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FEDERAL COURT OF AUSTRALIA

**Omnilab Media Pty Limited v Digital Cinema Network Pty Ltd [2011]
FCAFC 166**

Citation: Omnilab Media Pty Limited v Digital Cinema Network Pty Ltd [2011] FCAFC 166

Appeal from: Digital Cinema Network Pty Ltd v Omnilab Media Pty Limited (No 2) [2011] FCA 509

Parties: OMNILAB MEDIA PTY LIMITED ACN 002 585 391 and OMNILAB MEDIA CINEMA SERVICES PTY LTD ACN 145 363 855 v DIGITAL CINEMA NETWORK PTY LTD

MICHAEL GEOFFREY SMITH v DIGITAL CINEMA NETWORK PTY LTD, OMNILAB MEDIA CINEMA SERVICES PTY LTD ACN 145 363 855 and OMNILAB MEDIA PTY LIMITED ACN 002 585 391

File number(s): VID 535 of 2011
VID 625 of 2011

Judges: JACOBSON, RARES AND BESANKO JJ

Date of judgment:

19 December 2011

Catchwords:

CORPORATIONS – directors – fiduciary and statutory duties owed by directors to company – whether director breached his duties to company by disclosing particular information to rival company – whether director breached his duties to company by diverting a business opportunity to a rival company – whether finding of dishonest and fraudulent breaches on the part of the director open to primary judge

CORPORATIONS – accessorial liability – whether rival companies were knowingly involved in the director's breaches of fiduciary and statutory duties – whether rival company knowingly assisted the third respondent with his breaches of fiduciary duties – whether knowing involvement in breach negated by inability to pursue opportunity

Legislation:

Corporations Act 2001 (Cth), ss 79, 180, 181, 182, 183 and 184;
Wrongs Act 1958 (Vic), s 24

Cases cited:

Baden v Société Générale pour Favouriser le Développement du Commerce et de l'Industrie en France S.A. [1993] 1 WLR 509;
Barnes v Addy (1874) LR 9 Ch App 244;
Birchnell v Equity Trustees, Executors and Agency Co Ltd (1929) 42 CLR 384;
Boardman v Phipps [1967] 2 AC 46;
Branir v Owston Nominees (No 2) (2001) 117 FCR 424;
Canadian Aero Service Ltd v O'Malley [1974] SCR 592;
Chan v Zacharia (1984) 154 CLR 178;
Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission (2000) 203 CLR 194;
Devries v Australian National Railways Commission (1993) 177 CLR 472;
Farah Constructions Pty Ltd v Say-Dee Pty Ltd (

2007) 230 CLR 89.
Hospital Products Ltd v United States Surgical Corporation (1984) 156 CLR 41.
King Network Group Pty Ltd v Club of the Clubs Pty Ltd (2008) 69 ACSR 172.
Mordecai v Mordecai (1988) 12 NSWLR 58.
R v Byczko (No 2) (1977) 17 SASR 460.
Regal (Hastings) Ltd v Gulliver [1942] 1 All ER 378.
Warman International Ltd v Dwyer (1995) 182 CLR 544.
Yorke v Lucas (1985) 158 CLR 661.

RP Austin, HAJ Ford and IM Ramsay, *Company Directors, Principles of Law and Corporate Governance* (LexisNexis Butterworths, 2005)
RP Meagher, JD Heydon & MJ Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (LexisNexis Butterworths, 4th ed, 2002)

Date of hearing: 23 and 24 August 2011

Place: Melbourne

Division: GENERAL DIVISION

Category: Catchwords

Number of paragraphs: 283

IN VID 535 OF 2011

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IN VID 625 OF 2011

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IN THE FEDERAL COURT OF AUSTRALIA

VICTORIA DISTRICT REGISTRY

VID 535 of 2011

GENERAL DIVISION

ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA

BETWEEN: OMNILAB MEDIA PTY LIMITED ACN 002 585 391
First Appellant

OMNILAB MEDIA CINEMA SERVICES PTY LTD ACN 145 363 855

Second Appellant

AND: DIGITAL CINEMA NETWORK PTY LTD
Respondent

JUDGES: JACOBSON, RARES AND BESANKO JJ

DATE OF ORDER: 19 DECEMBER 2011

WHERE MADE: SYDNEY (VIA VIDEO LINK TO MELBOURNE)

THE COURT ORDERS THAT:

1. Leave be granted to the First and Second Appellants to appeal against Orders 1 & 2 of the orders made by Gordon J on 31 May 2011.
2. The appeal be dismissed.
3. The First and Second Appellants pay the costs of the application for leave to appeal and the appeal.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011* (Cth).

IN THE FEDERAL COURT OF AUSTRALIA

VICTORIA DISTRICT REGISTRY

GENERAL DIVISION

ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA

BETWEEN: MICHAEL GEOFFREY SMITH
Appellant

AND: DIGITAL CINEMA NETWORK PTY LTD
First Respondent

OMNILAB MEDIA PTY LIMITED ACN 002 585 391
Second Respondent

OMNILAB MEDIA CINEMA SERVICES PTY LTD ACN 145 363 855
Third Respondent

JUDGES: JACOBSON, RARES AND BESANKO JJ

DATE OF ORDER: 19 DECEMBER 2011

WHERE MADE: SYDNEY (VIA VIDEO LINK TO MELBOURNE)

THE COURT ORDERS THAT:

1. Leave be granted to the Appellant to appeal against Order 1 of the orders made by Gordon J on 31 May 2011.
2. The appeal be dismissed.
3. Leave to appeal against Gordon J's order as to the extent of the contribution to be awarded to the Second and Third Respondents against the Appellant be refused.
4. The Appellant pay the costs of the application for leave to appeal and the appeal.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011* (Cth).

IN THE FEDERAL COURT OF AUSTRALIA

VICTORIA DISTRICT REGISTRY

VID 535 of 2011

GENERAL DIVISION

ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA

BETWEEN: OMNILAB MEDIA PTY LIMITED ACN 002 585 391
First Appellant

OMNILAB MEDIA CINEMA SERVICES PTY LTD ACN 145 363 855

Second Appellant

AND: DIGITAL CINEMA NETWORK PTY LTD
Respondent

VID 625 of 2011

BETWEEN: MICHAEL GEOFFREY SMITH
Appellant

AND: DIGITAL CINEMA NETWORK PTY LTD
First Respondent

OMNILAB MEDIA PTY LIMITED ACN 002 585 391
Second Respondent

OMNILAB MEDIA CINEMA SERVICES PTY LTD ACN 145 363 855
Third Respondent

JUDGES: JACOBSON, RARES AND BESANKO JJ

DATE: 19 DECEMBER 2011

PLACE: SYDNEY (VIA VIDEO LINK TO MELBOURNE)

REASONS FOR JUDGMENT

JACOBSON J.

Introduction

1. Digital Cinema Network Pty Ltd (“DCN”) is a joint venture company that was formed in about July 2008 for the purpose of exploiting business opportunities in the cinema industry arising from the conversion of movie projection from analogue to digital.
2. The business opportunities are lucrative. They include the sale of expensive digital conversion equipment to a large number of cinema owners throughout Australia.
3. In order to ameliorate the cost of the equipment, and no doubt as an incentive to cinema owners to purchase the equipment, the major American film studios are prepared to pay a subsidy to cinema owners called a Virtual Print Fee or VPF.
4. However, the film studios are not prepared to deal directly with the cinema owners. Rather, they seek to enter into VPF agreements with a “digital integrator” who has the support of a sufficient number of cinema owners to make the project worthwhile to the studios.
5. Up to at least December 2009, Mr Michael Smith, a director of DCN, conducted negotiations with a number of Hollywood film studios with a view to them entering into VPF agreements with DCN as the digital integrator.
6. In conducting these negotiations with the studios, Mr Smith purported to represent DCN and that company’s name was inserted in the draft VPF agreements. Importantly, Mr Smith represented to the studios that in conducting the negotiations he had the support of the Independent Cinemas Association of Australia (“ICAA”), the industry body that represents independent cinema owners and operators within Australia. However, in his dealings with ICAA, Mr Smith purported to represent MGS Group Pty Ltd, a company which he owned or controlled, and which was only one of the two joint venturers that owned DCN.
7. In December 2009, ICAA made it clear to Mr Smith that it did not wish to have DCN named as the digital integrator or “deployment entity” in the VPF agreements but wished to appoint a rival company of DCN, Omnilab Media Pty Limited (“Omnilab Media”) as the nominated deployment entity in the VPF agreements.
8. Shortly thereafter, Mr Smith handed over to Omnilab Media two draft VPF agreements in which DCN was named as the deployment entity. Mr Smith also provided over a period of time:

considerable knowledge on digital cinema to Omnilab Media who entered this market from a standing start.
9. The primary judge (Gordon J) found that Mr Smith’s actions in handing over the draft VPF agreements and disclosing information to Omnilab Media, and another company, Omnilab Media Cinema Services Pty Ltd (“Omnilab MCS”) constituted a breach of his fiduciary duties to DCN.
10. Her Honour found that Mr Smith’s actions were dishonest. Her Honour also came to view that Omnilab Media and Omnilab MCS (the “Omnilab Parties”) knowingly assisted Mr Smith in breaching his fiduciary duties to DCN in accordance with the second limb of *Barnes v Addy* (1874) LR 9 Ch App 244 at 251–252 (“*Barnes v Addy*”).

11. Her Honour was therefore satisfied that the Omnilab Parties assisted Mr Smith with knowledge of a dishonest and fraudulent design on the part of Mr Smith. The requirement of knowledge which her Honour found to be satisfied was actual knowledge, that is to say, the first of the five categories of knowledge discussed in the well known authority *Baden v Société Générale pour Favouriser le Développement du Commerce et de l'Industrie en France S.A.* [1993] 1 WLR 509 (“*Baden*”), usually described as the *Baden* categories, to which we will refer later.
12. The Omnilab Parties and Mr Smith seek leave to appeal from the primary judge’s orders made on 31 May 2011 declaring that Mr Smith breached his fiduciary duties to DCN and that the Omnilab Parties knowingly assisted Mr Smith’s breaches. Mr Smith also seeks leave to appeal against her Honour’s declaration that the Omnilab Parties are entitled to contribution from Mr Smith of one third of the damages or compensation awarded against them. All of the declarations are interlocutory because her Honour has not yet determined the amount of the damages or compensation.
13. The hearing proceeded on the basis that we reserved the question of leave so that we could hear full argument on the merits of the appeal, that being the essential issue in considering whether leave ought to be granted.
14. Before considering the grounds on which the appellants seek to challenge the declarations made by the primary judge, it is necessary for us to address the form of the proceeding at first instance, the factual background and findings made by her Honour and her Honour’s reasons.
15. The form of the proceeding is important because it was a Fast Track matter in which there were no pleadings. The terms in which the allegations of duty, breach and knowing assistance were made in the relevant Fast Track documents are therefore critical to a proper consideration of her Honour’s findings and the issues raised in the grounds of appeal.

The Fast Track Statement

16. DCN relied on a Further Amended Fast Track Statement (the “Fast Track Statement”) filed on 3 March 2011, about six weeks before the commencement of the trial.
17. The Fast Track Statement identified the issues likely to arise as, relevantly, whether Mr Smith contravened ss 180–184 of the *Corporations Act 2001* (Cth) (“*Corporations Act*”), whether he breached his fiduciary duties to DCN and whether the Omnilab Parties “are liable as accessories in respect of Smith’s contraventions and breaches”.
18. The factual matters on which DCN relied were set out in a statement of contentions forming part of the Fast Track Statement.
19. DCN’s principal contention was that Mr Smith disclosed to Omnilab Media certain valuable information belonging to DCN. The information was said to include drafts of VPF agreements, knowledge of the VPF negotiation process and the requirements, responsibilities and functions of a digital integrator under the VPF agreements with the American film studios.

20. The other important aspect of DCN's contentions was that the Omnilab Parties were said to "have been aware" that Mr Smith was a director of DCN and that he had been negotiating VPF agreements with the film studios "on DCN's behalf".
21. These matters were said to give rise to breaches by Mr Smith of, *inter alia*, his duty of good faith to DCN, his duty not to make improper use of information gained by him as a result of his position with DCN and his duty to avoid a conflict between his personal interest and his duty to DCN.
22. The conduct of the Omnilab Parties in making use of the information supplied by Mr Smith was said to make the Omnilab Parties liable to DCN for aiding and abetting, or being knowingly concerned in Mr Smith's contraventions and for "knowingly assisting Smith in breaching his fiduciary duties to DCN".
23. The Omnilab Parties were also said to have "knowingly received property belonging to DCN obtained by Smith in breach of his fiduciary duties to DCN".
24. The property which the Omnilab Parties were said to have received was a VPF agreement entered into by one of the Omnilab Parties with Paramount film studios.
25. DCN claimed loss and damage flowing from the contraventions and breaches. The principal losses were said to be those which flow from not being a party to the VPF agreements. DCN sought injunctions against Mr Smith and the Omnilab Parties restraining them from participating in negotiations with the film studios in respect of VPF agreements.
26. The Omnilab Parties' answer to DCN's claim was contained in its Fast Track Response. Four principal lines of defence emerge from the Fast Track Response.
27. The first was that in his negotiations with the American film studios, Mr Smith represented his own company, MGS, which was acting as agent for ICAA.
28. The second was that DCN never had the support of the members of ICAA to be the "integrator" under the proposed VPF agreements with the studios. Thus, on the Omnilab Parties' approach to the case, there was no commercial opportunity for DCN to exploit in its negotiations with the studios.
29. The third aspect of the Omnilab Parties' defence was that it denied knowledge that DCN had previously conducted negotiations with the studios.
30. A fourth aspect of the defence is also important. The Omnilab Parties contended that from January 2009 they were in negotiations with ICAA to provide ICAA members with part of the technology required for delivery of digital movies and that at all relevant times Omnilab Media was told by ICAA that ICAA intended to recommend to its members that Omnilab Media be the integrator in the VPF agreements.
31. The Omnilab Parties also contended that in order to bolster the delivery of services as integrator for ICAA, Omnilab Media sought to secure the benefits of DCN's experience by entering into negotiations for the acquisition of DCN by Omnilab Media. However, it was

common ground between the parties that the negotiations for the acquisition of DCN were unsuccessful.

32. Mr Smith did not file a Fast Track Response. The reason for this seems to be that he was joined as a respondent only on 2 February 2011. His written submissions filed on 9 March 2011 were apparently intended to serve the purpose of encapsulating his defence to the claim.
33. Mr Smith's answer to the breach of fiduciary duties claim was that the content of the duty depended upon the scope of his relationship with DCN and his role as an agent for ICAA in the negotiations with the studios.
34. The substance of Mr Smith's defence appears to be that DCN did not have the capacity to satisfy the "critical mass requirement" of the film studios, that ICAA was the only entity which could negotiate with the studios and that his conduct of the negotiations with the studios did not give rise to a real sensible possibility of conflict.

Overview of Background Facts

35. The primary judge gave a detailed exposition of the facts covering the period from the mid 2000s to September 2010. Her Honour divided the factual narrative into 15 separate time periods, although some may be seen to be more critical than others.
36. Since her Honour relied principally upon the documentary record in reaching her decision, it will be necessary to set out some of the documentary record in considering the issues raised by the proposed appeal.

Mid-2000s to 2007

37. The factual background commences in mid-2000s when the United States film studios began providing financial assistance to cinemas to upgrade their projection equipment to digital. As stated above, the financial assistance was the particular form of subsidy called a VPF.
38. From at least August 2007, ICAA sought to assist its members, who were the owners or operators of independent cinemas, to obtain the best possible arrangements for their upgrade to the digital era.
39. Mr Smith was the owner of an independent cinema in or near Melbourne. From about August or September 2007, he was proposing to, and in fact did, meet with some of the film studios to discuss the conversion of independent cinema owners in Australia to digital. He held those meetings independently of ICAA.

May 2008 to December 2008

40. Mr Mark Sarfaty was the CEO of ICAA. In late May or early June 2008 Mr Sarfaty met Mr Smith. They had a discussion, in general terms, about the effect on independent cinemas of the digital age.
41. As at 4 June 2008 Mr Smith was in the throes of establishing DCN as a "partnership" between his company, MGS, and digitAll Pty Ltd ('digitAll'), a company controlled by two brothers, Mr Martin Gardiner and Mr James Gardiner. At that time, the intention of the DCN "partners"

was for DCN to supply and install a digital turn-key solution to enable cinemas to convert from analogue to digital. There was no mention at that time of DCN entering into VPF agreements with the film studios.

42. However, as DCN's business plans began to unfold, it was clear by August or September 2008 that DCN intended to negotiate with the film studios for a VPF agreement and that DCN wished to enlist the support of independent cinema owners to include their screens in VPF negotiations with the studios.
43. Mr Smith made a presentation to the Australian International Movie Convention ("AIMC") in September 2008 at which he asked cinema owners to support DCN in its VPF negotiations with the studios.
44. Mr John Fleming was the General Manager of a subsidiary of Omnilab Media. That company described itself as Australia and New Zealand's largest independently owned vertically integrated media company. It was therefore a potential competitor of DCN.
45. Importantly, Mr Fleming attended the AIMC and heard Mr Smith's presentation. Mr Fleming's evidence was that he did not recall DCN being mentioned in the presentation but after the conference Mr Fleming met Mr Martin Gardiner

who told him that digitAll had entered into a partnership with Smith and the partnership was operating as DCN.

46. On 24 September 2008, the Board of Omnilab met and considered a document entitled "Digital Cinema Current Strategy". In that document:

DCN was described as representing between 200 and 400 independent cinema exhibitors. This document also states that DCN aimed to be an integrator and worked with ICAA.

47. On 1 October 2008 Mr Smith sent an email to Mr Sarfaty setting out a proposal for the ICAA Board. The email was from "Michael Smith [m@masgroup.com]".
48. The email of 1 October 2008 stated (inaccurately) that "we" are negotiating a VPF on behalf of about 200 independent cinemas". Mr Smith went on to say that he proposed that "we continue" the negotiations, not on behalf of the cinemas, but "on behalf of all ICAA members at the direction of the ICAA Board." Mr Smith also said that at the point the deals were agreed with each studio, "we would present the deal to the ICAA Board for approval."
49. Mr Smith set out in the email the advantages which he saw in this approach, including:
 - The deal will become an ICAA deal rather than an MGS or a DCN deal; and
 - MGS will charge a fee of 1% upon successful implementation of each VPF agreement.
50. Mr Smith's email also stated that under his proposal:

the negotiation of the VPFs is a completely separate exercise from the supply of equipment, the two are not tied together.

51. On 15 October 2008, shortly before departing for Los Angeles to meet with the film studios, Mr Smith sent an email to a large number of independent cinema owners. The email sought written confirmation for DCN to negotiate a VPF agreement which would enable the conversion of the cinemas to digital projection.
52. As the primary judge observed at [21], the response to Mr Smith's email was not overwhelming. It did not provide him with a sufficient number of screens to meet the "critical mass" requirements of the film studios. Her Honour observed:

whatever the minimum, Smith did not have the numbers. Smith concluded that he could not get the support he needed to conduct the VPF negotiations without the support of ICAA. Smith told his partners in DCN, the Gardiners, that he had been approached by Sarfaty.

53. During October 2008, there were a number of communications between Mr Smith and Mr Sarfaty about their respective roles in the VPF negotiation process. The communications culminated in the production of a draft letter to ICAA members which was eventually settled between Mr Smith and Mr Sarfaty and emailed by Mr Sarfaty to ICAA members on 3 November 2008.
54. The email of 3 November 2008 is reproduced at [26] of the primary judgment. Mr Sarfaty stated in the email that ICAA requested members to complete a letter of authorisation appointing ICAA "to negotiate indicative VPFs on their behalf." He said the letter did not compel members to accept the terms of the VPF if they considered them to be unsatisfactory. He said:

The letter merely serves to confirm the member has authorised ICAA to solicit VPF agreements on their behalf.

55. The email of 3 November 2008 continued as follows:

ICAA then proposes to engage Michael Smith of MGS Group to represent ICAA members in the VPF negotiations.

The purpose of this process is to ensure that member interests are directly represented by ICAA in all VPF discussions and negotiations between studios and integrators on behalf of independent cinemas.

Although MGS Group joint venture partner, Digital Cinema Network will be making ICAA members an offer for equipment supply in the future, at this time Michael will only be seeking to negotiate the VPF and these negotiations will not be contingent on equipment supply.

...

Michael has proposed a fee structure which will see MGS retaining a proportion of the VPF as a "signing fee" for costs incurred and services rendered, with a further proportion of the VPF being retained as an ongoing administration fee which would go to ICAA.

56. During November 2008, Mr Smith sought meetings with the film studios. On 6 November 2008 he emailed Disney a document on a DCN letterhead which stated that DCN was negotiating VPFs to facilitate conversion to digital equipment on behalf of independent exhibitors in Australia. The document also stated that DCN was working closely with ICAA.
57. Contemporaneously with these events, Mr Fleming held discussions with Mr Martin Gardiner and Mr Smith. On 22 October 2008, the Board of Omnilab Media authorised Mr Fleming to hold discussions with digitAll and DCN about a possible partnership. Omnilab Media's Board minutes of 19 November 2008 indicate that Mr Fleming held discussions with Mr Martin Gardiner and Mr Smith but with "no feedback".
58. At the meeting on 19 November 2008, the Board of Omnilab resolved that Mr Fleming would "maintain [a] watching brief" on DCN, Mr Martin Gardiner and Mr Smith.
59. In December 2008, Mr Sarfaty sent an email to Mr Smith recording the current state of the negotiations for the VPF. The email recorded that the film studios had indicated to Mr Smith that they would only pay a VPF to an integrator supplying digitally compliant (or "DCI") equipment to cinema operators and that they would require the integrator to guarantee compliance of the equipment for the term of the VPF; the studios would also require the integrator to collect and distribute the VPFs to cinema operators.
60. In late December 2008, Mr Sarfaty and Mr Smith signed a confidentiality agreement for the purpose of enabling ICAA, MCS and DCN to consider the feasibility of entering into a business arrangement for the negotiation of VPFs on behalf of ICAA members. The parties to the confidentiality agreement were ICAA, MGS and DCN.

January and February 2009

61. During January 2009 Mr Smith communicated with the film studios about the form of the VPF agreement. He received copies of the draft VPF agreement from three of the studios and provided copies to Mr Sarfaty.
62. At around the same time, ICAA was speaking to Omnilab Media. On 8 February 2009, ICAA and Omnilab Media entered into a confidential agreement for the supply by ICAA to Omnilab of certain confidential information. The stated purposes of the agreement included enabling ICAA and Omnilab Media to consider the feasibility of entering into a business arrangement for the creation of a digital media distribution network for ICAA members.
63. In late February 2009, Mr Fleming produced a "white paper" for the Board of Omnilab Media. The document was dated November 2008 but it was not provided to the Board until later. It contained about 80 pages. It was, as Mr Fleming said, "far from a concise document" comprising a "collection of a lot of research notes".
64. The primary judge referred to a section of the white paper which contained an analysis by Mr Fleming of the Australian market. The analysis included the following comment:

There is an opportunity for [Omnilab Media] to align with [DCN] to be involved as an integrator for independent cinema operators. The challenge for this group will be funding the variety of independent exhibitors.

March and April 2009

65. On 5 March 2009 Mr Smith sent an email to Mr Sarfaty about the VPF negotiations with the film studios. Mr Smith listed a number of points of which the following are relevant:

- Mr Smith of MGS and DCN was to negotiate VPF details for ICAA on behalf of members.
- MGS was to charge ICAA \$500 per screen for the negotiations.
- When Mr Smith and Mr Sarfaty believed that the VPF agreement was “sorted”, it would be taken to the ICAA Board for ratification.

66. The email of 5 March 2009 also included the following statement:

Negotiations for the last year have been with DCN as the integrator. Negotiations continue on that basis.

67. On 13 March 2009 Mr Smith emailed Fox Studios about the VPF Agreement and said that:

[O]ur intention is that we would come to an agreement that we are both happy with, we would then have the ICAA Board ratify the document (perhaps they will ask for some changes).

68. The primary judge said at [38] that Mr Smith provided “the same information” to Mr Martin Gardiner on 16 March 2009. This seems to be a reference to an email from Mr Smith to Mr Gardiner of that date attaching a VPF PowerPoint presentation which included the following under the heading ICAA model:

- Meeting with ICAA CEO Mark Sarfaty regularly to discuss details.
- Once Mark and I believe an agreement is acceptable, we will present to Board for feedback;
- If necessary will then go back to studios, until both studio and board are happy.

69. During April and May 2009, Mr Smith was in email contact with the studios about the VPF agreements.

70. At the end of April, Mr Sarfaty sent Mr Fleming ICAA’s business strategy which stated that ICAA was seeking to negotiate a VPF deal with the film studios and added:

how can Omnilab Media and MGS/DCN work together to achieve a successful outcome for ICAA members.

71. There was a meeting between Mr Fleming and Mr Sarfaty. Mr Fleming sent his notes of the meeting to Mr Sarfaty on 3 May 2009. The notes recorded that ICAA, through MGS, would get a VPF deal which would allow for a 3 year transition.

May to August 2009

72. On 11 May 2009 Mr Fleming sent an email to Mr Smith attaching documents described as “structure charts”. Each of the charts showed ICAA holding the VPF. MGS was described as the preferred supplier, which appears to be a reference to its role as supplier of the digital conversion equipment. MGS was also shown as occupying the role, in partnership with DCN, of providing theatre management systems.
73. The role of Omnilab Media in Mr Fleming’s “structure charts” was described in a number of different ways, but it is clear enough that what was envisaged was consistent with the business strategy sent by Mr Sarfaty to Mr Fleming, namely that Omnilab Media would work with MGS and DCN to achieve a successful outcome for ICAA members in the delivery of the VPF and supply of equipment and related services.
74. On 18 May 2009 Mr Smith sent an email to Warner Brothers. The email attached a document on DCN letterhead which stated, relevantly:

DCN is negotiating a VPF on behalf of independent cinemas across Australia ...

[DCN] is a partnership between MGS and DigitAll ...

DCN are negotiating VPFs to facilitate conversion to DCI compliant ... projection equipment on behalf of independent exhibitors in Australia. We have been directly assigned to negotiate on behalf of ICAA.

75. Mr Smith’s email of 18 May 2009 went on to suggest that ICAA’s preferred model was for a VPF agreement to be made directly between the film studios and each exhibitor.
76. The same day, Mr Smith emailed a document in the same form as the document sent to Warner Brothers to a number of other studios.
77. As the primary judge observed at [44], the preferred model of VPF agreement suggested by ICAA left no role for a digital integrator and DCN would not be a party to the contract. It appears from a later email (to which we refer below) that Mr Smith proposed that DCN be rewarded for its efforts by payment of a fee per screen conversion.
78. That email was dated 29 June 2009 and was sent by Mr Smith to Mr Sarfaty. The email was sent from Mr Smith’s MGS email address but, as her Honour pointed out at [47], the email showed that Mr Smith described the relationship which he had in the negotiations with the studios as being between ICAA and DCN.
79. The relevant parts of the email of 29 June are as follows:

we are exclusively negotiating VPFs on behalf of the ICAA member cinemas ...

You and I shall liaise on the content of the agreements as we negotiate and when we have a document that we believe is acceptable, it will be tabled with the ICAA Board

for consideration. Upon their agreement, the agreements will be put to the ICAA members for ratification.

We will negotiate towards the following outcomes:

...

- Agreements to be directly between the distributor and the exhibitor
- If an integrator is demanded by the studios, DCN in conjunction with ICAA shall manage the requirements for ICAA members
- The discounted ICAA fee charged by DCN will be a total of \$500+ gst per screen.

80. The email of 29 June 2009 went on to say that if a deal should be reached for ICAA members to receive VPFs through another integrator, the details of the arrangement would be negotiated by DCN and the fee per conversion would still be payable.
81. Mr Sarfaty reported to the Board of ICAA on 1 July 2009. His report set out the content of Mr Smith's email of 29 June 2009.
82. During July and August 2009, there were further communications between Mr Sarfaty and Mr Smith. Mr Sarfaty asked Mr Smith for a written contract setting out the terms of the arrangement with ICAA. Mr Sarfaty also asked Mr Smith for copies of the current draft VPF agreements but Mr Smith did not provide them.
83. Mr Smith did not think that a written contract was required and the issue was apparently resolved by the statement appearing in Mr Sarfaty's Report to the ICAA Board in August 2009 in which he stated that Mr Smith had tabled a letter of offer to ICAA and that Mr Smith would present the details at the Annual General Meeting of ICAA.
84. The primary judge referred to the letter of offer at [48] but she did not specifically identify the document. It seems to us that the letter of offer must have been Mr Smith's email of 29 June 2009.
85. In early August 2009, Mr Sarfaty held confidential discussions with Omnilab Media about the possibility of establishing a national digital distribution network. Mr Fleming asked Mr Sarfaty about Mr Smith's role in "the business structure of the distribution network". Mr Sarfaty responded to Mr Fleming by saying:

I'm cautious about the notion of a vehicle that includes DCN in a capacity which is greater than an installation company because I would have to sell it into (sic) ICAA members and at this time I'm not in a position to offer that assurance.

September and October 2009

86. The primary judge recorded in her reasons at [51] that by early September 2009, ICAA was unhappy with Mr Smith. The reason for this was said to be a lack of information provided by Mr Smith.

87. On 4 September 2009 Mr Smith sent an email to a representative of one of the American film studios. The email asked for the studio's approval for Mr Smith to share the VPF documentation with Mr Sarfaty. Mr Smith's email stated that Mr Sarfaty was under a non-disclosure agreement "to us" and that the documentation was to be kept confidential to Mr Smith and Mr Sarfaty.
88. It would appear that Mr Smith received the approval he sought because on 10 September 2009 he forwarded the Paramount VPF agreement to Mr Sarfaty and asked him not to disclose the agreement to anyone.
89. At about the same time, Mr Fleming was still working on a strategy for participating in the conversion of cinemas to digital. In early October 2009 he sent a document to the staff of Omnilab Media describing the partnership structure of DCN and the nature of DCN's business. He described it as a "solid player in the independent sector" that provided "the only true turn-key solution" although its ability to cover a large portion of the sector was questionable.
90. Importantly, Mr Fleming's document to Omnilab Media staff included the following statement:

Critically, Mike Smith, the principal of DCN has been leading the negotiations with studios on VPFs, on behalf of ICAA.

91. Shortly afterward, Mr Smith received an "action plan" from Mr Fleming which referred, amongst other things, to the need to agree upon an ownership structure that recognised:

- the needs of ICAA;
- the needs of Mr Sarfaty;
- the value and role to be played by DCN in this relationship.

92. The primary judge observed at [56] that at this time (early October 2009), ICAA (or Mr Sarfaty) had decided to put the role of integrator of the VPFs out to tender. She said that:

Omnilab Media sensed an opportunity. And, it would appear Smith sensed an opportunity with Omnilab Media.

93. On or about 19 October 2009, Mr Fleming with the assistance of Mr Sarfaty, prepared a feasibility study for consideration by the Board of Omnilab Media. Mr Fleming was also assisted by Mr Ross Entwistle (the operator of an independent cinema in Canberra who was also a member of ICAA), and Alan Engert, another Omnilab Media employee.
94. The feasibility study included an attachment dealing with the proposed formation and structure of a new company to deal with the delivery and administration of VPFs for ICAA members. The new company contemplated by the structure was to be a "partnership" between Omnilab Media and DCN to be brought about by Omnilab Media taking a 51% share of DCN.
95. The attachment included the following comment:

Maybe we can drive DCN shares of the business through key KPIs.

- 100% for finalized VPF

96. On 23 October 2009 Mr Entwistle prepared an “Opportunity Statement” for Omnilab Media. The document included the following statements:

- Mr Smith, the principal of DCN, had been leading the negotiations with studios on VPF’s on behalf of ICAA;
- Omnilab Media should join forces with a local partner and DCN appeared to be the best fit;
- Buying equity in DCN was not the preferred option because of the difficulty in valuing DCN’s business.

November 2009

97. On 8 November 2009 Mr Entwistle emailed Mr Fleming with a suggested “approach” for separate meetings he had scheduled with Mr Sarfaty and Mr Smith. His suggested approach was for a new company to be formed as an “Omnilab – led entity” in which Omnilab Media would have two board seats, with ICAA and DCN each having one seat on the board of directors.

98. In describing the proposed structure of the new entity, Mr Entwistle said it would give ICAA a “seat at the table” and would provide ICAA with comfort about a number of key elements. That included the fact that the new company would be led by Omnilab Media which had credibility and longevity in the business as well as providing, through DCN, technical personnel to execute installations.

99. The proposed structure was described by Mr Entwistle as a transition phase. He made reference to Omnilab Media buying DCN “in whole or part” but the price to be paid was not specified.

100. By mid-November negotiations between Omnilab Media and DCN had not been concluded. Mr Entwistle sent an email to Mr Fleming on 18 November 2009 emphasising the need for Omnilab Media to:

[N]ail down DCN. We need them ‘in the tent’ asap, where we can get full transparency, and stop them running around on their own.

101. As the primary judge observed at [61], the Gardiners were aware of the negotiations between Mr Smith and Omnilab Media for the sale and purchase of DCN. This was evidenced by an email from Mr Martin Gardiner to Mr Smith dated 30 November 2009 in which Mr Gardiner stressed the need for Omnilab Media to commit to a basis of valuation of DCN “before we commit to any commercial disclosure”.

December 2009

102. On 1 December 2009 an important meeting took place between Mr Smith, Mr Sarfaty and Mr Fleming. At the meeting Mr Sarfaty invited Omnilab Media (on behalf of ICAA members) to take the role of deployment entity in the VPF's. It appears that Mr Sarfaty also suggested that Omnilab Media be the supplier of the digital equipment to the cinema operators.
103. The primary judge described this as a "fundamental shift" and she said that Mr Smith explained it by saying that if ICAA wanted to do a deal with the support of its members, then there was nothing he could do against it.
104. The changed position with Omnilab Media as the integrator in the VPF agreement was described by Mr Fleming in a document dated 15 December 2009. Mr Fleming stated in the document that the fees payable to an integrator would be between \$500 and \$1,500 per screen but that "\$500 of this would go to DCN for their work so far".
105. Mr Fleming went on to set out the action that Omnilab Media needed to take to carry out its new role as integrator. This included:
- understanding what a digital cinema integrator does;
 - getting access to the VPF agreements from Mr Smith, subject to a non-disclosure agreement; and
 - carrying out business modelling for the new organisational structure which would take account of, *inter alia*, Mr Sarfaty "increasing his value" by "pulling this alliance together".
106. On 18 December 2009 Mr Smith sent Mr Fleming the template of the VPF agreements with two American film studios. Mr Smith told Mr Fleming that the documents were highly confidential and
- for the purpose of evaluating the role, risk and liabilities inherent in being an integrator.
107. Importantly, Mr Smith took this step even though DCN and Omnilab Media had not entered into a sale agreement and in the absence of any agreement between them as to the basis for valuing DCN. Also, there was no non-disclosure agreement between DCN and Omnilab Media.
108. Later that morning, Mr Fleming forwarded the draft VPF agreement to Ms Goyal, Omnilab Media's in-house counsel. In his covering email Mr Fleming said he was now at the "pointy end" of negotiating a position as a digital cinema integrator but a number of things required consideration. One of them was a purchase agreement for DCN. Another was to review the VPF agreement to build a risk profile.
109. Significantly, Mr Fleming's email of 18 December 2009 states that Mr Smith "of DCN" had been negotiating the VPF agreements with the film studios. Mr Fleming went on to suggest a meeting with Mr Smith to get his "input on commercials" and to determine the areas of risk and cost.

110. On 18 December 2009 and 19 December 2009 there was correspondence between Mr Smith and Mr Sarfaty about a VPF agreement with Fox Studios. The correspondence culminated in a request from Mr Smith to Mr Sarfaty seeking a letter of confirmation that DCN was appointed to negotiate VPF's on behalf of ICAA members.

January 2010

111. On 7 January 2010, Mr Sarfaty responded to Mr Smith's request for a letter of appointment. However, the letter stated that "Michael Smith of MGS Group" had been appointed to conduct the VPF negotiations on behalf of ICAA members. The letter also stated that any agreement was subject to ICAA board approval and that, if approved, the agreement would be recommended to members for adoption.
112. Mr Smith replied to Mr Sarfaty later that day suggesting that the letter of appointment should refer to "Smith of MGS Group and Digital Cinema Network". Mr Sarfaty then wrote to the President of ICAA recommending against this course. His email to the President stated:

The reality is that MGS is mike's company whilst DCN is a JV with the Gardner (sic) brothers.

113. On 20 January 2010 Mr Sarfaty wrote to Mr Smith refusing to alter the letter of appointment (to which I referred at [54]–[55]) to refer to both MGS and DCN. Mr Sarfaty made the point that since 3 November 2008 the relationship between ICAA and Mr Smith was with MGS and the role of DCN was to be kept separate from VPF negotiations.
114. Mr Smith replied on 22 January 2010 stating that a lot has happened since November 2008. He said that when he first started chasing VPF's "we did so as MGS". However the studios required that an integrator be involved and that MGS be a partner with an integration company, DCN, and:

We trade as DCN, and the deals are being negotiated with DCN as the integrator.

115. Mr Smith's email of 22 January 2010 goes on to say that the absence of any reference to DCN in the letter of appointment would require explanation to the studios "as all of their communications relate to DCN".
116. The primary judge rejected Mr Smith's attempts in cross-examination to distance himself from the contents of this email. Her Honour found that Mr Smith continued to represent himself to the studios as being from DCN and that he asked Mr Sarfaty to acknowledge this by mentioning DCN in the appointment letter.
117. On 31 January 2010, Mr Fleming made a proposal to the board of Omnilab Media for the establishment of a new company called Omnilab Media Cinema Services Pty Ltd. That company would acquire the business and assets of DCN, including its name. Mr Smith and Mr Sarfaty would be directors. This proposal would enable Omnilab Media to "partner with an established player", namely DCN but without acquiring the corporate entity. Mr Fleming's proposal made specific mention of the fact that DCN was a joint venture between MGS and digitAll".

February 2010

118. On 3 February 2010 the board of ICAA considered the new company structure that had been proposed by Mr Fleming. Mr Sarfaty reported on the proposed structure, listing the elements of it, including the purchase by Omnilab Media of the business of DCN and the formation of a new company with a Board seat for each of ICAA and DCN.
119. After the ICAA board meeting, there were further discussions between Mr Smith and Mr Sarfaty about Mr Smith's request for DCN's name to be included in the appointment letter relating to VPF negotiations. The discussions culminated in an amendment to the terms of the appointment letter on 10 February 2010 which now stated that ICAA had:
- an arrangement with Michael Smith of MGS Group (and DCN) to undertake Virtual Print Fee (VPF) negotiations on behalf of ICAA members.
120. The amended letter went on to state that upon presentation by Mr Smith to ICAA of a draft VPF agreement, the board of ICAA would consider the draft and, upon approval, recommend the agreement to its members for approval.
121. On 12 February 2010 Mr Smith approached a lawyer in the United States, Mr Blinderman, to act as counsel in finalising the VPF deals. Mr Smith told Mr Blinderman that DCN had been negotiating the deal but he (Mr Smith) forwarded details of Mr Blinderman's fee structure and other information to Omnilab Media. The reason he did so was, according to Mr Sarfaty, he had suggested to Mr Fleming that the ICAA/Omnilab/DCN deal was sufficiently advanced for Omnilab Media to itself engage Mr Blinderman.
122. However, an "update" prepared by Mr Fleming on 16 February 2010 expressed the reasoning in different terms. It stated that Mr Smith would be undertaking further discussions with the studios and that Mr Smith intended:
- to alert the studios to Omnilab Media's intention to invest in DCN and present the revised commercial terms.
123. Mr Fleming's update also recorded that Mr Smith had rejected an offer of \$400,000 for the purchase of DCN, and set out a revised deal of \$650,000. The revised proposal was to cover the purchase of DCN's assets including the value of the VPF and DCN's name. Curiously, on 16 February 2010 Mr Smith rejected Omnilab Media's offer to purchase DCN's assets for \$650,000.
124. Between 16 and 18 February 2010 Mr Smith was heavily engaged in arrangements involving Omnilab Media and the film studios. He sent a cover note to Omnilab Media which recorded that it (Omnilab Media) had conducted a preliminary review of the VPF agreement provided by DCN. He also arranged for Mr Blinderman to attend with Mr Smith in meetings with the studios. Mr Fleming agreed that Omnilab Media would pay Mr Blinderman's fees.
125. The primary judge went on to refer to a series of emails dated between 19 and 23 February 2010 which indicated that Omnilab Media had agreed to provide legal assistance to DCN in finalising the VPF agreements which DCN had in progress, while negotiations continued for Omnilab Media to purchase DCN.

126. Her Honour observed at [91] that Mr Fleming had assisted Mr Smith to draft the section of the document which included the statement that Omnilab Media had agreed to provide legal assistance to DCN while negotiations for the purchase of DCN continued and that Omnilab Media had conducted a preliminary review of VPF's provided by DCN.
127. Her Honour stated that Mr Smith's evidence when cross-examined about that document was unsatisfactory.
128. Her Honour also observed that Mr Smith's strategy in providing assistance to Omnilab Media was not disclosed. She said the conduct of Mr Smith, Mr Sarfaty and Mr Fleming was "far from open". Her Honour also referred to an email from Mr Fleming to Mr Sarfaty on 21 February 2010 stating that Mr Fleming was considering advising his board to abort discussions with DCN and noting:

the challenges created by acquiring DCN including the fact that DCN does not have an agreement in place with ICAA to negotiate the VPF – this resides with MGS.

March 2010

129. Between 1 and 9 March 2010 there were a number of communications between Mr Smith, Mr Sarfaty and Mr Fleming. The effect of what was discussed is recorded by the primary judge at [95]–[97]. Relevantly, the three men discussed a "DCN Omnilab Deal" which included statements to the effect that:
- Omnilab Media would be the integrator.
 - Omnilab Media believed there was value in the acquisition of DCN.
130. An amended draft of the "DCN Omnilab Deal" was sent by Mr Smith to Mr Fleming on 11 March 2010. Omnilab Media remained the integrator but MGS was to receive somewhere between \$150,00 and \$300,000. Mr Smith stated in the document that consideration would be given to a 12 month contract for Mr James Gardiner.
131. On 11 and 12 March 2010 there were a number of internal Omnilab Media emails about the documentation that was required to implement the deal with DCN. Relevantly, one of the emails to Mr Fleming referred to the need for an agreement with Mr Smith for him to negotiate with the Gardiners: "before anyone announces we (Omnilab having acquired DCN) are to be the integrator to an ICAA conference".
132. The primary judge observed at [98] that the Gardiners were aware that the negotiations with Omnilab Media were on foot. She referred to a number of emails which showed that Mr Martin Gardiner knew of the negotiations, but the emails do not indicate that Mr Gardiner was aware of the detail of the contents of the negotiations.
133. The primary judge observed at [102] that on 15 March 2010 drafting of the agreements for the implementation of the transaction continued in earnest. However, on 19 March 2010, in the absence of any concluded agreement between Omnilab Media and DCN, ICAA stated, in a confidential briefing note, that Omnilab Media had entered into a heads of agreement with DCN for the purchase of DCN's business.

134. ICAA’s confidential briefing note went on to say that Omnilab Media and ICAA wished to reach an agreement with Mr Smith for the novation of the VPF agreements.
135. On 24 March 2010 Omnilab Media, DCN and ICAA entered into a non-disclosure agreement for the purpose of the involvement of the Omnilab parties and the DCN parties in the provision of VPF and digital cinema equipment and services to ICAA members.
136. However, as the primary judge observed at [106], DCN abandoned any claim for misuse of information provided to the Omnilab parties under this agreement.

April to May 2010

137. In April and May 2010 Mr Smith continued to negotiate a VPF agreement with the film studios. DCN was named as the deployment entity in the draft VPF Agreement with the studios.
138. At the same time, Mr Smith was continuing to negotiate the sale of DCN to Omnilab Media.
139. Emails dated between 17 May 2010 and 25 May 2010 show that Mr Smith and Mr Fleming were proceeding on the basis the DCN would be named as integrator or deployment entity in the VPF agreement which would be taken over by Omnilab Media after the company acquired DCN.

June 2010

140. During June 2010 Mr Smith was continuing to negotiate VPF agreements with the film studios. DCN was still the named entity in the draft agreement but in the negotiations with Disney Studios Mr Smith drew attention to DCN’s role which he said was not that of a traditional aggregator:

but is instead serving as a facilitator to ensure that the independent theatre owners in Australia and New Zealand have access to the VPF financing mechanism.

141. Importantly, in his letter to Disney Studios, Mr Smith said that a possible acquisition of Omnilab Media was a “work in progress” and, if it proceeded, the structure of the VPF deal would not change; rather, DCN would “just be owned by a “larger company”.
142. The primary judge observed at [115] that on 7 June 2010 Mr Smith emailed the Gardiners about Omnilab Media. Her Honour found that Mr Martin Gardiner’s evidence about what he learned of the prospect of the Omnilab company being the deployment entity was “inconsistent”. She found that:

On any view, (Mr Martin) Gardiner knew no later than August 2010 and most probably as early as May 2010.

143. However, the primary judge’s finding at [116] makes clear that Mr Smith had provided Mr Fleming with copies of the draft deployment agreements naming DCN as the deployment entity, before May 2010. Her Honour’s finding was that Mr Smith had provided Mr Fleming (and Ms Goyal) with a copy of the Paramount agreement in January, the Fox agreement in February, the Sony agreement in March and the Disney agreement in April.

144. By 23 June 2010 relations between Mr Martin Gardiner and Mr Smith were strained. The cause of this appears to be some element of disagreement as to the respective roles of digitAll and MGS in the DCN joint venture. Mr Smith's email of 23 June 2010 refers to their respective roles and makes it clear that his aim was to have DCN manage the VPF agreements. The email is set out in the primary judgment at [117]. It concludes with the following remarks:

I discussed with you many times over the last several months about my concerns about the VPF negotiations, ICAA's influence over this, and I really want to spend some time with the three of us discussing this.

145. During June 2010 Ms Goyal worked on a revised sale of assets agreement for the sale of DCN's assets to Omnilab Media. The purchase price stated in the draft was less than the figure previously mentioned. The figure stated in the June draft was \$300,000.

July 2010

146. On 6 July 2010 Ms Goyal provided a revised sale of assets agreement to Mr Smith. Somewhat curiously, Mr Smith suggested the VPF negotiations were between MGS and ICAA and, as her Honour said:

that the ICAA/MGS/ Omnilab Media VPF agreement be put in place before the Sale of Assets Agreement was signed.

147. Her Honour went on to say that, on 7 July 2010. Mr Smith became concerned. She referred at [122]–[123] to a number of emails, the effect of which were that Mr Smith sought to have Omnilab Media take over the VPF agreement by way of an assignment from DCN. Mr Blinderman suggested other methods of achieving the same practical outcome.

148. However, an in-house Omnilab Media email from Mr Fleming dated 8 July 2010 indicated that he was aware of difficulties in the approach proposed by Mr Smith. The email included the following remarks:

I am still wondering how we restrain the Gardiners. I have also asked [Smith] to consider how he walks away from the partnership. I gather the Gardiners have already threatened a 'conflict of interest'.

149. Nevertheless, later on 8 July 2010 Mr Fleming sought the incorporation of an entity to be called Omnilab Media Digital Cinema Network Pty Ltd. He asked that this be done immediately:

so that we can write it into the draft of the VPF agreement next week while [Smith] is in LA.

150. Prior to 9 July 2010 Mr Martin Gardiner became aware of talk within the industry that Omnilab Media had purchased DCN, even though no such agreement had been reached. On 7 July 2010 he expressed his anger to Mr Smith and asked whether the film studios were clear that DCN was negotiating the VPF agreements. He also said to Mr Smith:

I just want to make sure that we are protecting the interests of our business.

151. On or shortly before 13 July 2010, Mr Fleming provided Mr Smith with a draft heads of agreement for Omnilab Media to purchase DCN. The stated purchase price was \$400,000 but the price included a fee of \$50,000 each to be paid to Mr Martin Gardiner and Mr Smith for various services. The draft provided, *inter alia*, that Omnilab Media would be the integrator.
152. On or about 16 July 2010, Mr Smith was directed by Omnilab Media to insert Omnilab Media Cinema Services Pty Ltd into the draft VPF agreements. Her Honour observed at [130] that Mr Fleming conceded in cross-examination that this was Omnilab Media's plan. She rejected Mr Fleming's refusal during cross-examination to accept that the name change was done at Omnilab Media's direction.
153. On 26 July 2010, Mr Smith sought to clarify his various roles in emails to Mr Sarfaty and Mr Martin Gardiner. The emails are set out at length at [131]–[132] of the primary judgment. The significant point which emerges from the emails is Mr Smith's statement that his intention was that DCN be the integrator, at least until it was made clear to him by ICAA that this was not acceptable to ICAA.
154. Later on 26 July 2010, Mr Fleming sent an email to Mr Cartledge. As Her Honour observed at [133], the email is important because it reveals Mr Fleming's knowledge as to the assistance that Mr Smith had provided to the Omnilab parties. We will set out in full the portion of the email reproduced by her Honour at [133] as follows:

One thing that we need to consider with [Smith], over the last 2 years he has openly and unreservedly (well for the most part) provided considerable knowledge on digital cinema to Omnilab Media who entered this market from a standing start.

For all of his failings, we do need to recognise this, as under normal circumstances we would have gone to someone ... who is costing us US\$10K per month. Over 2 years it adds up.

We do have a problem with the Gardeners (sic) ... however [Smith] needs to be recognised by Omnilab outside the VPF payments – no matter how [Sarfaty] feels about him.

155. At the end of July 2010, Omnilab Media commenced to carry out some due diligence on DCN. However, as has already been pointed out, no sale of DCN to Omnilab Media was ever concluded.

August and September 2010

156. On 1 August 2010 the dispute between the parties became litigious. Her Honour set out the relevant correspondence in [136]– [141]. We do not need to repeat it save to say that in an email from Mr Fleming on 1 August 2010 he stated, *inter alia*:

We must assert that we always understood that ICAA commissioned the VPF negotiations and that it always had the right to appoint an integrator.

157. Her Honour went on at [142]ff to refer to other correspondence in this period concerning the question of who was to be the integrator in the VPF agreements.

158. Her Honour observed at [146] that on 16 September 2010 the commercial relationship between Omnilab Media and ICAA was formalised. ICAA members were informed of the arrangements and ICAA received non-binding expressions of interest from members representing 594 screens.

The primary judge's assessment of the witnesses

159. The primary judge found that most of the witnesses were unimpressive and were intent on advancing their case rather than in answering questions asked of them. She said that this was particularly so in relation to the evidence of Mr Smith, Mr Fleming and Mr

Sarfaty but she also found that Mr Martin Gardiner's evidence was coloured by his view that he had been betrayed by Mr Smith.

160. Her Honour said at [148] that there were significant discrepancies in the accounts that each of Mr Smith, Mr Fleming and Mr Sarfaty gave of critical events and, in the end, she relied principally upon the contemporaneous documentary record.

What was not in dispute

161. The primary judge made a critical observation at [153] as to the matters or claims that were not in dispute at the close of DCN's case.

162. First, there was no dispute that MGS entered into an agreement with ICAA which provided for MGS to conduct negotiations on behalf of ICAA for VPF agreements with the film studios. It is evident that this was a reference to the letter of 3 November 2008 which her Honour set out at [26] of her reasons for judgment.

163. Second, Mr Smith did not breach his duties to DCN as a result of his action in causing MGS to enter into the agreement contained in the letter of 3 November 2008.

164. Third, Omnilab Media did not misuse confidential information in relation to:

- The information provided by Mr Gardiner and Mr Smith to Mr Fleming on 11 November 2008;
- Any information that was the subject of the non-disclosure agreement dated 24 March 2010; and
- Any information Omnilab Media obtained in the course of its due diligence examinations conducted on DCN's premises in early to mid 2010.

The primary judge's findings on Mr Smith's liability

165. Her Honour set out the legal principles applicable to a contravention of each of the provisions of ss 180(1), 181(1), 182(1) and 183(1) of the *Corporations Act*. She did so in a way that is unexceptional, citing a number of authorities in support of the principles which she recorded.

166. Her Honour accepted at [164], that Mr Smith's relevant fiduciary obligations to DCN were in substance no different from the obligations imposed by ss 180 to 183 of the Corporations Act .
167. The primary judge went on to observe that, as the High Court said in *Warman International Ltd v Dwyer* (1995) 182 CLR 547 at 558 ("Warman"), it is no defence to a claim of breach of fiduciary duty that the plaintiff was unwilling, unlikely or unable to make the profits for which an account is to be taken, or that the fiduciary acted honestly and reasonably.
168. Her Honour explained at [181] that the key to understanding this case is to recognise the fact that it concerns negotiations by or on behalf of an entity that either was, or sought to be, an agent or intermediary for a number of Australian independent cinemas. Her Honour went on to say that the entity sought to produce, as a result of the negotiations, a set of agreements on behalf of the cinemas with the film studios, from which the entity, as a party to those agreements, would obtain benefits.
169. However, as her Honour explained at [181]:

the intermediary could achieve that result *only* if it had authority from a *sufficient* number of cinemas ... to make the agreements.

170. The primary judge went on to summarise the effect of what had taken place so far as concerned the authority of the relevant entity to carry on the negotiations with the cinemas. She pointed out that, for a time, Mr Smith in his capacity as a director of DCN, had authority from some cinemas. Then, for a time, Mr Smith in his capacity as a director of MGS, had authority from ICAA to make such an agreement on behalf of its members. Finally, Smith, seeking to act on behalf of both MGS and DCN, obtained ICAA's authority to enter into agreements with the studios. However, no such agreements were ever concluded.
171. What then occurred was that ICAA engaged the Omnilab Parties to enter into agreements with the studios. Importantly, her Honour made the following findings at [183]:

Both before and after the Omnilab Parties were engaged in this capacity by ICAA, Smith told the Omnilab Parties what he knew about every aspect of the negotiations. It may be assumed, for the purposes of argument, that after ICAA appointed Omnilab, Smith was bound to tell ICAA all he knew about the state of negotiations. However, to do this before the Omnilab Parties were an agent of the principal in the negotiations (ICAA) would be a breach of Smith's duties to DCN if he was not authorised to do so.

172. Her Honour went on to say at [186]:

Even if DCN had been acting as an agent for ICAA (and no party suggested that it was), DCN had no exclusive right to negotiate on behalf of ICAA. It was always open to ICAA to appoint an agent alone or in addition to or in substitution for MGS, or DCN. But only if and to the extent to which DCN had been acting as ICAA's agent would DCN have been bound to make available to (or at the direction of) its principal, ICAA, what DCN knew about the state of negotiations with the Studios.

173. She made the following finding at [187]:

However, as no party suggested that DCN was ever appointed as ICAA's agent, DCN was not obliged (and Smith was not authorised) to assist a rival in becoming an agent for ICAA. And that is what Smith did. He assisted the Omnilab Parties (and ICAA) to make the transition from DCN having the leading role in negotiating with the Studios.

174. **Following paragraph cited by:**

[Links Golf Tasmania Pty Ltd v Sattler](#) (26 June 2012) (Jessup J)

540. The modern Australian formulation of the conflict rule is that provided by Mason J in his dissenting judgment in [Hospital Products](#) (156 CLR at 103):

Accordingly, the fiduciary's duty may be more accurately expressed by saying that he is under an obligation not to promote his personal interest by making or pursuing a gain in circumstances in which there is a conflict or a real or substantial possibility of a conflict between his personal interests and those of the persons whom he is bound to protect: *Aberdeen Railway Co. v. Blaikie Brothers*. By linking the obligation not to make a profit or take a benefit to a situation of conflict or possible conflict of interest the proposition, in accordance with the authorities, (a) excludes the relevance of an inquiry into the actual motives of the fiduciary; and (b) excludes restitutionary relief when the interest of the fiduciary is remote or insubstantial: see *Boulting v. Association of Cinematograph, Television and Allied Technicians*; *Phelan v. Middle States Oil Corporation*.

What Mason J referred to "a real or substantial possibility of a conflict" is the same notion as Lord Upjohn described as "a real sensible possibility of conflict" in [Boardman v Phipps](#) [1967] 2 AC 46, 124. Although his Lordship was in dissent, his formula was endorsed by the Privy Council in [Queensland Mines Ltd v Hudson](#) (1978) 18 ALR 1, 3 and has been applied both in the NSW Court of Appeal ([Beach Petroleum NL v Abbott Tout Russell Kennedy](#) (1999) 48 NSWLR 1, 89 [425]) and, twice recently, in the Full Court ([Blackmagic Design Pty Ltd v Overliese](#) (2011) 191 FCR 1 at [99] and [Omnilab Media](#) [2011] FCAFC 166 at [174] and [230]). The way the principle was expressed by Mason J in [Hospital Products](#) was adopted by McHugh, Gummow, Hayne and Callinan JJ in [P ilmer v Duke Group Ltd \(In Liq\)](#) (2001) 207 CLR 165, 199 [78] . I would refer also, in this context, to what was said by McLure P in [Streeter](#) (278 ALR at 303 [67]):

Mason J in [Hospital Products](#) stated the conflict rule in terms of a conflict between "interest and interest". I understand the analysis to be as follows. A fiduciary has (within the scope of his engagement or undertaking) a duty of undivided loyalty to the person to whom the duty is owed, in this case the company of which he is a director. Thus, ordinarily a director cannot have personal interests that conflict with the interests of the company.

Although the conflict rule is usually formulated in terms of the need to avoid a conflict of duty and interest, the Mason J formulation assists in the understanding (and application) of the conflict rule.

Her Honour's critical findings on the claims of breach of duty by Mr Smith are at [194]–[196]:

Smith's actions of disclosing information to the Omnilab Parties constituted a breach of Smith's duties to DCN. First, his actions amounted to breach (or breaches) of s 180(1) because, objectively, an ordinary person with the knowledge and experience of Smith would not be expected to have disclosed the information that he did if he was acting on his own behalf: *ASIC v Adler* (2002) 168 FLR 253 at 347. The fact that there was a possibility of DCN being purchased by Omnilab Media should, in my view, have heightened Smith's concern to ensure that he did not disclose the information identified above. The fact that, for the purposes of this litigation, DCN described the information in question as "confidential information" may distract attention from the more basic consideration of whether what Smith did was what an ordinary person with his knowledge and experience might be expected to have done in the circumstances if he or she was acting on their own behalf. The answer is no.

Further, Smith's actions contravened s 181(1) of the Corporations Act. In my view, Smith acted with a consciousness that what was being done was not in the best interests of the company: see, by way of example, [66], [67]–[68] above: *ASIC v Maxwell* (2006) 24 ACLC 1308 at [108] and [109]. His actions were dishonest. His conduct was not inadvertent. He played one entity off against the other. He failed to make full and true disclosure to DCN. He knew that the information he was providing to the Omnilab Parties should not have been disclosed. Put another way, it cannot be said that between October and December 2009 Smith exercised his powers in the interests of DCN. As was said in *Boardman v Phipps* [1967] 2 AC 46, a reasonable person would foresee that there was a real, sensible possibility of a conflict in Smith in taking the actions that he did. Further, those actions caused detriment to DCN in breach of ss 182(1) and 183(1) of the Corporations Act. The detriment foreshadowed in November 2009 – the disclosure of commercially valuable information: see [61] above.

Smith sought to make a number of answers to these claims. Smith submitted that the VPF negotiations were "never part of DCN's business" but belonged to ICAA. Smith submitted that, at best, DCN could only hope or aim for a role in the implementation of digital cinema in Australia. As will be apparent from the foregoing analysis, the way in which Smith now seeks to characterise his conduct and the consequences that flow from it is rejected. Smith, as a director of DCN, started to negotiate and continued to negotiate with the Studios over the VPF agreements. In that role and capacity he obtained access to the draft VPF agreements and commercial information about the role of a digital integrator. He turned to ICAA, and ultimately Omnilab. The information he provided to Omnilab was obtained by him in his capacity as a director of DCN, and was commercially valuable. The fact that it was possible, if not probable, that DCN would not have the minimum number of screens available to satisfy the Studios is, for the reasons stated earlier, no answer to the claim for breach of

duties brought against Smith. The next principal basis on which Smith sought to answer these claims was that DCN could not have pursued the VPF opportunity itself.

That contention is addressed in further detail below [at [212]–[215]] and is rejected.

175. The primary judge went on to address several further claims of breach of duty by Mr Smith. Those claims were that he breached his fiduciary duty to DCN by, in effect, transferring the opportunity constituted through DCN’s negotiations for the VPF agreements to Omnilab Media.

176. Her Honour made the following findings about these claims at [198]:

DCN submitted, and I accept, that Smith’s actions of disclosing information to the Omnilab Parties and transferring the negotiations for VPF agreements to the Omnilab Parties constituted a breach of Smith’s duties to DCN. First, his actions amounted to breach (or breaches) of s 180(1) because, objectively, an ordinary person with the knowledge and experience of Smith would not be expected to have disclosed the information or behaved in the way that he did if he was acting on his own behalf: *ASIC v Adler* (2002) 168 FLR 253 at 347. The issue may be tested in this way – was what Smith did what an ordinary person with his knowledge and experience might be expected to have done in the circumstances if he or she was acting on their own behalf? The answer is no.

The primary judge’s findings on accessory liability

177. Her Honour set out the principles that apply to a claim of involvement of a person in a contravention under s 79 of the *Corporations Act*. She referred to the leading authorities including *Yorke v Lucas* (1985) 158 CLR 661 (“*Yorke v Lucas*”).

178. Her Honour also referred to the principles which apply to knowing assistance in a breach of fiduciary duty as stated in the leading authorities, including the decision of the High Court in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 (“*Farah*”).

179. Her Honour found at [192] that Mr Smith as the principal of DCN, had been leading the negotiations with the film studios on VPF’s on behalf of ICAA and that DCN was the named contracting party in the draft VPF agreements.

180. Her Honour also found at [192] that Mr Smith, as the principal of DCN, obtained information about the VPF negotiation process, the requirements, responsibilities and functions of a digital integrator, the commercial opportunities presented by being a digital operator and the form and content of the draft VPF agreements being negotiated by DCN.

181. Importantly, her Honour went on to find that Mr Smith disclosed that information to Omnilab Media when there was no agreement in place between DCN and Omnilab Media.

182. Her Honour also referred to Mr Smith’s disclosures to the Omnilab Parties over a two year period as recorded in Mr Fleming’s email of 26 July 2010 which i have reproduced at [154] above. Her Honour found that Mr Smith’s disclosures were “open” and “for the most part” “unreserved” and the disclosures provided “considerable knowledge” to the Omnilab parties, who had entered the digital market from a “standing start”.

183. Her Honour addressed the claim of involvement in a contravention under s 79 of the *Corporations Act* at [202]ff. She said at [202]–[203]:

The essential elements are established. First, Smith breached ss 181(1), 182(1) and/or 183(1) of the *Corporations Act* : see [194] – [199] above.

Secondly, the facts establish that the Omnilab Parties had actual knowledge of each of the essential matters that go to make up the contravention and had that knowledge at the time of Smith’s alleged contraventions: *ASIC v Australian Investors Forum Pty Ltd (No 2)* (2005) 23 ACLC 929 at [114] – [115] . What then were the essential matters that went to make up the contravention and what facts establish that the Omnilab Parties had actual knowledge of each of those matters at the time of the alleged contravention?

184. Her Honour made findings in relation to the claims of knowing involvement in Mr Smith’s contraventions of ss 181–183 of the *Corporations Act* by disclosing information about the VPF negotiation process and related matters to the Omnilab Media at [204]. The findings were as follows:

The essential matters that go to make up the contravention by Smith of ss 181(1), 182(1) and/or 183(1) of the *Corporations Act* are summarised in [189] – [190] above. As those paragraphs demonstrate, the Omnilab Parties (and Fleming in particular) had actual knowledge of each of those matters at the time of the alleged contravention. In fact, the Omnilab Parties obtained that knowledge because of the plans drafted by Fleming, approved by the Omnilab Board and then implemented by the Omnilab Parties to obtain from Smith the information and assistance the Omnilab Parties needed to “evaluate the role, risks and liabilities inherent in being an integrator”, to do business modelling on “costs associated with VPF and identified risks” and to “determine [their] commitments and build a risk profile for the Board”. The Omnilab Parties knew this because they requested the information for a specific purpose, they then received the information sought and used it as they intended.

185. Her Honour made findings about the matter going to the claims of knowing involvement in Mr Smith’s contraventions of ss 181 to 183 by transferring the opportunity constituted by DCN’s negotiations for the VPF agreements to the Omnilab Parties at [205]. Those findings were:

The essential matters that go to make up the contravention by Smith of ss 181(1), 182(1) and/or 183(1) of the *Corporations Act* and his fiduciary duties are summarised in [189] – [190] above. As those paragraphs demonstrate, the Omnilab Parties (and Fleming in particular) had actual knowledge of the following matters at the time of the alleged contravention:

1. the disclosure of the information from Smith to Omnilab: see [197] above;
2. from 20 January 2010, Omnilab Media took steps to insert the name of an Omnilab entity as the deployment entity; and
3. in mid July 2010 it directed Smith to insert Omnilab MCS into the draft VPF agreements.

186. Her Honour made findings about the claim of knowing assistance by the Omnilab Parties in Mr Smith's breaches of his fiduciary duties to DCN at [208]–[209]. Those findings were as follows:

For the same reasons, I consider that the evidence also establishes that the Omnilab Parties “knowingly assisted” Smith in breaching his fiduciary duties to DCN in accordance with the second limb of *Barnes v Addy* (1874) LR 9 Ch App 244. The Omnilab Parties possessed the requisite degree of knowledge: see [204] and [205] above. The breaches of fiduciary duty by Smith were dishonest and fraudulent. The conduct, constituting the breaches of duty by Smith, was not inadvertent. Moreover, the dishonest and fraudulent conduct that gave rise to those breaches of duty was conduct in which the Omnilab Parties actually assisted Smith. They assisted him because they not only drafted and approved the plan but directed the plan. This is not one of those cases where reasonable minds could differ as to the validity or otherwise of a disputed claim: *King Network Group Pty Ltd v Club of the Clubs Pty Ltd* (2008) 69 ACSR 172 at [55].

I accept that, in order to demonstrate knowing assistance, (a) it is necessary to recognise that the allegation is a serious allegation that ought to be assessed in accordance with the principles in *Briginshaw v Briginshaw* (1938) 60 CLR 336 (*Say-Dee* (2007) 230 CLR 89 at 162), and (b) it is necessary for DCN to demonstrate that the Omnilab Parties had the intention of furthering that dishonest breach (*Biala Pty Ltd v Mallina Holdings Ltd* (1993) 11 ACSR 785 at 832). In the present case, I consider that each of those elements is satisfied. As noted above, the contemporaneous evidence disclosed that the Omnilab Parties (and Fleming in particular) had actual knowledge of each of the matters constituting the contravention at the time of the contravention. In *Say-Dee* at [163], the Court stated “there is a distinction between rendering liable [1] a defendant participating with knowledge in a dishonest and fraudulent design and rendering liable [2] a defendant who dishonestly procures or assists in a breach of trust or fiduciary obligation where the trustee or fiduciary need not have engaged in a dishonest or fraudulent design”. The defendant in [1] is liable. The defendant in [2] is not. Here, the Omnilab Parties clearly fall within the first category. They planned it and then executed it.

187. It was an important part of the Omnilab parties defence of the claim that they submitted that any allegation of dishonesty by reason of knowing involvement was negated by the fact that DCN could not have pursued the VPF opportunity itself.
188. Her Honour dealt with the submission at [215] as follows:

That submission is rejected on two bases. First, it misdescribes the nature of the breaches by Smith in which Omnilab knowingly assisted and/or was knowingly involved. The breaches were not limited to a “lost opportunity”: see [192] – [204] above. Secondly, as the High Court stated in *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 558, it is no defence that DCN was unwilling, unlikely or unable to make the profits for which the account is to be taken or that the fiduciary acted honestly and reasonably. The obligation is strict. In any event, Smith as a director of DCN was precluded from diverting to the Omnilab Parties without the approval of DCN any

business advantage for which it had been negotiating: see by way of example *Canadian Aero v O'Malley* [1974] SCR 592 at 606-607. In the present case, the business advantage for which DCN had been negotiating was the possibility of DCN being appointed the digital integrator. Here, the case was not concerned with the diversion of a concluded or semi-concluded business advantage (and nor does it have to be), but with the taking of steps by Smith (with the knowledge and at the direction of the Omnilab Parties) which were intended to achieve (and ultimately did achieve) the appointment of Omnilab MCS as the digital integrator in the Paramount VPF Agreement. As Fleming said, the taking of steps by Smith (with the knowledge and at the direction of the Omnilab Parties) for the previous two years had provided considerable knowledge to the Omnilab Parties, who entered the market from a 'standing start'.

The Cross-claim

189. The primary judge dealt with the claim for contribution by the Omnilab Parties at [226]–[227]. The claim was made by the Omnilab Parties against Mr Smith under s 24 of the *Wrongs Act 1958* (Vic).
190. Her Honour considered that the Omnilab Parties should not recover a complete indemnity for any equitable damages or compensation to be awarded against them because they stood to gain a greater benefit from the breaches than Mr Smith. Her Honour went on to find that the Omnilab Parties should recover contribution from Mr Smith to the extent of one-third of any damages awarded against them.

Relief

191. Her Honour declined to order injunctive relief sought by DCN to restrain the Omnilab Parties and Mr Smith from negotiating with the studios. She said at [229]:

Neither ICAA nor any of its members were joined as parties to these proceedings or given notice of the application. The fact that ICAA was not joined as a party to these proceedings provides the third basis for refusing the injunction. ICAA has and retains access to all relevant information. It has pursued and continues to pursue the VPF agreements with the Studios and is entitled to do so. Fourthly, as DCN is well aware, ICAA and Omnilab have continued to negotiate with the Studios. Those negotiations have resulted in the agreement between Omnilab and Paramount and the real possibility of other agreements with other Studios.

192. Her Honour also said at [231]–[232]:

Finally, the evidence disclosed that DCN was unable to perform the functions of a digital integrator to the satisfaction of the Studios – it could not provide the minimum number of screens and did not have sufficient financial resources to provide the guarantees sought by the Studios.

In all the circumstances, equitable relief in the form of an injunction is refused. The other relief sought by DCN will be the subject of further hearing.

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The primary judge's orders

193. On 31 May 2011, Her Honour made the following declarations:

1. [Mr Smith] breached his fiduciary obligations to [DCN] by:
 - (a) disclosing to the [Omnilab Parties] the Virtual Print Fee (VPF) negotiation process, the requirements responsibilities and functions of a digital integrator, the commercial opportunities presented by being a digital integrator under VPF agreements, and the form of the contents of draft VPF agreements being negotiated by the [DCN]; and
 - (b) transferring the [DCN's] negotiations for VPF agreements to the [Omnilab Parties].(**"[Mr Smith's] breaches of fiduciary obligations"**).
2. The [Omnilab Parties] knowingly assisted in [Mr Smith's] breaches of fiduciary obligations.
3. The [Omnilab Parties] are entitled to contribution from [Mr Smith] to the extent of one third of the damages or compensation awarded against them.

The notices of appeal and the issues on the appeal

194. The Omnilab parties and Mr Smith filed Notices of Appeal the declarations set out above at [193].
195. The Notices of Appeal are lengthy but counsel for the appellants sought to synthesise the relevant issues in oral argument.
196. Mr Peters SC, who appeared for the Omnilab Parties, grouped his submissions into four areas. The first was a challenge to the primary judge's finding that Mr Smith breached his fiduciary duties to DCN. This was said to fall into two parts, namely a failure to determine the scope of Mr Smith's duties having regard to the relevant factual context, and a failure to consider the commercial context when determining the breach.
197. The second issue was the primary judge's finding of knowledge by the Omnilab parties. This was said to be wrongly made because her Honour failed to take into account all the evidence, in particular that of Mr Fleming, about ICAA's control of the negotiations with the studios and Mr Fleming's subjective belief that DCN could not avail itself of the corporate opportunity.
198. The third issue raised by Mr Peters was one of procedural fairness as to the way in which her Honour characterised the claims made by DCN at the trial.
199. The issue focused upon her Honour's characterisation of DCN's complaint at [185] of her judgment as follows:

had Smith not told the Omnilab Parties all he knew about the state of negotiations before February 2010, ICAA would likely not have engaged the Omnilab Parties to act as ICAA's agent. That is, that the Omnilab Parties were appointed as a rival to DCN only because the Omnilab Parties were able to take up negotiations seamlessly.

200. The effect of the submissions of the Omnilab Parties on this issue was that her Honour's characterisation of the issue in this way was not pleaded, opened or run by DCN at the trial.
201. The fourth issue raised by Mr Peters involved DCN's Notice of Contention. DCN contended that the primary judge's orders should be affirmed on the ground that the Omnilab Parties had the requisite degree of knowledge to satisfy the second and fourth categories identified in *Baden*.
202. The substantial ground on which Mr Crennan, who appeared for Mr Smith, attacked the primary judge's findings of breaches by Mr Smith was that her Honour failed to analyse the scope of Mr Smith's fiduciary duties to DCN at the time of the breaches.
203. The gravamen of Mr Crennan's submission was that viewed in its commercial context, the negotiations conducted by DCN were at all times subject to ICAA's consent. Thus the corporate opportunity was always subject to ICAA's right of veto and, at the time when the breaches were said to have occurred, DCN had no opportunity because ICAA was not prepared to select it as the deployment entity.

Breach of Duty

204. Much was said by the appellants about the scope of Mr Smith's fiduciary duties to DCN. The substance of what was said was that the scope of his duty was to be limited by the nature of his role as an agent or intermediary for ICAA whose consent was essential for any concluded agreement between an intermediary and the film studios.
205. It was implicit in those submissions that Mr Smith owed fiduciary duties to DCN as a director of that company. So much is plain, not only from his position as a director of DCN but from the nature of that company as a form of joint venture between Mr Smith's company, MGS, and the Gardiners' company, digitAll.

206. **Following paragraph cited by:**

Firmtech Aluminium Pty Ltd v Xie; Zhang v Xu; Xie v Auschn Conveyancing & Associates Pty Ltd (17 October 2024) (Nixon J)

465. It is always necessary, when determining the scope of fiduciary obligations in a particular case, to have regard the specific circumstances of that case. In *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 102; [1984] HCA 64, Mason J observed that the "scope of fiduciary duty must be moulded according to the nature of the particular relationship and the facts of the case". This principle has been described as "fundamental": *Omnilab Media Pty Ltd v Digital Cinema Network Pty Ltd* (2011) 285 ALR 63; [2011] FCAFC 166 at [206] per Jacobson J (Rares and Besanko JJ agreeing).

Anderson v Canaccord Genuity Financial Ltd (08 December 2023) (Gleeson, Leeming and White JJA)

157. In *Omnilab Media Pty Ltd v Digital Cinema Network Pty Ltd* [2011] FCAFC 166; 285 ALR 63 at [206], Jacobson J said with the agreement of Rares J that:

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

Diakovasili v Order of Ahepa NSW Incorporated (31 October 2023) (Black J)

184. In *Omnilab Media Pty Ltd v Digital Cinema Network Pty Ltd* (2011) 285 ALR 63; [2011] FCAFC 166 at [206], Jacobson J similarly observed (Rares and Besanko JJ agreeing) that:

“[i]t is fundamental that the scope of the fiduciary duty must be moulded according to the nature of the particular relationship and the facts of the case: *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41 at 69, 102.”

Murdoch v Mudgee Dolomite & Lime Pty Ltd (in liq) (16 February 2022) (Macfarlan, Gleeson and Leeming JJA)

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

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

Mudgee Dolomite & Lime Pty Ltd v Murdoch (28 October 2020) (Black J)

116. It is important also to recognise that a necessary step in determining whether a breach of the rule against conflict of interest is established is to ascertain the subject matter of the relevant fiduciary obligations, which may be determined from the course of dealing between the parties: *Birtchnell v Equity Trustees, Executors and Agency Co Ltd* (1929) 42 CLR 384 at 409; [1929] ALR 273 at 284; [1929] HCA 24 per Dixon J; *Omnilab Media Pty Ltd v Digital Cinema Network Pty Ltd* (2011) 285 ALR 63; 86 ACSR 674; [2011] FCAFC 166 at [206], where Jacobson J (with whom Rares and Besanko JJ agreed) characterised the proposition “that the scope of the fiduciary duty must be moulded according to the nature of the particular relationship and the facts of the case” as “fundamental”; *Colorado* above at [361]; *Re Pages Property Pty Ltd* [2020] NSWSC 1270 at [45].

Pages Property Investments Pty Ltd v Boros (17 September 2020) (Black J)

45. It is important also to recognise that a necessary step in determining whether a breach of the rule against conflict of interest is established is to ascertain the subject matter of the relevant fiduciary obligations, which may be determined from the course of dealing between the parties: *Birtchnell v Equity Trustees Executors and Agency Co Ltd* [1929] HCA 24; (1929) 42 CLR 384 at 409; [1929] ALR 273 at 284 per Dixon J; *Omnilab Media Pty Ltd v Digital Cinema Network Pty Ltd* [2011] FCAFC 166; (2011) 285 ALR 63; 86 ACSR 674 at [206], where Jacobson J (with whom Rares and Besanko JJ agreed) characterised the proposition “that the scope of the fiduciary duty must be moulded according to the nature of the relationship and the facts of the case” as “fundamental”; *Colorado* above at [361]. In *Grimaldi v Chameleon Mining NL (No 2)* [2012] FCAFC 6; (2012) 200 FCR 296; 287 ALR 22; 87 ACSR 260, the Full Court of the Federal Court (Finn, Stone and Perram JJ) observed (at [179]) that:

“The concept of “duty” in the “conflict of duty and interest” formula of the first of these [themes] is convenient shorthand. It refers simply to the function, the responsibility, the fiduciary has assumed or undertaken to perform for, or on behalf of, his or her beneficiary. What that function or responsibility is, is a question of fact. It may be narrow and circumscribed, as is often the case with specific agencies; it may be broad and general, as is characteristically the case with the functions of company directors; its scope may have been antecedently defined or determined; it may have been ordained by past practice; it may be left to the fiduciary’s discretion to determine; and it may evolve over time as is commonly the case with partnerships. Put shortly the actual function or responsibility assumed determines “[t]he subject matter over which the fiduciary obligations extend” for conflict of duty and interest and conflict of duty and duty purposes.”

DTM Constructions P/L trading as QA Developments v Poole (28 September 2017) (Ann Lyons SJA)

[48] This approach was also endorsed in *Streeter v Western Areas Exploration Pty Ltd (No 2)* [19] where Murphy JA stated that a determination of a breach of a duty depended on the character and scope of the relationship between the parties and the mere fact that an opportunity comes to a fiduciary in the course of such a relationship does not necessarily mean that there has been a breach of duty. In *Barescape Pty Ltd v Bacchus Holdings Pty Ltd (No. 9)* [20] Black J had also confirmed the following statement:

“The proposition that the subject matter over which fiduciary obligations extend is to be determined from the course of dealing between the parties was also recognised in *Chan v Zacharia* above at 196 and 204, *Canberra Residential Developments Pty Ltd v Brendas* [2010] FCAFC 125; (2010) 188 FCR 140 at [36], *Streeter v Western Areas Exploration Pty Ltd (No 2)* above at [70] and in *Links Golf Tasmania Pty Ltd v Sattler* [2012] FCA 634 at [471]. In *Omnilab Media Pty Ltd v Digital Cinema Network Pty Ltd* [2011] FCAFC 166; (2011) 285 ALR 63 at [206], Jacobson J (with whom Rares and Besanko JJ agreed)

characterised the proposition ‘that the scope of the fiduciary duty must be moulded according to the nature of the relationship and the facts of the case’ as ‘fundamental’.”

Coyte v Norman; Centre Capital (Newcastle) Pty Ltd v B Scorer (07 September 2016) (Black J)

145. The applicable legal principles are well-established but operate subject to a proper definition of the scope of the relevant duties and the scope of the relevant corporate opportunity. It is necessary to address these principles more fully than Counsel did in submissions. As I noted in *Re Colorado Products Pty Ltd (in prov liq)* above at [361] ff, a necessary step in determining whether a breach of the rule against conflict of interest is established is to ascertain the subject matter of the relevant fiduciary obligations, which may be determined from the course of dealing between the parties: *Birtchnell v Equity Trustees, Executors and Agency Co Ltd* [1929] HCA 24; (1929) 42 CLR 384 at 409 per Dixon J; *Chan v Zacharia* above at 196 and 204 per Deane J; *Streeter v Western Areas Exploration Pty Ltd (No 2)* [2011] WASCA 17; (2011) 278 ALR 291 at [70]. In *Omnilab Media Pty Ltd v Digital Cinema Network Pty Ltd* [2011] FCAFC 166; (2011) 285 ALR 63 at [206], Jacobson J (with whom Rares and Besanko JJ agreed) characterised the proposition that the scope of a fiduciary duty must be “moulded according to the nature of the particular relationship and the facts of the case” as “fundamental”.

Huang v Wang (05 May 2015) (Black J)

34. I summarised the relevant principles in *Re Colorado Products Pty Ltd (in prov liq)* above as follows:

“... a necessary step in determining whether a breach of the rule against conflict of interest is established is to ascertain the subject matter of the relevant fiduciary obligations, which may be determined from the course of dealing between the parties: *Birtchnell v Equity Trustees, Executors and Agency Co Ltd* [1929] HCA 24; (1929) 42 CLR 384 at 409 per Dixon J; *Chan v Zacharia* above at 196 and 204 per Deane J; *Streeter v Western Areas Exploration Pty Ltd (No 2)* above at [70]; *Omnilab Media Pty Ltd v Digital Cinema Network Pty Ltd* [2011] FCAFC 166; (2011) 285 ALR 63 at [206], where Jacobson J (with whom Rares and Besanko JJ agreed) characterised the proposition “that the scope of the fiduciary duty must be moulded according to the nature of the relationship and the facts of the case” as “fundamental”. The Defendants point out, and I accept, that the content of fiduciary duties are moulded to the character of the particular relationship so that, even within an established fiduciary relationship (such as between director and corporation), the content of the duties will not be uniform for all cases, and that fiduciary obligations exist in relation to a defined area of conduct and, except in that defined area, the fiduciary retains its economic liberty: *United Dominions Corporation Ltd v Brian Pty Ltd* [1985] HCA 49; (1985) 157 CLR 1 at 11 per Mason, Brennan and Deane JJ; *Noranda*

Re Colorado Products Pty Ltd (in prov liq) (16 June 2014) (Black J)

361. As the Defendants point out, a necessary step in determining whether a breach of the rule against conflict of interest is established is to ascertain the subject matter of the relevant fiduciary obligations, which may be determined from the course of dealing between the parties: *Birtchnell v Equity Trustees, Executors and Agency Co Ltd* [1929] HCA 24; (1929) 42 CLR 384 at 409 per Dixon J; *Chan v Zacharia* above at 196 and 204 per Deane J; *Streeter v Western Areas Exploration Pty Ltd (No 2)* above at [70]; *Omnilab Media Pty Ltd v Digital Cinema Network Pty Ltd* [2011] FCAFC 166; (2011) 285 ALR 63 at [206], where Jacobson J (with whom Rares and Besanko JJ agreed) characterised the proposition "that the scope of the fiduciary duty must be moulded according to the nature of the relationship and the facts of the case" as "fundamental". The Defendants point out, and I accept, that the content of fiduciary duties are moulded to the character of the particular relationship so that, even within an established fiduciary relationship (such as between director and corporation), the content of the duties will not be uniform for all cases, and that fiduciary obligations exist in relation to a defined area of conduct and, except in that defined area, the fiduciary retains its economic liberty: *United Dominions Corporation Ltd v Brian Pty Ltd* [1985] HCA 49; (1985) 157 CLR 1 at 11 per Mason, Brennan and Deane JJ; *Noranda Australia Ltd v Lachlan Resources NL* (1988) 14 NSWLR 1 at [15] per Bryson J; *Streeter v Western Areas Exploration Pty Ltd (No 2)* above at [70]. In *Grimaldi v Chameleon Mining NL (No 2)* [2012] FCAFC 6; (2012) 200 FCR 296, the Full Court of the Federal Court (Finn, Stone and Perram JJ) observed that:

"The concept of 'duty' in the 'conflict of duty and interest' formula of the first of these [themes] is convenient shorthand. It refers simply to the function, the responsibility, the fiduciary has assumed or undertaken to perform for, or on behalf of, his or her beneficiary. What that function or responsibility is, is a question of fact. It may be narrow and circumscribed, as is often the case with specific agencies; it may be broad and general, as is characteristically the case with the functions of company directors; its scope may have been antecedently defined or determined; it may have been ordained by past practice; it may be left to the fiduciary's discretion to determine; and it may evolve over time as is commonly the case with partnerships. Put shortly the actual function or responsibility assumed determines '[t]he subject matter over which the fiduciary obligations extend' for conflict of duty and interest and conflict of duty and duty purposes".

In *Howard v Commissioner of Taxation* [2014] HCA 21, a judgment delivered after I had heard submissions and reserved judgment in the matter, French CJ and Keane JJ in turn referred (at [34]) to the principle that:

"The scope of the fiduciary duty generally in relation to conflicts of interest must accommodate itself to the particulars of the underlying relationship which give rise to the duty so that it is consistent with and conforms to the scope and limits of that relationship."

Their Honours also noted, with reference to authority, that such a duty is to be "moulded according to the nature of the relationship and the facts of the case". Gageler J (at [110]) there referred with approval to the observation in *Grimaldi v Chameleon Mining NL (No 2)* to which I have referred above. This principle can in turn overlap with principles of waiver and ratification, summarised by Tracey J in *Holyoake Industries (Vic) Pty Ltd v V-Flow Pty Ltd* [2011] FCA 1154; (2011) 86 ACSR 393 at [92] (varied on appeal on another point in *V-Flow Pty Ltd v Holyoake Industries (Vic) Pty Ltd* [2013] FCAFC 16; (2013) 93 ACSR 76), as having effect that:

"A breach may be avoided if the fiduciary makes a full and frank disclosure of the facts to the person to whom the duty is owed and that person consents to the fiduciary acting in a way that would otherwise place him or her in a position of conflict. Disclosure and consent may also retrospectively excuse a breach which has already occurred."

Barescape Pty Ltd v Bacchus Holdings Pty Ltd (No 9) (27 August 2012) (Black J)

141. The importance of definition of the scope of the fiduciary's undertaking is also emphasised by Professor P D Finn in *Fiduciary Obligations*, Lawbook Co, 1977 at 542:

"The all-important matter is the undertaking actually given by the fiduciary. Until the scope and ambit of the duties assumed by the fiduciary has been ascertained that no question of conflict of duty and interest can arise. You must ascertain what the fiduciary has undertaken to do, before you can say he has permitted his interest to conflict with his undertaking."

Similarly, R P Meagher, J D Heydon and M J Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies*, 4th ed, LexisNexis Butterworths, 2002 at [5-070] note that the reach of the equitable principles depends upon "the precise nature and scope of the relationship in each individual case". The proposition that the subject matter over which fiduciary obligations extend is to be determined from the course of dealing between the parties was also recognised in *Chan v Zacharia* above at 196 and 204, *Canberra Residential Developments Pty Ltd v Brendas* [2010] FCAFC 125; (2010) 188 FCR 140 at [36], *Streeter v Western Areas Exploration Pty Ltd (No 2)* above at [70] and in *Links Golf Tasmania Pty Ltd v Sattler* [2012] FCA 634 at [471]. In *Omnilab Media Pty Ltd v Digital Cinema Network Pty Ltd* [2011] FCAFC 166; (2011) 285 ALR 63 at [206], Jacobson J (with whom Rares and Besanko JJ agreed) characterised the proposition "that the scope of the fiduciary duty must be moulded according to the nature of the relationship and the facts of the case" as "fundamental".

It is fundamental that the scope of the fiduciary duty must be moulded according to the nature of the particular relationship and the facts of the case: *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 69 and 102.

207. Dixon J observed in *Birchnell v Equity Trustees, Executors and Agency Co Ltd* (1929) 42 CLR 384 at 408 that the subject matter over which the fiduciary obligations extend is determined by the character of the venture or undertaking for which the relationship exists. His Honour went on to say that this is to be ascertained not merely from the express agreement of the parties, whether embodied in a written instrument or not, but also from the course of dealing actually pursued by the entity to whom the duties are owed.
208. Here, the entire thrust of the primary judge's findings was that the subject matter of Mr Smith's duties to DCN was the corporate opportunity which Mr Smith obtained in his capacity as a director of DCN in the negotiations which he conducted with the film studios for the VPF agreements.
209. These findings appear in numerous places in her Honour's judgment but they are stated most clearly in [196]. Her Honour there found that Mr Smith in his role and capacity as a director of DCN negotiated with the studios and, in that capacity, obtained access to the draft VPF agreements and to commercial information about the role of a digital integrator.
210. It was plain that DCN's name was, at least until June 2010, to appear in the VPF agreements as the integrator or deployment entity. That was a central reason why Omnilab Media sought to acquire the assets or undertaking of DCN.
211. It is not to the point in defining the scope of Mr Smith's fiduciary duties to DCN that Mr Smith's ability to achieve an agreement between DCN and the studios was ultimately dependent upon the consent of ICAA.
212. Mr Smith may well have owed duties to ICAA. He may have breached those duties. But this case concerns his duties to DCN. The scope of those duties cannot be limited by reference to the duties he owed to ICAA or by the fact that DCN's corporate opportunity was subject to ICAA's right of veto.
213. It is true that the effective veto power held by ICAA may have rendered somewhat illusory the value of DCN's opportunity. But that was not an issue before the primary judge because the quantum of any loss was deferred for later hearing. Moreover, the short answer to this proposition is the well established principle that it is no defence that the plaintiff may be unlikely or unable to make the profits: *Warman* at 558.
214. What emerges from the primary judge's lengthy narration of the facts and her detailed findings is that Mr Smith, without the consent of DCN, diverted to a rival, namely the Omnilab Parties, a business opportunity which belonged to DCN.
215. Whether Mr Smith obtained the opportunity for DCN to enter into agreements with the studios by misrepresenting to them that DCN had the support of ICAA does not destroy the existence of the opportunity. In any event, her Honour's findings make it plain that, for some time, Mr Smith did have authority from ICAA to speak on DCN's behalf.

216. Although the Fast Track Statement did not refer to the business opportunity rule, the primary judge's findings make it plain that she found a breach by Mr Smith of the fiduciary duty stated by Laskin J in *Canadian Aero Service Ltd v O'Malley* [1974] SCR 592 at 607 ("Canadian Aero"). His Honour there stated the duty as one which
- disqualifies a director ... from usurping for himself or diverting to another person or company with whom or with which he is associated a maturing business opportunity which his company is actually pursuing.
217. The primary judge referred to that passage from *Canadian Aero* in stating the relevant principle at [166] of her reasons. The principle is well established in Australia, having been applied in a number of authorities including the decision of the New South Wales Court of Appeal in *Mordecai v Mordecai* (1988) 12 NSWLR 58 at 65 ; see also RP Austin, HAJ Ford and IM Ramsay, *Company Directors, Principles of Law and Corporate Governance* (LexisNexis Butterworths, 2005) at 368–369[9.8].
218. As the learned authors of that work observe at [9.8], until the decision of the Supreme Court of Canada in *Canadian Aero* , the authorities tended to deal with business opportunity cases under the broader conflict of interest and profit rules. That was the way in which the Fast Track Statement proceeded but there is nothing to suggest any unfairness in categorising the breach in the present case as a breach of the business opportunity rule.
219. In any event, the primary judge found at [195] that, in exercising his power to assist the Omnilab Parties, Mr Smith contravened the conflict rule stated in *Boardman v Phipps* [1967] 2 AC 46 at 123–124 ; see also *Chan v Zacharia* (1984) 154 CLR 178 at 198.
220. I have some concerns about her Honour's findings that Mr Smith's actions were dishonest. In my opinion, it would have been preferable for DCN to have been able to point to passages in the cross-examination of Mr Smith which exposed the dishonesty of his actions. We were not taken to any pages of the transcript which fulfilled that task.
221. Nevertheless, it seems to me that her Honour's finding of dishonesty is supported by the findings which she made about the assistance that Mr Smith provided to the Omnilab Parties and his failure to make full disclosure to the Gardiners. What is significant is that Mr Smith told the Omnilab Parties what he knew about every aspect of his negotiations with the studios and thereby assisted a rival to take from DCN the leading role in the negotiations with the studios. He did so without obtaining a non-disclosure agreement from the Omnilab Parties and without securing a binding agreement from Omnilab Media to purchase the assets of DCN. Moreover, he stood to obtain benefits from the Omnilab Parties in the form of a board seat and monetary payments.
222. Those findings were amply supported by the written communications to which I have referred. They make it clear enough that, as her Honour said, Mr Smith played off one entity against the other and that he failed to make full and true disclosure to the Gardiners.
223. Furthermore, the primary judge found that Mr Smith was an unsatisfactory witness. This finding, coupled with the uncontested documentary record, make it clear enough in my view that it was open to the primary judge to find that Mr Smith acted dishonestly.

224. I should add that I have taken into account the emphasis which counsel for Mr Smith placed upon the terms of the letter agreement between ICAA and Mr Smith dated 3 November 2008.
225. It is true, as Mr Crennan emphasised, that the letter distinguished the respective roles of MGS and DCN in the process of converting cinemas from analogue to digital. In particular, what was envisaged by the letter was that DCN would be confined to the role of selling and installing digital equipment to cinema operators.
226. However, the short answer to this is that the position changed over the ensuing period. Whilst Mr Sarfaty was cautious about conferring upon DCN a role greater than that of an installation company, it is clear that at least until December 2009 Mr Sarfaty was prepared to contemplate the possibility, albeit reluctantly, that DCN may be the integrator. Even after the “fundamental shift” in Mr Sarfaty’s stance as to who would be the deployment entity, Mr Sarfaty was prepared to include DCN’s name in the letter of appointment: see [85], [102] and [119] above.
227. The lengthy factual narrative undertaken by the primary judge shows that there was considerable fluidity in the discussions between the principal protagonists, Mr Smith, Mr Fleming and Mr Sarfaty, as to the role DCN was to occupy. But all of the protagonists knew that during the critical periods, Mr Smith was negotiating the VPFs with the studios on behalf of DCN.
228. The scope of DCN’s business, as Mr Smith conducted it both in his dealings with Mr Fleming and Mr Sarfaty, and the film studios, included the aim of making DCN the integrator in the VPF agreements with the studios.
229. That is sufficient to overcome any lack of clarity in Laskin CJ’s “admirably flexible” statement of the business opportunity rule in *Canadian Aero*: RP Meagher, JD Heydon & MJ Leeming, *Meagher, Gummow and Lehane’s Equity: Doctrines and Remedies* (LexisNexis Butterworths, 4th ed, 2002) at 177–178 [5–100].
230. It also explains why the primary judge found that there was a real, sensible possibility of conflict in Mr Smith’s taking the actions which he did to assist a rival to obtain the position of integrator in the VPF agreements with the studios.

Knowledge

231. The High Court has made it clear that what is required for “knowledge” under the second limb of *Barnes v Addy* (1874) LR 9 Ch App 244 at 251–252, is assistance, with knowledge in a dishonest and fraudulent design: *Farah* at [174]–[179].
232. The degree of knowledge must be one of the first to fourth categories stated in *Baden*; see *Farah* at [177].
233. The “dishonest and fraudulent design” may consist of a breach of trust or a breach of fiduciary duty, but any breach of fiduciary duty relied upon to support a claim of accessory liability under the second limb of *Barnes v Addy* must be dishonest and fraudulent: see *Farah* at [179].

234. The position is not relevantly different in a claim of accessory liability under s 79 of the *Corporations Act* because a person cannot be knowingly concerned in a contravention unless the person has knowledge of the essential elements of the contravention: *Yorke v Lucas* at 670.
235. The primary judge made the necessary findings in terms of those authorities because she found that the Omnilab Parties, in particular through Mr Fleming, had actual knowledge of Mr Smith's breaches, and that Mr Smith's breaches were dishonest and fraudulent.
236. There was ample evidence of actual knowledge by Mr Fleming that DCN was a joint venture between MGS and digitAll and that Mr Smith, as a principal of DCN had been conducting the negotiations for the VPFs with the film studios. The primary judge made that finding in several places in her judgment but it is most clearly stated at [204] of the primary judgment.
237. However, two difficulties arise. The first is that her Honour found at [204] that the Omnilab Parties had actual knowledge because of the plans drafted by Mr Fleming to obtain from Mr Smith the information which the Omnilab Parties needed to evaluate the role, risks and liabilities of an integrator.
238. The difficulty with this finding is that it is not entirely clear how the finding fits with her Honour's exclusion from the case of any breach of fiduciary duty in relation to the information the subject of the non-disclosure agreement of 24 March 2010 and information obtained by Omnilab Media in the course of due diligence conducted in early to mid 2010.
239. It seems to me to be implicit in her Honour's finding at [204] that the knowledge to which she there referred went beyond that which was excluded from DCN's claim.
240. In particular, the effect of her Honour's finding appears to me to be that Mr Fleming had actual knowledge that Mr Smith was leading the negotiations with the studios on behalf of DCN (even if that role was subject to ICAA's ultimate veto power), that DCN was named as the integrator in the draft VPF agreements and that Mr Smith could not hand over to the Omnilab Parties the benefit of the business opportunity without the consent of the Gardiners.
241. As her Honour said at [187] what Mr Smith did was to assist a rival of DCN to become an agent of ICAA. He enabled the Omnilab Parties to take over the negotiations with the film studios "seamlessly" and in a way which sacrificed the interests of DCN. Her Honour's findings make it clear that Mr Fleming knew this. The findings were supported by the factual narrative which include a number of instances of actual knowledge by Mr Fleming of those contraventions by Mr Smith and of his failure to obtain the consent of the Gardiners. For example, in Mr Fleming's email of 8 July 2010 he said he had asked Mr Smith to consider how he (Mr Smith) can walk away from the partnership with the Gardiners.
242. The second difficulty is in the primary judge's finding that Mr Smith's breaches of fiduciary duty were dishonest and fraudulent. As we indicated above, we have some concerns about the strength of this finding. However, as the High Court observed in *Farah* at [173], a person may have acted dishonestly by the standards of ordinary and decent people without appreciating that the act in question was dishonest.

243. The primary judge was well aware of the seriousness of her finding and applied the correct legal principles. She did not think it was a case where reasonable minds could differ as to the effect of Mr Smith's actions: cf *King Network Group Pty Ltd v Club of the Clubs Pty Ltd* (2008) 69 ACSR 172 at [55] per Hodgson JA.
244. Whilst it would have been preferable for us to have been taken to passages of the cross-examination of Mr Smith and Mr Fleming which demonstrated dishonesty and actual knowledge, I am of the view that the factual narrative makes it sufficiently clear that the finding of dishonesty and Mr Fleming's knowledge, were open to the primary judge.
245. In particular, it was open to her Honour to make those findings because the facts plainly demonstrated Mr Smith's actions in assisting a rival company to obtain the benefit of the role of integrator in circumstances which included provision of a board seat for Mr Smith on the new entity and possible financial benefits to him. Moreover, he provided this assistance without securing any binding agreement between Omnilab Media and DCN for the Omnilab Parties to acquire the shares or assets of DCN. Mr Fleming had actual knowledge of all of these elements of Mr Smith's breaches of duty and of the absence of consent of the Gardiners.

Procedural fairness

246. There may be some force in the criticism of the primary judge's characterisation of DCN's claim in [185] of her reasons for judgment. This is because her Honour said that the claim may be understood as being that, had Mr Smith not told the Omnilab Parties what he knew of the negotiations with the film studios, ICAA would not have engaged the Omnilab Parties as ICAA's agent. There was no suggestion of this allegation in the Fast Track Statement.
247. Nevertheless, when [185]–[187] of her Honour's reasons are read as a whole, we think it is sufficiently clear that her Honour properly characterised the claim against Mr Smith as one of breach of fiduciary duty by providing valuable information about the VPF agreement and negotiation process and the requirements and responsibilities of a digital integrator so as to assist the Omnilab Parties to obtain that role.
248. That claim, and her Honour's findings were therefore within the allegations made in the Fast Track Statement, in particular para 19 of that document which alleged the wrongful disclosure of that information.
249. I am mindful of the warning given in the authorities that claims of dishonesty and of knowing participation in a dishonest and fraudulent design must be properly pleaded and particularised: see, for example, *Farah* at [170].
250. Thus, where a case such as this proceeds as a Fast Track matter, careful attention is required to the articulation of the material facts and circumstances said to give rise to the claim.
251. Here, I am of the view that the Fast Track statement could have been drafted with more precision but I accept that the gravamen of the claim of diversion of DCN's business opportunity fell within the terms of the statement. I do not consider that her Honour wrongly characterised the nature of the claim at [185] of her reasons.

Notice of Contention

252. DCN sought to contend, upon the assumption that leave to appeal is granted, that the claim of knowing assistance in Mr Smith's breaches of fiduciary duty falls within the 2nd to 4th categories of knowledge stated in *Baden*.
253. The primary judge indicated that if she had not allowed the claim under the 1st category she would not have granted DCN leave to amend the claim, the application to amend having been made during closing submissions. Her Honour did not accept DCN's submission that the expanded claim was implicit in its pleaded claim and she said it did not accord with the way in which the parties conducted the litigation. That is sufficient to dispose of this issue.

Conclusion

254. In view of the full consideration we have given to this matter, I think the appropriate course is to grant leave to appeal but to dismiss the appeal against the declarations of breach and knowing assistance. However, no possible error has been demonstrated in her Honour's determination that the Omnilab Parties should recover contribution from Mr Smith of one third of any damages awarded against them and very little attention was given to this issue. I would therefore refuse leave to appeal against this order.
255. Therefore the orders that I would make are that:
1. Leave be granted to DCN to appeal against Orders 1 & 2 made by the primary judge.
 2. The appeal against Orders 1 & 2 be dismissed.
 3. Leave to appeal against the primary judge's order as to the extent of contribution to be awarded to the Omnilab Parties against Mr Smith be refused.
 4. The Omnilab Parties and Mr Smith pay the costs of the application for leave to appeal and of the appeal.

I certify that the preceding two hundred and fifty-five (255) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Jacobson.

Associate:

Dated: 19 December 2011

IN THE FEDERAL COURT OF AUSTRALIA

VICTORIA DISTRICT REGISTRY

GENERAL DIVISION

VID 535 of 2011

ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA

BETWEEN: OMNILAB MEDIA PTY LIMITED ACN 002 585 391
First Appellant

OMNILAB MEDIA CINEMA SERVICES PTY LTD ACN 145 363 855
Second Appellant

AND: DIGITAL CINEMA NETWORK PTY LTD
Respondent

VID 625 of 2011

BETWEEN: MICHAEL GEOFFREY SMITH
Appellant

AND: DIGITAL CINEMA NETWORK PTY LTD
First Respondent

OMNILAB MEDIA PTY LIMITED ACN 002 585 391
Second Respondent

OMNILAB MEDIA CINEMA SERVICES PTY LTD ACN 145 363 855

Third Respondent

JUDGES: JACOBSON, RARES AND BESANKO JJ

DATE: 19 DECEMBER 2011

PLACE: SYDNEY (VIA VIDEO LINK TO MELBOURNE)

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REASONS FOR JUDGMENT

RARES J

256. I have had the privilege of reading the reasons of Jacobson J and Besanko J. I agree with them and the orders proposed.

I certify that the preceding one (1) numbered paragraph is a true copy of the Reasons for Judgment herein of the Honourable Justice Rares.

Associate:

Dated: 19 December 2011

IN THE FEDERAL COURT OF AUSTRALIA

VICTORIA DISTRICT REGISTRY

VID 535 of 2011

GENERAL DIVISION

ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA

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VID 625 of 2011

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Appellant

AND: DIGITAL CINEMA NETWORK PTY LTD
First Respondent

OMNILAB MEDIA PTY LIMITED ACN 002 585 391
Second Respondent

Third Respondent

JUDGES: JACOBSON, RARES AND BESANKO JJ

DATE: 19 DECEMBER 2011

PLACE: SYDNEY (VIA VIDEO LINK TO MELBOURNE)

REASONS FOR JUDGMENT

BESANKO J

257. I have had the advantage of reading the reasons for judgment of Jacobson J. I agree with his Honour's conclusions.
258. I would grant leave to Omnilab Media Pty Ltd and Omnilab Media Cinema Services Pty Ltd (the 'Omnilab parties') to appeal against the first and second orders made by the primary judge on 31 May 2011 and to Mr Smith to appeal against the first of the said orders. However, in each case I would dismiss the appeal. I would refuse leave to appeal to Mr Smith to appeal against the third order made by the primary judge to the effect that the Omnilab parties are entitled to a contribution from him to the extent of one-third of the damages or compensation awarded against them. As to the third order nothing was put by Mr Smith to suggest that there is sufficient doubt about the correctness of the third order to warrant a grant of leave to appeal.
259. I wish to express my own reasons for rejecting the principal arguments advanced by the Omnilab parties and Mr Smith in relation to the primary judge's conclusions with respect to Mr Smith's breaches of fiduciary duty and the principal arguments advanced by the Omnilab parties in relation to the primary judge's conclusion that they had actual knowledge of Mr Smith's dishonest and fraudulent design.

MR SMITH'S BREACHES OF FIDUCIARY DUTY

260. It is not in question that Mr Smith as a director of Digital Cinema Network Pty Ltd ('DCN') owed fiduciary duties to the company.
261. The primary judge found that Mr Smith breached his fiduciary duties by an act of disclosing information to the Omnilab parties and by an act of transferring negotiations with the film studios to the Omnilab parties. I do not think that there can be any challenge to her Honour's findings of primary fact concerning Mr Smith's acts and conduct. The real challenge is to the inferences and conclusions drawn from the primary facts. To the extent that there is a challenge to the primary facts, for reasons I will give in the context of the challenge by the Omnilab parties to her Honour's findings with respect to their knowledge of Mr Smith's dishonest and fraudulent design, any such challenge to her Honour's findings must be rejected.
262. Mr Smith and the Omnilab parties challenged her Honour's conclusion that Mr Smith breached his fiduciary duties to DCN on two principal grounds. First, they contended that Mr Smith's fiduciary duties to DCN did not extend to the information and negotiations provided or transferred to the Omnilab parties because Mr Smith and his company, MGS Pty Ltd ('MGS'), were at all relevant times after November 2008 acting in the negotiations with the film studios on behalf of the Independent Cinemas Association of Australia ('ICAA'). They submitted that the primary judge found that in November 2008 ICAA and its members engaged Mr Smith of MGS, not DCN, and ICAA members were told about Mr Smith's role in DCN, but that role was limited to equipment supply. They submitted that the primary judge recorded the fact that it was not in dispute that MGS entered into an agreement with ICAA, which provided for MGS to conduct negotiations on behalf of ICAA for Virtual Print Fee ('VPF') agreements with the film studios and that Mr Smith did not breach his duties to DCN as a result of his action in causing MGS to enter into the said agreement. They argued that after November 2008 DCN's status within the negotiations with the film studios was 'either non-existent or, at best, that of an unauthorised sub-agent'.
263. Secondly, they contended that Mr Smith's fiduciary obligations to DCN did not extend to the information and negotiations provided or transferred to the Omnilab parties because at no time was DCN in a position to operate as a digital integrator which was the subject of the information and the negotiations.
264. With respect to the first argument, Mr Smith and the Omnilab parties placed great weight on the letter dated 3 November 2008 from ICAA to its members and, in particular, that part of it which provides:
- ICAA then proposes to engage Michael Smith of MGS Group to represent ICAA members in the VPF negotiations.
265. The relevant parts of the letter are set out in the reasons of Jacobson J (at [54]–[55]). This letter establishes, so it was argued, that Mr Smith (or his company, MGS) in his discussions and negotiations with the film studios was acting for ICAA not DCN. Mr Smith and the Omnilab parties pointed to other evidence which was said to support this conclusion.
266. The primary judge found that until August 2010 Mr Smith, in all his dealings with the film studios, made it plain that if the studios were to contract for the provision of VPFs to independent cinema owners in Australia, DCN would be the contracting party. Until 9 August

2010, DCN was named as the contracting party on each draft form of VPF agreements produced by the studios and negotiated by Mr Smith. Her Honour found that Mr Smith gave these draft agreements to the Omnilab parties and ICAA and it followed that both parties knew that this was the proposal put to the studios. Her Honour also found that to assist Mr Smith with his negotiations with the studios, he asked ICAA for, and ultimately was given, a letter, which, after a great deal of debate both within ICAA and with Mr Smith about including a reference to DCN, said that ‘ICAA has an arrangement with Michael Smith of MGS Group (and DCN) to undertake Virtual Print Fee (VPF) negotiations on behalf of ICAA members’.

267. The primary judge found that for a time Mr Smith in his capacity as director of DCN sought and had authority from some individual cinemas to make an agreement with the film studios. Then, for a further time, Mr Smith, in his capacity as director of MGS, sought and had authority from ICAA to make such an agreement on behalf of its members. Finally, Mr Smith, seeking to act on behalf of both MGS and DCN, sought and obtained authority from ICAA to make such an agreement on behalf of its members. The primary judge noted that no party suggested that DCN had been appointed as an agent for ICAA. The primary judge addressed the argument now put to this Court and rejected it. She said (at [196]):

Smith, as a director of DCN, started to negotiate and continued to negotiate with the Studios over the VPF agreements. In that role and capacity he obtained access to the draft VPF agreements and commercial information about the role of a digital integrator. He turned to ICAA, and ultimately Omnilab. The information he provided to Omnilab was obtained by him in his capacity as a director of DCN, and was commercially valuable.

268. As I understand the primary judge’s reasoning it was as follows. Mr Smith undoubtedly started in his negotiations with the film studios acting as a director of DCN. From the point of view of the film studios they were dealing with Mr Smith of DCN. The valuable information and the benefit of the negotiations were obtained by him in his capacity as a director of DCN. In a sense whatever was happening ‘behind the scenes’ with MGS or ICAA was irrelevant. In my respectful opinion that reasoning is correct. I also agree with DCN’s submission that Mr Smith was a director of DCN, the company had been established for the specific purpose of negotiating and entering into VPF agreements and Mr Smith had been instructed by the board of DCN to negotiate VPF agreements with the film studios. Objectively ascertained the parties to the negotiations concerning the VPF agreements were Mr Smith on behalf of DCN and the film studios.
269. A further answer to the first argument is as follows. The letter of 3 November 2008 may be evidence of a limited agency between ICAA and Mr Smith or his company, MGS, dealing with discussions and negotiations with the film studios but it said nothing about who was to be the digital integrator which was a position or role insisted on by the film studios. It was plainly not to be ICAA and I did not understand there to be any serious suggestion that it was to be MGS. There may have been latent conflict difficulties for Mr Smith as a result of the agreement dated 3 November 2008 but his fiduciary duties to DCN in respect of its efforts to become the digital integrator survived the agreement. His subsequent conduct over a long period in proposing DCN as the digital integrator is eloquent proof of that fact.

270. The second argument advanced by Mr Smith and the Omnilab parties is in a sense closely related to the first argument. It is that DCN would never have had the minimum number of screens available to satisfy the film studios. This, it was said, had two consequences. First, it meant that Mr Smith could not have been negotiating on behalf of DCN. The answer to this submission is that provided by the primary judge and that was that from the point of view of the parties to the negotiations Mr Smith was acting for DCN. Secondly, it was submitted that there was no loss of opportunity by DCN because DCN could not have taken advantage of the opportunity. There is no doubt that what Mr Smith had done in his negotiations with the film studios over the period from 2008 to July 2010 was commercially valuable. Mr Fleming of the Omnilab parties recognised as much in an email to Mr Cartledge dated 26 July 2010:

One thing that we need to consider with [Smith], over the last 2 years he has openly and unreservedly (well for the most part J) provided considerable knowledge on digital cinema to Omnilab Media who entered this market from a standing start.

For all of his failings, we do need to recognise this, as under normal circumstances we would have gone to someone ... who is costing us US\$10K per month. Over 2 years it adds up.

We do have a problem with the Gardeners (sic) ... however [Smith] needs to be recognised by Omnilab outside the VPF payments – no matter how [Sarfaty] feels about him.

271. As the primary judge noted, the negotiations had not reached the stage of a concluded or semi-concluded business advantage, but as she also noted that was not necessary before a breach of fiduciary duty may be found. In *Canadian Aero Service Ltd v O'Malley* [1974] SCR 592 ('*Canadian Aero Service Ltd v O'Malley*'), Laskin J (as he then was) said:

It follows that O'Malley and Zarzycki stood in a fiduciary relationship to Canaero, which in its generality betokens loyalty, good faith and avoidance of a conflict of duty and self-interest. Descending from the generality, the fiduciary relationship goes at least this far: a director or a senior officer like O'Malley or Zarzycki is precluded from obtaining for himself, either secretly or without the approval of the company (which would have to be properly manifested upon full disclosure of the facts), any property or business advantage either belonging to the company or for which it has been negotiating; and especially is this so where the director or officer is a participant in the negotiations on behalf of the company.

An examination of the case law in this Court and in the Courts of other like jurisdictions on the fiduciary duties of directors and senior officers shows the pervasiveness of a strict ethic in this area of the law. In my opinion, this ethic disqualifies a director or senior officer from usurping for himself or diverting to another person or company with whom or with which he is associated a maturing business opportunity which his company is actively pursuing; he is also precluded from so acting even after his resignation where the resignation may fairly be said to have been prompted or influenced by a wish to acquire for himself the opportunity sought by the company, or where it was his position with the company rather than a fresh initiative that led him to the opportunity which he later acquired.

Canadian Aero Service Ltd v O'Malley was referred to with approval in *Warman International Ltd v Dwyer* (1995) 182 CLR 544 ('*Warman International Ltd v Dwyer*') at 558 and 562.

272. The fact that, as the primary judge put it, 'it was possible, if not probable' that DCN would not have the minimum number of screens available to satisfy the film studios was no answer to the claim that Mr Smith had breached the fiduciary duties he owed to DCN. It was not necessary for DCN to show that it was willing, able and likely to secure the appointment as digital integrator (*Warman International Ltd v Dwyer* ; *Regal (Hastings) Ltd v Gulliver* [1942] 1 All ER 378 at 392–394 ; *Phipps v Boardman* [1967] 2 AC 46). As the primary judge found, the fact was that Mr Smith as a director of DCN had gained valuable commercial information and had progressed negotiations with the film studios to a certain point. He was not free to disclose that information and transfer those negotiations to a third party without the fully informed consent of DCN. He did not have the fully informed consent of DCN.

THE KNOWING ASSISTANCE OF THE OMNILAB PARTIES IN RESPECT OF MR SMITH'S BREACHES OF FIDUCIARY DUTY

273. There was a strong challenge to her Honour's conclusion that the Omnilab parties had actual knowledge of Mr Smith's dishonest and fraudulent design. As part of that challenge the Omnilab parties pointed to what they contended was unchallenged evidence of Mr Fleming which clearly negated any finding of actual knowledge by the Omnilab parties of Mr Smith's dishonest and fraudulent design. The Omnilab parties put before the Court a schedule entitled 'Evidence and Findings Inconsistent with Knowledge of Breach/Participation in Dishonest Design'. The schedule identified what was said to be unchallenged evidence of Mr Fleming which (without descending into the details) supported a conclusion that he believed DCN could not perform the functions of a digital integrator and that Mr Smith or his company MGS or both were in fact negotiating with the film studios on behalf of ICAA. The Omnilab parties contended that as the evidence was unchallenged it should have been accepted with the consequence that the finding of knowledge of Mr Smith's dishonest and fraudulent design could not stand.
274. In considering this submission it is necessary to examine the primary judge's approach to the witnesses who gave evidence before her. The primary judge said that her factual analysis 'primarily focussed on contemporaneous documentary records' and that that was deliberate. She said that she found most of the witnesses unimpressive and 'more intent on advancing their case rather than answering the questions asked of them' (at [148]). She included in that criticism Mr Fleming, Mr Sarfaty and Mr Smith and she said that there were significant discrepancies in the accounts each gave of critical events. A little later in her reasons she said of these three witnesses that they were particularly concerned to advance their cases rather than answer questions asked of them and she said (at [151]):

The difficulty was that each had acted in a manner which, at the very least, raised serious questions about their actions. As a result, each was intent on defending, or recreating, what occurred to justify his actions.

275. Although she did not expressly say so, the primary judge clearly took the view that DCN had adequately put its case to the witnesses called by the Omnilab parties and, in particular, Mr Fleming.

276. From time to time in the course of her reasons the primary judge referred to the evidence of the witnesses. For example, she referred to evidence of Mr Fleming that he denied knowing that DCN was the party negotiating the VPF agreements, and that his explanation to a Ms Goyal was a 'simplified explanation' because he did not want to go into the detailed differences between DCN and MGS. She rejected that evidence because it was inconsistent with the contemporaneous documentary record.
277. My examination of the parts of the transcript which have been provided to this Court indicates that a number of important propositions advanced by DCN were quite clearly put to Mr Fleming. The contention that DCN was put in the contracts as a mere placeholder was challenged in the cross-examination of Mr Fleming (Transcript 274). The contention that DCN was the party negotiating with the studios was put to Mr Fleming in cross-examination (Transcript 376). The contention that in the negotiations Mr Smith or his company, MGS, was acting as agent for ICAA was challenged in the course of Mr Fleming's cross-examination (Transcript 377). It was put to Mr Fleming that the reason he told two film studios that the Omnilab parties were going to buy DCN was because he knew DCN was the party which was going to sign the agreements (Transcript 451).
278. This sample and the fact that the trial judge must be taken to have concluded that the evidence of the Omnilab parties had been adequately challenged by DCN and the fact that depending on the particular matter it is not necessary to challenge a witness on every paragraph in his or her affidavit (*R v Byczko (No 2)* (1977) 17 SASR 460) lead me to reject the proposition that the primary judge was bound to accept certain aspects of Mr Fleming's evidence even if that proposition is otherwise correct as a matter of law. Once we move from this proposition to an attack on the primary judge's conclusion about the credibility and reliability of witnesses, the Omnilab parties face the difficult burden of persuading the Court that the primary judge erred in her assessment of the witnesses (*Devries v Australian National Railways Commission* (1993) 177 CLR 472 at 479). Nothing was said on the appeal which suggested to me that there were grounds to interfere with her Honour's assessment of the credibility and reliability of the witnesses who gave evidence before her.
279. Her Honour based her finding of the knowledge of the Omnilab parties of Mr Smith's dishonest and fraudulent design on documents prepared by Mr Fleming in early October 2009, a conversation between Mr Smith and Mr Fleming on 11 October 2009, the preparation of a feasibility study by the Omnilab parties on 19 October 2009, internal debate within the Omnilab parties in the middle of November 2009, Mr Smith providing draft agreements naming DCN as the deploying entity to Mr Fleming on 18 December 2009, reports to the board of Omnilab, and an email from Mr Fleming to Ms Goyal dated 18 December 2008 in which Mr Fleming said:

Michael Smith (of DCN) has been negotiating the agreements with the Studios.

280. As I have said, her Honour rejected Mr Fleming's evidence that he did not know DCN was the party negotiating the VPF agreements. In an important finding her Honour said (at [192]):

Ultimately, the position was put beyond any doubt by the executive summary Fleming produced for the Omnilab Board dated 31 January 2010: see [79] and [80] above. That Board paper recorded, as was the fact, that:

1. DCN was negotiating the VPF agreements with the Studios and intended to sign the VPF agreements;
2. negotiations were 80% complete (marked up contracts) and it would be difficult to restart the process.

In cross examination, Fleming unsurprisingly conceded that as at 31 January 2010, he believed DCN was going to be the entity signing the VPF contracts 'on the basis that Omnilab was going to acquire DCN'. It was unsurprising because DCN's name was on the draft VPF agreements when Fleming first received them in mid December 2009.

281. As far as the breach of fiduciary duty constituted by the transfer of the negotiations is concerned, her Honour said that in addition to the above matters, at the relevant time the Omnilab parties, and Fleming in particular, had actual knowledge of Mr Smith's disclosure of information to Omnilab, that Omnilab Media from 20 January 2010 had taken steps to insert the name of an Omnilab entity as the deployment entity and that in mid July 2010 it directed Smith to insert Omnilab MCS into the draft VPF agreements.
282. In summary, it seems clear from her Honour's findings as set out in the reasons of Jacobson J that the Omnilab parties knew that Mr Smith was a director of DCN and that in that capacity he had conducted negotiations with the film studios. The Omnilab parties knew that the information Mr Smith had obtained from the film studios and the position he had reached in his negotiations with them were commercially valuable. It participated in a plan whereby it obtained the benefit of the information and negotiations without DCN's consent and without paying any compensation to it. Mr Smith's conduct was dishonest 'judged by the standards of ordinary, decent people' (*Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at 162 [173]) and the Omnilab parties had actual knowledge of that conduct.
283. In my opinion, not only was her Honour's conclusion that the Omnilab parties had actual knowledge of Mr Smith's dishonest and fraudulent design open on the evidence she accepted, but in my respectful opinion it was the correct conclusion. Certainly no error has been shown (*Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 at 203–204 [14] per Gleeson CJ, Gaudron and Hayne JJ).

I certify that the preceding twenty-seven (27) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Besanko.

Associate:

Dated: 19 December 2011

Cited by:

Firmtech Aluminium Pty Ltd v Xie; Zhang v Xu; Xie v Auschn Conveyancing & Associates Pty Ltd [2024] NSWSC 1293 (17 October 2024) (Nixon J)

465. It is always necessary, when determining the scope of fiduciary obligations in a particular case, to have regard to the specific circumstances of that case. In *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 102; [1984] HCA 64, Mason J observed that the “scope of fiduciary duty must be moulded according to the nature of the particular relationship and the facts of the case”. This principle has been described as “fundamental”: *Omnilab Media Pty Ltd v Digital Cinema Network Pty Ltd* (2011) 285 ALR 63; [2011] FCAFC 166 at [206] per Jacobson J (Rares and Besanko JJ agreeing).

Native Extracts Pty Ltd v Plant Extracts Pty Ltd (No 2) [2024] FCA 106 (23 February 2024) (Downes J)

123. However, it is not sufficient for the purposes of s 79 that a person acquires knowledge of the essential matters which go to make up the contravention *after* it has occurred and, at that time, fails to take appropriate action even if the effect of that action is to conceal, ratify or knowingly derive benefit from the contravention: see *Australian Securities and Investments Commission v Australian Investors Forum Pty Ltd (No 2)* (2005) 53 ACSR 305; [2005] NSWSC 267 at [114]–[118] (Palmer J), approved in *Digital Cinema Network Pty Ltd v Omnilab Media Pty Ltd (No 2)* [2011] FCA 509 at [171] (Gordon J), (upheld on appeal in *Omnilab Media Pty Ltd v Digital Cinema Network Pty Ltd* (2011) 86 ACSR 674; [2011] FCAFC 166 (Jacobson, Rares and Besanko JJ)).

Anderson v Canaccord Genuity Financial Ltd [2023] NSWCA 294 (08 December 2023) (Gleeson, Leeming and White JJA)

Omnilab Media Pty Ltd v Digital Cinema Network Pty Ltd [2011] FCAFC 166; 285 ALR 63; *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296; [2012] FCAFC 6; *Gunasegaram v Blue Visions Management Pty Ltd* [2018] NSWCA 179; 129 ACSR 265, followed and approved.

Anderson v Canaccord Genuity Financial Ltd [2023] NSWCA 294 (08 December 2023) (Gleeson, Leeming and White JJA)

157. In *Omnilab Media Pty Ltd v Digital Cinema Network Pty Ltd* [2011] FCAFC 166; 285 ALR 63 at [206], Jacobson J said with the agreement of Rares J that:

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

Diakovasili v Order of Ahepa NSW Incorporated [2023] NSWSC 1282 (31 October 2023) (Black J)

184. In *Omnilab Media Pty Ltd v Digital Cinema Network Pty Ltd* (2011) 285 ALR 63; [2011] FCAFC 166 at [206], Jacobson J similarly observed (Rares and Besanko JJ agreeing) that:

“[i]t is fundamental that the scope of the fiduciary duty must be moulded according to the nature of the particular relationship and the facts of the case: *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41 at 69, 102.”

BCEG International (Australia) Pty Ltd v Xiao [2022] NSWSC 972 (22 July 2022) (Rees J)

348. Certainly, the content and subject matter over which the fiduciary duty extends will depend on the circumstances of the case at hand: *Mudgee v Mudgee Dolomite & Lime Pty Ltd (in liq)* [2022] NSWCA 12; (2022) 398 ALR 658 at [81] (per Leeming JA). As French CJ and Keane J held in *Howard v Federal Commissioner of Taxation* (2014) 253 CLR 83; [2014] HCA 21 at [34]: (emphasis added)

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

See also *Omnilab Media Pty Ltd v Digital Cinema Network Pty Ltd* [2011] FCAFC 166; (2011) 285 ALR 93 at [206] (per Jacobson J); *Boardman v Phipps* [1967] 2 AC 46 at 127 (per Lord Upjohn); *United Dominions Corp Ltd v Brian Pty Ltd* (1985) 157 CLR 1 at 11; *Hospital Products* at 69 (per Gibbs CJ), 102 (per Mason J).

Murdoch v Mudgee Dolomite & Lime Pty Ltd (in liq) [2022] NSWCA 12 (16 February 2022) (Macfarlan, Gleeson and Leeming JJA)

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

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

DHL Supply Chain (Australia) Pty Limited v United Workers' Union [2021] FCA 707 (24 June 2021) (Snaden J)

33. Even if the character of the information sought by the Site Survey falls short of confidential information, it remains nonetheless strongly arguable that its procurement offends ss 182(1) and 183(1) of the *Corps Act*. Insofar as concerns the disclosure of information, those sections are not limited to information that is confidential: *Hydrocool Pty Ltd v Hepburn (No 4)* (2011) 279 ALR 646, 698 [355] (Siopis J); *Digital Cinema Network Pty Ltd v Omnilab Media Pty Ltd (No 2)* [2011] FCA 509, [163] (Gordon J)—affirmed on appeal in *Omnilab Media Pty Ltd v Digital Camera Network Pty Ltd* (2011) 285 ALR 63, 82 [165] (per Jacobson J, Rares and Besnako JJ agreeing)).

Mudgee Dolomite & Lime Pty Ltd v Murdoch [2020] NSWSC 1510 (28 October 2020) (Black J)

116.

It is important also to recognise that a necessary step in determining whether a breach of the rule against conflict of interest is established is to ascertain the subject matter of the relevant fiduciary obligations, which may be determined from the course of dealing between the parties: *Birtchnell v Equity Trustees, Executors and Agency Co Ltd* (1929) 42 CLR 384 at 409; [1929] ALR 273 at 284; [1929] HCA 24 per Dixon J; *Omnilab Media Pty Ltd v Digital Cinema Network Pty Ltd* (2011) 285 ALR 63; 86 ACSR 674; [2011] FCAFC 166 at [206], where Jacobson J (with whom Rares and Besnako JJ agreed) characterised the proposition “that the scope of the

fiduciary duty must be moulded according to the nature of the particular relationship and the facts of the case” as “fundamental”; *Colorado* above at [361]; *Re Pages Property Pty Ltd* [2020] NSWSC 1270 at [45].

Pages Property Investments Pty Ltd v Boros [2020] NSWSC 1270 (17 September 2020) (Black J)

45. It is important also to recognise that a necessary step in determining whether a breach of the rule against conflict of interest is established is to ascertain the subject matter of the relevant fiduciary obligations, which may be determined from the course of dealing between the parties: *Birtchnell v Equity Trustees Executors and Agency Co Ltd* [1929] HCA 24; (1929) 42 CLR 384 at 409; [1929] ALR 273 at 284 per Dixon J; *Omnilab Media Pty Ltd v Digital Cinema Network Pty Ltd* [2011] FCAFC 166; (2011) 285 ALR 63; 86 ACSR 674 at [206], where Jacobson J (with whom Rares and Besanko JJ agreed) characterised the proposition “that the scope of the fiduciary duty must be moulded according to the nature of the relationship and the facts of the case” as “fundamental”; *Colorado* above at [361]. In *Grimaldi v Chameleon Mining NL (No 2)* [2012] FCAFC 6; (2012) 200 FCR 296; 287 ALR 22; 87 ACSR 260, the Full Court of the Federal Court (Finn, Stone and Perram JJ) observed (at [179]) that:

“The concept of “duty” in the “conflict of duty and interest” formula of the first of these [themes] is convenient shorthand. It refers simply to the function, the responsibility, the fiduciary has assumed or undertaken to perform for, or on behalf of, his or her beneficiary. What that function or responsibility is, is a question of fact. It may be narrow and circumscribed, as is often the case with specific agencies; it may be broad and general, as is characteristically the case with the functions of company directors; its scope may have been antecedently defined or determined; it may have been ordained by past practice; it may be left to the fiduciary’s discretion to determine; and it may evolve over time as is commonly the case with partnerships. Put shortly the actual function or responsibility assumed determines “[t]he subject matter over which the fiduciary obligations extend” for conflict of duty and interest and conflict of duty and duty purposes.”

AHRKalimpa Pty Ltd v Schmidt [2017] VSC 701 (22 November 2017) (Elliott J)

[247] For completeness, the finding in par 253 above as to Schmidt’s state of mind does not affect any relevant issue with respect to Otway Livestock’s knowledge: see, for example, *Omnilab Media Pty Ltd v Digital Cinema Network Pty Ltd* (2011) 285 ALR 63, 94 [242] (Jacobson J, with whom Rares and Besanko JJ agreed), citing *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 162 [173]. See also *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296, 357 [243], [245].

DTM Constructions P/L trading as QA Developments v Poole [2017] QSC 210 (28 September 2017) (Ann Lyons SJA)

[48] This approach was also endorsed in *Streeter v Western Areas Exploration Pty Ltd (No 2)* [19] where Murphy JA stated that a determination of a breach of a duty depended on the character and scope of the relationship between the parties and the mere fact that an opportunity comes to a fiduciary in the course of such a relationship does not necessarily mean that there has been a breach of duty. In *Barescape Pty Ltd v Bacchus Holdings Pty Ltd (No. 9)* [20] Black J had also confirmed the following statement:

“The proposition that the subject matter over which fiduciary obligations extend is to be determined from the course of dealing between the parties was also recognised in *Chan v Zacharia* above at 196 and 204, *Canberra Residential Developments Pty Ltd v Brendas* [2010] FCAFC 125; (2010) 188 FCR 140 at [36], *Streeter v Western Areas Exploration Pty Ltd (No 2)* above at [70] and in *Links Golf Tasmania Pty Ltd v Sattler* [2012] FCA 634 at [471]. In *Omnilab Media Pty Ltd v Digital*

Cinema Network Pty Ltd [2011] FCAFC 166; (2011) 285 ALR 63 at [206], Jacobson J (with whom Rares and Besanko JJ agreed) characterised the proposition ‘that the scope of the fiduciary duty must be moulded according to the nature of the relationship and the facts of the case’ as ‘fundamental’.”

Coyte v Norman; Centre Capital (Newcastle) Pty Ltd v B Scorer [2016] NSWSC 1242 (07 September 2016) (Black J)

145. The applicable legal principles are well-established but operate subject to a proper definition of the scope of the relevant duties and the scope of the relevant corporate opportunity. It is necessary to address these principles more fully than Counsel did in submissions. As I noted in *Re Colorado Products Pty Ltd (in prov liq)* above at [361] ff, a necessary step in determining whether a breach of the rule against conflict of interest is established is to ascertain the subject matter of the relevant fiduciary obligations, which may be determined from the course of dealing between the parties: *Birtchnell v Equity Trustees, Executors and Agency Co Ltd* [1929] HCA 24; (1929) 42 CLR 384 at 409 per Dixon J; *Chan v Zacharia* above at 196 and 204 per Deane J; *Streeter v Western Areas Exploration Pty Ltd (No 2)* [2011] WASCA 17; (2011) 278 ALR 291 at [70]. In *Omnilab Media Pty Ltd v Digital Cinema Network Pty Ltd* [2011] FCAFC 166; (2011) 285 ALR 63 at [206], Jacobson J (with whom Rares and Besanko JJ agreed) characterised the proposition that the scope of a fiduciary duty must be “moulded according to the nature of the particular relationship and the facts of the case” as “fundamental”.

Duncan v Independent Commission Against Corruption [2016] NSWCA 143 (22 June 2016) (Bathurst CJ, Beazley P and Basten JA)

425. This statement was approved by the Full Court on appeal: *Omnilab Media Pty Limited v Digital Cinema Network Pty Ltd* [2011] FCAFC 166 per Jacobsen J, Rares J agreeing.

Investa Properties Pty Ltd v Nankervis (No 7) [2015] FCA 1004 (10 September 2015) (Collier J)

70. Principles articulated in *Canadian Aero Services* in respect of the fiduciary obligations of senior employees have been adopted in Australia in such cases as *Bayley and Associates Pty Ltd v DBR Australia Pty Ltd* [2013] FCA 1341; *Nicholls v Michael Wilson and Partners Ltd* [2012] NSWCA 383; *Colour Control Centre Pty Limited v Ty* [1995] NSWSC 96; *Minlabs Pty Ltd v Assaycorp Pty Ltd* (2001) 37 ACSR 509; *Weldon and Co v Harbinson* [2000] NSWSC 272 and *Omnilab Media Pty Ltd v Digital Cinema Network Pty Ltd* (2011) 285 ALR 63, and were also the subject of learned consideration in Batty R, “Examining the Incidence of Fiduciary Duties in Employment” (2012) 18 *Canterbury Law Review* 187.

Huang v Wang [2015] NSWSC 510 (05 May 2015) (Black J)

34. I summarised the relevant principles in *Re Colorado Products Pty Ltd (in prov liq)* above as follows:

“... a necessary step in determining whether a breach of the rule against conflict of interest is established is to ascertain the subject matter of the relevant fiduciary obligations, which may be determined from the course of dealing between the parties: *Birtchnell v Equity Trustees, Executors and Agency Co Ltd* [1929] HCA 24; (1929) 42 CLR 384 at 409 per Dixon J; *Chan v Zacharia* above at 196 and 204 per Deane J; *Streeter v Western Areas Exploration Pty Ltd (No 2)* above at [70]; *Omnilab Media Pty Ltd v Digital Cinema Network Pty Ltd* [2011] FCAFC 166; (2011) 285 ALR 63 at [206], where

Jacobson J (with whom Rares and Besanko JJ agreed) characterised the proposition "that the scope of the fiduciary duty must be moulded according to the nature of the relationship and the facts of the case" as "fundamental". The Defendants point out, and I accept, that the content of fiduciary duties are moulded to the character of the particular relationship so that, even within an established fiduciary relationship (such as between director and corporation), the content of the duties will not be uniform for all cases, and that fiduciary obligations exist in relation to a defined area of conduct and, except in that defined area, the fiduciary retains its economic liberty: *United Dominions Corporation Ltd v Brian Pty Ltd* [1985] HCA 49; (1985) 157 CLR 1 at 11 per Mason, Brennan and Deane JJ; *Noranda Australia Ltd v Lachlan Resources NL* (1988) 14 NSWLR 1 at [15] per Bryson J; *Streeter v Western Areas Exploration Pty Ltd (No 2)* above at [70].

Cornerstone Property & Development Pty Ltd v Suellen Properties Pty Ltd [2014] QSC 265 (28 October 2014) (Jackson J)

68. If the information as to the availability of land for purchase is not trust property, is there another way of characterising the first defendant's opportunity to purchase Lot 7 in the present case as trust property within the meaning of the first limb of *Barnes v Addy*? Since *Farah*, there have been several cases in which a breach of fiduciary duty consisting of misuse of business information or the "diversion" of a business opportunity has been made the subject of a second limb *Barnes v Addy* liability. [25]. But only one case of which I am aware has suggested or considered that for possible first limb liability. [26].

via

[25] *Able Tours Pty Ltd v Mann* [2009] WASC 192; *Omnilab Media Pty Ltd v Digital Cinema Network Pty Ltd* (2011) 285 ALR 63; and *Zomojo Pty Ltd v Hurd (No 2)* (2012) 299 ALR 621.

Re Colorado Products Pty Ltd (in prov liq) [2014] NSWSC 789 (16 June 2014) (Black J)

361. As the Defendants point out, a necessary step in determining whether a breach of the rule against conflict of interest is established is to ascertain the subject matter of the relevant fiduciary obligations, which may be determined from the course of dealing between the parties: *Birtchnell v Equity Trustees, Executors and Agency Co Ltd* [1929] HCA 24; (1929) 42 CLR 384 at 409 per Dixon J; *Chan v Zacharia* above at 196 and 204 per Deane J; *Streeter v Western Areas Exploration Pty Ltd (No 2)* above at [70]; *Omnilab Media Pty Ltd v Digital Cinema Network Pty Ltd* [2011] FCAFC 166; (2011) 285 ALR 63 at [206], where Jacobson J (with whom Rares and Besanko JJ agreed) characterised the proposition "that the scope of the fiduciary duty must be moulded according to the nature of the relationship and the facts of the case" as "fundamental". The Defendants point out, and I accept, that the content of fiduciary duties are moulded to the character of the particular relationship so that, even within an established fiduciary relationship (such as between director and corporation), the content of the duties will not be uniform for all cases, and that fiduciary obligations exist in relation to a defined area of conduct and, except in that defined area, the fiduciary retains its economic liberty: *United Dominions Corporation Ltd v Brian Pty Ltd* [1985] HCA 49; (1985) 157 CLR 1 at 11 per Mason, Brennan and Deane JJ; *Noranda Australia Ltd v Lachlan Resources NL* (1988) 14 NSWLR 1 at [15] per Bryson J; *Streeter v Western Areas Exploration Pty Ltd (No 2)* above at [70]. In *Grimaldi v Chameleon Mining NL (No 2)* [2012] FCAFC 6; (2012) 200 FCR 296, the Full Court of the Federal Court (Finn, Stone and Perram JJ) observed that:

"The concept of 'duty' in the 'conflict of duty and interest' formula of the first of these [themes] is convenient shorthand. It refers simply to the function, the responsibility, the fiduciary has assumed or undertaken to perform for, or on behalf of, his or her beneficiary. What that function or responsibility is, is a question of fact. It may be narrow and circumscribed, as is often the case with specific agencies; it may be broad and general, as is characteristically the case with the functions of company directors; its scope may have been antecedently defined or determined; it may have been ordained by past practice; it may be left to the fiduciary's discretion to determine; and it may evolve over time as is commonly the case with partnerships. Put shortly the actual function or responsibility assumed determines [t]he subject matter

over which the fiduciary obligations extend' for conflict of duty and interest and conflict of duty and duty purposes".

In *Howard v Commissioner of Taxation* [2014] HCA 21, a judgment delivered after I had heard submissions and reserved judgment in the matter, French CJ and Keane JJ in turn referred (at [34]) to the principle that:

"The scope of the fiduciary duty generally in relation to conflicts of interest must accommodate itself to the particulars of the underlying relationship which give rise to the duty so that it is consistent with and conforms to the scope and limits of that relationship."

Their Honours also noted, with reference to authority, that such a duty is to be "moulded according to the nature of the relationship and the facts of the case". Gageler J (at [110]) there referred with approval to the observation in *Grimaldi v Chameleon Mining NL (No 2)* to which I have referred above. This principle can in turn overlap with principles of waiver and ratification, summarised by Tracey J in *Holyoake Industries (Vic) Pty Ltd v V-Flow Pty Ltd* [2011] FCA 1154; (2011) 86 ACSR 393 at [92] (varied on appeal on another point in *V-Flow Pty Ltd v Holyoake Industries (Vic) Pty Ltd* [2013] FCAFC 16; (2013) 93 ACSR 76), as having effect that:

"A breach may be avoided if the fiduciary makes a full and frank disclosure of the facts to the person to whom the duty is owed and that person consents to the fiduciary acting in a way that would otherwise place him or her in a position of conflict. Disclosure and consent may also retrospectively excuse a breach which has already occurred."

Bayley & Associates Pty Ltd v DBR Australia Pty Ltd [2013] FCA 1341 (10 December 2013) (Foster J)
Omnilab Media Pty Ltd v Digital Cinema Network Pty Ltd (2011) 285 ALR 63 applied

Bayley & Associates Pty Ltd v DBR Australia Pty Ltd [2013] FCA 1341 (10 December 2013) (Foster J)

254. In *Omnilab Media Pty Ltd v Digital Cinema Network Pty Ltd* (2011) 285 ALR 63 at 90 –[216]–[218], Jacobson J, sitting as a member of the Full Court, observed that the business opportunity rule articulated by Laskin J in *Canadian Aero Service Ltd v O'Malley* at 607 was a well-established principle in Australia.

Digital Cinema Network Pty Ltd v Omnilab Media Pty Limited [2013] FCA 1060 (18 October 2013) (Murphy J)

Omnilab Media Pty Ltd v Digital Cinema Network Pty Ltd [2011] FCAFC 166; 86 ACSR 674,
Venus Adult Shops Pty Ltd & Ors v Fraserside Holdings Ltd & Anor

Digital Cinema Network Pty Ltd v Omnilab Media Pty Limited [2013] FCA 1060 (18 October 2013) (Murphy J)

3. On 16 May 2011 liability was determined in favour of the applicants (*Digital Cinema Network Pty Ltd v Omnilab Media Pty Limited (No 2)* [2011] FCA 509) ("the liability judgment"). On 16 December 2011 the appeal against the liability judgment was dismissed (*Omnilab Media Pty Ltd v Digital Cinema Network Pty Ltd* [2011] FCAFC 166; 86 ACSR 674).

Digital Cinema Network Pty Ltd v Omnilab Media Pty Limited [2013] FCA 1035 (10 October 2013) (Gordon J)

2. The hearing listed to commence on 28 October 2013 will deal with the question of damages (the **Damages Hearing**). Liability was determined on 16 May 2011 (*Digital Cinema Network Pty Ltd v Omnilab Media Pty Limited (No 2)* [2011] FCA 509). An appeal against the orders determining liability was dismissed on 19 December 2011 (*Omnilab Media Pty Limited v Digital Cinema Network Pty Ltd* (2011) 86 ACSR 674). The Damages Hearing has been listed for hearing since March 2013. It was originally listed for hearing on 15 April 2013 but was adjourned because, *inter alia*, a number of studio executives who the Applicant intended to call to give evidence were located overseas and despite an order being made in February 2011

under the *Foreign Evidence Act 1994* (Cth) for them to give evidence in relation to liability, those executives had stated that they would not attend unless legally compelled to do so.

Digital Cinema Network Pty Limited v Omnilab Media Pty Limited [2013] FCA 497 (24 May 2013) (Gordon J)

1. The parties' dispute was and remains acrimonious. Liability has been determined: *Digital Cinema Network Pty Ltd v Omnilab Media Pty Limited (No 2)* [2011] FCA 509. That trial lasted just five days. Liability was affirmed on appeal: *Omnilab Media Pty Limited v Digital Cinema Network Pty Ltd; Smith v Digital Cinema Network Pty Ltd* (2011) 285 ALR 63. The damages hearing is listed for 28 October 2013, on an estimate of four weeks. Any proposal to narrow the damages dispute, including references out, has been rejected by one party or the other. This is the latest dispute in this long running saga.

Barescape Pty Ltd v Bacchus Holdings Pty Ltd (No 9) [2012] NSWSC 984 (27 August 2012) (Black J)

141. The importance of definition of the scope of the fiduciary's undertaking is also emphasised by Professor P D Finn in *Fiduciary Obligations*, Lawbook Co, 1977 at 542:

"The all-important matter is the undertaking actually given by the fiduciary. Until the scope and ambit of the duties assumed by the fiduciary has been ascertained that no question of conflict of duty and interest can arise. You must ascertain what the fiduciary has undertaken to do, before you can say he has permitted his interest to conflict with his undertaking."

Similarly, R P Meagher, J D Heydon and M J Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies*, 4th ed, LexisNexis Butterworths, 2002 at [5-070] note that the reach of the equitable principles depends upon "the precise nature and scope of the relationship in each individual case". The proposition that the subject matter over which fiduciary obligations extend is to be determined from the course of dealing between the parties was also recognised in *Chan v Zacharia* above at 196 and 204, *Canberra Residential Developments Pty Ltd v Brendas* [2010] FCAFC 125; (2010) 188 FCR 140 at [36], *Streeter v Western Areas Exploration Pty Ltd (No 2)* above at [70] and in *Links Golf Tasmania Pty Ltd v Sattler* [2012] FCA 634 at [471]. In *Omnilab Media Pty Ltd v Digital Cinema Network Pty Ltd* [2011] FCAFC 166; (2011) 285 ALR 63 at [206], Jacobson J (with whom Rares and Besanko JJ agreed) characterised the proposition "that the scope of the fiduciary duty must be moulded according to the nature of the relationship and the facts of the case" as "fundamental".

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473. In *Hospital Products Ltd v US Surgical Corporation* (1984) 156 CLR 41, the question was whether the relationship in question was a fiduciary one at all, the majority holding that it was not. Indeed, Gibbs CJ (a member of the majority) held that there was "no part of the transaction to which a fiduciary obligation might sensibly be limited" (156 CLR at 73). The case as such does not, therefore, stand as authority as to the scope of a fiduciary's duties. Mason J, however, dissented with respect to the existence of such a relationship, and was thus required to consider the consequences of his holding, in which context his Honour said (156 CLR at 102-103):

The categories of fiduciary relationships are infinitely varied and the duties of the fiduciary vary with the circumstances which generate the relationship. Fiduciary relationships range from the trustee to the errand boy, the celebrated example given by Fletcher Moulton L.J. in his judgment in *In re Coomber*, in which, after referring to the danger of trusting to verbal formulae, he pointed out that the nature of the curial intervention which is justifiable will vary from case to case. In accordance with these

comments it is now acknowledged generally that the scope of the fiduciary duty must be moulded according to the nature of the relationship and the facts of the case: *Phipps v. Boardman*; *Kuys*; *Canadian Aero Service Ltd. v. O'Malley*. The often-repeated statement that the rule in *Keech v. Sandford* applies to fiduciaries generally tends to obscure the variable nature of the duties which they owe. The rigorous standards appropriate to a trustee will not apply to a fiduciary who is permitted by contract to pursue his own interests in some respects. Thus, in the present case the so-called rule that the fiduciary cannot allow a conflict to arise between duty and interest (*Kuys*) cannot be usefully applied in the absolute terms in which it has been stated.

That was the passage to which the Full Court referred in *Canberra Residential*; and it did so in a way that would make Mason J's dictum – albeit that his Honour was in dissent – binding on me. Indeed, the proposition that “that the scope of the fiduciary duty must be moulded according to the nature of the relationship and the facts of the case” was recently described by Jacobson J, with the assent of Rares and Besanko JJ, as “fundamental”: *Omnilab Media Pty Ltd v Digital Cinema Network Pty Ltd* (2011) 285 ALR 63, 89 [206].

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540. The modern Australian formulation of the conflict rule is that provided by Mason J in his dissenting judgment in *Hospital Products* (156 CLR at 103):

Accordingly, the fiduciary's duty may be more accurately expressed by saying that he is under an obligation not to promote his personal interest by making or pursuing a gain in circumstances in which there is a conflict or a real or substantial possibility of a conflict between his personal interests and those of the persons whom he is bound to protect: *Aberdeen Railway Co. v. Blaikie Brothers*. By linking the obligation not to make a profit or take a benefit to a situation of conflict or possible conflict of interest the proposition, in accordance with the authorities, (a) excludes the relevance of an inquiry into the actual motives of the fiduciary; and (b) excludes restitutionary relief when the interest of the fiduciary is remote or insubstantial: see *Boulting v. Association of Cinematograph, Television and Allied Technicians*; *Phelan v. Middle States Oil Corporation*.

What Mason J referred to “a real or substantial possibility of a conflict” is the same notion as Lord Upjohn described as “a real sensible possibility of conflict” in *Boardman v Phipps* [1967] 2 AC 46, 124. Although his Lordship was in dissent, his formula was endorsed by the Privy Council in *Queensland Mines Ltd v Hudson* (1978) 18 ALR 1, 3 and has been applied both in the NSW Court of Appeal (*Beach Petroleum NL v Abbott Tout Russell Kennedy* (1999) 48 NSWLR 1, 89 [425]) and, twice recently, in the Full Court (*Blackmagic Design Pty Ltd v Overliese* (2011) 191 FCR 1 at [99] and *Omnilab Media* [2011] FCAFC 166 at [174] and [230]). The way the principle was expressed by Mason J in *Hospital Products* was adopted by McHugh, Gummow, Hayne and Callinan JJ in *Pilmer v Duke Group Ltd (In Liq)* (2001) 207 CLR 165, 199 [78]. I would refer also, in this context, to what was said by McLure P in *Streeter* (278 ALR at 303 [67]):

Mason J in *Hospital Products* stated the conflict rule in terms of a conflict between “interest and interest”. I understand the analysis to be as follows. A fiduciary has (within the scope of his engagement or undertaking) a duty of undivided loyalty to the person to whom the duty is owed, in this case the company of which he is a director. Thus, ordinarily a director cannot have personal interests that conflict with the interests of the company. Although the conflict rule is usually formulated in terms of the need to avoid a conflict of duty and interest, the Mason J formulation assists in the understanding (and application) of the conflict rule.