

# The quest continues: who is a fiduciary?

**THE FIRST ENGLISH ATTEMPT** to write an account of equitable jurisdiction was published in 1523,<sup>1</sup> predating the Spanish Armada, the foundation of the American colonies and the rise and fall of the British Empire.

Yet, nearly five centuries on, equity has yet to provide a widely accepted, exhaustive and concise definition of the circumstances which give rise to a fiduciary duty of trust and confidence.<sup>2</sup>

In *Pilmer v Duke Group Limited (In liq.)*,<sup>3</sup> the High Court again<sup>4</sup> considered the issue. The decision has special weight because the majority consisted of four judges who gave reasons in a joint judgement. It considers several important issues: the focus here is the Court's consideration of fiduciary duty.

## The facts

The board of a listed company, Kia Ora,<sup>5</sup> wished to take over Western United Ltd. The companies had some common directors and shareholders so Australian Stock Exchange main board listing rule 3J(3) required that Kia Ora shareholders be sent "reports, valuations or other material from independent qualified persons sufficient to establish that the purchase or sale price of such assets is a fair price."<sup>6</sup>

Kia Ora retained accountants who reported that, "from the point of view of Kia Ora, the price proposed to be offered is fair and reasonable in all of the circumstances."<sup>7</sup>

The report was placed before a meeting of shareholders who approved the bid which was successful.

The price paid vastly exceeded the true worth of the acquired assets,<sup>8</sup> Kia Ora became insolvent and commenced proceedings against its directors and accountants. The accountants conceded their report, and incorporated valuation, was incompetently prepared and in breach of the duty of care owed to the company.<sup>9</sup>

Of relevance is Kia Ora's allegation that the accountants owed it a fiduciary duty and that for them to have provided any report was a breach of that duty. The company argued that the accountants should have refused the retainer.

## The trial judge<sup>10</sup>

The accountants admitted that an implied term of their retainer contract was that they act independently.<sup>11</sup> But the trial judge held that no fiduciary relationship had arisen between Kia Ora and the accountants.<sup>12</sup>

The trial judge found that the accountants "were not independent of Kia Ora or Western United" in the sense of the implied term<sup>13</sup> because of associations between the partners of the accountancy firm and Kia Ora, Western United and "the man who had orchestrated the takeover."<sup>14</sup>



BY ANDREW LYONS

## The Full Court<sup>15</sup>

The Full Court held that the accountants owed a fiduciary duty to Kia Ora and "by providing the report to Kia Ora, they had acted in conflict with their duty to act only in the best interests of Kia Ora<sup>16</sup> and had, accordingly, acted in breach of a fiduciary obligation owed to Kia Ora."<sup>17</sup>

## The High Court

The majority<sup>18</sup> held that the accountants did not owe a fiduciary duty to Kia Ora<sup>19</sup> and, further, there had been no breach of any such duty.<sup>20</sup> Kirby J dissented.

Three broad points are extracted:

- first, the majority said a fiduciary relationship will arise upon "the undertaking or agreement by the fiduciary to act for or on behalf of or in the interests of another person in the exercise of power or discretion which will affect in a legal or practical sense the interests of that other person."<sup>21</sup>

This is an endorsement of the remarks of Mason J in *Hospital Products Ltd v United States Surgical Corp*<sup>22</sup> frequently adopted by lower courts. Mason J arrived at this by identifying it as "the critical feature of the (accepted fiduciary) relationships."<sup>23</sup>

Identification of, and extrapolation from, "the critical feature of those (well-recognized fiduciary) relationships" does not require that the critical feature always be present before a fiduciary relationship of trust and confidence is established. The door is left open for the influence of other definitions or theories of fiduciary relationships. The case-by-case approach continues.<sup>24</sup>

The dissenting judge endorsed the proposition that "the unifying principle of fiduciary obligations arises from the existence of a duty of loyalty that, reflecting 'higher community standards or values' gives rise to a legitimate expectation that the other party will act in the interests of the first party or at least in the joint interest of the parties and not solely self-interestedly."<sup>25</sup>

That approach fails to identify a useful criterion to determine whether the expectation is legitimate.

- second, the joint judgement illuminates what is required by that part of the 'critical feature' that refers to an undertaking or agreement "to act for or on behalf of or in the interests of another person."

In a general sense, the accountants fulfilled that element of the test: they agreed 'to act for' Kia Ora in

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3/231 George St, Brisbane City  
PO Box 13173 George Street  
BRISBANE QLD 4003  
DX 40166, BRISBANE UPTOWN  
[IDS@worldinvestigators.com](mailto:IDS@worldinvestigators.com)  
[www.worldinvestigators.com](http://www.worldinvestigators.com)