Glenn Newton QC (GN): Good afternoon. I'm hoping everybody is there. My name is Glenn Newton and I'm here with my very talented colleagues from Level Twenty Seven, Matthew Hickey and Bianca Kabel. We're going to talk to you about fiduciary duties, obviously.

Just by way of introduction, can I thank everyone for being here. Can I thank everyone on behalf of Matthew and Bianca, and myself, and also on behalf of Level Twenty Seven Chambers. It's always a pleasure to present these seminars and Level Twenty Seven is always very happy to participate in them if we can.

Now can I explain to you what we're going to do today. There is one admin thing I need to remind you about, and it's this, that there will be a chat button at the bottom of your screen. If you wish to engage in some electronic questioning please feel free to hit it. We will attend to it when we can.

The other matter is this, I'd really like to explain to everybody what we're going to do today because we all have discrete roles. More because of my seniority rather than my callow youth, I have delegated to myself probably the easiest task today. And that is to talk to you about fiduciary duties in a general fashion. Whereas Matthew and Bianca have more specific tasks.

Although I'm going to deal with the topic generally I'm hoping not to deal with it in a glib or superficial fashion, if that's not tautological. On the other hand, Matthew will be dealing with a more precise topic, namely the recent-ish now decision of the High Court in the *Forrester*'s case from late 2018, which is also relevant to a point I want to make to you today because it highlights the fact that there is often dissension in the ranks amongst the judges as to the correct outcome in any given case. And the point I want to make about that is that there is, you know, a fiduciary duty conundrum not necessarily one answer to the problem, but I'll come back to that. And the *Forrester*'s case is a good example of that. Matthew Hickey will deal with that.

On the other hand, Bianca Kabel is dealing with the question of whether or not there is, in effect, a statutory equivalent, particularly under the corporation's legislation to a *Barnes v Addy* claim. Now, by that of course, I'm talking about accessorial or in ancillary liability, which is the foundation for a *Barnes v Addy* claim, you need a fiduciary obligation. The question then arises, if you don't have a fiduciary obligation, can you nonetheless under, for example, the corporation's legislation bring what is in effect a *Barnes v Addy* claim by a different name and obtain the same sort of relief? Which is an interesting question and Bianca will deal with that.

You will see that in the topic today there is reference to the question of whether or not fiduciary duties are a mystery. Let me give you some examples of why we bothered putting

that in because there is a degree of mystery and you see that reflected both in academic writings as well as in judicial decisions. Let me give you an example from the former, namely academic writings. Fiduciary duties have been referred to, by a number of very well credentialed authors, on the topic in this way, "This branch of the law is characterised by disagreement, uncertainty and controversy. It is bedevilled by unthinking resort to verbal formulae and has become a strange and nonsensical jurisprudence."

Now Paul Finn, who of course, is a former Federal Court Judge, now professor and the writer, the author, I should say of the *locus classicus* on fiduciary obligations, has said this in a recent paper that he published that "…we remain no closer to agreeing upon a simple, intelligible and coherent account of the fiduciary principle and its rationale. Instead, we are heading unnecessarily in the opposite direction." That's not a very comforting thought for those of us who practice in an area where fiduciary duty questions might arise. But I want to give you an example of judicial criticism, a recent one by Justice Perram in the Federal Court very late last year, on a strikeout application on a *Barnes v Addy* pleading, an ancillary liability pleading. His Honour said this, clearly not in love with the attempt to plead the cause of action, "…but the pleading shows so few signs of clear thinking, that the pleaders have become lost in their own house of mirrors." And then His Honour went on to say that it took him "…an entire week to understand the pleadings arcane obscurities, which were simply incomprehensible." And then he went on to conclude that he suspected there was a case in there somewhere struggling to free itself from the pleading. And then probably with a comedic pause, he said, "The task at hand is not a complex one for a skilled equity Junior."

WHY ARE FIDUCIARY DUTIES A CONDUNDRUM?

So that's why we put in the mystery questions in the topic. But before I get into the detail, let me give you a little bit of a pracese. The core obligation in fiduciary law is an obligation of undivided loyalty. And that's the highest obligation known to the civil law. But don't be put off if when you are greeted with a fiduciary duty problem you are unable to discern THE particular answer, and I'm using 'the' with capitals. That's because there may not be one answer to the problem. I can give you two judicial illustrations of that, the book ends if you like.

The first real analysis of the fiduciary duty question by the High Court in Australia was, of course, the *Hospital Products Ltd v United State Surgical Corporation Ltd* case from as long ago as 1984. That case involved essentially the judicial ranks on all the lines, including in the High Court, which decided the ultimate issue by the narrowest of majorities. Interestingly, the judge who is invariably quoted by later cases on the topic of fiduciary duties in Justice Mason who was in dissent on the outcome, but not on matters of principle.

If you go to the most recent case in the High Court which is the case with which Matthew Hickey will deal with, the *Ancient Order of Foresters in Victoria Friendly Society v Lifeplan Australia Friendly Society Ltd & Anor* case, there was again a case where the judge at first

instance determined it in a particular way. The full court of the Federal Court disagreed in a unanimous court as a judgment of the Court, which says the trial judge got it wrong. Then in the High Court, there was almost a unanimous decision, there was one dissenting, the very able Justice Nettle dissenting. But the majority said that the full court of the Federal Court got it wrong.

So don't be too distressed if when you get a fiduciary duty conundrum you can't quite work out why there it doesn't seem to be one answer. That might be because there are a number of options which have to be explored. You need to look at the circumstances, etc.

And what are the difficulties? Well, they are really twofold. There are technical difficulties, by which I mean, that you need to understand the elements of a cause of action. And you need to be in a position to plead them in a way that had escaped the pleader in the case for Justice Perram.

The second sort of difficulties are difficulties in approach, if I can put it that way. That is where the reasonable minds may disagree. There might be differences in approach about whether or not there is a fiduciary duty at all, what the scope of the duty is, and then on the relief question - what's the scope of the relief? Could for example, someone obtain an equitable lien, or find a compensation, might they get a constructive trust? Those are matters where discretions become involved and the facts are very determinable.

WHY IS FIDUCIARY DUTY IMPORTANT?

Now, can I deal then with really what is the first question. It is this, why is the topic of fiduciary duties important? Now, bear in mind that the use of the term 'fiduciary' should really be avoided. It's a convenient word to use because it immediately telegraphs some things. But just to label someone a fiduciary is not sufficient to answer the problems that will then arise in any given case. The important thing to remember is that the obligation is one of undivided loyalty. And it is the most onerous obligation known to the civil law. So there is really in a fiduciary duty case only one side of the record, the fiduciary is there to act in the interests of another, the principal or the beneficiary. That has to be contrasted with a contract case where the position is entirely different. And let me give you a very brief illustration of the point I want to make about that, and I'll refer to two cases.

One is a very interestingly named *Great American Chocolate Chip Cookie* case, which was an American case where Judge Posner, very well credentialed, said this "Contract law does not require parties to behave altruistically toward each other. It does not proceed on the philosophy that I am my brother's keeper. That philosophy may animate the law of fiduciary obligations but parties to a contract are not each other's fiduciaries."

Then, more relevantly and more recently, for our jurisprudence, Justice Gleeson, when Chief Justice of the High Court said this, "Many, perhaps even most, contracts are made between parties of unequal bargaining power and good conscience does not require parties to contractual negotiations to forfeit their advantages or neglect their own interests." Now, that is not the case when you're dealing with fiduciary obligations, you do have to if you're a fiduciary sacrifice your own interests and devote your time and attention to the interests of the principal or the beneficiary. So, it is important because it is the most onerous obligation of undivided loyalty.

The second reason why the topic is important is this, fiduciary relationships, in fact, are everywhere. I'm not sure exactly the constitution of our audience today, but I would be surprised if most of the people here are not fiduciaries for one reason or another, either because you are employees, or because you are partners, you might be trustees, you might be solicitors who are in a fiduciary relationship with clients, you might be company directors or you might be trustees. If you want to know what the obligation of undivided loyalty looks like, zoom left or right and you will see it, you are probably it. They are everywhere.

The third reason why they are important is this, and it has to do with the scope of relief, which is available to anyone, you know, in a breach of fiduciary duty case. There are potentially two species of relief, one in specie relief against property either by way of constructive trust or perhaps by way of equitable lien. And there is otherwise monetary compensation by way of equitable compensation, which might extend to the gains that the fiduciary made even though those gains would not have been made by the beneficiary or the principal. So the breadth of the relief, that is a vital, is another important aspect or fiduciary rule.

HOW DO YOU BECOME A FIDUCIARY?

One other question is, how do you become a fiduciary? Excuse me using the label, but how do you become a fiduciary? You can become a fiduciary in two ways, either because of the status of the office which you occupy, by which I mean, if you're a trustee, or a company director, or a solicitor or an employee or a partner, you will be in a fiduciary relationship because of the status of the office which you occupy. It is inherent in that office that you have an obligation of undivided loyalty, and that's an obligation that you have voluntarily assumed.

The other way that you might become a fiduciary is if you have agreed to assume an obligation of undivided loyalty notwithstanding you don't occupy one of those offices. It's been controversially raised, for example, in cases involving joint ventures, usually unsuccessfully because the point about a joint venture is that the wronged party traditionally has rights either in contract law or in the law of torts that will give it appropriate relief without the need to impose an obligation of undivided loyalty. But you become it in two ways, either because of the obligation of your office, or, of course, you have just decided to assume the obligation.

WHICH FIDUCIARY DUTIES ARE IMPORTANT?

Now, what are the fiduciary duties which are important? Well, this is a semi controversial question. The conventional approach is that there are two fiduciary duties: not to put yourself in a position where you might potentially make a profit; or you will potentially be in a position of conflict. They are the proscriptive duties, by which I mean they are duties which you are obliged to perform by not putting yourself in that position. It is said that they don't create any positive obligations. That's a little controversial in the sense that it is often the case that in order to comply with your proscriptive duties you as a fiduciary are obliged to take steps, take positive steps, for example, to identify for your beneficiary a potential conflict. That's a step you have to take but nonetheless the duties are conventionally regarded as proscriptive duties, not imposing positive obligations - although that's a little controversial.

More controversially, it might be said that the fiduciary duties are not confined to the profit or the conflict point. But instead, they extend to an obligation of undivided loyalty to the powers which are vested in a particular person. Now, I'm referring most notoriously to the *Bell Group* litigation that took place in Western Australia over a period of some twenty years. That case was determined in 2013. Both the judge at first instance and the Court of Appeal in Western Australia found a breach of fiduciary obligations notwithstanding the absence of profit and conflict. It was all to do with whether or not duties of acting in the best interests of a company were said to be fiduciary duties. Certainly the Court of Appeal, and indeed the trial judge, said they were even though in that case there was no suggestion of profit or conflict by the directors who made the decision to give the bank creditors in that case security either for the repayment of loans.

The reason it was important in that case, which was a *Barnes v Addy* case, was that the liquidators wanted to claim money back from banks, who had in a sense been preferred by the giving of security. But to make the bank's obliged to repay money the liquidators had to establish that the directors had breached a fiduciary obligation, because a *Barnes v Addy* claim is founded in a breach of a fiduciary obligation. So the question was, is a duty to act in the best interest a fiduciary duty? And the court said it was.

HOW DO YOU COMPLY WITH YOUR FIDUCIARY DUTIES?

The important question is, how do you comply with your fiduciary duties? You do it in this way. First of all, by not putting yourself in a position where you might potentially make a profit or be in a position of conflict. As part of that, you have an obligation as a fiduciary to fully inform the beneficiary or the principal and to obtain the fully informed consent of those parties in the event you are going to do something that would otherwise put you in breach of your obligations.

Now, can I summarise a little. How do you become a fiduciary? You're either a fiduciary because of the office you occupy, or of course, the fact that you have assumed the

obligation notwithstanding it's not inherent in your office. The core obligation is one of undivided loyalty. The conventional approach is the duties are proscriptive, they are negative in nature, they don't pose positive obligations, although you may have to take positive steps to satisfy them.

More controversially, the question is whether the duties extend beyond the profit and conflict point to extend, for example, in the corporate context, to acting in the best interest of the company. That was in the *Bell Group* case in WA said to be a fiduciary duty. I should say that that question, namely, whether fiduciary duties extend that far was the subject of a successful special leave application in the High Court. But the case was settled before it was argued so that question about the actual limits of the duty have still not been answered by the High Court, I would say.

The way to comply with your obligations is to make full and frank disclosure by obtaining the fully informed consent of the beneficiaries. Otherwise, you may well be exposed to a personal obligation to account which might involve in specie relief against you or indeed relief by way of equitable compensation.

Why is the topic important? It is because of the breadth of the relief that is available. And the breadth of the relief reflects the fact that this is the most onerous civil obligation known to the law.

Now, I appreciate I'm probably out of time, but for the sake of completeness, if you have some hours and you want to read exhaustively on the topic, if you go to our chambers website, the Level Twenty Seven website, that might be either on the Level Twenty Seven website, or under my biography there, there's a button you can hit, which will give you a very long dissertation on the topic. But thank you for your attention. And now can I introduce Matthew Hickey.

Matthew Hickey (MH): Thanks very much. And can I echo Glenn sentiments. It's lovely to have you all join us virtually at this time of the day rather than at the end of the working day when everybody's tired and not really all that interested in listening to barristers blather on about fiduciary duties.

REMEDIES IN THE CONTEXT OF FIDUCIARY DUTIES – CONSTRUCTIVE TRUST AS THE LAST RESORT

I'm going to talk about remedies. One of the things that strikes me as quite interesting is that in the context of fiduciary duties, when people think of remedies, often the very first thing they think of, at least those that instruct me, have been known to suggest this is the constructive trust. I'm here to suggest that the constructive trust is not the first thing that one really ought to think of when contemplating the question of remedies. It's important to recognise that there are, of course, a variety of other remedies that might be more appropriate in the

circumstances of the particular case you find yourself in. I want to discuss it by reference to a number of authorities at the High Court.

The first is this case, *Bathurst City Council v PwC Properties*. You can see the citation there on your screen [slide 9]. In that case, it was a 1998 case, the High Court decided this, that "Before the court imposes a constructive trust as a remedy it should first decide whether having regard to the issues in the litigation there are other means available to quell the controversy. An equitable remedy which falls short of the imposition of a trust may assist in avoiding a result whereby the plaintiff gains a beneficial proprietary interest which gives an unfair priority of other equally deserving creditors of the defendant." So there's a fairly clear articulation in 1998 of the proper approach to whether or not the constructive trust is the proper remedy.

Again, in the following year in *Giumelli v Giumelli*, the citation is there [slide 12]. The High Court said this "Before a constructive trust is imposed the courts should first decide whether having regard to the issues in the litigation there is an appropriate equitable remedy which falls short of the imposition of a trust." At the heart of the appeal in that case, was the question whether the relief granted by the full court was appropriate and whether sufficient weight was given by the court to various factors to be taken into account, including, and this is the important part, the impact upon relevant third parties in determining the nature and quantum of the equitable relief to be granted.

And then some ten years later, in 2010, in *John Alexander's Club Pty Ltd v White City Tennis Club Ltd* [slide 14], the High Court reiterated the point and said this, "The constructive trust ought not to be imposed if there are other orders capable of doing full justice." One point that had been made in *Giumelli v Giumelli*, the High Court said and the lines of cases to which that case referred, is that "…care must be taken to avoid granting equitable relief which goes beyond the necessities of the case." Another point in those cases is that third party interests must be borne in mind in deciding whether a constructive trust should be granted. That line of cases does not commit a constructive trust to be declared in a manner injurious to third parties merely because the plaintiff has no other useful remedy against the defendant. So that's an important thing to think about, to bear in mind that there are important considerations to be had as to whether third party interests might be affected, even if the plaintiff may, in fact, have no other available remedies.

So really, those cases tell us that the High Court suggests that the constructive trust rather than being the first thing that comes to mind should be indeed the relief of last resort.

TYPES OF REMEDIES AVAILABLE – ACCOUNT OF PROFITS

Of course, there are other remedies, which might be available, injunctions, declarations, rescission are things which come to mind. Actually, I've only got enough time today to talk about one and I've decided to restrict myself to this, the account of profits.

I have decided to frame the discussion by reference to an analysis of a relatively recent High Court decision to which Glenn's already made reference. And that's this case [slide 18], the *Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society and Anor*, and you see the citation there.

I must say, whenever I see the name of this particular decision it always reminds me of this organisation [slide 19] which will be known to those of you of a certain age and obviously not all of you, which was of course, the clubhouse of this particular fellow [slide 20]. And so, I like to think of the Foresters as being people who sit around in their clubhouse dressed with these particular funny hats. I encourage you to do so while I talk to you about this case, it will no doubt make it more interesting.

At the heart of this decision is Lifeplan. Now they have got a very jaunty sounding name. It sounds kind of cheerful, but for those of you who are unfamiliar with the facts of this case, in fact, they were involved in the selling of funeral plans. Their core business was selling funeral plans to people who were still alive but who had anticipated the inevitable demise in years to come. Relevantly, Lifeplan had two employees, Mr. Woff and Mr. Corby. Mr. Woff was the Senior Manager of a subsidiary and Mr. Corby was the National Sales Manager. In my mind's eye, I must say I pictured them as being a little bit like these two fellows [slide 22]. The significant part of their job, their undertaking for Lifeplan, was establishing relationships with funeral directors in order that the funeral directors would affect referrals to Lifeplan of funeral plans.

So imagine we are dealing with people that look as cheerful about their jobs as these particular fellows [slide 23]. Now, as I said, Woff and Coby are the central figures in this particular case, and in July 2010, while they were still employed by Lifeplan, these two fellows surreptitiously proffered to Foresters, the other party in this particular decision, a proposal to develop Foresters' funeral products business in a way that would capture for Foresters much if not all of the existing business of Lifeplan's relevant subsidiary. It involves Foresters employing these two fellows and entering into a marketing agreement with a company that they would establish for the purpose of undertaking this particular exercise. Thereby embarking on a systematic course of action to win over funeral directors that had previously been the refers to Lifeplan of their business. They formalised the proposal in a detailed five-year business concept plan, that is Foresters and these two chaps. That plan, the business concept plan, was fairly characterised by the full court in the Federal Court, as I quote, "…a comprehensive plan presented by employees of Lifeplan to Lifeplan's actual and prospective competitor, prepared using valuable confidential information of their employer, and to a significant degree recognisable as such, that set out a detailed strategy to attack the commercial base of that employer in order to win as many clients as possible from the employer after they left it.

And so to take as quickly as possible the business presently enjoyed by Lifeplan, and replicate its success for the benefit of the new prospective employer."

So one can see it was, in essence, a wholesale attempt to plunder the confidential information and business records of Lifeplan. And the primary judge in the Federal Court found that the use of Lifeplan's confidential information in the preparation of that business plan must have been apparent to an honest and reasonable person in the position of members of Foresters' board to have been, of course, nefarious.

And so what we see then, is this. At the stage this business plan has been developed, Lifeplan has a very successful business. They have, in 2010, their business in the order of AUD 68 million turnover a year, it's a highly profitable business. In 2010, Foresters by comparison had a business that was turning over something in the order of AUD 1.6 million a year, and were making no profit at all.

As a consequence of the implementation of this plan, Foresters developed a business that rose to the order of AUD 24 million in profit, and Lifeplan's business had fallen to something in the order of AUD 45 million a year. So there's a very evident situation that developed by reference to the facts where Foresters has wholes bolus stolen the business of Lifeplan, with the assistance of Misters Woff and Corby. So we find ourselves in a situation where Foresters are swimming in cash it would seem.

Unsurprisingly, Lifeplan commenced proceedings in the Federal Court. They commenced proceedings against Mr. Woff and Mr. Corby, and indeed against the relevant Foresters subsidiary. Foresters themselves were subsequently joined, and Lifeplan's claim in the proceeding indicated that Woff and Corby had breached their fiduciary duties and that Foresters had knowingly assisted in those breaches, a fairly orthodox kind of claim. The claims also included that Woff, as an officer of Lifeplan, and Foresters had contravened provisions of the *Corporations Act*. I won't dwell upon that, Bianca in due course is going to talk about aspects of the *Corporations Act*.

Lifeplan elected to claim accounts of profits rather than to pursue any claim for damages and that is relevant for reasons to which I will turn shortly. What they saw was the profit earned and to be earned through the operation of Foresters competing funeral products business calculated on a net present value by reference to the net profit projected to be made on contracts entered into and projected to be entered into in each year of the operation and projected operation of Foresters' funeral plan. So, in essence, they wanted all of the profits. The primary claim then was the entire value of the Foresters' funeral product business.

At first instance the primary judge, who was Justice for Besanko, found that in addition to having breached obligations of confidence to Lifeplan and the relevant subsidiary, Woff and

Corby had engaged in a number of breaches of their respective fiduciary duties of loyalty to Lifeplan and its relevant subsidiary. His Honour found that Foresters had knowingly participated in some but not all of those fiduciary breaches. He ordered an account of profits entirely in equity against each of Misters Woff and Corby and each was ordered to account for the sum of his drawings and distributions. But His Honour declined to order any account of profits against Foresters even though they had been in knowing participation. The reasons Justice Basanko gave for that was that confidential information was not itself, His Honour found, used to generate profits.

Given what I have already told you about the level of profitability of the of the stolen business, perhaps unsurprisingly, the case went on to appeal to the full court of the Federal Court. It was comprised of Chief Justice Allsop and Justices Middleton and Davies. It is a single decision of the full court and their Honours found that the primary judge's approach to ordering an account of profits against Foresters was unduly narrow. They held this, that "…without the breaches of duty in which Foresters was not only involved, and without Woff and Corby taking advantage of their position and of the confidential information taken from their employer, Foresters would not have made the profits it did from the business with the interventions of Misters Woff and Corby." They continued that "…to conclude that such as a sufficient causal connection to found liability to account for profits of the business would not be to extend the causal relationship beyond the expressions of profits actually made by reason of the breaches. Rather, it would be to fashion the remedy in a way that in terms of a causal attribution would conform to and enforce and not undermine the strictness of the duty by fashioning the remedy to fit the nature of the case and the particular facts."

The full court noted that the breaches of duty by Woff and Corby did not transfer an extant business to Foresters, but rather lead to Foresters establishing a new business, the establishment of which necessarily involved the deployment of capital, skill and expertise in the undertaking of business risk. And they took the view that the account of profits would be too extreme if it were to extend to the entire value of the Foresters funeral fund business rather, it should "Tailor the order to the circumstances, which required an account of profits to be a proportionate response to fulfill equity's remedial objectives. Nevertheless, it needed to vindicate the principles of fidelity, fidelity, trust and honesty, which underlie the imposition of fiduciary duties, which were breached and served as an encouragement against being swayed to participate for personal gain and the dishonest breaches of others of their duties of fidelity."

We see there the court saying there needed to be a proportionate response in the circumstances. What they held there was that the proportionate response in the circumstances of this case was to order that Foresters account for Lifeplan for the net present value of the profits made and projected to be made on contracts entered into by Foresters between the beginning of February 2011 and the end of 2015. They adopted that approach

because that was the relevant period which had been contemplated by the business plan that had been developed by Woff and Corby.

Again, unsurprisingly perhaps, Foresters appealed from that decision and the High Court was comprised of Chief Justice Kiefel, Justices Keane and Edelman, who formed the majority and Justice Gageler. Now, Justice Gageler agreed in the result, but took a slightly different approach to the majority in that he considered it was the occasion for an articulation of principle, but the majority thought not. If you're interested in an analysis of the articulation of principle, then certainly the reasons of Justice Gageler are worth consideration.

In the High Court Forster submitted this, that its "…liability to account in discord should be confined to those profits that were the direct result of each of the particular acts by which it committed the equitable wrong of knowingly assisting Woff and Corby in a dishonest and fraudulent design." So, we see Foresters in the High Court attempting to confine their liability by reference to the particular acts of knowing participation on their behalf. But the High Court majority rejected that approach. They said that Foresters could not limit its liability to disgorge profits by claiming that only limited profits were caused by a particular act of knowing assistance when the consequences of those acts, the High Court said, were inseparable from the consequences of Woff and Corby's general scheme of breach of fiduciary duty.

The High Court also said that the liability to account and to disgorge benefits encompasses any benefit by the knowing participant in a breach of fiduciary duty as a result of that participation. They said that "The equitable disgorgement principle with which we're concerned is actually prophylactic rather than a restitutionary principle." That is to say we are concerned with deterring people, those who enjoy fiduciary positions from breaching those duties in order to enjoy the profits of doing so.

WHAT MEANING FROM THE DECISION IN ANCIENT ORDER OF FORESTERS IN VICTORIA FRIENDLY SOCIETY V LIFEPLA AUSTRALIA FRIENDLY SOCIETY & ANOR?

What was it then that the High Court decided in this particular case? The High Court decided that there was no principled basis for requiring Foresters to disgorge anything less than the value of the business connections acquired by it from its participation in the disloyalty of Woff and Corby. So we have a broadening by the High Court in this case.

That's the outcome. It leads to the question then of what a person in Foresters' position might do to reduce the amounts for which it Is obliged to account in a case such as this. The onus of course, is on a person in the position of Foresters, and where causation is sufficiently established the onus is upon the erring fiduciary, in this case Foresters, to show that they should not account for the full value of the advantage. There are two means of doing that, to mean, ways in which the wrongdoer might discharged the onus.

The first is by proving that his or her entitlement by proving that he or she enjoyed an entitlement to an allowance for costs incurred and labour when still employed in the creation of the profit. The second way is by demonstrating that the benefit or advantage is beyond the scope of the liability for which they should be required to account profits. No precise test has been prescribed, the High Court observed in this case, for determining when it will be inequitable to account for a benefit on the basis that it has no reasonable connection with the wrongdoing.

As one can see, the approach of causation to the question of account of profits is very helpfully analysed and discussed in this particular case. There was a significant broadening in the High Court of the liability of Foresters to account as knowing participants in the breaches of Woff and Corby.

That begs the question then as to what the takeaways are from the matters about which I wish to speak to you today. They are these: the constructive trust should not be the first thing that you think about when dealing with breaches of fiduciary duty. The authorities to which I've taken you today demonstrate quite conclusively that really they are imposed as the last resort. An account of profits is something which extends to any benefit that is derived from either the breach or the knowing participation in the breach. And in circumstances where it is made out who is the wrongdoer, there is the shifted onus to demonstrate that they should be entitled to an amount for an allowance for their development of the profit, which is just in all the circumstances.

I hope that's been of some assistance. Obviously I too like Glenn am constrained by the time but I am grateful for you all joining us today and we invite your questions of course at the end. But now, I am very pleased to be able to throw to Bianca Kabel.

Bianca Kabel (BK): Thank you Matthew. And thank you, if I can add my own thanks, to you all for joining us this afternoon.

ANCILLARY LIABILITY & THE CORPORATIONS ACT

As Glenn mentioned, I intend to speak to the topic of ancillary liability, in terms of *Barnes v Addy* and whether the *Corporations Act* provides a neat statutory equivalent, at least to the extent that applies to directors and officers. Now, the topic is quite an important one. I think I speak for Glenn, Matthew and myself in saying that we've seen a bit of a tendency, particularly in pleadings, that when an action is brought against a third party for breach of directors duties, for instance, to plead a wrapped up allegation in the alternative, either under the *Corporations Act* or inequity. Essentially then to treat the two as perfect equivalence without attention to the particular nuances that might arise.

For example, quite recently in fact, the full court of the Federal Court observed that the two regimes are quite similar. What I would like to do today, however, is to explore that some more. And as I hope, we'll come to see, to demonstrate that there are in fact real differences between the two regimes. Those differences really require quite careful attention by the pleader in considering how the pleading ought to be structured and which particular regime might in fact serve your client's interests best at the end of the day.

First, as Chief Justice Bathurst said recently, extra curialy, you can of course only have *Barnes v Addy* liability when there is a breach of fiduciary duty. We first then must confine ourselves, but start rather with the question of primary liability. In doing so, what I'd like to do is to confine ourselves to the two uncontroversial fiduciary duties if I can describe them in that way, so to treat them as breaches of the profit and conflict rule rather than the more difficult extensions that we have seen.

Under the *Corporations Act* then, the starting point is s185 which provides that the Act does not derogate from any existing rule of law for these purposes. So we now have at least at the two regimes subsists alongside each other. We also know that the *Corporations Act* contains duties which appear to reflect fiduciary duties in equity for directors and officers. Immediately however, there are a number of differences.

The first is what we see in s182 which contains the statutory equivalent of the profit rule. Arguably, it is slightly broader than what we see in equity, but for the most part it is substantially similar in content. However, if the profit is dishonest the Act does provide for criminal liability in s184.

The conflict rule is found in s191 and it is in different terms to what we see in equity. It provides as follows "A director of a company who has a material personal interest in a matter that relates to the affairs of the company must give the other directors notice of the interest unless a relevant exception applies." That is, it imposes a positive obligation upon a director to disclose a material personal interest.

Now there's been some debate in recent jurisprudence as to whether fiduciary duties ever pose, particularly the conflict rule, a positive duty to disclose. And there was some dicta in *Farah Constructions v Say-Dee* which re-enlivens that debate. The prevailing view, however, in equity is that the duties remain proscriptive, and that a positive obligation upon a fiduciary to disclose is simply the manner by which that fiduciary complies with its negative obligation.

So the obligation then, I say, certainly in my view, is different in content to what we see in equity, in that respect, but also in that it now imports a materiality threshold. And it doesn't, in fact, you might think, require conflict as such so much as an interest that relates to the affairs

of the company. Now, where the lines might we draw there is it is another question. There is also another key difference in respect to the conflict rule, which I'll come back to shortly.

THE BROADENING SCOPE OF WHO IS AN OFFICER

In terms of the duty stage, there are at least two other obvious differences between the regimes. The first is the class of persons upon whom duties are imposed. That is, arguably, although again remains to be seen, a class more broad than the typical fiduciaries. That is because of the definition of officer.

Officer includes limbs of people who would not necessarily be subject to fiduciary duties in equity. In particular, I'm referring to paragraph 9(2b) which refers to "a person who has the capacity to affect significantly the corporation's financial standing". Now, the prevailing view, until recent times, was that a person who had such a capacity must derive that capacity from an office within the company. For instance, a person who has some recognised role or duties within the company. The Queensland Court of Appeal affirmed that last year in *King v ASIC*. That decision, however, was recently overturned on that question by the High Court, and the majority of Chief Justice Kiefel, Justices Gageler and Keane preferred a literal interpretation of the words "capacity to affect significantly, the financial standing of the company". In their view, the inquiry is not whether or not the person holds an office within the company, but instead is a two stage inquiry. First, whether the person has the relevant capacity. And second, whether the person is "of" the corporation. We might think that "of the corporation" might be a bit of a difficult standard for us to apply and we'll see how that plays out.

Certainly at this stage, it is fair to say that their Honours were not as concerned as the Court of Appeal was in *King v ASIC* in Queensland, and also the Court of Appeal in *Grimaldi* with the consequences and the expansion of the application of the duty that that might result in.

DIRECTORS DUTY OF CARE UNDER THE CORPORATIONS ACT

The next difference that we see is that s180 of the *Corporations Act* imposes a duty of care and skill. Now, this is importantly a civil penalty provision, which as I'll come to later, is an important nexus for attracting civil liability under the Act. It seems then that the *Corporations Act* has at least for this question resolved the issue of the scope of duties, fiduciary duties owed in favour of a broader view, that is encompassing a duty of care and skill and permitting relief, similar to equitable relief, again, which we will come to from the breach of duty of care by a director or officer.

BARNES V ADDY LIABILTY

So then, to turn to *Barnes v Addy* liability as we know it. I think it Is important to remember first that *Barnes v Addy* was delivered extemporaneously and at the time it was not considered to be of particular significance. In fact, on the day it was delivered there were two cases

handed down, one was reported in The Times, and the other was *Barnes v Addy* - no mention made of it. Yet it is the seminal decision upon which we base our jurisprudence today.

Now there are two limbs of *Barnes v Addy* and they will be well known to you but it's always worth remembering them. The first is, as highlighted on the slide [slide 43], knowing receipt of trust property. The second, participation in the dishonour and fraudulent design. Of course, in Australia that it is necessary that dishonesty be by the defaulting fiduciary and not only the third party.

Can I make a slight deviation at this point to highlight a pleading difficulty. There is some recent jurisprudence in the Supreme Court of Queensland that suggests it is not necessary when pleading second when *Barnes v Addy* liability to expressly plead the words "dishonest and fraudulent design". It is enough, if you like, that the general flavour of the pleading would result in such a finding or could result in such a finding. There is in fact a decision of Justice Perram's which is to the opposite effect, which was delivered only a few weeks later, a decision in the Supreme Court of Queensland. In my view, given the terms that we see of s150 of the UCPR, which are quite clear, and then the force of Justice Perram's decision, it is prudent, if not the better approach, and in fact consistent with the pleader's ethical obligations to expressly plead those words and the material facts which it is said to support the inference.

TRANSLATING BARNES V ADDY UNDER THE CORPORATIONS ACT

So then, how do we see *Barnes v Addy* liability translate under the Act? As I mentioned earlier, ancillary liability under the Act comes in specifically in respect of civil penalty provisions. An example is on the slide [slide 44], s182, and particularly subsection two. A person who is involved in a contravention of subsection one, which is our profit rule, contravenes the subsection. Now to be involved, a person must, as is identified there, fall within the terms of s79, which is now extracted on the slide [slide 45]. You'll see there that those words are in certainly different language to what we've discussed as the two limbs of *Barnes v Addy*.

The first key difference I want to flag for you is the one that I foreshadowed earlier in respect to the conflict rule, and that is this. S191, containing the conflict rule, is not the civil penalty provision, it is in fact an offence. However, specifically, a contravention of a civil penalty provision is what is required for the attraction of compensation under the Act. So immediately, it seems that the Act doesn't make provision for compensation for a breach of the conflict rule. Now, that might instinctively seem to be quite a significant difference between the two. But when you actually think through it, it does seem difficult to imagine a situation and certainly I haven't found a case example where a plaintiff has successfully succeeded in an action for breach of the conflict rule, that wasn't also attendant with a breach of the conflict rule, certainly an action for compensation or for an account.

The second key difference is the knowledge required and the participation required for an attribution of third party liability. This is the point that I meant earlier about the difference in the language that we see. What s79 doesn't require is a receipt of trust property necessarily, or any participation in a dishonest or fraudulent design. What it requires is knowledge of the essential elements and some sort of relevant participation, forming it within one of those sub segments.

So, it seems that in all likelihood, one can satisfy the terms of the Act by satisfying the requirements of equity, but perhaps not vice versa. So again, that creates some difficulty in terms of pleading a capture all alternative.

CAUSATION

Now, the next point I would like to address briefly is the issue of causation. This is somewhat of a difficult point at the moment. Coming back to the decision in *King v ASIC* that I mentioned earlier, this is in the Court of Appeal's decision. The Queensland Court of Appeal in the extract on the slide [slide 46] confirmed that to be involved in a contravention within the meaning of s79 does not require a causative element.

Now, there's some interesting things that arise from that, and it will require a bit of a digression into the facts of the case that's referred to on the slide. In that case, Mr. King, relevantly was the CEO of the ultimate holding company of a group of companies. A subsidiary of that group made an unauthorised and significant payment to another entity in the group, it was alleged, without proper consideration.

It had been pleaded by ASIC, and found by the primary judge, that Mr. King had approved and authorised the transaction. That finding was appealed and upheld by the Court of Appeal. What we see on the slide is, in fact, the Court of Appeal beginning to make its alternative finding in support of the orders that it made against Mr. King. Now, despite it being an alternative finding, the Court of Appeal delivered a second set of reasons, the penalty reasons if you like, in which they relied specifically on this finding as the basis for the penalty which they ordered against Mr. King. Critically, that penalty included the awarding of a compensation order. So, the tension then arises when one looks to the relevant section of the *Corporations Act* for the ordering of compensation orders. And you'll see, as we do on the slide [slide 47], that in subparagraph 1b it is necessary, in order for the court to order a person to compensate a corporation, that the damage resulted from the contravention. It naturally seems to invite a causation element.

In my view, it's difficult to reconcile the Court of Appeal's reliance upon that particular finding or observation, and its maintenance of the compensation order. One way to justify the position might be to construe the Act to require that the contravention by the primary contravener and by the knowingly involved contravener or participant are in fact the same

contravention. So the third party can be involved in the contravention by the primary contravener and if the loss flows from that contravention it is sufficient. If that is so, however, that would be a significant departure from the causation requirements in equity. And we see that from the case that Matthew referred to earlier, the *Ancient Order of Foresters* case, for a "but for" tests used between the profits made by the third party participant and their participation in the conduct, not the fiduciary's participation.

I think in fact, the correct answer is that the Court of Appeal's observations were probably right. It is not necessary to prove that a participant caused the conduct for a participant to be knowingly involved within the meaning of s79. For instance, declaratory relief may follow as well as other penalties. But if compensation is ordered, s1317H (1b) does require there be a causal link. The Court of Appeal was then wrong perhaps to rely upon that finding and a penalty reasons in not disserving the compensation order. I should note, however, having expressed that view that special leave was sort to appeal on that point and was refused.

DIFFERENCES IN RELIEF

Finally, we can turn into the question of relief and where we might see some differences there. I won't repeat what Matthew has already said about the scope of relief available and equity safe to say that, although the extract we saw earlier from *Barnes v Addy* refers to constructive trustees. Of course, that is not the only remedy that is available against a third party recipient.

I would like to make a quick observation about the scope of the relief available. Now we can see from this slide [slide 47], in subparagraph two, that it includes profits made by any person resulting from the contravention of the offense. So the scope of monetary relief available under the *Corporations Act* is much broader than what we see in equity. However, interestingly, and certainly relevant given Matthew's presentation, there is no neat equivalent in equity to an order for proprietary leave or a constructive trust. What it does permit, the Act is injunctive relief to compel a person, if desirable, to do a thing. Now, the question remains whether or not the court will use these broad powers to compel a transfer for proprietary interest. I have not in my searches found an example of that happening.

I hope that that rather whirlwind tour has demonstrated somewhat that there are some real differences between the regime for seeking accessory liability under the *Corporations Act*, and in equity. In that sense, they are not true alternatives, and each have their own unique advantages and disadvantages for a particular case. It is important again, I urge you, to carefully consider which of those regimes might apply best to the particular circumstances that you might be considering and how whether in structuring your pleading or in framing your case it might be preferable to favour one over the other. And certainly to identify and address the nuances between the two regimes in doing so.

Can I thank you for your attention. I will hand back to Glenn.

GN: Thank you to Matthew and thank you to Bianca.

I suppose one of the difficulties in these sorts of seminars is that if you are able to demystify something, you nonetheless create other mysteries as you go along. Hopefully, we haven't done too much of the latter. But thank you to Matthew and Bianca for their efforts.

I am told that we did not have any questions. So we're in a position to sign off. It has been a pleasure to deliver this seminar today. I hope you found it useful. Feel free to contact any of us, either myself or Matthew or Bianca if you have any questions about this, or if you need some guidance about something or are otherwise interested in a topic. Always feel free to keep in touch. As I said, we have some papers on our website, Chambers' website at Level Twenty Seven about the topic anyway, so feel free to avail yourselves of them if it's useful for it. Thank you.