from MDL to those companies on the face of MDL's financial statements. Again I do not think that much turns on this in circumstances where Brian knew that more than a hundred thousand dollars had been paid out by MDL to RKM or Bright Pear *every month.*

210 It is necessary steadily to bear in mind that this is not a case where MDL complains that it suffered any loss. There is no challenge to the finding that MDL suffered no loss. While it is settled principle that MDL may be entitled to recover profits made in breach of fiduciary duty which MDL could not itself ever have made, the fact that a plaintiff may thereby obtain a windfall gain, without ever running the risk that the business endeavour may be loss-making, engages discretionary considerations including the need to act promptly which may operate more stringently that in a case for equitable compensation for loss.

211 Brian believed no later than by October 2011 that some $1.5 million had been paid out by MDL to Bright Pear. In fact, the amount was greater, and part of the payment was made to RKM rather than Bright Pear. In the scale of operations of MDL, that was a very substantial amount. It was more than the previous year's entire profit. The fact that Brian did not know the precise amount, nor the precise recipient, is not to the point. (He did not know those details because, despite being a director and co-owner, he did not himself seek copies of the entries in the general ledger which showed payments, nor

did he investigate the enormous new expense for suppliers that appeared in the 30 June 2011 financial statements of his company.)

212 It is necessary to identify when it became inequitable for MDL to recover profits made by RKM and Bright Pear. The onus lays upon the appellants (*Warman International Ltd v Dwyer* at 561-562), and other things being equal, the court should err in favour of the person to whom the fiduciary obligation which has been breached was owed.

213 When producing documents in 2020, Brian or Scott advised that they had been produced in April 2011. It is plain on the face of some of the documents that they could not have been produced prior to July 2011. It is clear beyond any doubt that there was an error on the part of those producing the documents. I do not think it would be right to limit the profits for which the appellants are required to account by reference to that error.

214 Further, it is one thing to know that there are ongoing breaches of duty and take no action, keeping that information to oneself. It is another thing to tell the fiduciary of a belief that money is being taken from the company, but thereafter nonetheless to take no action.

215 The contemporaneous documents confirm that by late October 2011 Brian or Scott or both of them had printed out copies of the relevant ledgers of MDL's accounts, including a ledger with supplier payments of $1,464,529 to Bright Pear, and Scott had confronted Stephen with the accusation that $1.5 million had been taken from the company. In the absence of an explanation or an undertaking, firm action was thereafter required. None was taken for months. I conclude that from November 2011 it became inequitable for MDL to continue to sit back and permit RKM and Bright Pear to continue to make profits at Cadia.

216 The primary judge found that Brian was understandably reluctant to confront his brother about these matters. The reluctance was understandable; he correctly realised the seriousness of the allegation, and he was far from being

in perfect health. But that does not deny that it was inequitable for Brian to stand by and permit RKM and Bright Pear to make profits after November 2011 and then, in proceedings brought years later, recover those profits from those companies.

217 These grounds are made out. It will be necessary for the parties to quantify the profits derived by RKM and Bright Pear at Cadia up to 31 October 2011 (so far as I can see, the primary documents necessary to do this are not found in the papers). It may be that the primary documents in evidence at the trial permit this to be done with precision; alternatively it should be possible to derive an estimate from the agreed total profit for that financial year.

Were the profits causally related to the breaches? (grounds 7, 8 and 9)

218 These grounds were addressed collectively in both sides' written submissions, and were only briefly addressed orally.

219 The appellants maintained that the primary judge was "obliged to look at the conduct in the context in which it took place so as to determine whether there is in fact a 'causally connected profit or gain'". They relied on *Streeter v Western Areas Exploration Pty Ltd (No 2)* [2011] WASCA 17; 278 ALR 291 and *Colour Control Centre Pty Ltd v Ty* [1995] NSWSC 96 in support of the proposition that:

> "If the opportunity was not in reality available to the company because the company was never in a position to take it up, it was lost in any event and should not be ordered, by parity of reasoning with *Target Holdings Ltd v Redferns (a firm)* [1996] AC 421."

220 They maintained that "if all of MDL's equipment had already been taken up and was being used, with the result that MDL needed to engage subcontractors to carry out the DWI1 work in order to fulfil its contractual obligations to Cadia – as it did here – any profit in the subcontract would have been lost to MDL in any event". They concluded that once it was appreciated that DWI 2, 3 and 4 were not diverted away from MDL, but were left behind when MDL left the Cadia site in order to carry out contractual obligations

elsewhere, "no causal connection can be said to exist between any breach of fiduciary or other duty and the profit sought to be accounted for in favour of MDL."

221 The respondents rightly submitted that these grounds were contrary to settled, binding authority.

222 It is axiomatic that a fiduciary can be ordered to account for profits which his, her or its principal could never make. In *Birtchnell v Equity Trustees, Executors and Agency Co Ltd* (1929) 42 CLR 384 at 409; [1929] HCA 24, Dixon J said that "the partner is responsible to his firm for profits, although his firm could not itself have gained them". His Honour endorsed a statement by Vaughan Williams LJ in *Costa Rica Railway Co Ltd v Forwood* [1901] 1 Ch 746 at 761 that if a director chooses to enter into a contract in cases where they have or may have a conflicting interest, then "the law will denude them of all profits they may make thereby", and "will do so notwithstanding the fact that there may not seem to be any reason of fairness why the profits should go into the pockets of their cestuis que trust, and although the profits may be such that their cestuis que trust could not have earned them all". In *Warman* the High Court said at 562-563:

> "it is firmly established that the liability of a fiduciary to account for a profit or gain made in breach of fiduciary duty does not depend upon the person to whom that obligation is owed suffering a loss or injury; and it is ordinarily immaterial to the fiduciary's liability to account that the person to whom the fiduciary obligation is owed could not have earned the profit or gain. The courts have always insisted on compliance by fiduciaries with strict and rigorous standards with a view to ensuring that they do not expose themselves to a conflict of interest and duty. The point is that a fiduciary is not entitled to make a profit out of, or by reason of, a fiduciary position without the knowledge and assent of the person to whom the fiduciary duty is owed. It follows that, if a profit has been made in breach of fiduciary duty, the person to whom the duty is owed is entitled to an account subject to the considerations discussed above and to the making of any appropriate allowance." (footnotes omitted)

223 Cardozo J made the same point 60 years earlier (in an intellectual property case):

> "[T]his is to misconceive utterly the position of an infringer accounting for illicit profits. 'An infringer cannot be heard to say that his superior skill or intelligence enabled him to realize profits by his infringement which a person of less skill might not have realized'": *Duplate Corporation v Triplex Safety Glass Co* 298 US 448 at 457 (1936).

224 These grounds are not made out.

Challenge to the calculation of profits (ground 10)

225 Ground 10 challenges the exclusion of a charge said to reflect the cost of capital and for risk from the computation of the profits of RKM and Bright Pear. The precise amount is $222,730. The appellants did not develop this ground orally.

226 There had been two aspects to the claim for just allowances at trial. The first seems to have been a more general claim, based on the skill, efforts, property and resources of RKM and Bright Pear, to the effect that a more generous allowance based on the principles in *Warman* at 561-562 should have been made. This was rejected at [154]-[155], and that aspect of the decision is not challenged on appeal. The second is the narrow question concerning the charge for capital and risk proposed by Mr Mullins, the expert accountant called by the appellants, which was rejected at [190]. The ground was developed in paragraphs 59 and 60 of the appellants' written submissions, which confined argument to this latter aspect.

227 This ground attracted a notice of contention, namely, that "it was equally open to his Honour to reject such a claim for just allowances upon the basis that (and his Honour ought to have held that) Robert Murdoch's 50% shareholding in [MDL] negatived the provision of any further allowance in favour of the Robert Murdoch interests". This was maintained orally, although when members of the Court observed that it turned on the happenstance of Robert's shareholding, no articulation of any principled basis was forthcoming.

228 I reject the submission that the claim for just allowance should be rejected by reason of the fact that Robert is a co-owner of MDL, the company to which Robert and Stephen owed fiduciary obligations. That cannot be right in

principle. The submission wrongly looks through the company to its shareholders, which is inconsistent with the facts that Robert and Stephen owed fiduciary duties to the company, and that it is the company which has brought proceedings to require them to account. Acceptance of the submission would produce capricious results. Suppose two directors only one of whom is a shareholder make profits for which they are accountable to their company. Why should the happenstance that one fiduciary is a shareholder but the other is not make any difference to the calculation of the profits made in breach of duty? The submission seeks to treat Robert and Stephen identically, despite the fact that while Robert is a 50% owner of MDL, Stephen is not. Fundamentally, the accounting required by equity is between fiduciary and the person to whom the fiduciary duties are owed. Here that is between company and director, or company and senior employee. The source of the fiduciary obligation being the corporate structure, there is no occasion to disregard it.

229 Separately, Brian also submitted that "the end result is only marginally different to the conclusions reached by the learned Trial Judge". This is a reference to the $222,730 being only some 5% of the profits ordered (of which it is noted "half of which notionally would flow through to Robert Murdoch himself via his shareholding in MDL").

230 I do not think it is an answer to an appellant who contends that there is appellable error in an amount of $222,730 to say that that is only around 5% of the total. I bear in mind that this is an appeal by way of rehearing, that many appeals in this Court involve amounts of less than $222,730, and the obligation to "determine as accurately as possible the true measure of the profit" in the passage from *Warman* reproduced at [199] above.

231 Accordingly, I turn to the substance of the point, doing the best I can in light of the short, written submissions advanced in its support. So far as I can see, pages 7174 and 7175 of the appeal books contain pages of a report of Mr Mullins in reply (to which neither side made any reference in their submissions) explaining the different approaches. This is the document upon

which the primary judge relied for the conclusion that the experts were agreed if the court rejected the inclusion of an allowance by way of capital charge or economic cost. Mr Ashby had applied pre-tax expenses of depreciation of $726,842 and interest of $64,616 to the revenue derived over the period in order to obtain an after-tax profit of $4,358,106. Mr Mullins' preferred approach was to apply a pre-tax "capital charge" of $383,953 and an after-tax economic cost (risk) deduction of $467,638 for the same period. It will be seen that Mr Ashby's deductions were $726,842 + $64,616 = $791,458 while Mr Mullins' were $383,953 + $467,638 = $851,591. However, the effect of (notional) tax meant that the bottom-line difference between the two approaches was greater. That is to say, Mr Mullins' smaller pre-tax deduction led to a larger incidence of (notional) tax in his calculations, which rose from Mr Ashby's figure of $1,867,760 to $1,990,011. But that was more than outweighed by the after-tax deduction said to reflect risk.

232 Mr Mullins accepted that if contrary to his views the calculation of profit should include depreciation and interest but not the capital charge and economic cost (risk) then he agreed with Mr Ashby's calculation.

233 The primary judge gave short reasons for rejecting the charge for capital and risk at [190]:

> "The expert report of Mr Mullins on which the Robert Murdoch Interests relied quantified the profit from the Cadia work in that period as $4,135,376 after making allowance for a 'capital charge' and an 'economic risk' allowance. I do not accept that allowance, which is not supported by any disclosed accounting standards or any other established accounting principle."

234 I have no difficulty in principle in a calculation of profit including a charge for capital. A rational way for a company to determine how to deploy its finite capital may require a unit of the business to produce a certain return in order to justify the deployment. Moreover, it appears (from p 7172 of the appeal books) that Mr Mullins regarded the capital charge as incorporating depreciation of capital assets, which were excluded from his calculations in order to avoid double counting. My view is strengthened by the fact that Mr Ashby accepted in the course of cross-examination that an allowance for the

opportunity cost of deploying capital could be appropriate. However, there is an overlap between a charge representing the cost of capital and the depreciation on the expensive items of machinery which already is found in the financial statements.

235 Mr Mullins' after-tax charge for economic cost is more problematic. His explanation is found at p 1854 of the appeal books. Its premise is that at the time an undertaking is commenced, it is not known with certainty that a profit will be achieved. The charge was calculated as the difference between the undiscounted net profit after tax and the discounted present value of net profit. Although the report stated that "I address the principles associated with the economic cost (risk) in section 5 (refer in particular to paragraphs 5.14 to 5.18", those paragraphs merely repeat essentially verbatim and do not further explain the approach.

236 I am unpersuaded by this reasoning. The task is to quantify the profit made by RKM and Bright Pear by certain activities over a certain time frame. The point arises in 2020, years after those activities occurred. This is not a case where one has to look forwards into the uncertain future to assess whether to take some action, where it may be appropriate to include an evaluation of risk. The task is to quantify the profits actually made by RKM and Bright Pear in a specified time frame in the historical past. Another way of making this point is to consider a case where a director takes a corporate opportunity. The opportunity may be very risky. Nonetheless, the director succeeds in making a large profit. The company has a right of election, after the event, between requiring the director to account for the profit or to compensate it for loss. The election is made with the benefit of hindsight, where it is known that the opportunity has been successfully exploited.

237 In short, while I can see a basis for the capital charge (in which case it is necessary to remove the allowance for depreciation), I am unpersuaded by the reasoning for an after-tax charge representing risk.

238 MDL's substantive answer to the entirety of this ground was to say that the appellants have not explained why any capital charge or economic risk allowance ought to have been allowed. MDL's submissions observe that there is no challenge to the reasoning that the allowance is unsupported by accounting standards or established accounting principles. And they make the important point that the determination of profit is (at least in the present case) an accounting exercise; cf *Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society Ltd* (2018) 265 CLR 1; [2018] HCA 43 at [24].

239 I accept MDL's submission. It was made in writing, in submissions dated 31 March 2021. There was no written response from the appellants, and their oral submissions did not address this ground. Further, while some companies face real choices as to the deployment of their limited capital, and may even require subsidiaries or separate business units to make out a case for the deployment of capital including generating an internal rate of return, MDL seems to have been run very differently. Its margins were very high, especially when the conduct in breach of Robert's and Stephen's fiduciary and statutory duties is taken into account, and there is no suggestion in its financial statements or any other documents (at least, so far as I have seen) to any cost of capital. Instead, the accounts actually incorporate (large) amounts of depreciation for the company's equipment. Fundamentally, the onus rests on Robert and Stephen to make out a case for deductions by way of general overheads in order to determine the profit: *Dart Industries Inc v Decor Corporation Pty Ltd* (1993) 179 CLR 101; [1993] HCA 54. I am unpersuaded that this Court should intervene to alter the basis upon which profits have been calculated. This ground is not made out.

Proposed cross-appeal ground 9: Timboon Quarry quantification

240 This ground concerns the quantification of the relief attributable to the acquisition of Timboon Quarry. For the reasons given above, it does not arise. Nor did it arise at trial. Nevertheless, the primary judge addressed it contingently, in the event he were wrong concerning this issue.

241 The primary judge addressed MDL's claimed loss at [220]-[233]. His Honour was required to resolve competing accounting and valuation evidence. This evidence addressed both historical realised profits and the present value of future profits. Realised profits were ultimately agreed at $2,356,910. Future profits were not agreed. The valuation evidence diverged on (a) the discount rate, (b) the lifetime of the quarry and (c) whether certain costs including for remediation should be incorporated. The primary judge also declined to determine whether interest was available.

242 The principal contention within ground 10 of the proposed cross-appeal was that that the primary judge should have found that Timboon Quarry had sufficient limestone reserves to sustain at least 30 years of operations, or alternatively 25 or 20 years. MDL sought a declaration that it was entitled as against Kurdeez Minerals and RKM:

> "to an account of profits earned by RKM and Kurdeez Minerals from the ownership and operation of the Timboon Quarry, as that term is used in the judgment dated 28 October 2020 ("Timboon Quarry") and/or compensation under s 1317H of the *Corporations Act 2001* (Cth), in the amounts of:
>
> (a) $2,365,910 in respect of historical realised profits, plus compound interest; and
>
> (b) $3,995,974, in respect of the present value of future profits."

243 The latter amount of $3,995,974 reflected MDL's expert assessment of the net present value of cashflows from the quarry over 30 years (the time preferred by MDL's expert), using a discount rate of 10% (the rate preferred by MDL's expert) and not including an allowance for remediation costs. There was no dispute about the profit to be applied over the timeframe, save insofar as the cross-respondents' expert made an allowance for the cost of a Rehabilitation Bond, while MDL's expert chose not to do so.

244 Although his Honour did not finally resolve the discount rate, the reasons at [228] and [230] suggest a scepticism with the 10% determined by MDL's expert. His Honour doubted that a sufficient evidentiary basis for an estimate of a 30 year life of quarry was warranted, although he did not reach a final conclusion on this issue: at [233].

245 If the primary judge had erred in concluding that there was no breach of duty in the acquisition of Timboon Quarry, then this Court would resolve this issue of fact if it could fairly do so. But there was no such error. The issue then becomes whether this Court should make notional findings as to the quantification of remedies to which MDL would be entitled in the event that both the trial judge and this Court is wrong as to the absence of liability, in circumstances where the primary judge did not himself make those findings. It seems plain that no useful purpose would be served in doing so, unless perhaps it exposes some error in legal principle.

246 I doubt it would be appropriate in valuing the future profits to be derived from that quarry to ignore the remediation costs, which seem to have been progressive and ongoing (the judge expressed the same view, albeit tentatively, at [231]). However, the most significant difference between the experts in terms of the actual calculation was (as it often is) the appropriate discount rate (10% or 13.5%). The primary judge did not resolve that dispute (although as already noted, his Honour expressed some scepticism with the justification for MDL's 10% figure), and it is outside the scope of the proposed ground of appeal. But without resolving that dispute, it is not possible to apply the calculations of either expert. The fact that resolving this proposed ground of appeal will be insufficient to determine what at best could only be a notional calculation of the net present value of future profits is, to my mind, a compelling indication of the inutility of the exercise. Indeed, it is a compelling reason not to grant leave.

247 There is at least one other difficulty in the approach for which MDL contended. MDL sought to recover as "an account of profits" the present value of profits to be derived in the future over many years. In substance, this was seeking to recover the "benefit" obtained by Robert and Stephen and their companies, and accorded with the broad approach recognised in *Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society Ltd* (2018) 265 CLR 1; [2018] HCA 43 esp at [24], [75] and [202]-[203]. The present value of future profits can be an appropriate method of valuing the

asset. But it would be necessary to give credit for the acquisition cost of the quarry, which so far as I can see MDL's calculations did not do.

Conclusion and orders

248 For those reasons, the appeal should be allowed in part. The partial success confines the profits to which MDL is entitled to those earned by RKM and Bright Pear at the Cadia mine for the period until 31 October 2011, which is an amount of $1,622,738 plus such profits as were made between 1 July 2011 and 31 October 2011. It ought to be possible to quantify the total amount so as to obtain a money judgment. The orders I propose will permit the parties to be heard as to this.

249 It is presently unclear whether each of Robert, Stephen, RKM and Bright Pear ought to be jointly and severally liable for that amount, or whether (a) each of Robert and RKM should be liable for the profits earned by RKM, and (b) each of Stephen and Bright Pear should be liable for the profits earned by Bright Pear. The orders I propose will also permit the parties to be heard as to this.

250 The primary judge deferred the question of interest (see order 11 made on 24 November 2020). Neither side expressed any complaint about that course, or advanced any submissions concerning interest. In those circumstances, nothing need be said.

251 Any dispute as to the quantum or form of the orders should be resolved by further submissions on the papers.

252 In relation to costs, the cross-appeal has failed, and costs of it should follow the event. The appeal has succeeded in part. A costs order which gives the partially successful appellants a proportion of their costs is appropriate, in accordance with what was said in *Doppstadt Australia Pty Ltd v Lovick & Son Developments Pty Ltd (No 2)* [2014] NSWCA 219, which approach simplifies and reduces the scope for further disputation concerning the quantification of the successful party's costs, and recognises that precision in the exercise is

illusory: *James v Surf Road Nominees Pty Ltd* (No 2) [2005] NSWCA 296 at [36]. I propose that MDL pay 50% of the appellants' costs of the appeal.

253 It will be necessary to re-exercise the discretion as to costs of the trial. The primary judge ordered the appellants to pay 30% of the costs of the derivative proceeding brought by Brian on MDL's behalf (order 10 made on 24 November 2020). I incline to the view that there should be no order as to the costs of the derivative proceeding brought by Brian on MDL's behalf, given that large aspects failed, and much of what succeeded at first instance should not have succeeded. However the parties are entitled to be heard about this, and the orders I propose will permit that to occur. My understanding is that a regime to which Brian and the liquidators have agreed protects the position of MDL, and that no order is necessary, but if that is not so, application may be made within the period in UCPR r 36.16.

254 I propose the following formal orders.

1. Appeal allowed in part.

2. Vary order 6 made on 24 November 2020 by inserting the words "until 31 October 2011" after the words "at the Cadia mine", so that the order reads in full

> "6. Declare that, at the election of the Company, by its liquidators, the Company is entitled as against RK Murdoch Pty Limited (RKM) and Tilecote Farm Pty Limited (previously known as Bright Pear Pty Limited) (BPPL) to:
>
> "(a) an account of the profits earned by RKM and BPPL from the work done by those companies at the Cadia mine until 31 October 2011, as that term is used in the judgment dated 28 October 2020 (Cadia Work); or
>
> (b) compensation for any loss by reason of the Cadia Work."

3. Set aside order 10 made on 24 November 2020.

4. MDL to pay 50% of the appellants' costs of the appeal.

5. Direct the parties to file and serve agreed short minutes of order, or in lieu of agreement, minutes of the orders each proposes and short submissions in support, not exceeding 5 pages, in respect of (a) the quantification of the profit derived by RKM and Bright Pear at the Cadia mine until 31 October 2011, (b) the form of the order concerning the profits derived by RKM and Bright Pear and (c) the order which should be made as to the costs in the Equity Division, within 14 days of today, with a view to any dispute being resolved on the papers.

6. Grant leave to MDL to file a cross-appeal, confined to grounds 1-8 of the draft cross-appeal in the papers but excluding grounds 2(b), 5(b) and 8(b), and dispense with the need to file and serve such cross-appeal, and otherwise dismiss the notice of motion filed 31 March 2021.

7. Dismiss the cross-appeal, with costs.

I certify that the preceding 254 paragraphs are a true copy of the reasons for judgment herein of the Honourable Justice Leeming and of the Court.

Date: 16.02.2022

Associate: