IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY **NO M 140 OF 2013**

On Appeal from the Full Federal Court of Australia

BETWEEN: **STEPHEN JAMES HOWARD**
Appellant

AND: **THE COMMISSIONER OF TAXATION OF THE COMMONWEALT OF AUSTRALIA**
Respondent

SUBMISSIONS OF THE RESPONDENT

Filed on behalf of the Respondent by
Maddocks Lawyers
140 William Street, Melbourne, VIC 3000

Date of document: 17 January 2014

Reference: Ms Angela Wood
Telephone: 03 9240 0842
Lawyer's email: Angela.Wood@maddocks.com.au
Facsimile: 03 9240 0799

PART I FORM OF SUBMISSIONS

1. These submissions are in a form suitable for publication on the internet.

PART II ISSUES

2. The Appellant identifies at [2] of his submissions an issue that does arise.

3. The Appellant's [3(a)] falsely identifies a central issue in the appeal by conflating two matters. This conflation (the **Appellant's conflation**) recurs throughout the Appellant's submissions.[1] The relevant opportunity was not frustrated by 'misfeasance of a third party', being misfeasance that resulted in the receipt of damages said to be held in trust. The only opportunity in play was that which the Appellant had identified in his private capacity; which he made available to the company subject to contingencies; which contingencies were unsatisfied through legitimate conduct of a third party; and where that same third party then proceeded by separate misfeasance to appropriate the opportunity for itself. Those last two matters are the Appellant's conflation.

4. This issue would be better framed thus: is it open to a director as fiduciary, once an opportunity identified in a private capacity and made contingently available to the company becomes incapable of realisation by the company through no fault of the director, to continue to pursue that opportunity in a private vein?

5. The Appellant's [3(b)] incorrectly states the issue. It is more accurately stated thus: whether the Litigation Agreement[2] was effective to transfer the award of damages to Disctronics so that the Appellant did not derive it as income before transfer; and, if so, whether the transfer is treated as not having been made by s 102B of the *Income Tax Assessment Act* 1936 (**the 1936 Act**)?

6. The Appellant also at AS [34] raises in passing a further issue about a deduction for costs.

PART III SECTION 78B OF THE *JUDICIARY ACT 1903* (CTH)

7. The Respondent considers that the issue of a s 78B notice is unnecessary.

PART IV FACTS

8. The facts set out by the Appellant and shown in the Appellant's chronology are too abbreviated. They invite a glossing over of key matters, and lead to the Appellant's conflation. A more complete statement of the facts is found in the Respondent's chronology.

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1 For the Appellant's conflation see inter alia Appellant's submissions (**AS**) [3(a)], [15], [16], [19], [25] ('satisfaction of the violated rights'), [28], [30], [31].

2 See Respondent's chronology item 43.

PART V LEGISLATIVE PROVISIONS

9. In addition to the Appellant's statement of applicable provisions, the Respondent refers to s 102A and former s 26AAB(14) of the 1936 Act, and to s 6-5(4) of the *Income Tax Assessment Act* 1997 (**the 1997 Act**).

PART VI ARGUMENT

Section A: first issue – the content of the Appellant's fiduciary duty and the consequences of its discharge

1) The core principles involved

The nature of a fiduciary duty

10. It is well established that a fiduciary has no general or positive legal duty to act in the interests of the beneficiary.[3] A fiduciary duty in the strict sense is proscriptive, forbidding a conflict of interest and duty, and any unauthorised profit from use of position, property or confidential information.[4]

The significance of the particular fiduciary relationship

11. A director and company is an established fiduciary relationship.[5] But mere identification of the fiduciary relationship does not elucidate the content of the duty. It is insufficient to suggest that the 'paradigm example' of the relationship of director and company, with its 'broad and general' duties, explains the content of the Appellant's duty.[6] Identification of the content remains necessary whether or not the fiduciary relationship falls within a recognised category, such as director and company or solicitor and client.[7]

12. Nor, without the necessary and accurate inquiry into the facts, and unweaving the Appellant's conflation, will that content be explained by general illustrations

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3 *Breen v Williams* (1996) 186 CLR 71 (***Breen***) at 113 (Gaudron and McHugh JJ) and 137-138 (Gummow J). See too *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165 (***Pilmer***) at 197-198 (McHugh, Gummow, Hayne and Callinan JJ).

4 *Breen* at 82-83 (Brennan CJ), 93-94 (Dawson and Toohey JJ) and 112-113 (Gaudron and McHugh JJ). And see the oft-cited passage of Deane J in *Chan v Zacharia* (1984) 154 CLR 178 (***Chan v Zacharia***) at 198-199 describing the two overlapping proscriptive 'themes': (1) that of precluding the fiduciary from being swayed by personal interest, and (2) that of precluding the fiduciary from actual misuse of his position for personal advantage. This passage is repeated in AS [14]. Being proscriptive, the fiduciary obligation 'tells the fiduciary what he must not do. It does not tell him what he ought to do': *Attorney-General v Blake* [1998] Ch 439 at 455. (Although inexact, the 'duty of loyalty' is intended herein as shorthand for this proscriptive duty.)

5 See eg *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 (***Hospital Products***) at 96.10 (Mason J).

6 AS [12].

7 *Maguire v Makaronis* (1997) 188 CLR 449 (***Maguire***) at 464 (Brennan CJ, Gaudron, McHugh and Gummow JJ). See also *Chan v Zacharia* at 195 (Deane J).

of the obligation of undivided loyalty. The scope of the duty may be 'antecedently defined or determined'.[8]

The content of the fiduciary duty must be ascertained carefully from the facts

13. Once a fiduciary relationship is established the next step is to ascertain the 'particular obligations' owed by the fiduciary.[9] It is 'necessary' to identify the content of the duty because that is 'the subject matter over which the fiduciary obligations extend'.[10]

14. The content is 'moulded according to the nature of the relationship and the facts of the case'.[11] All the facts and circumstances must be carefully examined.[12] The actual duty assumed (by reference to the facts) will determine the extent of the fiduciary obligation.[13] The content to be 'defined' includes 'the alleged conflict or significant risk of conflict between duty and interest'.[14] And this 'must be identified' with specificity, and not in a 'general way'.[15] This is a principled basis for any narrowing of fiduciary rules applying to directors.[16]

15. Close attention to the facts is inescapable. Relevant facts include the 'character of the venture or undertaking' for which the relationship exists, which in turn is found in any applicable agreement and/or course of dealing.[17] If there is a governing agreement (here the London Agreement: see Respondent's chronology item 17), the relationship must accommodate itself to its terms so it is consistent with and conforms to them.[18]

The content of the duty need not comprehend all conduct of the fiduciary

16. A fiduciary duty does not attach to aspects of a fiduciary's conduct falling outside the content of the duty.[19] Where a fiduciary's obligations are limited to a

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8 *Grimaldi* v *Chameleon Mining NL* (No 2) (2012) 200 FCR 296 (***Grimaldi***) at 345-346 (the Court).

9 *Maguire* at 464 (Brennan CJ, Gaudron, McHugh and Gummow JJ); *Chan v Zacharia* at 195 (Deane J).

10 *Breen* at 82-83 (Brennan CJ), citing *Birtchnell v Equity Trustees, Executors & Agency Co Ltd* (1929) 42 CLR 384 (***Birtchnell***) at 409 (Dixon J).

11 *Hospital Products* at 102.6 (Mason J) and 69 (Gibbs CJ); *Birtchnell* at 408 (Dixon J); *News Ltd v Australian Rugby Football League Ltd* (1996) 64 FCR 410 at 539 (the Court); *Chan v Zacharia* at 195, 196 and 204-205 (Deane J). See also *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1 (***John Alexander***) at 34-36 (the Court).

12 *Hospital Products* at 73.3 (Gibbs CJ).

13 *Birtchnell* at 408 (Dixon J); *Grimaldi* at 345-346 (the Court); *Phipps v Boardman* [1967] 2 AC 46 at 127 (Lord Upjohn).

14 *Pilmer* at 198-199 (McHugh, Gummow, Hayne and Callinan JJ). Their Honours there cited Frankfurter J in *Securities and Exchange Commission v Chenery Corporation* 318 US 80 at 85-86 (1943): 'But to say that a man is a fiduciary only begins analysis: it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary? In what respects has he failed to discharge those obligations? And what are the consequences of his deviation from duty?'

15 *Pilmer* at 200-201 (McHugh, Gummow, Hayne and Callinan JJ).

16 *Streeter v Western Areas Exploration Pty Ltd (No 2)* (2011) 278 ALR 291 (***Streeter***) at 304 (McLure P).

17 *Birtchnell* at 408 (Dixon J); *Hospital Products* at 73 (Gibbs CJ); *United Dominions Corp Ltd v Brian Ltd* (1985) 157 CLR 1 (***United Dominions***) at 11 (Mason, Brennan and Deane JJ).

18 *Hospital Products Ltd* at 97 (Mason J); *John Alexander* at 36 (the Court); *Streeter* at 304 (McLure P).

19 *Breen* at 82-83 (Brennan CJ).

particular activity or have a limited scope (as here), he or she can engage in profit making activities outside that field or scope without breaching his or her duties.[20] The facts may show (as they do here) that, while there may be no 'comprehensive' or 'general' fiduciary relationship because the fiduciary retains some capacity to act in his, her or its own interests, 'a more limited fiduciary relationship' is not thereby excluded because it is 'well settled that a person may be a fiduciary in some activities but not in others'.[21] To similar effect, a person 'may be in a fiduciary position quoad part of his or her activities and not quoad other parts: each transaction, or group of transactions, must be looked at.'[22]

17. Hence, among the principles that were common ground before it, the Full Court accepted, correctly, that a person holding a fiduciary position is entitled to engage in profit-making activities outside the fiduciary office.[23] Apart from responsibilities within the strict boundaries of his fiduciary duty, the Appellant retained his economic liberty and was free to act in his own interests in the KLGC venture.

The facts will strongly influence any question of discharge of the duty

18. Where a particular dealing involving the fiduciary's duty of loyalty is complete, this will ordinarily demonstrate that any interest or duty associated with it is also at an end.[24] If there is any continuing duty or interest, such that they may conflict, it must be identified.[25] This forms part of the careful factual inquiry necessary to define the content of the duty.

19. In certain circumstances, where a fiduciary relationship has come to an end, the former fiduciary may still owe duties to the former beneficiary. However these circumstances are ordinarily either limited to solicitors or other professionals owing a duty not to act against former clients in 'closely related matters', or are explained by a separate duty of confidence in relation to acquired information, or by reference to public policy in the administration of important societal institutions, such as the legal system.[26] None of these matters apply here.

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20 *Noranda Australia Ltd v Lachlan Resources NL* (1988) 14 NSWLR 1 (***Noranda***) at 15 (citing *Chan v Zacharia* at 195 (Deane J)) and 17; *New Zealand Netherlands Society 'Oranje' Incorporated v Kuys* [1973] 1 WLR 1126 (***Kuys***) at 1130 (Lord Wilberforce); *Birtchnell* at 408 (Dixon J); *Hospital Products* at 73 (Gibbs CJ) and 97-98 (Mason J); *Van Rassel v Kroon* (1953) 87 CLR 298 at 302-303 (Dixon CJ); *Queensland Mines Ltd v Hudson* (1978) 52 ALJR 399 at 403-404.

21 *Hospital Products* at 97.10-98.3 (Mason J). See too *Kelly v CA & L Bell Commodities Corp Pty Ltd* (1989) 18 NSWLR 248 at 256B-257D (Mahoney JA, with whom Priestley JA and Clarke JA agreed).

22 *Kuys* at 1130 (Lord Wilberforce), citing inter alia *Birtchnell* at 408 (Dixon J).

23 Full Court at [4(a)] and [5] referring for that proposition to inter alia *Noranda*. In *Noranda* at 15, Bryson J said: '[A] person under a fiduciary obligation to another should be under that obligation in relation to a defined area of conduct, and exempt from the obligation in all other respects. Except in the defined area, a person under a fiduciary duty retains his own economic liberty.'

24 *Pilmer* at 200-201 (McHugh, Gummow, Hayne and Callinan JJ).

25 *Pilmer* at 200-201 (McHugh, Gummow, Hayne and Callinan JJ).

26 The proposition that the broader duty of loyalty itself survives cessation of the relationship has not been accepted in the UK: see eg *Prince Jefri Bolkiah v KMPG* [1999] 2 AC 222 (***Prince Jefri***) at 235 (Lord Millett); *Attorney-General v Blake* [1998] Ch 439 at 453-454. Australian authorities diverge on the point:

20. There have been certain cases where, although the fiduciary relationship has ended, the former fiduciary has been held accountable for profits made from pursuit of opportunities after that time. On analysis, these are cases where, while the relationship is still on foot, the fiduciary makes use of that position to generate or enhance an opportunity for which he or she is then and there accountable to the principal. In such a case, the fiduciary cannot, by terminating the relationship, pursue that opportunity for private gain.[27] In these 'diverted opportunity' cases, an errant fiduciary has *unconscionably* channelled the opportunity to his or her private benefit. But where (as here) there is no such malfeasance there is no occasion to visit equitable sanction on the fiduciary's conscience.

21. Further, whether or not there is termination, in the context of the profit rule,[28] it is necessary to show a 'sufficient connection (or "causation") between breach of duty and the profit derived, the loss sustained, or the asset held'.[29] What will constitute a sufficient temporal and causal connection between the use of the fiduciary office and the receipt of the benefit will depend on the facts, 'including the circumstances in which the opportunity arises and the nature of it and the nature and extent of the company's operations and anticipated future operations'.[30] Relevant to that question, pertinent here, are: **(1)** whether the opportunity resulted from the fiduciary position at all;[31] **(2)** whether the opportunity for gain arose prior to the commencement of the fiduciary relationship but is pursued whilst the relationship subsists;[32] **(3)** whether on the facts the opportunity was indeed one the company 'had been actively pursuing or was one which was maturing *in the hands of* [the company] (emphasis added)';[33] and **(4)** the presence or absence of legal entitlement in relation to the

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see *Ismail-Zai v Western Australia* (***Ismail-Zai***) (2007) 34 WAR 379 at 387-388 (Steytler P); *Geelong School Supplies Pty Ltd v Dean* (2006) 237 ALR 612 at 617-618 (Young J). For examples of those following UK authority, see eg *Menkens & Anor v Wintour & Anor* [2011] QSC 7 at [117]-[119]; *Beach Petroleum NL v Kennedy* (1999) 48 NSWLR 1 at 47-48 (the Court); *Belan v Casey* [2002] NSWSC 58 at [18]-[21] (Young CJ in Eq); *PhotoCure ASA v Queen's University at Kingston* (2002) 56 IPR 86; *British American Tobacco Australia Services Ltd v Blanch* [2004] NSWSC 70; *Asia Pacific Telecommunications Ltd v Optus Networks Pty Ltd* [2005] NSWSC 550 at [54]-[55] (Bergin J); *A v The Law Society of Tasmania* (2001) 10 Tas R 152; *Ismail-Zai* at 387-388 (Steytler P); *Kallinicos & anor v Hunt & ors* (2005) 64 NSWLR 561. For examples of those not following UK authority, see eg *Spincode Pty Ltd v Look Software Pty Ltd* (2001) 4 VR 501 at 521-524 (Brooking J) (obiter); *Sent v John Fairfax Publications Pty Ltd* [2002] VSC 429 at [98]-[104] (Nettle J) (obiter); *Pinnacle Living Pty Ltd v Elusive Image Pty Ltd* [2006] VSC 202 at [13] (Whelan J); *Gugiatti v City of Stirling* (2002) 25 WAR 349 at 351-352 (Templeman J).

27 *Industrial Development Consultants Ltd v Cooley* [1972] 1 WLR 443 (***Cooley***); *Green & Clara Pty Ltd v Bestobell Industries Pty Ltd* [1982] WAR 1 (***Green & Clara***); *Crowson Fabrics Ltd v Rider* [2007] EWHC 2942 (Ch); [2009] IRLR 288; [2008] FSR 17 (***Crowson***); *Canadian Aero Service Limited v O'Malley* [1974] SCR 592; (1973) DLR (3d) 371 (***Canadian Aero***). See also *Bowstead and Reynolds on Agency* (19th ed, 2010) at pp 250-255; and M Conaglen, *Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary Duties* (2010) at pp 188-190.

28 That is, the second 'theme' in the dictum of Deane J in *Chan v Zacharia* at 198-199.

29 *Maguire* at 468 (Brennan CJ, Gaudron, McHugh and Gummow JJ); *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 557 (the Court); *Streeter* at 304-305 (McLure P) and 355 (Murphy JA).

30 *SEA Food International Pty Ltd v Lam* (1998) 16 ACLC 552 (***SEA Food***) at 557-558 (Cooper J).

31 *Links Golf Tasmania Pty Ltd v Settler & Anor* (2012) 213 FCR 1 (***Links Golf***) at 154-155 and 162-163 (Jessup J).

32 *SEA Food* at 556-558 (Cooper J).

33 *SEA Food* at 558 (Cooper J).

opportunity.[34] Further, in the context of the conflict rule,[35] a sufficient causal connection must likewise be shown, although mere temporality is inadequate for liability.[36]

22. In summary, in the 'diverted opportunity' cases referred to at [20], the fiduciary's liability to account arises because the fiduciary's diversion of the opportunity involves circumvention or avoidance of the duty, notwithstanding cessation of the relationship. That is not the case here. Further, as referred to in the cases at [21], regardless of any cessation of the relationship, where there is no sufficient causal connection between the use of fiduciary office and the private gain, there is no cause for equitable intervention. That is the case here.

The relevance of inquiry as to any breach of duty

23. The relevant inquiry as to the content of the duty also includes an examination of acts or omissions that may amount to a failure to discharge those obligations.[37] In examining whether the Appellant had or had not breached his duty, the Full Court was not, as the Appellant asserts, 'fundamentally in error',[38] but rather correctly analysed the content of the duty[39] because equity will only intervene to give a remedy where there is a breach.[40] Particularly once fiduciary duties are framed proscriptively (eg 'not to place oneself in a position of conflict'; 'not to profit from position, property or confidential information'), it is apposite to speak of breach as a necessary condition for a remedy.

2) The facts underpinning the Appellant's fiduciary duty

24. The content of the Appellant's fiduciary duty arises from the facts referenced in the Respondent's chronology. They can usefully be analysed in four phases.

First phase – prior to the contingent introduction of Disctronics July 1999

25. At its inception and prior to mid July 1999 the KLGC venture was entirely unconnected to Disctronics, and at all times had nothing to do with Disctronics' ordinary business.[41] It was an idea of Donovan and he first retained Bucknall as a consultant.[42] The concept was to acquire a golf course, install a quality

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34 *Links Golf* at 154-155 (Jessup J).

35 That is, the first 'theme' in the dictum of Deane J in *Chan v Zacharia* at 198-199.

36 *Streeter* at [75] (McLure P)

37 *Maguire* at 464 (Brennan CJ, Gaudron, McHugh and Gummow JJ); *Chan v Zacharia* at 195 (Deane J).

38 AS [28].

39 See Full Court at inter alia [7], [20].

40 See eg *In re Coomber; Coomber v Coomber* [1911] 1 Ch 723 at 728-729 (Fletcher Moulton LJ). Upon stating that the court may interfere where there is a fiduciary relation, his Lordship continued: '[t]hereupon in some minds there arises the idea that if there is any fiduciary relation whatever any of these types of interference is warranted by it. They conclude that every kind of fiduciary relation justifies every kind of interference. Of course that is absurd. The nature of the fiduciary relation must be such that it justifies the interference.' (This passage was cited by Brennan CJ in *Breen* at 82.6.)

41 Primary judge [74]; Respondent's chronology item 1. Disctronics' business concerned media disc technology, not golf course ownership.

42 Primary judge [6], [11]; Respondent's chronology item 1.

operational tenant, and sell the asset so improved (or 'packaged') to a purchaser for a profit.[43] Disctronics had no 'interest' of any sort in the KLGC venture prior to the London Agreement of 13 or 14 July 1999.[44]

26. Edmonds and Cahill first became involved in April 1999 when Donovan retained them as consultants.[45] In May 1999 the Appellant and Quinert joined the venture as profit participants.[46] On 2 July 1999 Edmonds and Cahill sought admission as profit participants.[47] On 6 July 1999 Edmonds also proposed adding Bucknall, with all six sharing the profit equally.[48]

27. On 6 July 1999 Donovan told Edmonds for the first time that Disctronics might seek to be purchaser if the equity required was within its capacity.[49] Between 6 and 11 July 1999 Edmonds prepared calculations showing inter alia the equity requirement was above Disctronics' capacity.[50] On 11 July 1999 Edmonds told Quinert he disagreed with Donovan's idea of making the KLGC venture available as an investment for Disctronics, and that in his view it was not a long term investment for Discrtonics.[51]

Second phase – the making of the London Agreement (13 or 14 July 1999) through to Edmonds and Cahill's rejection of Disctronics as purchaser (4 August 1999)

28. At that point the Appellant, Donovan and Quinert met in London for a board meeting of Disctronics over 12, 13 and 14 July 1999.[52] The board members were the Appellant, Donovan, Quinert and Mackie. The following discussions occurred between them, although not at the formal board meeting and not recorded in the minutes of the meeting.[53]

29. First, on 12 July 1999 the Appellant, Donovan and Quinert came to a consensus in a three way discussion that 'one objective' was to make the KLGC venture available to Disctronics as purchaser.[54]

30. Secondly, on 13 or 14 July 1999 there was a four way informal discussion between the Appellant, Donovan and Quinert and Mackie (this being the

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43 Primary judge [4], [5], [11]; Respondent's chronology item 2.

44 Donovan privately considered Disctronics as a possible purchaser of the golf course in about April 1999: Primary judge [15]; Respondent's chronology item 5. However, the London Agreement represented the first time the matter was raised with Disctronics itself, including with its fourth director Mackie who played no role in the KLGC venture.

45 Primary judge [13]; Respondent's chronology item 6. Around this time Donovan privately considered Disctronics as a possible purchaser: Primary judge [15]; Respondent's chronology item 5.

46 Primary judge [13]; Respondent's chronology item 7.

47 Primary judge [16]-[17]; Respondent's chronology item 10.

48 Primary judge [17]-[18], [56]; Respondent's chronology item 11.

49 Primary judge [17]-[18], [56]; Respondent's chronology item 11.

50 Primary judge [17]-[18], [20], [56]; Respondent's chronology item 13.

51 Primary judge [22]; Respondent's chronology item 15.

52 Primary judge [23]; Respondent's chronology item 17.

53 Exhibit 1.

54 Primary judge [23]; Respondent's chronology item 16.

'London Agreement'). The essence was that the first three directors would now pursue the golf course proposal as a possible investment opportunity for Disctronics subject to an express proviso that the equity investment requirement did not exceed $1.5m. Mackie had limited interest in the matter but did not object to it going forward as a possibility.[55] There is no contemporaneous documentary record of the London meeting. What there is consists of the affidavit evidence of conversations, supported by what came to be recorded in the Litigation Agreement two years after the event. It is not in dispute that recital B of the Litigation Agreement, read with recital A, accurately summarises the London Agreement as made above.

31. To understand the London Agreement, it is helpful to distinguish what it could and could not achieve. As between Disctronics and three of its four directors (that is, excluding Mackie) (hereafter **the Appellant and his co-directors**), the London Agreement meant that Disctronics was entitled to expect that they would work to bring the investment opportunity within its grasp, if that were to prove possible.

32. But the London Agreement could not of itself ensure that Disctronics could take over the investment opportunity. That could occur only if two contingencies could be satisfied: first that the equity contribution required from the purchaser could be capped at $1.5m or less, and second that each of the other three joint venturers out of the total of six agreed to Disctronics being introduced as the purchaser of the golf course.

33. As the subsequent events unfolded, these contingencies were unsatisfied, and irrevocably so, as will be seen below.

34. Between 14 and 19 July 1999 the six joint venturers continued discussions. While the possibility of Disctronics being admitted as the purchaser was one of various options on the table, no agreement was reached on whether it would be permitted to become the purchaser.[56]

35. It was in that state of uncertainty that a critical teleconference was held on 20 July 1999 between five of the venturers (without the Appellant, but who subsequently agreed with the minutes of the meeting) (**the 20 July meeting**). What resulted here was an agreement as to joint venture terms for all six participants, including sharing profit '6 equal ways'.[57] The minutes do not mention Disctronics, whether as a joint venture member, specified purchaser, or having any right to purchase. Indeed the minutes specifically record that the matter of sourcing equity funding would be further addressed only after the purchase price of the property and details of the lease arrangements are known.[58]

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55 Primary judge [24]-[27], [52], [56], [76]; Full Court [6(c)]; Respondent's chronology item 17.

56 Primary judge [26]-[28]; Respondent's chronology item 18.

57 Primary judge [31], [56]; Exhibit 3 (minutes); Full Court [6(d) and (e)]; Respondent's chronology item 19.

58 Exhibit 3; Respondent's chronology item 19.

36. Warren J correctly accepted that the 20 July meeting was the formation (in the sense of confirmation) of the joint venture between the six parties. To this extent she accepted the case being put by the Appellant in the Supreme Court. However in critical respects she (correctly) placed qualifications on the nature of the joint venture formed. She rejected the proposition that Disctronics was a member of the joint venture, and she rejected the proposition that it had an option, if it chose, to be the equity provider, ie. ultimate purchaser, of the property.[59]

37. Warren J was perfectly correct in these findings. The minutes of the 20 July meeting compel these two qualifications; and there is no other evidence which could outweigh the prima facie correctness of the minutes.

38. To the extent[60] Jessup J construed the reasons of Phillips JA in the Court of Appeal as requiring a departure from Warren J on this point, his Honour was wrong to do so. In the Court of Appeal, Edmonds and Cahill alleged that the later attempt to introduce Disctronics as purchaser on 4 August 1999 was a repudiation of the joint venture agreement.[61] Read as a whole, the Court of Appeal's decision is consistent with the trial judge's finding that Disctronics had no enforceable right to be introduced as purchaser, and that Disctronics was not a joint venturer in its own right.[62] The Court of Appeal decided that, given Disctronics had been contemplated by all parties as a *possible* purchaser, the attempts by the Appellant and his co-directors to introduce it as *the* purchaser did not amount to a repudiation. That finding does not transmogrify into a conclusion that Disctronics had an enforceable right to be the purchaser. It simply meant that the Appellant and his co-directors could seek to have Disctronics be the purchaser without repudiating the joint venture agreement, but Edmonds and Cahill were not obliged to accede to that request.

39. On 3 August 1999 Edmonds put two proposals forward; the first, consistent with the discussions until then, would have continued to see an unspecified equity provider, for an amount of $2.585m (ie, above Disctronics' capacity), and a resulting profit share to be split six ways. The second was that the six venturers would themselves directly acquire the golf course. This would have removed the idea of an equity provider and a resulting profit share as the venturers would now have become the direct owners of the course. In doing so it would have reduced the total investment cost of the project, and reduced the required equity contribution to $760,000.[63]

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59 Primary judge [56] and [59], reflecting the finding in *Disctronics v Edmonds* [2002] VSC 454 at [131]-[134] and [180] (Warren J); Respondent's chronology items 47 and 48.

60 Primary judge [67] and [68].

61 See *Donovan v Edmonds* (2005) 12 VR 513 (***Donavan v Edmonds***) at 526 (Phillips JA).

62 See eg *Donovan v Edmonds* at 527 [31], [32], 530 [39], 532 [45], 549 [95] (Phillips JA).

63 Primary judge [35]; Respondent's chronology item 21.

Third phase – Edmonds and Cahill's rejection of Disctronics as purchaser (4 August 1999 to 10 August 1999)

40. On 4 August 1999 the Appellant and his co-directors rejected the second proposal of Edmonds, and went further by purporting to exercise Disctronics' 'entitlement to take on the acquisition',[64] and to do so at a price which was within its capacity but would destroy the concept of a six-way split of profit share that lay at the heart of the joint venture. This assertion was an overstatement of the rights which they, or Disctronics, had against the other joint venturers. As seen above, the other joint venturers had not taken any step prior to this date to agree to give Disctronics any such option.

41. Nevertheless, consistent with the duty which they had assumed to Disctronics, this somewhat inflated demand can be seen as crystallising as clearly as possible for the other joint venturers the question: are you, or are you not, prepared to accept that Disctronics will become the equity participant?

42. The answer given Edmonds and Cahill was a resounding, final and irrevocable 'no'. This can be seen from the acrimonious conversations on 4, 5 and 6 August referenced by Jessup J at [40]-[44].[65] As the final confirmation, on 10 August 1999, Edmonds and Cahill rejected a proposed resolution of their differences put by the Appellant and his co-directors.[66]

43. The short point of Edmonds and Cahill, and a reasonable one from their perspective, was that the advancement of Disctronics as the purchaser was now being done on terms that would reduce the purchase price paid by it below what a third party would pay and thereby squeeze the profit share available to the six venturers. The directors of Disctronics may be happy to accept that, because they would benefit through their ultimate interests in Disctronics, but Edmonds and Cahill would suffer. Any attempts to find a way to compensate the latter for this inequality came to no fruition in this period.

44. By 10 August, if not earlier, any chance of Edmonds and Cahill accepting Disctronics as the equity provider was dead. The second contingency was irrevocably unsatisfied. Related to this was that the first contingency had also proved incapable of fulfillment – on the latest figures involving an independent third party participant, the equity contribution was in excess of $2.5m, and the only way it could be got under $1.5m was via the alternative second proposal of Edmonds that removed the external equity participant altogether.[67]

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64 Primary judge [38], Full Court [6(g)]; Respondent's chronology item 24.

65 Primary judge [40]-[43]; Respondent's chronology item 25.

66 Primary judge [44]; Respondent's chronology item 27. The proposed resolution sought to alter Edmonds and Cahill's status to fee earning agents instead of joint venture members. See also primary judge [46]-[47]: on 12 August 1999, the Appellant (through Quinert) again asserted Disctronics' 'right' to acquire the golf course which Edmonds and Cahill (through Edmonds) again rejected on 13 August 1999.

67 See [39] above. See also primary judge [35]-[37]; Warren J [48]-[49]; Phillips JA [20]; Exhibits O, P and Q; Respondent's chronology item 21.

45. Notably also, the attempt to have Disctronics accepted as purchaser, and Edmonds and Cahill's rejection of it, did not dissolve the joint venture.[68]

Fourth phase – Edmonds and Cahill's misappropriation of the joint venture (10 August 1999 to 14 December 1999)

46. Separately to the above, Edmonds and Cahill commenced communications with the golf course owner from 10 August 1999 to acquire it for themselves and to the exclusion of the other 4 joint venturers.[69] On 27 August 1999 Edmonds and Cahill (and a new associate) offered to purchase the golf course from the original owner.[70] On 29 October 1999 Edmonds and Cahill and their associate, through a corporate entity, executed a contract of sale with the owner. The transfer was registered on title on 14 December 1999.[71]

47. The facts above expose the Appellant's conflation. Edmonds and Cahill's rejection of Disctronics as a purchaser from the joint venturers was clear on 4, 5 and 6 August 1999. It was confirmed on 10 August. It was final and irrevocable. It was a position which Edmonds and Cahill were entitled in law to take. It came about importantly because the first contingency had now driven the venturers apart. This rejection did not constitute Edmonds and Cahill's misappropriation of the KLGC venture. Indeed, it could not have – it was a contingency contemplated by the London Agreement.

48. Edmonds and Cahill's later misappropriation of the opportunity cannot be conflated, in law or fact, into their earlier lawful rejection of Disctronics as a purchaser.

3) The Appellant's fiduciary duty is discharged in fact and law

49. From the foregoing the following matters are clear.

50. *First phase*. There is no dispute that the Appellant acted solely in his own capacity in the joint venture from May 1999 until the London Agreement. The opportunity he then identified and pursued was his and his alone (subject only to his duties to the other five co-venturers).

51. *Second phase*. His fiduciary relationship with Disctronics came to have operation in relation to the KLGC venture only because of, and consistent with the terms of, the London Agreement.[72] His duty in this period can be conceived of at two levels. Having agreed with his co-directors that he would attempt to

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68 Warren J [183.3] (the joint venture was not dissolved until 10 August 1999 when Edmonds and Cahill took the joint venture opportunity for themselves); primary judge at [58]; Respondent's chronology item 28.

69 Primary judge [48]. This constituted dissolution of the joint venture, giving rise to the claim for damages: Warren J [165], [183]; primary judge [58], Respondent's chronology item 28.

70 Primary judge [50].

71 Primary judge [50].

72 AS [10]. The time of the London Agreement (13-14 July 1999: see Full Court at [11], referring to the primary judge at [76]) is the time 'the investment in the golf course was put to and adopted by Disctronics'. See too AS [11].

have the opportunity made available to Disctronics, he was bound to strive to bring this result about. That is, it was his mandate to try to bring the two contingencies about. This aspect of duty, expressed prescriptively, was a duty owed by a fiduciary but not a strict fiduciary duty as such. He could be expected to exercise care and diligence in performing this aspect of the duty, but it was not the classic proscriptive fiduciary duty that is the concern of equity.[73] There is no doubt he performed this aspect of duty.

52. At the second level, equity would attach its proscriptive duties to the circumstances. During the period when it was possible that the two contingencies might be brought about, it being his duty to advance that outcome, equity would not permit him to prefer his private interest; nor permit him to appropriate for himself or any nominee the opportunity which at that stage, and contingently, equity would regard as that of the company. Equally, had the two contingencies been satisfied, he would have been bound to see to it that Disctronics consummated the opportunity.

53. In terms of capacity, in this second phase he continued as a person acting in his own right vis-à-vis the other five co-venturers. But vis-à-vis Disctronics, he was acting on its behalf in seeking to have the contingent opportunity made good.

54. *Third phase.* From the events of 4, 5 and 6 August, it became clear that the two contingencies would not be met. This resulted in a discharge *in fact* of the Appellant's prescriptive duty to the company. It was clear that Edmonds and Cahill, as they were entitled to, would not accept Disctronics as the equity participant, not least because at the price sought, their profit was squeezed.

55. Once there was nothing more the Appellant could reasonably be expected to do to advance the opportunity on behalf of Disctronics, the proscriptive duties also fell away as a matter of *law*. Specifically:

55.1 there was no longer any scope for conflict between duty and interest – there being no continuing duty to be performed for and on behalf of Disctronics;

55.2 for the Appellant to continue to pursue the opportunity in his own right was not to make use of any position, property or confidential information which belonged to Disctronics – rather he was reverting to use of the position which he had generated in his own right; which he had contingently surrendered and which after the contingencies had failed there was no reason not to pursue again in his own right if he desired.

56. The KLGC venture, whether described as an 'investment'[74] or 'opportunity'[75] or 'maturing business opportunity'[76] never 'belonged' to Disctronics as asserted by

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73 See [10] above.
74 AS [10].
75 AS [15], [16].
76 AS [10], [15].

the Appellant.[77] It had at best an expectation contingent on Edmonds and Cahill's assent to it being purchaser. Nor was the Appellant 'negotiating' for Disctronics[78] except in the sense provided for, and within the constraints of, the London Agreement. His role was limited to making endeavours *within* the joint venture to have Edmonds and Cahill accept Disctronics. This was the extent of Disctronics' opportunity in respect of the KLGC venture.

57. This is clearly not a case of a director wrongly appropriating an opportunity or transaction which truly belonged to his or her company. Nothing belonging to Disctronics was 'misappropriated'. There was no occasion for 'informed assent'[79] by Disctronics – it had no power to assent to a director taking a profit to which it was not itself entitled.

58. The result was that thereafter the Appellant had reverted to his singular, personal capacity in dealing with his co-venturers. He was entitled to assert his rights against the co-venturers to see the 20 July agreement brought to fruition.

59. If, for example, the six venturers had been able to agree on a suitable equity participant (other than Disctronics, it having been excluded), then the resultant profit share would have been up for six-way division pursuant to the 20 July agreement. The Appellant would have been entitled to his share. There would have been no question that he held this for and on account of Disctronics.

60. If the six venturers, consistent with their obligations of good faith to each other, had agreed on a modified form in which to take up the investment opportunity, any profit so resulting would again have been for the Appellant's own account.

61. In each of these scenarios, the Appellant would have owed no duty to Disctronics whether to continue to advance the venture; likewise would have been entitled to no indemnity from Disctronics for costs and expenses incurred in advancing the venture; and likewise would have had no obligation to account for profits made from pursuing the venture or claim for indemnity for losses arising from its failure.

62. Quite simply, he would have been acting in his own right, and his directorship would have been immaterial.

63. *Fourth phase*. The analysis is no different in the world as it in fact played out. As we know, Edmonds and Cahill having acted within their rights in rejecting Disctronics, then chose to exceed their rights by appropriating the joint venture asset for themselves.

64. It was then a matter wholly for the Appellant in his private capacity whether to take action to seek to recover for the losses he had suffered from the defendant's actions.

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77 AS [13].

78 AS [13].

79 AS [15], [16].

65. He had no *entitlement*, arising from the highly limited, contingent and now discharged fiduciary duty which he had previously owed to Disctronics, to require it to indemnify him for the costs of the action; nor did he owe it a commensurate *duty*, arising from that same circumstance, to prosecute the action. Profits or losses from the action were not, on the ground of that circumstance, for the account of Disctronics.

66. *Correct application of principle*. This result accords with principle. As seen above at [18]-[22], the strict standards of equity will require the fiduciary to account for profits made by reason of position, property or confidential information acquired in the fiduciary capacity. The prophylactic nature of equity's relief is designed to hold the fiduciary to the highest standards and to avoid temptation. So if the director, while acting for the company, learns of a business opportunity, the director must account for it to the company, unless relieved by a fully informed consent. This is even if the company could not have realised the opportunity for itself. The reason is so the director is not even tempted to divert to himself that which he would not have learnt of but for his office.

67. None of that applies here. This opportunity was from the outset on the private account of the Appellant and his co-directors. They had no duty, fiduciary or otherwise, to bring it to the company. They chose to do so, on defined, limited and contingent terms (without direct consideration it may be noted, but one might infer because the director desired an indirect benefit in the form of increased value of shares in the company, especially given its tax losses). The contingencies fail. The Appellant as director has no further prescriptive duty to the company in respect to the opportunity. To require that he forsake it in his private right, absent fully informed consent, is to allow the company to sterilise the opportunity which was never more than contingently its. That does not vindicate the high standards of equity. It turns them into instruments of oppression.[80]

68. Accordingly, the Full Court correctly found the following. **(1)** Disctronics' expectation in the KLGC venture was contingent only.[81] **(2)** The content of the Appellant's duty was therefore to use reasonable endeavours to have Disctronics become purchaser, and if (and only if) he succeeded in having Disctronics accepted as purchaser by Edmonds and Cahill did he agree to rebate his profit share to Disctronics.[82] **(3)** In consequence of Edmonds and Cahill's rejection of Disctronics after the Appellant's endeavours (they having no enforceable obligation to accept Disctronics), the Appellant had discharged his fiduciary duty.[83] **(4)** Hence he had not conflicted his interest and duty, and so did not breach his fiduciary duty.[84] **(5)** Accordingly he continued to act in his

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80 See eg *Chan v Zacharia* at 204-205 (Deane J).

81 Full Court [19].

82 Full Court [18]–[19].

83 Full Court [18].

84 Full Court [20].

own capacity in the joint venture, and received the award of damages in that capacity.[85]

4) Other particular problems with the Appellant's approach

Further error – the damages as a substitute benefit

69. A further associated error is the Appellant's contention that the award of damages was a substitute benefit for profits which would have otherwise accrued to Disctronics as purchaser.[86] That again ignores Edmonds and Cahill's rejection of Disctronics. It was not to be purchaser. It had no right to be purchaser. Therefore it could not have accrued profits. The award of damages cannot substitute for a profit that can never have accrued to Disctronics.

Further error – calculation of the damages show a 'substitute benefit'

70. The Appellant's contentions concerning a 'substitute benefit' also appear to refer implicitly to the primary judge's finding that the manner of calculating the damages implied recognition of Disctronics as the purchaser.[87] The primary judge observed that the award was calculated by reference to the profits of those who acquired and operated the golf course, and that this was the activity of a purchaser but not of the joint venture (which was to acquire, install a tenant and immediately on-sell).

71. It is submitted that his Honour's reasoning is not sustainable. The award was not intended to be equal to the plaintiffs' profit if the joint venture had proceeded as planned. Rather, it was calculated by reference to Edmonds and Cahill's gains.[88] Further, his Honour overlooked the fact that the plaintiffs were awarded only four sixths of the gains, with Edmonds and Cahill retaining two sixths collectively.[89] That alone shows that the award was not a substitute benefit for Disctronics had it been purchaser. And further, one sixth went to Bucknall as a plaintiff, although he was not a director of Disctronics,[90] and accordingly his award cannot on any view represent Disctronics' 'denied gains'.

Further error – the Litigation Agreement as a 'confirmation of trust'

72. The Appellant contends that the Litigation Agreement is a 'confirmation' of the Appellant's obligation to account for his fiduciary duty to Disctronics, and 'so a

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85 Full Court [20].

86 See eg AS [16] '... the value of what had been appropriated ...', and '... the award came ... as the fruits of the venture ...'; AS [26] 'The trust relationship extends ... to the fruit of the rights ...'; AS [31] 'What came ... as a result of the action taken came to them ... in substitution for the profit from, the venture ...'.

87 Primary judge [84], [85].

88 *Disctronics v Edmonds* [2002] VSC 454 at [216] (Warren J) and *Donovan v Edmonds* (2005) 12 VR 513 at 543 (Phillips JA).

89 *Disctronics v Edmonds* [2002] VSC 454 at [216].

90 The primary judge described this as 'something of a windfall for him' (primary judge [86]) but, with respect, that is no explanation for the juristic basis of the court's award to him.

declaration of trust'.[91] This contention suffers from the same defects identified above in the Appellant's argument as to the content of his duty. As the Appellant had no fiduciary duty beyond endeavouring to have Edmonds and Cahill accept Disctronics as purchaser (if the equity requirement could be achieved), and as that duty was discharged, there is no trust property to which the alleged trust can attach.

73. Any constructive trust to be imposed on the Appellant in favour of Disctronics, as claimed in AS [19], is dependent on the prior existence of a breach or threatened breach of fiduciary obligations.

74. For the reasons set out above, Disctronics' beneficial capacity depended on contingencies that were not satisfied. The correct content of the Appellant's fiduciary duty to Disctronics therefore demonstrates that there are no grounds for the imposition of a constructive trust, nor for holding that an express trust is to be founded on the Appellant's statement in the London Agreement of his intention to 'rebate' any entitlement from his participation in the joint venture. That undertaking to 'rebate' was clearly based on satisfaction of the two contingencies in the London Agreement. It follows that the submission made in AS [23] is unfounded. A trust that does not exist cannot be confirmed.

75. What then are we to make of the facts that the action as brought named both the Appellant and Disctronics as plaintiffs, that the latter did fund the action, and that the Appellant says he is wishing to perform his duty by accounting for the proceeds to the company (notwithstanding it failed in the litigation)?

76. Only this. It is no doubt open in law to a director after the event to establish a new and fresh accounting relationship with a company in respect to a past matter which in some way engaged the company (even though it failed to establish any enforceable right against anyone). That subsequent agreement will generate separate rights and liabilities between director and company. If monies are got in, the relationship may carry trust consequences if there is a need for a proprietary remedy. But none of this can change the character of what has already occurred. If the director was pursuing the action in what was his own capacity in law, he receives the fruits beneficially even if he has separately agreed to account for them to the company.

Section B: second issue – the Litigation Agreement as an assignment

77. This issue was not raised by the Appellant at trial. The Full Court permitted it to be raised on appeal on the basis that there was a short answer to it in *Booth v Commissioner of Taxation*;[92] namely, that the Litigation Agreement did not prevent the Appellant's beneficial derivation of the award of damages.[93] The Full Court was correct for the following reasons.

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91 AS [21], and footnote 23. The Appellant also asserts that the Litigation Agreement is an instrument of assignment effective to alienate his income. That point is dealt with as the second issue below.

92 (1987) 164 CLR 159 (***Booth***) at 167 (per Mason CJ).

93 Full Court [9].

78. Contrary to what the Appellant says at AS [21] and [33], the Litigation Agreement does not assign any 'right' to damages. It assigns 'any award of damages ... made in [his] favour' (emphasis added). It was an assignment of possible future income (the award), not of a right to income. If effective in equity,[94] it operated to vest that property in Disctronics only after the Appellant first acquired that income.[95] The clause draws a clear distinction between **(1)** the rights in the proceedings and the participation of the assignors in the joint venture (which are not assigned); and **(2)** the award of damages if any that may in the future arise from the rights in the proceedings and the participation in the joint venture (which is assigned).

79. Such an assignment does not affect the character of the future receipt as assessable income in the hands of the Appellant, either as income derived directly, or as income applied or dealt with on his behalf or as he directs pursuant to s 6-5(4) of the 1997 Act.[96] The primary judge correctly held that the assignment did not pass to Disctronics the full net proceeds of the litigation if it should be the case that the Appellant himself was left with a taxation liability in relation to it.[97]

80. If, despite the foregoing, the Litigation Agreement was effective to transfer the right to the award of damages to Disctronics, then s 102B of the 1936 Act operates to treat that transfer as not having been made, and so negates that outcome.[98]

Section C: third issue – deduction for costs

81. If the appeal is dismissed the Appellant should not have a deduction for his alleged share of litigation costs.[99] He has not substantiated his claim. The statement that 'Disctronics' payment discharged the obligations of the plaintiffs' (AS [34], footnote 44) was not proved. Disctronics itself was a litigant. The Appellant did not prove that he incurred any costs, nor that he incurred all of them in the subject income year (2005). The Litigation Agreement, which was proved, provides that Disctronics incurred all costs.[100] and that was the Appellant's evidence.[101]

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94 See R Meagher, D Heydon and M Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (4th ed, 2002) at [6-485]; *Glegg v Bromley* [1912] 3 KB 474; *Norman v Federal Commissioner of Taxation* (1963) 109 CLR 9 (***Norman***) at 21 (Menzies J).

95 *Booth* at 165-167 (Mason CJ) referring, inter alia, to *Norman*.

96 *Booth* at 167 (Mason CJ).

97 Primary judge [101].

98 See Part VII below dealing with the Respondent's Notice of Contention.

99 AS [34].

100 Primary judge [99] ('Disctronics was to pay the costs of all').

101 See exhibit SJH-13 to Exhibit Y (the Appellant' affidavit of 27 May 2010). Exhibit SJH-13 is a Disctronics document showing the costs it incurred as at 27 March 2006. At [7] (p 34) of Exhibit Y, the Appellant states '[o]n a net basis Disctronics thus expended an amount in excess of $1.2m' in legal costs for the Supreme Court proceedings at first instance and on appeal.

PART VII RESPONDENT'S NOTICE OF CONTENTION

82. The submissions in this Part are put in the strict alternative to those in 'Section B: second issue – the Litigation Agreement as an assignment' above.

83. It is recognised that the Full Court did not receive full submissions on either side on the direct application of s 102B of the 1936 Act. That came about because of the belated way in which the Appellant invoked the Litigation Agreement as an assignment: see [77] above. Nevertheless, s 102B was placed in the ring below and it is fair that the Respondent be permitted to rely on it as an alternative defence to a point first raised by the Appellant in the Full Court.

84. As will be seen below, the point depends on a question of characterisation of the Litigation Agreement supplemented (possibly) by a need to decide a question of 'associateship' arising from the undisputed findings of primary fact at trial. This Court is in as good a position as the Full Court to decide these points and a remitter is unnecessary.

85. Section 102B of the 1936 Act treats the transfer of a right to receive income as not having been made if three conditions are met, resulting in the income remaining assessable to the transferor. Those conditions are met here. For completeness, all three conditions will be addressed below even though, from the Appellant's submissions, it appears that only the first condition is in dispute.[102]

86. First, the Appellant transferred a "right to receive income from property". This means "a right to have income that will or may be derived from property paid to, or applied or accumulated for the benefit of, the person owning the right."[103] It may include both a presently existing chose in action, or an equitable assignment of future property as and when it comes into existence.[104] In the strict alternative to the Respondent's contentions above regarding *Booth*, the right which the Appellant transferred was the right to receive the award of damages which arose from the judgment of the Supreme Court. That right is distinguishable from the underlying property. The property which the award of damages came from was the Appellant's rights in equity against Edmonds and Cahill (arising from the joint venture), which rights included the equitable choses in action being asserted in the Supreme Court proceedings. That property was not transferred and remained in the hands of the Appellant, as demonstrated by the language used in the Litigation Agreement (it assigned only 'any award of damages ... made in [his] favour') and did not transfer control of the conduct of the Supreme Court proceedings to Disctronics).

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102 AS [32]–[33].

103 Section 102A(1) of the 1936 Act.

104 *Booth* at 168 (Mason CJ).

87. Secondly, the Appellant made the transfer to an associate - Disctronics. The meaning of 'associate' in former s 26AAB(14) of the 1936 Act applies.[105] A company will be an associate of a natural person where, inter alia:[106]

> the company is, or its directors are, accustomed or under an obligation, whether formal or informal, to act in accordance with the directions, instructions or wishes of the taxpayer, of another person who is an associate of the taxpayer by virtue of another subparagraph of this paragraph, of a company that is an associate of the taxpayer by virtue of another application of this subparagraph or of any 2 or more such persons.

88. Based on the undisputed findings of primary fact by the primary judge, the Appellant met this requirement in respect of Disctronics: **(1)** he was chairman of its board of directors;[107] **(2)** he, with the other directors decided that Disctronics should re-invest its insurance bonds in the KLGC venture,[108] and caused the company to pursue that opportunity[109] on the contingencies of the London Agreement; **(3)** he negotiated terms to seek to resolve the dispute with Edmonds and Cahill in August 1999, including Disctronics' paying fees to them and Bucknall, and terms concerning the provision of finance to Disctronics and its directors;[110] **(4)** he extracted Disctronics' promise to pay his costs in the Supreme Court;[111] **(5)** he procured Disctronics' offer to pay Bucknall's costs in the Supreme Court;[112] **(6)** he with other directors caused Disctronics to be issued a share in the company which they sought to be the nominee purchaser of the golf course.[113]

89. Thirdly, the transfer must be for a period that will or may terminate before 7 years from the date on which income from the property is first paid to, applied or accumulated for the benefit of the transferee by reason of the transfer.[114] An absolute assignment of a right to receive income will meet this condition if the period for which the right is transferred is less than the 7 year period, including an absolute assignment where the right which is actually transferred may be exhausted or may otherwise come to an end before expiry of the 7 year period.[115] Here: **(1)** the assignment of the award occurred only after it was made (as prior to that time the award was only future property); and **(2)** the assignment of the right to receive the award was not for a period greater than 7 years from when it was first paid, applied or accumulated for the benefit of Disctronics, despite the assignment of the award to Disctronics absolutely.

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105 Section 102A(1) of the 1936 Act.

106 Former section 26AAB(14)(a)(v)(A) of the 1936 Act.

107 Primary judge [6].

108 Primary judge [15], [23], [24], [71] and [76].

109 Primary judge [85].

110 Primary judge [43].

111 Primary judge [52] and [99].

112 Primary judge [65].

113 Primary judge [77].

114 Section 102A(1) of the 1936 Act.

115 *Booth* at 170 (Mason CJ).

90. Accordingly, all three conditions in s 102B(1) were met. If the Litigation Agreement was, in the strict alternative, effective to assign the right to receive the award to Disctronics (stemming from the judgment of the Supreme Court) so that it derived it as income, then s 102B treated the transfer as if it had not been made. Accordingly, the award of damages formed part of the Appellant's assessable income.

91. The Appellant contends that s 102B(1) does not apply by relying on an exclusion in subsection 102B(2)(b).[116] That exclusion applies where the right to receive income that was transferred arose from the ownership by the transferor of an interest in the property and, before or at the time of the transfer of the right, the transferor also transferred that interest in property to the transferee or another person.

92. This exclusion does not apply to the hypothesised transfer of the right to receive the award of damages. As outlined above, the property from which the right to receive the award of damages arose constituted the Appellant's rights in equity against Edmonds and Cahill. That property was not transferred before or at the time the award was transferred, or at all, as demonstrated by the language of the Litigation Agreement, including its failure to surrender control of the Supreme Court proceedings to Disctronics. Contrary to the Appellant's claim, the Litigation Agreement did not assign the Appellant's right to sue, nor any rights or interests of the Appellant in the joint venture. Consequently, the property from which the award of damages arose was not assigned to Disctronics, or to any other person.

PART VIII ESTIMATED HOURS

93. It is estimated that 2 and a quarter hours will be required for the presentation of the oral argument of the Respondent.

Dated 17 January 2014

Justin Gleeson SC
Solicitor-General
Telephone: 02 6141 4139
Facsimile: 02 6141 4099
Email: justin.gleeson@ag.gov.au

Peter Sest SC

Telephone: 03 9225 8858
Facsimile: 03 9600 0320
Email: sest@vicbar.com.au

Philip Bender
Telephone: 03 9225 6941
Facsimile: 03 9225 8395
Email: pbender@vicbar.com.au

Counsel for the Respondent

116 AS [32]

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY **NO M 140 OF 2013**

On Appeal from the Full Federal Court of Australia

BETWEEN: **STEPHEN JAMES HOWARD**
Appellant

AND: **THE COMMISSIONER OF TAXATION OF THE COMMONWEALT OF AUSTRALIA**
Respondent

APPENDIX A TO RESPONDENT'S SUBMISSIONS

Income Tax Assessment 1936

26AAB(14) In this section, unless the contrary intention appears:

associate, in relation to a person (in this definition referred to as the ***taxpayer***) means:

(a) where the taxpayer is a natural person, other than a taxpayer in the capacity of a trustee:

(i) a relative of the taxpayer;

(ii) a partner of the taxpayer or a partnership in which the taxpayer is a partner;

(iii) if a person who is an associate of the taxpayer by virtue of subparagraph (ii) is a natural person - the spouse or a child of that person;

(iv) a trustee of a trust estate where the taxpayer or another person who is an associate of the taxpayer by virtue of another subparagraph of this paragraph benefits or is capable (whether by the exercise of a power of appointment or otherwise) of benefiting under the trust, either directly or through any interposed companies, partnerships or trusts; or

(v) a company where:

(A) the company is, or its directors are, accustomed or under an obligation, whether formal or informal, to act in accordance with the directions, instructions or wishes of the taxpayer, of another person who is an associate of the taxpayer by virtue of another subparagraph of this paragraph, of a company that is an associate of the taxpayer by virtue of another application of this subparagraph or of any 2 or more such persons; or

(B) the taxpayer is, the persons who are associates of the taxpayer by virtue of sub-subparagraph (A) and the preceding subparagraphs of this paragraph are, or the taxpayer and the persons who are associates of the taxpayer by virtue of that sub-subparagraph and those subparagraphs are, in a position

to cast, or control the casting of, more than 50% of the maximum number of votes that might be cast at a general meeting of the company;

102A Interpretation

(1) In this Division:

"associate" , in relation to a person, means any person who is an associate, within the meaning of subsection 26AAB(14), in relation to the person.

"interest" , in relation to property, means any legal or equitable estate or interest in the property.

"property" means any property whether real or personal.

"right to receive income from property" means a right to have income that will or may be derived from property paid to, or applied or accumulated for the benefit of, the person owning the right.

"the prescribed date" , in relation to a person who transfers to another person a right to receive income from property, means the day preceding the seventh anniversary of the date on which income from the property is first paid to, or applied or accumulated for the benefit of, the other person by reason of the transfer.

(2) A reference in this Division to a transfer of an interest in property or of a right to receive income from property shall be read as a reference to any such transfer, whether made for valuable consideration or not.

...

(5) Where an interest in property or a right to receive income from property is transferred by 2 or more persons jointly, each of those persons shall, for the purposes of this Division, be deemed to have transferred an interest in that property or a right to receive income from that property, as the case may be.

Income Tax Assessment 1997

6-5 Income according to ordinary concepts (*ordinary income*)

(1) Your *assessable income* includes income according to ordinary concepts, which is called *ordinary income*.

Note: Some of the provisions about assessable income listed in section 10-5 may affect the treatment of ordinary income.

(2) If you are an Australian resident, your assessable income includes the *ordinary income you *derived directly or indirectly from all sources, whether in or out of Australia, during the income year.

...

(4) In working out whether you have ***derived*** an amount of *ordinary income, and (if so) when you ***derived*** it, you are taken to have received the amount as soon as it is applied or dealt with in any way on your behalf or as you direct.