FEDERAL COURT OF AUSTRALIA

Grimaldi v Chameleon Mining NL (No 2) [2012] FCAFC 6

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| Citation: | | Grimaldi v Chameleon Mining NL (No 2) [2012] FCAFC 6 | |
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| Appeal from: | | Chameleon Mining NL v Murchison Metals Limited [2010] FCA 1129 | |
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| Parties: | | **PHILLIP FELICE GRIMALDI v CHAMELEON MINING NL (ACN 098 773 785) and MURCHISON METALS LIMITED (****ACN 078 257 799)**  **CHAMELEON MINING NL (ACN 098 773 785) v MURCHISON METALS LIMITED (ACN 078 257 799) AND CROSSLANDS RESOURCES LTD (ACN 061 262 397) AND JACK HILLS HOLDINGS PTY LTD (ACN 127 384 696)** | |
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| File numbers: | | NSD 68 of 2011  NSD 73 of 2011 | |
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| Judges: | | **FINN, STONE AND PERRAM JJ** | |
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| Date of judgment: | | 21 February 2012 | |
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| Catchwords: | | **CORPORATIONS –** *Corporations Act 2001* (Cth), s 9 – “director” – “officer” – de facto director – no single test for determining whether a person is such – assuming or performing the functions of a director of the company in question – directors or consultants or both – blurring of “de facto” and “shadow” – de facto officer – unnecessary to differentiate de facto director from de facto officers  **CORPORATIONS** – *Corporations Act 2001* (Cth), ss 181 and 182 – director and de facto director misappropriating corporate funds – effecting a transaction in which they had a personal interest – using position in expectation of obtaining an introduction fee  **CORPORATIONS** – *Corporations Act 2001* (Cth), s 1317H – construction of provision – inclusion of “profits” within “damage suffered” – whether profits can be sought without claim for, or proof of, loss  **CORPORATIONS** – knowledge of corporation – imputation of director’s knowledge to corporation – knowledge of own wrongdoing – “fraud on the company” exception – receipt of a secret commission  **EQUITY** – Fiduciary obligations – imposing standards of conduct – overlap of conflict of duty and interest and misuse of fiduciary position – defining the subject matter over which fiduciary obligations extend  **EQUITY** – Fiduciary obligations – receipt of civil law bribe or secret commission – characteristics of secret commission – third party payer’s position – assumption of risk of agent’s nondisclosure to its principal  **EQUITY** – Participation in the wrongdoing of a trustee or fiduciary – classes of case – *Barnes v Addy* – liabilities as a knowing recipient or a knowing assistant – fault based liabilities – the “knowledge” of wrongdoing required of a knowing recipient – present Australian law – unhelpful formulae  **EQUITY** – Corporate property as “trust property” for *Barnes v Addy* purposes – money paid or property transferred under a contract – breach of fiduciary duty – whether the transaction must be  avoided before proprietary relief can be awarded – *Daly v Sydney Stock Exchange* – constructive trusts and tracing corporate property  **EQUITY** – Remedies – fashioning remedy to fit the nature of the case and its facts – doing what is “practically just” – awarding the remedy which is “appropriate” in the circumstances – the remedial constructive trust and appropriateness – discretionary considerations  **EQUITY –** Fiduciaries’ Liability to Account and the Account of Profits – purpose and limits of an account of profits – breach of duty only one of several sources of profit – misuse of “trust moneys” in a fiduciary’s trade or business – applicable principles – the “just allowance” device  **EQUITY** – Account of Profits – accounting for the profits actually made – when parties may be jointly and severally liable for profits  **EQUITY** – Interest awards where trust moneys misused – presumption of profit made reflected in award of interest – award of compound interest and periodic rests  **EQUITY** – Remedies – against knowing recipients and knowing assistances – whether joint and several as between fiduciary/trustee and the third party participants  **EQUITY** – Remedies – for bribes and secret commissions – *Lister & Co v Stubbs* not followed – constructive trust of the property received an available remedy if appropriate in the circumstances  **PRACTICE AND PROCEDURE** – Appeals – application to amend – application to reopen decision to refuse amendment to Notice of Contention – application to reopen on grounds of legal error – *Grimaldi v Chameleon Mining NL (No 1)* [2011] FCAFC 95 reopened – *Federal Court Rules 2011* r 39.04 – application to further amend notice of appeal | |
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| Legislation: | | *Companies Act 1929* (UK) s 380  *Companies Act 1961* s 5, s 9, s 124, s 229, Pt 5 Div 2  *Companies Act 2006* (UK) s 155(1), s 250, s 251  *Company Directors Disqualification Act 1986* (UK)  *Corporate Law Economic Reform Program Act 1999* (Cth)  *Corporations Act 2001* (Cth) s 9, s 79, s 82A, s 117, s 179, s 180, s 181, s 182, s 183, s 184, s 185, s 201B, s 206C, s 1317H, Pt 6D.2 Div 4  *Federal Court of Australia Act 1976* (Cth) s 54A  *Federal Court Rules* r 39.04, O 72A  *Mining Act 1978* (WA)  *Partnership Act 1892* (NSW) s 29  Explanatory Memorandum to the Companies Bill 1980[34]  Explanatory Memorandum, Corporate Law Economic Reform Program Bill 1998 | |
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| Cases cited: | | *Aequitas v AEFC* (2001) 19 ACLC 1,006 cited  *Agip (Africa) Ltd v Jackson* [1990] 1 Ch 265 cited  *Aktas v Westpac Banking Corporation Ltd (No 2)* (2010) 241 CLR 570 cited  *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 considered  *Ardlethan Options Ltd v Easdown* (1915) 20 CLR 285 distinguished  *Attorney-General for Hong Kong v Reid* [1994] 1 AC 324 applied  *Attorney-General v Alford* (1855) 4 De G, M&G 843; 43 ER 737 cited  *Attorney-General v Edmunds* (1868) LR 6 Eq 381 cited  *Austin & Partners Pty Ltd v Spencer*, SC of NSW, 1 Dec 1998 cited  *Australian Medic-Care Co Ltd v Hamilton Pharmaceutical Pty Ltd* (2010) 261 ALR 501 cited  *Australian Securities and Investments Commission v Adler* (2002) 168 FLR 253 cited  *Australian Securities Commission v AS Nominees Ltd* (1995) 133 ALR 1 cited  *Autodesk Inc v Dyason (No.2)* (1993) 176 CLR 300 cited  *Baden v Société Générale pour Favouriser le Développment du Commerce et de l’Industrie en France SA* [1993] 1 WLR 509 considered  *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2001] Ch 437 cited  *Bank of New South Wales v Rogers* (1941) 65 CLR 42 cited  *Barnes v Addy* (1874) LR 9 Ch App 244 applied  *Barnett v South London Tramways Co* (1887) 18 QBD 815 cited  *Bass Brewers Ltd v Appleby* [1997] 2 BCLC 700 cited  *Bathurst City Council v PWC Properties Pty Ltd* (1998) 195 CLR 566 applied  *Baxter v Obacelo Pty Ltd* (2001) 205 CLR 635 cited  *Beach Petroleum NL v Johnson* (1993) 43 FCR 1 considered  *Bell Group Ltd (in liq) v Westpac Banking Corporation* (2008) 70 ACSR 1 cited  *Belmont Finance Corporation v Williams Furniture Ltd (No 2)* [1980] 1 All ER 393 cited  *Belmont Finance, Houghton v Notard*, *Lowe and Wills* [1928] AC 1 considered  *Birmingham v Renfrew* (1937) 57 CLR 666 cited  *Birtchnell v Equity Trustees, Executors and Agency Co Ltd* (1929) 42 CLR 384 applied  *Black v S Freedman & Co* (1910) 12 CLR 105 cited  *Boardman v Phipps* [1967] 2 AC 144considered  *Boston Deep Sea Fishing & Ice Co Ltd v Ansell* (1888) 39 ChD 339 cited  *Boyns v Lackey* (1958) 58 SR (NSW) 395 cited  *Breen v Williams* (1996) 186 CLR 71 cited  *Bridgewater v Leahy* (1998) 194 CLR 457 applied  *Browne v Dunn* (1894) 6 R 67 cited  *Burdick v Garrick* (1870) LR 5 Ch App 233 cited  *Burland v Earle* [1902] AC 83 cited  *Buzzle Operations Pty Ltd (in liq) v Apple Computer Australia Pty Ltd* [2011] NSWCA 109 cited  *Cadogan Petroleum Plc v Tolley* [2011] EWHC 2286 (Ch) cited  *Canada Safety Ltd v Thompson* [1951] 3 DLR 295 cited  *Canadian Dredge & Dock Co Ltd v The Queen* (1985) 19 DLR (4th) 314 cited  *Cement Australia Pty Ltd v Australian Competition and Consumer Commission* (2010) 187 FCR 261 followed  *Chan v Zacharia* (1984) 154 CLR 178 applied  *Charter plc v City Index Ltd* [2008] Ch 313 cited  *Citadel General Assurance Co v Lloyds Bank Canada* (1997) 152 DLR (4th) 411 cited  *Clegg v Edmondson* (1857) 8 De G M&G 787; 44 ER 593 cited  *CMS Dolphin Ltd v Simonet* [2001] 2 BCLC 704 cited  *Colbeam Ltd v Stock Affiliates Pty Ltd* (1968) 122 CLR 25 cited  *Commissioner of Taxation v Macquarie Health Corporation Ltd* (1998) 88 FCR 451 cited  *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373 followed  *Cook v Deeks* [1916] AC 554 cited  *Corporate Affairs Commission (Vic) v Bracht* [1989] VR 821 cited  *Corporate Affairs Commission v Drysdale* (1978) 141 CLR 236 applied  *Cowan de Groot Properties Ltd v Eagle Trust plc* [1992] 4 All ER 700 cited  *D’Amore v MacDonald* (1973) 32 DLR (3d) 543 cited  *Daly v Sydney Stock Exchange* (1986) 160 CLR 371 distinguished  *Daraydan Holdings Ltd v Solland International Ltd* [2005] Ch 119 cited  *Dart Industries Inc v Décor Corporation Pty Ltd* (1993) 179 CLR 101 applied  *Davis v Insolvency and Trustee Service Australia (No.2)* (2011) 190 FCR 437 cited  *Dean v MacDowell* (1878) 8 Ch D 345 cited  *Deputy Commissioner of Taxation v Austin* (1998) 28 ACSR 565considered  *Docker v Somes* (1834) 2 My & K 655; 39 ER 1095 cited  *Donato v Legion Cabs (Trading) Cooperative Society Ltd* [1966] 2 NSWR 583 cited  *DPC Estates Pty Ltd v Grey and Consul Development Pty Ltd* [1974] 1 NSWLR 443 cited  *Dubai Aluminium Co Ltd v Salaam* [2003] 2 AC 366 cited  *Eagle Trust plc v SBC Securities Ltd* [1992] 4 All ER 488 cited  *Eden v Ridsdale’s Railway Lamp & Lighting Co* (1889) 23 QBD 368 considered  *Eden v Ridsdales Railway Lamp and Lighting Co Ltd* (1889) 23 QBD 368 followed  *Elders Trustee and Executor Co Pty Ltd v E G Reeves Pty Ltd* (1987) 78 ALR 193 cited  *Emanuel Management Pty Ltd (in liq) v Foster’s Brewing Group Ltd* (2003) 178 FLR 1 cited  *Entwells Pty Ltd v National and General Insurance Co Ltd* (1991) 5 ACSR 424 cited  *Equiticorp Finance Ltd (in liq) v Bank of New Zealand* (1993) 32 NSWLR 50 cited  *Equiticorp Industries Group Ltd v The Crown* [1998] 2 NZLR 481 cited  *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218 cited  *Ernest v Vivian* (1863) 33 LJ Ch 513 cited  *Evans v European Bank Ltd* (2004) 61 NSWLR 75 cited  *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 applied  *Farrow Finance Co Ltd (in liq) v Farrow Properties Pty Ltd (in liq)* (1997) 26 ACSR 544 cited  *Flockton v Bunning* (1872) LR 8 Ch App 323 cited  *Fodare Pty Ltd v Shearn* [2011] NSWSC 479 cited  *Foskett v McKeown* [2001] 1 AC 102 cited  *Fox v Percy* (2003) 214 CLR 118 cited  *Furs Ltd v Tomkies* (1936) 54 CLR 583 applied  *Gencor ACP Ltd v Dalby* [2000] 2 BCLC 734 cited  *Giumelli v Giumelli* (1999) 196 CLR 101 applied  *Glandon v Tilmunda* [2008] NSWSC 218 cited  *Grant v Gold Exploration and Development Syndicate* [1900] 1 QB 233 at 249 cited  *Greater Pacific Investments Pty Ltd (in liq) v Australian National Industries Ltd* (1996) 39 NSWLR 143 considered  *Green & Clara Pty Ltd v Bestobell Industries Pty Ltd (No 2)* [1984] WAR 32 cited  *Grimaldi v Chameleon Mining NL (No.1)* [2011] FCA 936 cited  *Hagan v Waterhouse* (1991) 34 NSWLR 308 cited  *Hancock Family Memorial Foundation Ltd v Porteus* (2000) 22 WAR 193 cited  *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298 considered  *Harris v S* (1976) 2 ACLR 51 cited  *Holloway v McFeeters* (1956) 94 CLR 470 applied  *Holpitt Pty Ltd v Swaab* (1992) 33 FCR 474 cited  *Horfman v M G Kailis Pty Ltd* [2009] WASC 166 cited  *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 applied  *House v The King* (1936) 55 CLR 499 cited  *Hovenden & Sons v Millhoff* (1900) 83 LT 41 cited  *Imperial Mercantile Credit Association v Coleman* (1873) LR 6 HL 189 applied  *In re Diplock* [1948] Ch 465 cited  *In re Hydrodam (Corby) Ltd* [1994] 2 BCLC 180 cited  *In re Macadam*; *Dallow v Codd* [1946] Ch 73 cited  *In re Western Counties Steam Bakeries and Milling Co* [1897] 1 Ch 617 cited  *Industries & General Mortgage Co Ltd v Lewis* [1949] 2 All ER 573 cited  *Insurance Corporation of British Columbia v Lo* (2006) 278 DLR (4th) 148 cited  *International Cat Manufacturing Pty Ltd v Rodrick* [2010] QSC 30 cited  *J C Houghton & Co v Nothard, Lowe and Wills Ltd* [1928] AC 1 cited  *John Alexander’s Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1 applied  *John v Dodwell & Co* [1918] AC 563 cited  *K&S Corporation Ltd v Sportingbet Australia* (2003) 86 SASR 312 cited  *Kalls Enterprise Pty Ltd (in liq) v Baloglow* (2007) 63 ACSR 557 cited  *Keech v Sandford* (1726) Sel Cas Ch 61; 25 ER 223 cited  *Keith Henry & Co Pty Ltd v Stuart Walker & Co Pty Ltd* (1958) 100 CLR 342 applied  *Koorootang Nominees Pty Ltd v Australia and New Zealand Banking Group Ltd* [1998] 3 VR 16 cited  *Leotta v Public Transport Commission* (1976) 9 ALR 437 cited  *Linter Group Ltd v Goldberg* (1992) 7 ACSR 580 cited  *Lister & Co v Stubbs* (1890) 45 Ch D 1 not followed  *Logicrose Ltd v Southend United Football Club (No 2)* [1988] 1 WLR 1256 cited  *Lonrho Plc v Fayed (No 2)* [1992] 1 WLR 1 cited  *Lord Provost of Edinburgh v Lord Advocate* (1879) 4 App Cas 823 cited  *Macdonald v Hauer* (1976) 72 DLR (3d) 110 cited  *MacDonald v Richardson* (1858) 1 Giff 81; 65 ER 833 cited  *Maguire v Makaronis* (1997) 188 CLR 449 cited  *Manley v Sartori* [1927] 1 Ch 157 cited  *Maronis Holdings Ltd v Nippon Credit Australia Pty Ltd* (2001) 38 ACSR 404 cited  *McCann v Switzerland Insurance Australia Ltd* (2000) 203 CLR 579cited  *McKenzie v McDonald* [1927] VLR 134 cited  *Metropolitan Bank v Heiron* (1880) 5 Ex D 319 not followed  *Michael Wilson & Partners Ltd v Nicholls* (2011) 282 ALR 685 applied  *Mistmorn Pty Ltd (in liq) v Yasseen* (1996) 21 ACSR 173 cited  *Morlea Professional Services Pty Ltd v Richard Walter Pty Ltd* (1999) 96 FCR 217 cited  *Morley v Australian Securities and Investments Commission* (2010) 274 ALR 205 cited  *Multicon Engineering Pty Ltd v Federal Airports Corporation* (1997) 47 NSWLR 631 cited  *Muschinski v Dodds* (1985) 160 CLR 583 applied  *My Kinda Town Ltd v Soll* [1982] FSR 147 cited  *Natcomp Technology Australia Pty Ltd v Graiche* [2001] NSWCA 120 cited  *Nathan v Dollars & Sense Finance Ltd* [2007] 2 NZLR 747 cited  *News Limited v Australian Rugby Football League Ltd* (1996) 64 FCR 410 cited  *Ninety Five Pty Ltd (in liq) v Banque Nationale de Paris* [1988] WAR 132 cited  *O’Halloran v R T Thomas & Family Pty Ltd* (1998) 45 NSWLR 262 cited  *O’Sullivan v Management Agency and Music Ltd* [1985] QB 428 cited  *Page v Rattiffe* (1896) 75 LT 371 cited  *Panorama Developments (Guildford) Ltd v Fidelis Furnishing Fabrics Ltd* [1971] 2 QB 711 cited  *Parker v McKenna* (1874) LR 10 Ch App 96 cited  *Paul A Davies (Aust) Pty Ltd v Davies* [1983] 1 NSWLR 440 cited  *Peninsula and Oriental Steam Navigation Co v Johnson* (1938) 60 CLR 189 cited  *Phipps v Boardman* [1967] 2 AC 46 cited  *Primeau v Granfield* 184 F 480 (1911) considered  *Queensland Mines Ltd v Hudson* (1975-1976) ACLC 28, 658 cited  *R v Drysdale* (1978) 3 ACLR 680 cited  *Re Cape Breton Co* (1885) 29 Ch D 795 cited  *Re Dawson (decd)*; *Union Fidelity Trustee Co Ltd v Perpetual Trustee Co Ltd* [1966] 2 NSWR 211 applied  *Re Jarvis*; *Edge v Jarvis* [1958] 1 WLR 815 considered  *Re Kaytech International plc* [1999] 2 BCLC 351 cited  *Re Montagu’s Settlement Trusts* [1987] 1 Ch 264 considered  *Re Parmalat Securities Litigation* 659 F Supp 2d 504 (SDNY 2009) cited  *Regal (Hastings) Ltd v Gulliver* [1942] 1 All ER 378 considered  *Revenue and Customs Commissioners v Holland* [2010] 1 WLR 2793 cited  *Rhodes v Macalister* (1923) 29 Com Cas 19 cited  *Richard Brady Franks Ltd v Price* (1937) 58 CLR 112 cited  *Robins v Incentive Dynamics Pty Ltd (in liq)* (2003) 175 FLR 286 considered  *Royal British Bank v Turquand* (1856) 6 EI&BI 327; 119 ER 886 cited  *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 cited  *Russell v Austwick* (1826) 1 Sim 52 57 ER 498 cited  *Scott v Scott* (1963) 109 CLR 649 considered  *Secretary of State for Trade and Industry v Tjolle* [1998] 1 BCLC 333 cited  *Shipway v Broadwood* [1899] 1 QB 369 cited  *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2011] 4 All ER 335 not followed  *Soulos v Korkontzilas* (1997) 146 DLR (4th) 214 cited  *Spangaro v Corporate Investment Australia Funds Management Ltd* (2003) 47 ACSR 285 cited  *Stone & Rolls Ltd (in liq) v Moore Stephens* (2008) 2 BCLC 461 considered  *Streeter v Western Areas Exploration Pty Ltd* 82 ACSR 1 cited  *Sumitomo Bank Ltd v Kartika Ratna Thahir* [1993] 1 SLR 735 (Sing) applied  *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418 cited  *Tailby v Official Receiver* (1888) 13 App Cas 523 cited  *Tara Shire Council v Garner* [2003] 1 Qd R 556 cited  *Timber Engineering Co Pty Ltd v Anderson* [1980] 2 NSWLR 488 cited  *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch) cited  *United States Surgical Corporation v Hospital Products International Pty Ltd* [1983] 2 NSWLR 157 considered  *United States v Carter* 217 US 286 (1910) followed  *Vadasz v Pioneer Concrete (SA) Pty Ltd* (1995) 184 CLR 102 applied  *Vyse v Foster* (1872) LR 8 Ch App 309 applied  *Warman International Ltd v Dwyer* (1995) 182 CLR 544 applied  *Wedderburn v Wedderburn* (1838) 4 My & Cr 41; 41 ER 16 cited  *Westpac Banking Corporation v Savin* [1985] 2 NZLR 41 cited  *Whisprun Pty Ltd v Dixon* (2003) 200 ALR 447 cited  *Willett v Blanford* [1841] 1 Hare 253; 66 ER 1027 cited  *Yates v Finn* (1880) 13 Ch D 839 cited  *Zhu v Treasurer of the State of New South Wales* (2004) 218 CLR 530 cited  Ananian-Cooper, “The Liability of Third Parties for Breaches of Trust or Fiduciary Duty: A Comparative Look at Five Themes Across Four Jurisdictions”, in Weaver Cragie, *Banker and Customer*, vol 5, 25-1701  Ashburner, *Principles of Equity* (1901), 187-200  Black et al, *CLERP and the New Corporations Law,* [4.69 ff]  Bogert, *Trusts and Trustees,* (2nd revised, 1995)§865 n 5, §928 n 8 and 15  *Bowstead and Reynolds on Agency* (19th ed, 2010),6.084-6.089  Butler (ed), *Equity and Trusts in New Zealand*, 2nd ed (2009), Ch 18  Conaglen Fiduciary Loyalty, (2010) Ch 9  Conaglen, “Difficulties with Tracing Backwards” (2011) 127 LQR 432  Corporations and Markets Advisory Committee Report, *Corporate Duties Below Board Level* (2006) 29-30, Appendix 1  Dal Pont, *Law of Agency,* (2nd ed, 2008) [12.7]-[12.19], [22.54], [22.56-22.59]  Dietrich and Ridge “‘The Receipt of What?’: Questions Concerning Third Party Recipient Liability in Equity and Unjust Enrichment”, (2007) 31 Melb UL Rev 47, 51-55  *Dobbs Law of Remedies,* vol 2 (2nd ed, 1999), 699-700  Elliott and Mitchell, “Remedies for Dishonest Assistance” (2004) 67 MLR 16  Finn, *Fiduciary Obligations,* (1978) [495]-[515]  *Ford and Austin’s Principles of Corporations Law* (7th ed, 1995), [8.360], [9.280]-[9.290]  Ford and Lee, *Principles of the Law of Trusts* [9.11110], [17.2210]-[17.2250]*,* [17.2650], [22.10320]-[22.10340], [22.10440]  Ford *Company Law* (4th ed, 1986), [1541]  *Ford’s Principles of Corporations Law*, vol 1, (10th ed) 3.400, 7.209, 7.264, 8.073-8.074, 13.070, 13.100  Goode, “A Reply” (2011) 127 LQR 493  Gower and Davies, *Principles of Modern Company Law* (8th ed, 2008), 16-9  Gummow, “Equity; too successful?” (2003) 77 ALJ 30, 40-41  Harpum, “The Stranger as Constructive Trustee” (1986) 102 LQR 114, 118 ff, 141-144  Hayton “Proprietary Liability for Secret Profits” (2011) 127 LQR 487  *Jacobs’ Law of Trusts in Australia* (4th ed, 1977), [1312]-[1314]  *Jacobs’ Law of Trusts in Australia*, 7th ed (2006), 1323, 1.333-1334  Lehane, “Fiduciaries in a Commercial Context” in Finn (ed), *Essays in Equity*, 107  *Lewin on Trusts* (18th ed, 2008), 20-33  Lewin, *Law of Trusts* (9th ed, 1891), 1026-1029  Lindgren, “Development of the Power of the Modern Company Secretary to Bind his Company” (1972) 46 ALJ 385  *Lindley & Banks on Partnership* (19th ed, 2010), Chps 12, 13 and 26  Meagher, Gummow & Lehane (4th ed), [5-190]-[5-230]  Meagher, Gummow and Lehane, *Equity: Doctrines & Remedies* (1st ed), [532]-[540]  Millet, “Bribes and Secret Commissions” [1993] Restitution LR 7  Mitchell and Watterson, “Remedies for Knowing Receipt” in Mitchell (ed), *Constructive and Resulting Trusts* (2010), 132 ff  Mortimore QC ed, *Company Directors*, (2009) 3.02, 3.58-3.62  Nicholls, “Knowing Receipt: The Need for a New Landmark” in Cornish et al, *Restitution Past, Present and Future* (1998)  Prof Austin, “Constructive Trusts” in Finn (ed), *Essays in Equity* at 240 (1985)  *Restatement of Agency 3rd* §504  *Restatement of Agency,* 3 Am Jur 2d, *“Agency”,* §226, §280, §5.04, §8.02  *Restatement of Contracts, Second*, §19b  Ricketson, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, [2.75]  Ridge, “Justifying the Remedies for Dishonest Assistance”, 460 ff (2008) 124 LQR 445  *Scott on Trusts,* vol 5 (4th ed, 1989), §517.1  Smith, *The Law of Tracing* (1997) 299  Snell, *Principles of Equity* (15th ed, 1908), 141-142  Underhill and Hayton, *Law of Trusts and Trustees*, 18th ed (2010), Ch 24, 98.37  Virgo, “Profits Obtained in Breach of Fiduciary Duty: Personal or Proprietary Claim?” [2011] Camb LJ 502  Wallace and Young, *Australian Company Law and Practice* (1965), 393-394  Waters, *The Constructive Trust* (1964), Ch IV  *Waters’ Law of Trusts in Canada*, 492-500, 3rd ed (2005), 500-504  Watts, “Imputed Knowledge in Agency Law – Excising the Fraud Exception” (2001) 117 LQR 300  Williams, *Joint Obligations* (1949), Ch 8 | |
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| Date of hearing: | 8, 9, 10, 11, 12, 15, 16 and 17 August 2011 | |
|  |  | |
| Date of last submissions: | 19 October 2011 | |
|  |  | |
| Place: | Sydney | |
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| Division: | GENERAL DIVISION | |
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| Category: | Catchwords | |
|  |  | |
| Number of paragraphs: | 783 | |
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| **In NSD 68 of 2011:** | | |
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| Counsel for the Appellant: | Mr A G Bell SC with Mr M Watts | |
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| Solicitor for the Appellant: | MJ Woods & Co | |
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| Counsel for the First Respondent: | Mr N Hutley SC, Mr M Bennett, Mr C H Withers, Dr B Kremer | |
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| Solicitor for the First Respondent: | Bennett & Co | |
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| Counsel for the Second Respondent: | Mr J Karkar QC with Mr S Penglis | |
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| Solicitor for the Second Respondent: | Freehills | |
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| **In NSD 73 of 2011:** | | |
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| Counsel for the Appellant/Cross Respondent: | Mr N Hutley SC, Mr M Bennett, Mr C H Withers, Dr B Kremer | |
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| Solicitor for the Appellant/Cross Respondent: | Bennett & Co | |
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| Counsel for the First, Second and Third Respondents/First, Second and Third Cross-Appellants: | Mr J Karkar QC with Mr S Penglis | |
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| Solicitor for the First, Second and Third Respondents/First, Second and Third Cross-Appellants: | Freehills | |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| NEW SOUTH WALES DISTRICT REGISTRY |  |
| GENERAL DIVISION | NSD 68 of 2011 |

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| ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA |

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| BETWEEN: | PHILLIP FELICE GRIMALDI  Appellant |
| AND: | CHAMELEON MINING NL (ACN 098 773 785)  First Respondent  MURCHISON METALS LIMITED (ACN 078 257 799)  Second Respondent |

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| JUDGES: | FINN, STONE AND PERRAM JJ |
| DATE OF ORDER: | 21 FEBRUARY 2012 |
| WHERE MADE: | SYDNEY |

THE COURT ORDERS THAT:

1. The appeal be dismissed with costs.

2. The cross-appeal be dismissed with costs.

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

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| NEW SOUTH WALES DISTRICT REGISTRY |  |
| GENERAL DIVISION | NSD 73 of 2011 |

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| ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA |

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| BETWEEN: | CHAMELEON MINING NL (ACN 098 773 785)  Appellant/Cross-Respondent |
| AND: | MURCHISON METALS LIMITED (ACN 078 257 799)  First Respondent/First Cross-Appellant  CROSSLANDS RESOURCES LTD (ACN 061 262 397)  Second Respondent/Second Cross-Appellant  JACK HILLS HOLDINGS PTY LTD (ACN 127 384 696)  Third Respondent/Third Cross-Appellant |

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| JUDGES: | FINN, STONE AND PERRAM JJ |
| DATE OF ORDER: | 21 February 2012 |
| WHERE MADE: | SYDNEY |

THE COURT ORDERS BY CONSENT THAT:

1. The Appellant (Chameleon Mining NL) do have leave to discontinue the appeal without liability as to costs and to file the Notice of Discontinuance attached as Annexure A to these orders.

2. The First Cross-Appellant (Murchison Metals Limited) and the Second Cross-Appellant (Crosslands Resources Ltd) do have leave to discontinue the cross-appeal without liability as to costs and to file the notice of discontinuance attached as Annexure B to these orders.

3. Any costs orders in the within proceedings made in favour of:

(a) Chameleon Mining NL, as against any or all of Murchison Metals Limited, Crosslands Resources Ltd or Jack Hills Holdings Pty Ltd; or

(b) any or all of the Murchison Metals Limited, Crosslands Resources Ltd or Jack Hills Holdings Pty Ltd, as against the Appellant,

in the proceedings be vacated.

4. The Court otherwise notes the parties’ agreement that upon such discontinuances neither party is required to pay the costs of the other parties such that the Appellant will not pay the Respondents’ costs in the appeal and the Cross-Appellants will not pay the costs of the Cross-Respondent in the cross-appeal.

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

**ANNEXURE A**

**Notice of discontinuance of appeal**

No. NSD 73 of 2011

Federal Court of Australia

District Registry: New South Wales

Division: General

On Appeal from a single Judge of the Federal Court of Australia

**CHAMELEON MINING NL**

Appellant/Cross-Respondent

**MURCHISON METALS LIMITED**

First Respondent/First Cross-Appellant

**CROSSLANDS RESOURCES LTD**

Second Respondent/Second Cross-Appellant

**JACK HILLS HOLDINGS PTY LTD**

Third Respondent/Third Cross-Appellant

Chameleon Mining NL, the Appellant, discontinues the whole of the appeal.

The Court on 21 February 2011 granted leave to the discontinuance.

**ANNEXURE B**

**Notice of discontinuance of cross-appeal**

No. NSD 73 of 2011

Federal Court of Australia

District Registry: New South Wales

Division: General

On Appeal from a single Judge of the Federal Court of Australia

**CHAMELEON MINING NL**

Appellant/Cross-Respondent

**MURCHISON METALS LIMITED**

First Respondent/First Cross-Appellant

**CROSSLANDS RESOURCES LTD**

Second Respondent/Second Cross-Appellant

**JACK HILLS HOLDINGS PTY LTD**

Third Respondent/Third Cross-Appellant

Murchison Metals Limited (the First Cross-Appellant) and Crosslands Resources Ltd (the Second Cross-Appellant) discontinue the whole of their cross-appeal.

The Court on 21 February 2011 granted leave to the discontinuance.

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| NEW SOUTH WALES DISTRICT REGISTRY |  |
| GENERAL DIVISION | NSD 68 of 2011 |

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| ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA |

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| BETWEEN: | PHILLIP FELICE GRIMALDI  Appellant |
| AND: | CHAMELEON MINING NL (ACN 098 773 785)  First Respondent  MURCHISON METALS LIMITED (ACN 078 257 799)  Second Respondent |

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| GENERAL DIVISION | NSD 73 of 2011 |

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| ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA |

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| BETWEEN: | CHAMELEON MINING NL (ACN 098 773 785)  Appellant/Cross-Respondent |
| AND: | MURCHISON METALS LIMITED (ACN 078 257 799)  First Respondent/First Cross-Appellant  CROSSLANDS RESOURCES LTD (ACN 061 262 397)  Second Respondent/Second Cross-Appellant  JACK HILLS HOLDINGS PTY LTD (ACN 127 384 696)  Third Respondent/Third Cross-Appellant |

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| JUDGES: | FINN, STONE AND PERRAM JJ |
| DATE: | 21 FEBRUARY 2012 |
| PLACE: | SYDNEY |

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**REASONS FOR JUDGMENT**

**THE COURT**

1 In appeals and a cross-appeal which raise quite a number of issues, one is central : “What are the principles that determine the appropriate equitable relief to be awarded against a third party who knowingly participates in another’s trust or fiduciary wrongdoing?” The circumstances in which such a liability can arise are, for present purposes, to be determined by reference to what are known colloquially now as the “two limbs” of *Barnes v Addy* (1874) LR 9 Ch App 244. Those limbs have a certain certainty in Australian law: see *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89. The same cannot be said of the relief they mandate.

2 Characteristically, *Barnes v Addy* liability has been invoked by innocent trust and fiduciary beneficiaries so as to project liability to compensate for their losses onto third parties who have participated in the delinquency of the trustee or fiduciary. In the present matters in contrast, the liabilities sought to be imposed on the third parties are for gains made by either or both of the delinquent fiduciary and the third parties. The Western Australian mining boom and a potentially very profitable iron ore mine provide the context and subject matter for the claims made.

3 The proceedings arose out of steps taken in several junior mining exploration companies in putting together and then developing from faltering beginnings a significant mining project. What this project required were, first and foremost, potentially productive iron ore tenements; secondly, a publicly listed company as a vehicle for investment; thirdly, the progressive aggregation of risk capital; and, fourthly, experienced geologists. The central human actors in developing the project were either well known to each other or else fortuitous “co-venturers” sharing ambitions of individual gain. Unorthodox steps were taken with little or no regard for corporate forms or for the fiduciary responsibilities of company directors and officers. And there were winners and losers as the project evolved. These proceedings are, in substance, in the nature of a retrospective attempt to reallocate gains and losses in consequence of events occurring, and actions taken, for the most part in 2004.

4 The mining project in question was developed by Murchison Metals Ltd. To put the matter inexactly, in 2004 through a series of transactions later to be examined it acquired control of what for convenience we will call the “Iron Jack Tenements”. These were located in the Jack Hills region of Western Australia which lies inland about halfway between Perth and Port Headland. The nearest available port is Geraldton. From the 1960’s mapping and prospecting for iron ore had been undertaken in the area. Though iron ore was detected, the area was not developed primarily because of the then low ore price and its ready availability from the Pilbara region. With the growth of the Chinese market by 2005 the previously deemed marginal iron ore resources of Jack Hills became viable. Murchison now exports that ore to China. We note in passing that the trial judge indicated that, at the time of the trial, the Iron Jack Tenements were thought to be worth in the order of $1 billion.

5 There is one matter we should emphasise at the outset. Save for Chameleon Mining NL, the principal corporate actors have changed their names on one or more occasions. For ease in exposition, we have given each company a single name in these reasons. Annexure 1 to the reasons lists the principal corporate actors and their relevant directors/officers for present purposes and identifies the various corporate name changes.

# I. OVERVIEW

6 The companies at the centre of the matter are Chameleon (the appellant in the proceedings), Murchison and Winterfall (the name we will give to Crosslands Resources Ltd, the second respondent and second cross-appellant). The acquisition of the Iron Jack Tenements was effected through Winterfall which was in turn the subject of a reverse takeover by Murchison.

7 Chameleon’s primary claims were that three of its former appointed directors were guilty both of breaches of their fiduciary duties to the company and of contraventions of sections 180, 181 and 182 of the *Corporations Act 2001*. We need only refer to two of them, Mr Barnes and Mr Roberts. Mr Barnes alone was sued by Chameleon. The claims made against him, as also those against Pinnacle (a company he owned and controlled) were settled without admission of liability on terms requiring them to pay $6 million to Chameleon.

8 Chameleon also made claims for breach of fiduciary duty and for contraventions of the Corporations Act against Phillip Grimaldi who was alleged (a) to have been a de facto director of Chameleon for the purposes of s 9(b)(i) of the Act or else an “officer” of the company and/or (b) to have been, relevantly, in a fiduciary relationship with it for some purposes. It should be emphasised in passing that Mr Grimaldi was as well a director of, and at all relevant times the controlling mind of, and moving force in, Murchison. Further complicating matters, he was also a director of several of Chameleon’s subsidiary companies, one of which was said to have been a consultant for Chameleon. The trial judge’s findings favourable to Chameleon on its claims are at the forefront of Mr Grimaldi’s appeal. Not only his own liability but also, as the case has been fought, that of Murchison turn on those findings. To anticipate our own conclusions, we are satisfied that (i) Mr Grimaldi was both a director and an officer of Chameleon for Corporations Act purposes; (ii) he was guilty of contraventions of ss 181 and 182 of the Act; (iii) he was in any event in a fiduciary relationship with Chameleon for certain purposes; and (iv) he breached the fiduciary duty he so owed Chameleon.

9 While there was a range of transactions and dealings in which breaches of duty were alleged against Barnes and Grimaldi, only two are of present moment. Though discrete, they converged in their consequences. The proper characterisation of these dealings and of their significance is central both to Grimaldi’s appeal and Murchison’s cross-appeal and Notice of Contention.

### (i) The “Cadetta Transaction”

10 This involved the acquisition by Chameleon of gold mining tenements in consideration for an issue of its shares. The purchase was negotiated by Mr Barnes and Mr Grimaldi for Chameleon. The share issue included 5 million shares for Murchison for no consideration. It was characterised by the trial judge as a “commission” payable to Mr Grimaldi (or at his direction). It was a benefit obtained by him by reason of his fiduciary position with Chameleon but without the informed consent of the company.

11 His Honour’s “commission” finding is challenged in both the Grimaldi appeal and the Murchison cross-appeal. We agree with the trial judge’s finding of breach of fiduciary duty.

12 What connects the Cadetta transaction to the second set of dealings to be considered is that immediately after the allotment of the shares to Murchison, Grimaldi arranged for their sale. The proceeds were then provided by Murchison to Winterfall. Murchison had previously entered into an agreement with Winterfall to pay it $350,000 which Winterfall required to meet its obligations to the vendors of the Iron Jack Tenements which it had previously contracted to buy. It is important to notice that at this time both Winterfall and Murchison had a desperate need of funds to meet their respective obligations.

### (ii) The Winterfall/Iron Jack Agreement; the Murchison/Winterfall Agreement; and the Chameleon Share Placement

13 These were sequential transactions. In February 2004 Winterfall entered into an agreement with a number of persons and companies to buy the Iron Jack Tenements. The purchase price was to be paid in instalments. Neither the company nor its principal shareholder and director, a Mr Zuks, had the money to pay the second instalment. Mr Barnes and Mr Grimaldi then approached Zuks (a person known to both of them) about the possibility of Murchison acquiring an interest in the Iron Jack Project. In May 2004 the two companies signed Heads of Agreement under which (a) Murchison agreed to pay Winterfall $350,000 (which both parties knew was required to pay the Iron Jack Vendors); and (b) Murchison was later to effect a “reverse takeover” of Winterfall with Mr Zuks and his partners receiving 40 per cent of the issued capital of Murchison. Murchison failed to pay the sum due on 30 May 2004. In early June an Addendum to the Heads of Agreement was executed. By this time Mr Grimaldi and Mr Barnes had raised the question of a spotter’s fee in the form of shares in Winterfall. Zuks agreed to this. As the primary judge indicated, there were no benefits in any of this for Chameleon.

14 In late June 2004 Grimaldi suggested Chameleon make a share placement for a capital raising of $360,000. Its stated purpose was for exploration at a gold mine. At this time Chameleon had little cash. In early July Mr Barnes and/or Mr Grimaldi told Mr Zuks that some of the payments due to the Iron Jack Vendors were going to be made by Chameleon. During July Mr Barnes drew cheques on Chameleon’s bank account for $56,250 and $96,500. Each was payable to an Iron Jack Vendor. As the trial judge held, having regard to Chameleon’s financial position, the only possible source of funds was from the capital raising which Mr Grimaldi was arranging on Chameleon’s behalf.

15 Ultimately, Murchison succeeded in meeting its obligations under its agreement with Winterfall. It did so by raising funds from various sources but the two cheques totalling $152,750 obtained from Chameleon comprised more than 40 per cent of the funding it needed to meet the crucial instalment.

16 Winterfall in turn was able to meet its obligations to the Iron Jack Vendors. It later acquired the tenements. Murchison’s reverse takeover of Winterfall was effected on 11 November 2004. The shareholders of Winterfall received a total of 80 million shares and more than 30 million options in Murchison in exchange for their shares in Winterfall. Ten million of those shares and 12 million options were issued for the benefit of Mr Barnes and Mr Grimaldi in exchange for the 10 million shares which had been allotted to them in Winterfall, as their “spotter’s fee”.

### (iii) The Claims Made and the Conclusions Reached

17 There was much controversy at the trial and on the appeals as to the true character and significance of the payments made by Chameleon. They clearly were made for the benefit of Murchison. The trial judge found that but for the receipt of $277,840 (the cheques and the “Cadetta” share sale moneys) which Murchison obtained through Grimaldi’s and Barnes’ breaches of fiduciary duty, Murchison would not have been able to pay Winterfall; Winterfall’s acquisition of the Iron Jack Tenements would not have been made; and the reverse takeover would not have happened. Murchison and Winterfall contest these matters in their cross-appeal. His Honour rejected the contention that the two cheque payments were loans to Murchison and found they were diversions of Chameleon’s funds to Murchison for the purpose of enabling, or at least assisting, it to acquire for its own benefit and not for Chameleon’s benefit, an interest in the Iron Jack Project through the acquisition of Winterfall. The two advances were procured by Grimaldi and Barnes in circumstances in which they had a direct conflict of duty and interest (by way of the success fee) in the consummation of the acquisition of Winterfall. His Honour found Grimaldi and Barnes both to be in breach of their fiduciary duties to Chameleon and to have contravened s 181(1)(a) and s 181(1)(b) of the Corporations Act. Grimaldi, additionally, was found to have been knowingly concerned in Barnes’ contraventions of ss 181 and 182 of the Corporations Act. It was also found that Mr Grimaldi would have been liable as a fiduciary for procuring the use of Chameleon’s funds for his own benefit even if he was not a director.

18 We agree with the primary judge’s characterisation of the two cheque payments. They were not loans to Murchison but were misappropriations of Chameleon’s funds. We also agree with his Honour’s liability finding against Mr Grimaldi.

19 We likewise agree with the relief granted against Mr Grimaldi although our reasons for doing so are more elaborate than his Honour’s. We have concluded that, in respect of the “spotter’s fee”, he and Mr Barnes obtained, Mr Grimaldi is liable to account *in specie* for such of the 10 million Murchison shares and options (or the product of their exercise) as he continues to hold or to have under his control for his own benefit. He is likewise liable to account for all of the value of, or the profits derived from, the balance of those shares and options. Further, he is liable to pay compensation to Chameleon pursuant to s 1317H of the Corporations Act for the amount of profits he obtained resulting from his contraventions of s 181 and s 182 of the Corporations Act. A number of additional and supplementary orders were also made which it is unnecessary to refer to here.

20 Chameleon’s second group of claims – the *Barnes v Addy* claims – allege the accessorial liabilities of Murchison and of Winterfall for their respective participations in breaches of fiduciary duty and/or breaches of trust by Mr Barnes and Mr Grimaldi. Of the two “limbs” of *Barnes v Addy*,the first makes a third party liable for “knowing receipt” of trust property (or of property held or controlled by another in a fiduciary capacity) if he or she receives it with knowledge that the trustee (or fiduciary) has given or disposed of it to him or her in breach of trust (or of fiduciary duty). The second, the “knowing assistance” limb, renders a third party liable who assists with knowledge in a dishonest or fraudulent design on the part of a trustee (or a fiduciary).

21 Liability was alleged – and found – against Murchison in respect both of the Cadetta transaction in which it was said to be both a knowing recipient and a knowing assistant in relation to the 5 million shares issued to it. It equally was alleged, and was found, to be liable as a knowing recipient and a knowing assistant in relation to the two Chameleon cheques drawn by Mr Barnes. Additionally Murchison was held liable for aiding and abetting the contraventions of ss 181 and 182 of the Corporations Act committed by Mr Barnes. Murchison accepted that Grimaldi was at the relevant times its controlling mind and that his knowledge was to be attributed to it, save where that knowledge was of his own fraud on it. It claimed at trial and has reiterated in its Notice of Contention that the 10 million Murchison shares received by Barnes and Grimaldi on the reverse take-over were a fraud on it.

22 The claim against Winterfall was that it was the “knowing recipient” of the Chameleon cheque moneys. His Honour found Mr Zuks knew that Barnes was a director of Chameleon and that Grimaldi was a director of Murchison and he knew in particular of Barnes’ conflict of duty and interest (arising from the “spotter’s fee” arrangement). The knowledge he had in the circumstances was sufficient to attract recipient liability. This conclusion is one of the grounds of Winterfall’s cross-appeal.

23 To anticipate matters, we agree with his Honour’s findings and his liability conclusions.

24 Much the most contentious part of the trial judge’s conclusion – and this is reflected most prominently in Chameleon’s grounds of appeal – were his Honour’s reasons and orders in relation to remedy. First, relief against Murchison and Winterfall. Rejecting Chameleon’s primary claim, the trial judge refused to impose a constructive trust over the entirety of, or any percentage of Murchison’s shareholding in Winterfall arising out of its use of the Chameleon cheques and the Cadetta 5 million shares. He likewise did not hold it liable as a constructive trustee of the 10 million shares Grimaldi and Barnes received as a spotter’s fee and which Murchison obtained in the reverse takeover. His Honour appears not to have considered separately Chameleon’s claim to proprietary relief against Winterfall arising from its use of the Chameleon cheques in the purchase of the Iron Jack Tenements. Also rejected was Chameleon’s claim that, as a knowing assistant, Murchison was jointly liable with Grimaldi to account to Chameleon for any profits made by Grimaldi in breach of fiduciary duty. All of these matters are in issue in Chameleon’s appeal.

25 The relief actually ordered against Murchison was personal in nature. It was cast in the alternative, and was so designed as to preclude double recovery. It was in essence that Murchison account for the moneys it received from the Chameleon cheques ($152,750) and the Cadetta shares ($125,090) and for the profits it obtained from the use of those funds. Alternatively, at Chameleon’s election, it was to pay equitable compensation to Chameleon in the amount of $152,750 plus compound interest at mercantile rates. An order for compensation under s 1317H of the Corporations Act was made in respect of Murchison’s participation in contraventions of the Act by the directors but so as not to include double recovery for profits made. Chameleon appeals against aspects of all of these orders. Similar alternative orders were made against Winterfall though only in respect of the Chameleon cheque moneys.

26 We have affirmed in part, and have disagreed in part, with his Honour’s conclusions on the relief which ought be awarded. Our reasons vary considerably from his Honour’s. We agree that proprietary relief against Murchison by way of the imposition of constructive trusts on some or all of the Winterfall shares it derived as a result of its reverse takeover of Winterfall, was properly refused. We also consider that proprietary relief against Winterfall by way of a proportionate interest in the Iron Jack Tenements, on account of the use of Chameleon’s moneys in their acquisition, ought be refused but on discretionary grounds. We would set aside the orders his Honour made for an account of profits against Murchison and Winterfall respectively and remit that matter to his Honour for reconsideration of the orders that should be made. We otherwise affirm the orders made by way of relief, save in relation to the interest awards granted which we would vary so as to require monthly, not annual, rests.

27 Such is the number of grounds of appeal and of contention that, to facilitate exposition, they will be dealt with synoptically in what follows commencing, as in the “Overview”, with the questions whether Grimaldi was a director or officer of Chameleon for Corporations Act purposes and/or a fiduciary of Chameleon who misused his position for his own benefit.

# II. THE CORPORATIONS ACT ISSUE: DE FACTO DIRECTOR OR OFFICER

28 In its pleading Chameleon has claimed in the alternative that Mr Grimaldi acted in one or more of the capacities of director, officer or fiduciary in relation to it from at least January 2004 until about 12 November 2004. The primary judge concluded Grimaldi was a de facto director for the purposes of the Corporations Act’s s 9(b)(i) definition of “director”. His Honour did not, in consequence, need to answer whether he was a shadow director within the s 9(b)(ii) definition of a director, or was an “officer” within the s 9(b)(i) and (ii) definition of that term. It was nonetheless indicated that there was “substantial force” in the proposition that he was an “officer”.

29 On the first day of the hearing leave was given to Chameleon to amend its Notice of Contention so as to assert that if Mr Grimaldi was not found to be a de facto director, then the trial judge should have found he was an “officer” and was liable thereby. Our reasons for giving leave are set out below: “Procedural and Pleading Matters”. As will later become apparent, the raising of the “officer” question brings more sharply into focus the policy and purposes of the Corporations Act in holding directors and officers liable in a case such as the present.

30 We should also indicate that on the second day of the appeal Mr Grimaldi unsuccessfully applied for leave further to amend his Notice of Appeal to include the ground that the trial judge had gone outside the pleadings in deciding the de facto director case. Our reasons for refusing leave are also to be found below: “Procedural and Pleading Matters”.

31 Grounds 1 and 2 of the Grimaldi appeal challenge the conclusion that he was a de facto director of Chameleon.

## 1. The Legislative Regime

32 Unlike s 155(1) of the UK *Companies Act 2006*, s 201B(1) of the Corporations Act provides that “[o]nly an individual … may be appointed as a director”. While this legislative language focuses immediately and understandably on the usual process by which a person becomes a director, ie appointment: but cf s 117(2)(d); we consider that the subsection should be construed to apply to a director howsoever that person becomes a director. The manifest purpose of the section is to prevent a corporation from being a director – a prohibition to be found in some number of jurisdictions: see Mortimore QC ed, *Company Directors*, 3.02. The Act’s definition of “director”, as will be seen, extends to a person who, though not appointed as a director, nonetheless assumes to act in the position of a director. Accordingly we consider the words “be appointed as” were not intended to be words of limitation but rather having regard to the purpose of the provision in its context, they signify no more than would have been the case had only the word “be” been used, ie only an individual “may *be* a director”.

33 We have needed to emphasise this because of the use Chameleon made of corporate “consultants” (which were the separate corporate vehicles of some of its directors) in the conduct and management of its affairs.

34 The current definitions of “director” and “officer” have a provenance in Australia’s corporation’s legislation which illuminates how these terms should be interpreted. Two related themes are evident for present purposes. The first is the definitions of “director” and “officer” have been contrived so as to enlarge the classes of persons concerned in the management and affairs of a corporation, upon whom legislative standards and liabilities ought be imposed. The second is the progressive integration of the standards and liabilities of “officers” with those of directors. The legislative policy of protection of corporations and of those who deal with them from the consequences of the conduct of those who participate significantly in a corporation’s affairs is clearly evident in these developments, even if the desirable scope of that protection remains contentious: see Corporations and Markets Advisory Committee Report, *Corporate Duties Below Board Level* (2006).

35 The State legislation – the *Companies Act 1961* – was both a catalyst to, and a precursor of, the above developments. It was notable for its s 5 definitions of “director” and “officer” and for its early partial integration of the liabilities of “directors” and “officers” in s 124. First, the definitions. “Director” was defined as including:

… any person occupying the position of director of a corporation by whatever name called and includes a person in accordance with whose directions or instructions the directors of a corporation are accustomed to act.

The second part of this definition refers to what are known as “shadow directors”. Such a shadow director provision subsists to this day. Its terms will not be repeated hereafter as it has no particular significance in the appeals. What is of present interest is the first part of the definition. Until the decision of the High Court in *Corporate Affairs Commission v Drysdale* (1978) 141 CLR 236 (“*Drysdale*”), the view taken of it was that it referred to persons who occupied a position to which were attached the powers and obligations the Companies Act attached to a “director”, but who were differently described under the company’s constitution or governing law: eg *Harris v S* (1976) 2 ACLR 51 at 54 and 71; *Corporate Affairs Commission v Drysdale* at 243 and 248. So, to be guilty of an offence under the director’s duty provision in s 124 of the Act, the person in question had to *hold* the “office” of director: *R v Drysdale* (1978) 3 ACLR 680 at 684-685.

36 While the High Court’s decision in *Drysdale* (reversing that of the New South Wales Court of Criminal Appeal) was not, in the event, concerned directly with the s 5 “director” definition, it altered significantly contemporary understanding of who could be said to be a director for the purposes of director’s duties provisions. It was held that “de facto directors” were directors.

37 At issue in *Drysdale* was whether a person whose appointment as director was terminated, but who thereafter continued both to occupy the office (albeit without lawful authority) and to discharge its duties, could be prosecuted for breach of the duties of honesty and diligence imposed on a “director” by s 124(1) of the Act. The judges held that the provision applied not only to persons lawfully in office but also to persons (a) whose appointment was defective or otherwise invalid but who nonetheless exercised the office; (b) who held over after their appointment came to an end; or (c) seemingly, who occupied the office as a usurper (or director *de son tort*): see further on usurpers *Revenue and Customs Commissioners v Holland* [2010] 1 WLR 2793 at [82] and *Buzzle Operations Pty Ltd (in liq) v Apple Computer Australia Pty Ltd* [2011] NSWCA 109 at [219]-[222]. Such were de facto directors. In reaching this conclusion, it is apparent that the concept of an “*office*” was integral to the judges’ reasoning. A de facto director was a person who did not have, or no longer had, lawful authority so to do, but who nonetheless *occupied* the office of director and discharged the duties attaching to that office: see esp at 242-243 per Mason J; 245 per Murphy J. Observations of Mason J illustrate this and have had enduring significance on the definition of a de facto officer. Having referred to Lindley LJ’s observation in *In re Western Counties Steam Bakeries & Milling Co* [1897] 1 Ch 617 at 627 that “to be an officer there must be an office” – ie a recognised position with rights and duties attached to it – Mason J continued (at 242):

The words of s 124(1) assume that the person in question *occupies an office* (“his office”) and that there are functions (“duties”) attaching to that office which he is discharging. I say “occupies” rather than “holds” because the first part of the definition of “director” makes it clear that a director is a person who occupies rather than holds an office … To say that a person occupies a position or office is to say something more than that he holds the position or office. The first statement denotes one who acts in the position, with or without lawful authority; the second denotes one who is the lawful holder of the office.

(Emphasis added.)

38 To be noted because of its relevance in this appeal is that the High Court did not address directly whether a person performing some only of the functions of a director could be said to occupy the position of director.

39 The remaining comments to be made about the 1961 Act are, first, that it defined “officer” as an omnibus term to include for present purposes “any director, secretary and employee”; secondly, while still differentiating between “directors” and “officers” for certain purposes, s 124 adopted the expedient of making certain liabilities and duties those of “officers” as such (so including directors): see eg s 124(2) (the misuse of information provision); see generally on the provenance of s 124, Wallace and Young, *Australian Company Law and Practice*, 393-394 (1965).

40 Turning to the 1981 Companies Act, there were changes and additions made to the definition of “director” and “officer”. Reference has already been made to the limited view taken by the NSW Court of Criminal Appeal of the s 5 definition of “director”. In *R v Drysdale*, Street CJ in responding (at 684-685) to the submission by the Crown that it would be “most unfortunate” to construe s 5 so as to permit the appellant to go free given his actions, observed:

… if the legislature wishes to bring within its purview persons who act as directors as well as those who hold office as such, then the relevant sections should be framed to this effect.

41 The legislative response, as revealed by the Explanatory Memorandum to the Companies Bill 1980(at [34]), took the Court of Criminal Appeal’s decision into account. The new s 5 definition, insofar as presently relevant, continued the existing shadow director provision, but modified the old definition as follows:

(a) any person occupying *or acting in* the position of director of the corporation, by whatever name called *and whether or not validly appointed to occupy or duly authorized to act in the position.*

(Emphasis added.)

This draws upon, and is an obvious elaboration of, the language and concepts used by Mason J in the extract from *Drysdale* which is quoted above. As will later be seen, while the definition of director has subsequently been disaggregated and its language simplified, the essential meaning of it as it relates to de facto directors has not been altered since 1981.

42 Section 5 retained an amended definition of “officer”. It now referred, for present purposes, to “a director, secretary, *executive officer* or employee of the corporation”. A new definition, that of “executive officer”, was added. The term meant, in relation to a corporation:

… any person, by whatever name called and whether or not he is a director of the corporation, who is concerned, or takes part, in the management of the corporation.

This addition heralded a new concern with senior officers in companies beyond directors.

43 Part V Division 2 of the 1981 Act (“Directors and other Officers”) accelerated the process of conflating the duties and liabilities of directors and of significant senior officers for some purposes. Section 229 (“Duty and liability of officers”) as now cast, imposed its standards and prohibitions on “an officer” or “an officer or employee”. But “officer” for the purposes of this section meant “a director, secretary or executive officer of the corporation”: s 229(5). As Professor Ford noted, by making the statutory standards for executive officers the same as for directors, the Act accommodated the managerial revolution, ie the phenomenon that many companies were managed not by, but under the direction of, the board: *Company Law*, [1541] (4th ed, 1986). The one matter to note in passing because of its significance to what was to come was that the definition of “executive officer” gave rise in first instance decisions to what have been described as “wide”: *Corporate Affairs Commission (Vic) v Bracht* [1989] VR 821; and “narrow”: *Holpitt Pty Ltd v Swaab* (1992) 33 FCR 474; views of the compass of the definition: see *Ford’s Principles of Corporations Law*, vol 1, 8073-8074; see also CAMAC, *Corporate Duties Below Board Level*, Appendix 1.

44 The Corporations Law regime introduced in 1991 continued both the previous s 5 definitions of “executive officer” and “officer”: see s 9; and the 1981 modified definition of “director”: see s 60. Section 232 of the Corporations Law, likewise continued the conflation of the duties and liabilities of directors and officers evidenced in s 229 of the 1981 Act.

45 In 1999 a new definition of “officer”, but not of “executive officer”, was enacted in the *Corporate Law Economic Reform Program Act 1999* (Cth) (“the CLERP Act”). It provided that, for present purposes, an “officer” meant:

(a) a director or secretary of the corporation; or

(b) a person:

(i) who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or

(ii) who has the capacity to affect significantly the corporation’s financial standing; or

(iii) in accordance with whose instructions or wishes the directors of the corporation are accustomed to act (excluding advice given by the person in the proper performance of functions attaching to the person’s professional capacity or their business relationship with the directors or the corporation).

It is on the provision in these terms, now replicated in the *Corporations Act 2001*,that Chameleon’s Notice of Contention relies. What is notable in the definition is that the focus of subpara (b) is essentially functional in character, its concern being with the stipulated quality of a person’s actions or capacity and their effects. The contemporary view was that the difference between the criteria now specified in subpara (b) and that earlier adopted in the definition of “executive officer” was not intended to change the class of persons regulated by the new definition: see CAMAC Report, *Corporate Duties Below Board Level*, 29-30. However, the Court of Appeal of New South Wales has rightly warned in relation to these very provisions that “cases on differently expressed predecessor provisions must be approached with care”: *Morley v Australian Securities and Investments Commission* (2010) 274 ALR 205 at [887]. It also should be emphasised that in subpara (b)(iii) provision is made for a “shadow-officer”, so paralleling the shadow director provision in the definition of “director”.

46 The *Corporations Act 2001* (Cth), while continuing the themes noted of maintaining an expanded definition of “director” and of isolating a group of “officers” who were to be treated similarly to directors for certain duty and liability purposes, made its own modifications.

47 The s 9(b)(i) definition of “director”, which relates to de facto directors, was simplified but without making any operative change to the 1981 definition. A “director” for present purposes means:

unless the contrary intention appears, a person who is not validly appointed as a director if:

(i) *they act in the position of a director*.

(Emphasis added.)

48 The definition of “officer” in s 9 is, for present purposes, in the same terms as were used in the CLERP Act and encompassed both directors and certain other officers. Though a separate definition of “officer” reflecting that in s 5 of the 1981 Act was retained until its repeal in 2004: see the 2001 Act, s 82A; it is the s 9 definition which is the operative one for the purposes of Chapter 2D (“Officers and Employees”) of the Act and in particular for the duties “of a director or other officer” contained in ss 180, 181 and 182: see s 179(2). These are the provisions Chameleon alleges were contravened by Grimaldi and Barnes. The final section requiring mention is s 185. Mirroring the approach of precursor legislation, it provides that ss 180-184 have effect in addition to any rule of law relating to the duty or liability of a person because of their office or employment in relation to a corporation. Importantly any fiduciary liability to Chameleon that Grimaldi may have as a director or officer is saved by this section.

49 One very obvious conclusion emerges from this sketch of Corporations Law history. In this case, given the contraventions of the Act that have been pleaded, no great purpose will be served in determining whether Mr Grimaldi was a director rather than just an officer. We emphasise this as much attention was given in Mr Grimaldi’s submissions to what makes a person a “director” for the purposes of the s 9 definition.

50 Before turning to the meaning of the s 9 formula in its context, it is necessary to make a brief digression into English law because of the manner in which Mr Grimaldi’s case has been presented.

## 2. The English Authorities

51 It would seem that, at trial, there was very little dispute as to the legal principles as they applied to any of the matters in issue. His Honour in consequence drew heavily upon Chameleon’s written submissions though taking account of observations in the respondents’ submissions. On the issue of de facto directors he thus relied upon contemporary Australian authority and in particular the decision of Madgwick J in *Deputy Commissioner of Taxation v Austin* (1998) 28 ACSR 565 (“*Austin*”) which is considered below. Though Mr Grimaldi’s Notice of Appeal alleged the trial judge misapplied the test and/or applied the wrong test for deciding whether a person was a de facto director, it was only in Mr Grimaldi’s reply submissions that the dimensions of the errors ascribed his Honour became apparent. Referring there almost exclusively to English authority – and most notably to the decision of the Supreme Court in *Revenue and Customs Commissioners v Holland* – four propositions were advanced by which it was said that the correctness of the trial judge’s conclusions should be tested. These were said to flow primarily from *Holland’s* case.

52 They were:

(1) to conclude that a person has acted in the position of a director of a corporation, it is necessary to establish that the person has assumed the rights and powers of the position of a director in that corporation to the extent that the person must be taken to have also assumed the duties and responsibilities of that position.

(2) having regard to the definitions of “director” and “officer” in s 9 CA, it is necessary to find that the person has undertaken functions in relation to the corporation which could properly be discharged only by a director.

(3) if the person is also appointed to another position in relation to a transaction, it is necessary to conclude that the relevant acts are not within the ambit of the discharge of his or her duty in that other position before it can be concluded that the person was acting in the position of a director of the corporation in relation to the transaction.

(4) the perception of outsiders who deal with the corporation is only relevant to the extent to which the corporation has held out the person as having acted in the position of director.

It was this change of course (ultimately acquiesced in by Chameleon) which accounts for this digression into English law.

53 We preface what we have to say with the observation that while persuasive authority of another jurisdiction is to be treated with the respect it deserves, we necessarily must adhere to the course of our own legal development. This last is of quite some present significance. It is clear that the statutory environment in which the de facto director issue is played out in the UK differs in important respects from our own. We would mark three matters in particular. *First,* because it is essential in understanding *Holland’s* case, UK law permits a company to be a director although, since the *Companies Act 2006* (UK), there must now be at least one director who is a natural person: s 155(1). In contrast, as already noted, only a natural person can be a company director in Australia: Corporations Act, s 201B(1). The central issue in *Holland*, which could not arise in Australia but which accounted for the 3-2 split in the Supreme Court, was whether the natural person director of a corporate director when acting entirely within the scope of his duties to that company, could be found because of his actions to be a de facto director of the company of which the corporate director was the sole director. It was held he could not.

54  *Secondly,* the long standing UK definition of a “director” is that the term “director” “includes any person occupying the position of director, by whatever name called”: *Companies Act 2006*, s 250; see also eg *Companies Act 1929* (UK) s 380. “Shadow director” is separately defined: *Companies Act 2006*, s 251. Unlike in Australia, the definitions of “director” and, importantly, “officer” have not been the subject of regular legislative attention over the last 30 years.

55  *Thirdly*, the director’s duties provisions of UK companies legislation, unlike Australia’s “Officer’s duties” provisions, drew a sharp distinction between directors (to whom express general provisions apply) and other “officers” for whom only limited, specific provisions seem to have been made: see Mortimore QC, *Company Directors*, 3.58-3.62 (2009); Gower and Davies, *Principles of Modern Company Law*, 16-9 (8th ed, 2008). There were not, and are not, “director or other officer” provisions similar to ss 180-183 of the Corporations Act. For the purposes of attracting statutory liabilities on account of a person’s involvement in the management of the affairs of a company, a much sharper distinction has to be drawn in the UK between directors and other officers than is the case in Australia and this, as will be seen below, because of the availability in Australia but not in the UK of the “other officer” provisions in circumstances like the present: see esp *In re Hydrodam (Corby) Ltd* [1994] 2 BCLC 180 at 183.

56 A similar difference is apparent when one compares the provisions of the *Company Directors Disqualification Act 1986* (UK) with the provisions of Part 2D.6 (“Disqualification from Managing Corporations”) of the Corporations Act. The principal, and apparently most utilised: see Gower at 10-2; provision of the former (s 6) applies only to “directors” and “shadow directors”: see generally, Mortimore QC, 28.112 ff. Automatic disqualification apart, the centrepiece of Australia’s disqualification provisions is s 206C which empowers a court to disqualify a person against whom a declaration has been made that that person has contravened a corporation/scheme civil penalty provision. Such provisions include the “director or other officer” duties and liabilities of ss 180-183 of the Act: see generally *Ford’s Principles of Corporations Law*, vol 1, 7209-7216.

57 The significance of the above is evident in comments made by Lord Collins in *Holland* (at [54]):

For almost 150 years de facto directors in English law were persons who had been appointed as directors, but whose appointment was defective, or had come to an end, but who acted or continued to act as directors. There was a *striking judicial innovation* in *In re Lo-Line Electric Motors Ltd* [1988] Ch 477 and *In re Hydrodam (Corby) Ltd* [1994] 2 BCLC 180 (endorsed by the Court of Appeal in *In re Kaytech International plc* [1999] 2 BCLC 351) by which (at the risk of over-simplification) persons who were held to be part of the corporate governance of a company, *even though not directors,* could be treated as directors for the purposes of statutory provisions relating to such matters as wrongful trading by, and *disqualification of, directors*.

(Emphasis added.)

58  *Fourthly*, a distinct matter of emphasis in some of the English cases is the concern for whether the alleged de facto director has assumed such a role (or “responsibility”) in a company and in its governance structure as to justify the imposition on him or her of the particular duty (statutory or fiduciary), liability, or disqualification which would be applicable to a director in the particular circumstances: see eg *Holland*, at [121].

59 We mean no disrespect in commenting that the legislative context of the English decisions on de facto directors so differs from Australia’s, that they should be treated with some reserve. Because of the view we have concerning the present state of Australian law in any event, we do not consider it necessary or profitable to engage upon an extended analysis of the English cases despite the urging of counsel for Mr Grimaldi. Nonetheless we do acknowledge that there are a number of useful lessons to be derived from those cases which for the most part are confirmatory of what is immanent in our own jurisprudence. We note two in particular.

60 The first – and it has been reiterated regularly – is that there is not one single decisive test of when a person will be found to be a de facto director and judges have, for the most part, cautioned against attempting to formulate one: see *Secretary of State for Trade and Industry v Tjolle* [1998] 1 BCLC 333 at 343-345; *Re Kaytech International plc* [1999] 2 BCLC 351 at 423; *Holland*, at [39]. The cases equally demonstrate that generalisations in this area can often require subsequent qualification: see the comments on *In re Hydrodam (Corby) Ltd* [1994] 2 BCLC 180 in *Holland*, at [90] and [106]-[108].

61 Secondly, once the concept of directors had been taken beyond that of persons who have been appointed (albeit ineffectively) to the position of director, or who have held over after their appointment has terminated – the traditional conception of a de facto director: cf *Corporate Affairs Commission v Drysdale* above – and was applied to persons who performed the functions of directors without any appointment whether or not they were held out as directors, several very obvious difficulties arose, as Lord Collins acknowledged in *Holland* at [91]. The distinction between shadow and de facto directors became impossible to maintain as in both instances their real influence in the affairs of a company may be a measure of the actual role they have in it: cf *Re Kaytech International plc*, at 424. Distinctly, to quote Lord Collins (at [91]):

… the courts were confronted with the very difficult problem of identifying what functions were in essence the sole responsibility of a director or board of directors.

We will return to this latter observation below.

## 3. The Applicable Legal Principles

62 In *Drysdale* the High Court found a de facto director could be guilty of a breach of the duty imposed on a “director” by s 124 of the 1961 Act without need to resort to the statutory definition of “director” in s 5 of that Act. While such may well remain the case in relation to contraventions of ss 180-182 of the 2001 Act: *Emanuel Management Pty Ltd (in liq) v Foster’s Brewing Group Ltd* (2003) 178 FLR 1 at [248]-[249]; we will confine what we have to say to the statutory definitions of “director” and “officer” in s 9 of the Act. Section 179(2) makes it abundantly clear the legislative intent was that those definitions were to inform the meaning of those terms as used in ss 180-182.

63 For present purposes a director is a person who is not validly appointed as such if that person “act[s] in the position of a director”: s 9 “director” (b)(i). The following emerges clearly enough from the wording of the definition in its context and from Australian case law.

64 (i) A person may be a director even without any purported appointment of that person to that position at any time. The definition applies as much to a person who is a true usurper of the functions of a director in a company: see eg *Re Valleys Rugby League Football Club Ltd* [1997] 2 QdR 645 at 654; as to a person who takes “an active part in directing the affairs of [a] company” with the acquiescence of de jure directors: eg *Austin & Partners Pty Ltd v Spencer*, SC of NSW, 1 Dec 1998, Windeyer J; see also *International Cat Manufacturing Pty Ltd v Rodrick* [2010] QSC 30.

65 (ii) The formula, “acts in the position of a director”, which mirrors the language of Mason J in *Drysdale* at 242 contemplates that in some degree at least the person concerned, though not appointed a director, has been “doing the work of a director” in that company: cf *In re Western Counties Steam Bakeries and Milling Co* [1897] 1 Ch 617 at 630. Or to put the matter more fully, the person concerned, though not a director de jure, has been acting in a role (or roles) within the company and performing functions one would reasonably expect to have been performed by a director of that company given its circumstances.

66 (iii) The roles and functions so performed will vary with the commercial context, operations and governance structure (to the extent it is operative: see *Mistmorn Pty Ltd (in liq) v Yasseen* (1996) 21 ACSR 173 at 177-178) of the company: *Austin* at 569-570. Their performance by that person may well be at variance with what is permitted by the Act or by the company’s constitution. Nonetheless, whether they suffice in the circumstances to constitute the person a director for the Act’s purposes will often be a question of degree having regard to “the nature of the functions or powers which are exercised and the extent of their exercise”: *Austin*, at 569-570; *Natcomp Technology Australia Pty Ltd v Graiche* [2001] NSWCA 120 esp at [14]-[15]; Re *Valleys Rugby League Football Club Ltd*, at 656.

67 (iv) There is no reason why the relationship of a person with a company may not evolve over time into that of de facto director. It also may be the case that the person only performs the role and functions that constitute him or her a director for a limited period of time: see *Austin*.

68 (v) Whether a person has acted in the position of a director is a question of substance and not simply of how that person has been denominated in, or by, the company: see s 9 “director” (a). The fact that a person has been designated a “consultant” for the performance of functions for a company will not as of course mean that person cannot be found to be a director. Whether or not he or she will be a director will turn on the nature and extent of the functions to be performed (both in and beyond the consultancy) and on the constraints imposed thereon. A limited and specific consultancy is unlikely on its own to be caught by the s 9 definition. Not so, a general and unconstrained one which permitted taking an active part in directing the affairs of the company even if not necessarily on a full-time basis: cf *Mistmorn* at 183 (the references there to *AS Nominees* and to *Antico* seem mistaken). Though we do not consider that the question actually requires determination in this case and thus we do not need to express a concluded view on it, we consider that if a consultant is a corporation and what it does through its own directors or officers results in “acting in the position of a director”, then, and consistently with the policy of s 201B (which requires a director to be a natural person), it will be a question of fact as to which director (or officer) in the consultant company is (or are) the de facto director(s) of the corporation.

69 (vi) Though the point seems not to have been authoritatively settled in Australia, we agree with Lord Collins in *Holland* (at [91]) that, with the extension of the de facto director concept to persons who have never purportedly been appointed director, a rigid distinction between a de facto and a shadow director cannot be maintained. A person’s power or influence over the directors of a company may provide the capacity to secure as of course compliance with his or her wishes or instructions for “shadow director” purposes: see *Australian Securities Commission v AS Nominees Ltd* (1995) 133 ALR 1 at 52-53. But the possession and exercise of such power or influence by a person alleged to be a de facto director may throw direct light on the evaluation of that person’s true position and influence in the affairs of the company. We also consider that like a shadow director whose wishes or instructions need not relate to all facets of the management of the company’s business: see *AS Nominees* at 52; the functions assumed by a de facto director likewise may be limited in their scope: see *Austin*. Nonetheless, as Williams J observed (at 656) in *Re Valleys Rugby League Ltd* there will commonly be the need to determine “how much a person must do before it can be held that such person is occupying or acting in the position of a director”.

70 (vii) It has commonly been said in both Australian and English cases (though it has been disputed by Madgwick J in *Austin*, at 569) that to be a de facto director one must be shown to have assumed or performed functions which only a de jure director or board can properly perform: see eg *Emanuel Management Pty Ltd (in liq) v Foster’s Brewing Group Ltd* at [250]; *Re Valleys Rugby League Football Club Ltd*, 645 at 657; see *In re Hydrodam*, at 182 but note the further elaboration in *Holland*, at [111]; or which are the “sole responsibility” of a director or board: see eg *Holland*, at [91]. This shorthand description of what is required to be established may be understandable, but it has the capacity to mislead in that it suggests that the duties or functions that can only properly be performed by de jure directors – or which are their sole responsibility – are capable of a priori enumeration. This may be possible in relation to those functions required by the Act or by the corporation’s constitution to be performed by directors or by the board (assuming the directors’ power of delegation has not been exercised: see s 198D of the Corporations Act and *Ford’s Principles of Corporations Law*,vol 1 [7.264]). But when one comes to that most fundamental of functions – managing the business of the company – which in a typical “Table A” type company is entrusted to the directors (see Art 73), *a priori* classification has no general utility. As we noted in our earlier discussion of officers, there has long been a spectrum of management practices which can result in a company’s business being managed by the board, under the board, by directors individually, by delegates, by some combination of these, by senior managers, by executive committees, etc. In many instances when one asks what *can only* properly be done by a director (or is the sole responsibility of a director) of a given company, one is actually inquiring whether, in the circumstances of that company, what is being done ought reasonably be regarded as being a responsibility of a director of that company. Or put shortly, was the work done, work for a director of that company? In a given company, this may involve an alleged director in the day-to-day management and business affairs of that company and may require his or her doing many things for reasons of need, expediency or whatever, but which hardly could be said to be things that only a de jure director can properly do: see eg *Mistmorn*, 183. In another corporate setting, the work done may be simply selective and strategic action. In the end what is being asked for is the making of a value judgment about the proper characterisation of what in its context the person in question had been doing.

71 (viii) Because the definition of “officer” includes a person (s 9(b)(i)) who, though not a director, “makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation” or (s 9(b)(ii)) “who has the capacity to affect significantly the corporation’s financial standing”, proof that a person exercises senior management functions, while ordinarily “a necessary condition of acting as a director” (to use Madgwick J’s words in *Austin* at 569) will not necessarily be a sufficient condition: ibid. We would note in relation to this, first, that the Act’s s 9 definition of “senior manager” mirrors exactly that part of the “officer” definition given above; and, secondly, in many cases (of which the present is one), the application of ss 180-183 to a “director or officer” can eliminate the need to differentiate between a de facto director and an officer (de facto or not) who is not a director: for the sharply contrasting situation in the UK see *In re Hydrodam* at 183.

72 (ix) It is unnecessary here to enter the debate on the extent to which the provisions of ss 180-183 had their reach down to “officers” other than directors altered by the repeal of the earlier definition of “executive officer” in favour of the current s 9 definition of “officer”: for a useful survey see generally CAMAC, *Corporate Duties Below Board Level* (2006). We reiterate, though, the caution given in *Morley* in relation to these provisions that “cases on differently expressed predecessor provisions must be approached with care”. However we would emphasise the following about the s 9 definition. First, though the Act’s functional definitions do not refer explicitly to the person acting in an “office” of the corporation, this in our view is implicit in them and is made explicit in other provisions of the Act, eg s 180(1). This said, a person who otherwise satisfies either of the requirements of subparas (b)(i) or (b)(ii) of the definition is likely as a rule to be acting in an office (or position) of the corporation for the purposes of the Act irrespective of whether he or she has been formally appointed to a position in it (ie the person can be a de facto officer) or has been engaged as a “consultant” to perform the functions in question. There is no reason in principle to differentiate between directors and s 9 officers in either of these regards. To do so would be contrary to the clearly manifest purpose of the legislation to extend the Act’s duties and liabilities to persons whose functions and/or capacities within a corporation extend to those described in subparas (b)(i) and (b)(ii) of the definition.

73 (x) The subpara (b)(i) requirement that a person makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation, does not mean that that person does so as one “in ultimate control” or that the decision makers are not subject to the direction and control of the board: *Morley* at [888]. As was said in *Morley* (at [893]):

The definition refers to participation in making decisions of a particular character. It does not prescribe that the decisions are made by the board, and it may be that a management decision to present a highly significant proposal will suffice; but wherever the decisions be found, the test is participation in their making. Participation is more than administrative arrangement, and there must be a real contribution from the postulated participation to the making of the decisions, but beyond that it is a question of fact.

Likewise the subpara (b)(ii) requirement that a person has the capacity to affect significantly the corporation’s financial standing refers to the character properly to be attributed to that person’s capacity in the circumstances. It may arise from the extent of that person’s participation in investment decisions or financial commitments made, from the dimensions of a decision or decisions, from the nature of that person’s participation in the control and direction of the affairs of the corporation, etc: cf *Australian Securities and Investments Commission v Adler* (2002) 168 FLR 253 (“ASIC v Adler”) at [74]. The question again is one of fact.

74 There are three additional matters upon which we should make some observations. The first is this. That a company has an active director or directors apart from the alleged de facto director, or has a properly constituted and apparently “functioning” board (whatever that might mean in a given setting), does not preclude a finding that the person in question was a director: see eg *Mistmorn* (one active director); *Austin & Partners* (functioning board); *International Cat Manufacturing* (one de jure director). That person’s activities may, for example, have simply been accepted as of course or acquiesced in by the de jure director(s) whatever their formal powers may have been to disavow them. Or they may be acting together “on an equal footing … in directing the affairs of the company”: *Re Richborough Furniture Ltd* [1996] 1 BCLC 507 at 524; *Holland* at [91]; by for example, sharing (formally or otherwise) responsibilities for the company’s affairs. All this illustrates is that the differing contexts in which the issue can arise can contrive what may or may not be some of the relevant considerations of which account should be taken.

75 Secondly, whether the company itself has held the person out as a director will itself be a relevant but not decisive consideration: see *Re Valleys Rugby League Football Club Ltd*. Similarly, in our view, perceptions of those dealing with the company that the person was a director can themselves be of some contextual evidentiary significance. This is more likely to be so where those perceptions were independently formed, reasonable in the circumstances and support the appearance that the person was acting “under colour of office”. That concept has a long history in the law of de facto officers: see Dixon, “De Facto Officers” (1938) 1 Res Judicatae 285 at 291. Third party perceptions, though, cannot change the reality of the true character of the position in which the person acts: *Re Richborough Furniture*, at 526.

76 Thirdly, although only of oblique significance to the present matter, we need for other purposes to make some reference to the position of a secretary of a company and its functions and it is convenient to do so here: on which see generally *Ford’s Principles of Corporations Law*, vol 1, [13.100]. A secretary has record-keeping responsibilities and a growing list of statutory duties relating in the main to ensuring compliance with formalities prescribed by the Corporations Act, for example, having a registered office, lodgement of notices with ASIC, etc: see s 188. Traditionally, the position was regarded as a humble one with little authority attached to it: eg *Barnett v South London Tramways Co* (1887) 18 QBD 815 esp at 817; but has evolved over time to become that of the chief administrative officer of a corporation: see *Panorama Developments (Guildford) Ltd v Fidelis Furnishing Fabrics Ltd* [1971] 2 QB 711 at 717; and its “natural mouthpiece”: *Donato v Legion Cabs (Trading) Cooperative Society Ltd* [1966] 2 NSWR 583 at 588; and see Lindgren, “Development of the Power of the Modern Company Secretary to Bind his Company” (1972) 46 ALJ 385. While it is now the case that a secretary has authority to enter into contracts for the purposes of a corporation’s administration, it remains the case that, without the board’s authorisation, the secretary has no authority to participate in the management of the company’s affairs.

## 4. The Relevant Companies

77 A brief description is needed of the three principal companies, and their relevant directors said to be implicated in the de facto director/officer question.

78 The first is *Chameleon*. This was a “start up” junior mining explorer with very limited funds. Its primary interest appears to have been in gold. It was incorporated in late 2001 to consolidate a portfolio of exploration areas in the Kimberley and later certain Fijian mining interests. The trial judge made the important and, on the material before us, accurate finding that its “affairs were managed in an informal (indeed unorthodox) manner”. It had four de jure directors at all presently relevant times. Only three need be noted here: Mr Barnes (who was a trained and skilled geologist), whose skills Chameleon wanted; Landan Roberts, (an accountant); and Manuel Nicholas Dondas who was the Chairman of the Board and who apart from attending board meetings and signing documents played no active part in the events to be considered. We would note in passing that Mr Barnes had a personal company, Pinnacle Nominees Pty Ltd, which had various dealings with Chameleon and Murchison (some referred to in these reasons) including, apparently, an agreement in late 2001 to provide services to Chameleon for a consideration of ordinary shares.

79  *Chameleon Ventures Ltd*, was a company controlled by Mr Roberts and his associates. Its relevant directors were Mr Roberts and Mr Grimaldi. These two first met in September 2001. They developed a good relationship and later shared accommodation in Sydney where they worked together. Chameleon Ventures acted as a consultant for Chameleon. The significance of this is considered below and is in issue in the appeal.

80  *Murchison*, initially a junior exploration company interested in iron ore tenements, was effectively Mr Grimaldi’s company by mid-2003. He had almost half of its over 16 million shares. He was at all relevant times the controlling mind of Murchison. Mr Grimaldi and Mr Barnes seem to have worked in tandem arranging deals between their respective companies. Murchison also appears to have agreed, on occasion, to provide specific services to Chameleon.

81 Finally, we would note that the parties’ agreed chronology (which was appended to his Honour’s reasons) showed that from about February 2002, Mr Grimaldi became increasingly involved in the plan for Chameleon to establish a new mining venture. He became a regular participant at discussions and meetings about Chameleon and attended frequently at Chameleon’s office. As the trial judge indicated, he played a significant role in Chameleon’s acquisition of the Kimberley prospects and in the acquisition by it of the Fiji properties.

## 5. The Trial Judge’s Findings and Mr Grimaldi’s Appeal

82 The case put at trial was that Mr Grimaldi had a “pervasive” role in most of Chameleon’s activities from about February 2002 to about November 2004. Chameleon’s written submissions listed 22 instances in which Mr Grimaldi was said to have been involved in the company’s affairs during that period. These instances were said to demonstrate that Mr Grimaldi directed Chameleon’s corporate strategy in a number of significant matters. The submissions then listed 11 instances in which he was said to have involved himself in the day-to-day running of the company.

83 His Honour found that some of the actions referred to were not actions of Mr Grimaldi qua director. These included some of the statements he made to Mr Roberts to do things which were explicable by their friendship and were in the nature of counselling and advice to Mr Roberts. Others grew out of his involvement on behalf of Murchison in the New Millenium transaction (which is not of present concern) which conferred benefits on Murchison and himself. His personal interest explained the steps taken to influence Chameleon to adopt and implement that transaction.

84 Nevertheless, the trial judge concluded (at Reasons [151]) there were “a large number of other actions carried out by Mr Grimaldi which … constitute[d] the performance of tasks that would typically be expected of a director of Chameleon”. That view was reached taking into account the company’s circumstances, its very limited funds and the “informal (indeed unorthodox) manner” in which its affairs were managed. The Agreed Chronology provides ample justification for his Honour’s conclusion.

85 His Honour then dealt with eleven discrete matters in almost all of which the actions taken by Mr Grimaldi were ones which he considered one would ordinarily have expected to be undertaken by a director. His Honour dealt shortly with each of these, for the most part briefly describing what was done and his conclusions thereon. Almost all of those conclusions have been put in issue in the Grimaldi appeal and have been analysed in some depth. It is necessary that we deal with them individually, but before so doing we should make the following comments by way of preface.

86 We would note that the oral evidence advanced by Chameleon concerning Mr Grimaldi was given by Mr Roberts. There were some aspects of Mr Roberts’ evidence that the court would not accept. These seem to have had little to do with Mr Grimaldi. This said, his Honour’s conclusions in the 11 matters to be referred to below were based principally on documentary evidence.

87 As we read his Honour’s reasons, we do not understand that his de facto director finding resulted simply from his aggregation of these particular, individual instances. We refer again to his “large number of … actions” comment above. In our view, fairly read, his Honour used the “specific actions” as being emblematic and supportive of his overall conclusion on Mr Grimaldi’s status. They were not each individually essential to it.

88 We would also emphasise that in this case the trial judge had the real advantage (a) of hearing the evidence; (b) of appreciating the significance of not hearing the evidence of those who could have given it – this case did take a “dramatic turn” in this regard with the trial judge being informed that the Chairman of Chameleon, Mr Dondas, would not be called by Barnes and Murchison on the day he was scheduled to give evidence, Mr Barnes having made the decision not to give evidence as also had Mr Grimaldi; and (c) of being able to discern in the narrative of the proceeding the interrelationships and cumulative effects and significance of the matters revealed. In this case the trial judge’s advantage cannot be underestimated especially when contrasted with the reconstruction in which we have had to engage in the appellate process.

89 We will consider in turn the 11 actions with which his Honour dealt. We preface this by noting that our consideration of them provides an integral part of our response to Grounds 1 and 2 of the grounds of appeal.

### (1) Acquiring the Fijian properties: Mr Grimaldi’s negotiation for Chameleon’s acquisition of the Fijian mining interests.

90 On 16 May 2002 the Chameleon board authorised Mr Grimaldi without any apparent limitation to negotiate and to prepare draft agreements for this purchase. The negotiations were completed in July 2002. His Honour’s conclusion was that it was open to him to find that this was a function which would ordinarily be undertaken by the directors. It was a fundamental part of the rationale for the business operations of Chameleon; it involved the exercise of a discretion as to the form and amount of the consideration to be provided (in the event it was the issue of over 18 million shares and 5 million options); and was not one which would ordinarily be delegated to a person who was not a director.

91 The Grimaldi contention on the appeal invites us to infer that (i) because Mr Grimaldi was to prepare drafts, he had no authority to bind; (ii) as the consideration agreed was a share issue, a board resolution was required; and (iii) (though there is no direct evidence of this) the transaction was considered at a 9 July board meeting (at which Mr Grimaldi was present by invitation), the minutes merely recording that the Chairman would call a meeting of shareholders to ratify purchases of assets (presumably including the Fijian properties) and agree issues of shares in acquiring the assets (presumably because these involved “related party” transactions). The companies of a then Chameleon director, Mr McLennan, were the vendors of the Fijian interests.

92 We will give our own views on Chameleon’s board below. We agree with his Honour’s characterisation of Mr Grimaldi’s role in the matter. He may not have had the capacity to bind the company, but in having unconstrained authority to negotiate a contract so significant to Chameleon, he was being entrusted with the work of a director of Chameleon. That he could not formally bind the company does not detract from the significance of what he was authorised to do. Neither does the need to make a share issue to give effect to what he negotiated. In any event, his actions would be consistent with those of an “officer” of Chameleon for the purposes of subpara (b)(i) of the Act’s s 9 definition and probably subpara 9(b)(ii). The share issue negotiated (over 18 million shares) constituted almost a doubling in the issued shares of the company: see the minutes of the Chameleon shareholders’ meeting of 4 November 2002.

### (2) The Chameleon Prospectus

93 On 31 May 2002 Chameleon engaged Chameleon Ventures to prepare a prospectus for Chameleon’s proposed capital raising. Chameleon Ventures in turn was seeking Grimaldi’s assistance (as the minutes of a board meeting noted) in preparing the prospectus. Mr Grimaldi, we would interpolate, was perceived to have particular acumen in raising funds. Having referred to the disclosure requirements of Div 4 of Pt 6D.2 of the Act and the assumptions in them that persons will be engaged in a professional or advisory capacity to assist in the preparation of a prospectus, his Honour indicated that there was nothing to suggest Mr Grimaldi’s functions were limited to the overall planning and verification process to be expected of a professional advisor. Mr Roberts’ evidence was that Mr Grimaldi decided the contents of the prospectus and dealt with external service providers including registries, sponsoring brokers, vendors and valuers. That evidence was accepted.

94 The Grimaldi contention is that his Honour failed to appreciate the role that Mr Grimaldi had undertaken and the capacity in which he was acting in preparing the prospectus.

95 In our view, this is a matter in which form is being advanced to triumph over substance. We comment generally later on the significance of consultancies in this matter. The phenomenon of officer/consultants was a prevalent one in the conduct of the company’s affairs: Barnes and Roberts conducted their relationships with Chameleon through companies and at the same board meeting at which Chameleon Ventures (a Mr Roberts’ company) was appointed to prepare the prospectus, it was appointed as “Management Consultants” [sic] for that task as also to provide “company secretarial duties” to Chameleon. We would note in passing that Mr Barnes was Chameleon’s Secretary from 2001 to 2006.

96 Mr Grimaldi was not a director of Chameleon Ventures when he performed his “engagement” (to use a neutral term) in this matter. If, vis-à-vis that company he was somewhat implausibly to be regarded as an assistant to it (and there is no evidence concerning what was his actual relationship with this company at all), he was to be perceived by Chameleon’s own board on 30 August 2002 as “the company’s [ie Chameleon’s] consultant” in relation to the prospectus preparations according to the board’s minutes of that date. Mr Grimaldi did not give any evidence. It was, in our view, open to his Honour to find that the function performed by Grimaldi went beyond that of an “assistant” and involved performing a function which, though preparatory in character, was one to be expected of a director (notwithstanding that the ultimate approval of the prospectus by the board was envisaged). It equally was open, given the state of the evidence, to infer that he was acting in reality for Chameleon and had been doing director’s work for it in this matter. In any event, we would again conclude that his function was consistent with that of an “officer” of Chameleon for s 9(b)(i) purposes.

### (3) Raising capital for Chameleon

97 By the time Mr Grimaldi became a director of Chameleon Ventures, the prospectus had been completed and the company had been listed on the Australian Securities Exchange. The trial judge simply noted that Mr Grimaldi then told Mr Roberts that Chameleon’s next task was to find investors in order to raise capital and achieve the minimum spread of shareholders required for ASX listing. From January 2003 until March 2003, the two were engaged in that task. Though saying no more about this matter, the clear inference is that his Honour considered Grimaldi and Roberts were acting in the position of directors of Chameleon.

98 The Grimaldi contention is that the trial judge overlooked that Murchison had assumed a contractual obligation to Chameleon to assist in fundraising. This was a consequence of the New Millenium agreement between the parties. It is said Grimaldi was acting in his capacities as a director of Murchison and of Chameleon Ventures.

99 Before expressing our own view it is necessary to make reference to the New Millenium contract. Under that agreement (executed in April 2002), Chameleon purchased four mining exploration properties from Murchison which had acquired these from companies either owned by Mr Barnes or of which he was a director. The circumstances of this transaction gave rise to an unsuccessful claim at trial alleging a dishonest design of (inter alia) Barnes and Grimaldi. In an addendum to the contract, the sale was made conditional on Chameleon obtaining listing with the ASX within 12 months of the contract date. Murchison for its part agreed to assist Chameleon to prepare the documentation for the listing and agreed it would “assist Chameleon in fund raising and or seeking underwriters … to achieve its fund raising plans”.

100 There is no evidence that the capital raising was being conducted by Chameleon Ventures. The only documentary suggestion that it might have had any such role in Chameleon’s affairs came from a pre-registration meeting of Chameleon (of 27 September 2001) at which it was resolved that “all funding needs for Chameleon … would be met by Chameleon Ventures”. This is the only documentary reference at all dealing specifically with fund raising by Chameleon Ventures. There is no evidence that, after its incorporation, Chameleon acted on this resolution. We would add that the appointment of Chameleon Ventures as “Management Consultants” in May 2002 was for the limited purposes of preparing a Prospectus for Capital Raising and for providing company secretarial duties. Nonetheless, in his reply submission, Mr Grimaldi asserts that his role in the capital raising commenced in January 2003 and it was “in discharge of his duties with Chameleon Ventures, which was responsible for the capital raising”. This clearly was not his duty as a director of that company: he did not assume that position until 31 October 2003. He went on to contend that because of the New Millenium contract his involvement in the fund raising was “also in discharge of Murchison Metal’s [sic] *duties* to Chameleon”: emphasis added.

101 The evidentiary haze here is obviously unhelpful. There is no evidence to suggest that Chameleon sought Murchison’s assistance in the fund raising and there is no suggestion it needed to, given it already had Mr Grimaldi’s (“the fund-raiser’s”) services at its disposal. The relevant term in the addendum to the New Millenium contract on its proper construction did not unconditionally oblige Murchison to provide fund raising services. It provided that Murchison “will … assist Chameleon in fund raising”. The provision envisaged a request for, or else the acceptance of the provision of, such assistance. There is no evidence that such occurred. We are not prepared to infer that Murchison’s fund raising duty, such as it was, was activated so that Mr Grimaldi could be said to be acting for Murchison in the fund raising undertaken by him and Mr Roberts. The submissions here seem to have the character of after the event “rationalisations”.

102 We would also comment in passing that if Chameleon Ventures (Mr Roberts’ company) was Chameleon’s anointed fund raiser as Mr Grimaldi contends, the statement made by Mr Grimaldi to Mr Roberts would have been a statement of the obvious (which we do not consider it was).

103 The remaining possibilities are that Roberts and Grimaldi were effecting the fund raising through Chameleon Ventures or that they were acting for Chameleon as such, Roberts as a director, Grimaldi in some unspecified assistance capacity. As foreshadowed we will refer below to the penumbral role the directors’ companies played in the management and direction of Chameleon. It probably does not matter for present purposes which of the above two characterisations is the correct one. If Mr Grimaldi was acting for Chameleon, then the function he was discharging was, in the circumstances, one properly to be expected of a director as his Honour implied. If it was done for Chameleon Ventures, but the actions taken by it (a) were ones properly to be expected of a director, and (b) were taken in fact by persons who otherwise were directors (de jure or de facto) of Chameleon Ventures, then, because of s 201B(1) of the Act, the actions of Chameleon Ventures could properly be characterised as actions by Grimaldi and Roberts as directors of Chameleon.

104 Our view is that in undertaking the fund raising Grimaldi and Roberts were acting for Chameleon. Neither of the other possibilities seem probable on the evidence. Our conclusion merely evidences the unorthodox manner in which this company conducted its affairs.

### (4) Appointing a Zenith Director; (5) Correspondence with Ian Prider

105 These events occurred in September/October 2003. Mr Grimaldi wrote to a Mr Trevor Prider of Zenith Development Co Ltd in September about (inter alia) the provision of funding for Chameleon. Later he wrote to a Mr Ian Prider, a principal of the law firm, Prider & Co Lawyers, on 7 October 2003, about a meeting. The letter said:

… we believe … it would be a good idea for Zenith to have a representative on the board of (Chameleon) … I will organise a directors resolution to approve your appointment.

His Honour made no further comment on this although he did later return to dealings with the Priders which we will mention below. He obviously considered that, in the 7 October correspondence, Mr Grimaldi was conducting himself as if in the position of a Chameleon director.

106 The Grimaldi contention is that this merely illustrated Mr Grimaldi acting as a “director [sic]” of Chameleon Ventures which in May 2002 had been appointed a consultant to provide “company secretarial duties” to Chameleon: on company secretarial duties see *Ford’s Principles of Corporations Law*, 13.100. We again note Grimaldi was not a director at this time.

107 On 27 September Mr Prider’s firm wrote a letter of advice to Mr Grimaldi about a statutory demand that had been served on it. The letter responded to an earlier letter to the firm from Mr Grimaldi. The 27 September letter was addressed to “Phillip Grimaldi, Chameleon Mining N.L.”.

108 His Honour considered that the letter from Mr Grimaldi to Prider & Co, and the response from Prider & Co, provided evidence of Mr Grimaldi carrying out management tasks that would ordinarily be performed by a director or senior officer of a company. The fact that Prider & Co’s letter of advice was addressed to Mr Grimaldi at Chameleon was evidence that Grimaldi was reasonably perceived by an outsider dealing with the company to be a director or senior officer of Chameleon.

109 The Grimaldi contention in relation to these two communications is that, when they are placed in the context of board minutes and of communications between Mr Grimaldi and Trevor Prider of Zenith and Ian Prider, it is apparent that Mr Grimaldi was acting either for Chameleon Ventures discharging its secretarial duties (in writing the 7 October “appointment to the board” letter) or under the direction, and with the authorisation, of the board. Whatever perception Prider & Co might have had of his status was said to be irrelevant.

110 We cannot agree with this. We were taken to a sequence of board minutes, emails and letters and instruments relating to the period 14 July 2003 to 7 October 2003. There are gaps and discontinuities in this sequence. What the documentary evidence discloses are three, not two, matters. The first relates to a share issue by Chameleon to Zenith of 8,750,000 shares plus options by way of direct investment for $1,750,000, seemingly as part of the company’s fund raising: see board minutes of 14 July 2003; letter of Ian Prider to Chameleon of 16 July 2003; and letter from Barnes and Roberts to Ian Prider of 8 August 2003. This led to a further board resolution of 23 September (Mr Grimaldi was not in attendance) in which it was resolved that Mr Roberts and Mr Grimaldi would meet with Zenith officers in Adelaide “to present a proposal for further funding for the company”. Mr Grimaldi wrote the 26 September letter referred to by his Honour confirming this meeting. It was further to that meeting and a later telephone conversation between Mr Grimaldi and Ian Prider that the board appointment letter of 7 October 2003 was sent.

111 We note again that at no time during this sequence of events was Mr Grimaldi a director of Chameleon Ventures. We are in no position to comment on the genesis of the dealings with Zenith other than to say they appear to have occurred as part of fund raising engaged in by Mr Grimaldi and Mr Barnes: see Agreed Chronology, para 12. It and the further attempted fund raising from Zenith, seem to have been matters in which the board participated (as witness the Chameleon board’s resolution to send Grimaldi and Barnes to Adelaide). We do not consider that it is reasonable to infer that Grimaldi and Roberts were acting other than on behalf of Chameleon in this matter: see our comments below on Chameleon Ventures’ consultancy. Though this particular fund raising dealing with Zenith clearly involved the board acting as such, it was properly open to the trial judge to consider that Mr Grimaldi’s participation in the process was such as to be expected of a person acting in the position of a director. We reject the contention that Mr Grimaldi’s 7 October “appointment to the board” letter was merely a company secretarial act. We consider that it properly could, and should, be taken to evidence Mr Grimaldi’s role for Chameleon in this dealing with Zenith. That was as a director, as his Honour appears to have concluded.

112 The second transaction to emerge from the sequence of communications related to a dealing between Tembo Gold Holdings Pty Ltd, a wholly owned subsidiary of Chameleon of which Mr Grimaldi was a director, and Zenith. It concerned Tembo Gold’s taking an option to purchase Zenith’s interests in a Brazilian instrument for over A$3 million. Chameleon guaranteed Tembo Gold’s obligations. The deed effectuating this dealing was approved by Chameleon’s board. It gave Zenith the right to set off any funds owed to it by Tembo Gold against any funds that Zenith might owe to Chameleon. Mr Grimaldi signed the deed for Tembo Gold; Mr Roberts, for Chameleon; and Ian Prider for Zenith.

113 Zenith (and a related company ACN) did not pay Chameleon for the July share issue. The combined debt was $3 million. In December 2003 and January 2004, Mr Roberts sent letters to Ian Prider demanding payment. Mr Prider replied invoking the deed’s set-off provision: Tembo owed Zenith $3 million and this could be set-off against Zenith’s obligation to Chameleon. As his Honour indicated, the situation for Chameleon was very serious. The failure of Zenith and ACN to pay left a “$3 million hole in Chameleon’s balance sheet”. Its auditors queried whether it could continue as a going concern.

114 Mr Grimaldi was closely involved in meetings and correspondence during February 2004 to seek to resolve the problem. On 14 February he wrote an “Internal Memo” to Mr Barnes in which he gave advice and made strategic recommendations about dealing with Ian Prider, Chameleon’s position and liquidity, and its relations with Murchison. We note the following:

My suggestion is this that to stop now because of an outburst by Ian Prider is not a realistic strategy. If you think you have problems now, they will be nothing to what will happen if you blow the whistle now. The end of the game has not arrived yet and to pull before you have to is crazy. Its like the problem you had with AIMM. You were convinced that it was going to be bad, because someone else had a problem in the past. What happen it was not the same.

I recommend and it is within are legal and financial capabilities. We work hard and get [Murchison] cashed up. The prospectus is finished except for Al Maynard’s report.

[Murchison] can finance Chameleon provide it has security or a joint venture etc.

In the event that the Priders do not perform [Murchison] can make a takeover bid for Chameleon and this will delist the company and we can then sought [sic] out the Prider problem for good.

115 The trial judge concluded that this memo, along with other steps Mr Grimaldi took at the time, indicated he had “made high level management decisions on matters that affected Chameleon’s financial standing”. We agree. The memo evidences not merely the then “co-adventurer” basis of the relationships both of Barnes and Grimaldi and of Chameleon and Murchison but also the depth of Grimaldi’s participation in directing and influencing the affairs of Chameleon. We reject the Grimaldi contention that all that the memo reveals is the advice of a director of a subsidiary company communicating with the director of its parent.

116 The other conclusion the trial judge arrived at in relation to Chameleon’s dealings with the Priders is that Grimaldi had on the balance of probabilities the practical direction of those dealings and this was sufficient to make him a de facto director in those dealings. While we agree with the ultimate conclusion that Mr Grimaldi did act as a de facto director for Grimaldi during the course of those dealings, we do not agree that he did so for *all* purposes or that he *alone* had the practical direction of them for the following reasons. We have already indicated that we cannot express a concluded view on the genesis and progress of the fund raising from Zenith. It is clear that Mr Barnes had a significant part in this. We likewise can express no view on the genesis of the Tembo Gold-Zenith transaction. In that transaction, for some purposes at least, Mr Grimaldi acted on behalf of Tembo Gold, a Chameleon subsidiary. This is not to say he may not as well have been acting to further purposes of Chameleon in that transaction. We simply make no finding on that.

117 The third matter to emerge from the communications to which we were taken seems to be only part of an exchange between Mr Grimaldi and Ian Prider. It seemingly commenced with Chameleon’s Board minutes of 23 September where reference was made to “pending legal issues” involving a company, Capital, with whom Mr Barnes was to meet. A letter, not in evidence, was written to Prider & Co Lawyers on 26 September 2003 by Mr Grimaldi which, we infer, sought legal advice about a statutory demand served on Chameleon. Mr Prider replied the following day in a letter addressed to Mr Grimaldi at Chameleon providing the advice sought. Mr Grimaldi replied to Mr Prider by email on 29 September – importantly with copies to Mr Barnes and Mr Roberts – indicating he had spoken to Barnes and Roberts, “directors of Chameleon”. He stated their opinion but, in giving instructions to Prider he used the collective pronoun “we” so self-identifying with the directors named and with Chameleon.

118 His Honour considered that this correspondence provided evidence of Mr Grimaldi carrying out management tasks that would ordinarily be performed by a director or senior officer of a company. We do not disagree with this conclusion and reject the Grimaldi suggestion that it should be inferred that he was acting as a conduit for legal advice. In saying this we are not finding he was “in ultimate control” of the matter, merely that he had the responsibility for it.

### (6) “Advice” to Mr McLennan

119 We earlier referred to Mr Grimaldi negotiating the purchase of Fijian properties from the companies of Mr McLennan who at the time was director of Chameleon. He resigned on 15 November 2002. This dealing apparently resulted in litigation with Chameleon. On 13 January 2004 Mr Grimaldi wrote to Mr McLennan indicating that he had met with Mr Barnes who was prepared to look at a commercial solution to the dispute but that if he (McLennan) wanted to settle the matter amicably, he would have to make the first move. Mr Grimaldi then advised Mr McLennan to withdraw his action and to write to Barnes that he wanted to settle the matter commercially. We would note in passing that in this letter Mr Grimaldi revealed he was aware of the phenomenon of “a de facto director”.

120 It is clear from the evidence that the de jure directors were aware of, and involved in, this litigation. The board minutes of 12 February 2004 contain discussion of it.

121 The trial judge made no explicit comment about the letter to Mr McLennan. We consider it reveals conduct appropriate to be taken by a director, if that person was in reality a director at the time, ie as evidence it has a confirmatory, rather than an indicative, character.

### (7) The March 2004 Share Placement

122 This placement to “investors” was ultimately contrived by Mr Grimaldi. A Mr Pettett of Northern Alliance Resources Ltd agreed with Mr Roberts that he would seek to find investors to take up a total of 7,750,000 shares in Chameleon in return for a commission payable to his own company. Mr Barnes and Mr Roberts signed a board resolution of Chameleon dated 28 February 2004 authorising an issue of that number of shares to professional investors at a price of 10 cents. Mr Pettett subsequently told Roberts he was now unable to introduce new investors. Mr Roberts told Mr Grimaldi of this. Grimaldi in turn told Roberts that it was considered acceptable to pay creditors in shares rather than in cash using shares from a share placement. Mr Grimaldi then drafted a letter for Mr Roberts to send to Mr Pettett which was in form a letter from Northern Alliance to Chameleon nominating twelve companies to which the 7,750,000 shares were to be issued. These included Mr Barnes’ company (Pinnacle), Mr Roberts’ company (Chameleon Ventures), Murchison, Tembo Gold and Mr Pettett’s company. Put shortly, Mr Grimaldi, not Mr Pettett, identified the persons to whom shares would be issued and the number of shares each was to receive. We agree with the trial judge that he exercised functions which would ordinarily be exercised by a director. We would add that what he did was to make use of Northern Alliance but in furtherance of Chameleon’s interests. We would also note in passing that the placement itself displayed a practice of preferential treatment that characterises transactions to be considered later in these reasons.

### (8) The Cadetta Transaction

123 We defer consideration of the detail of Mr Grimaldi’s involvement in this until we consider the transaction in its own right. The primary judge’s conclusion when considering his status in this matter was that he was acting on behalf of Chameleon in negotiating the transaction and, whether he was a director or a fiduciary, he owed fiduciary duties to the company. As will be seen, we agree.

### (9) The Cerro Negro Copper Mine Acquisition

124 We can deal with this briefly. It was Mr Roberts’ evidence, accepted by the trial judge, that Mr Grimaldi negotiated the acquisition of this in Chile on behalf of Chameleon and made all the decisions on Chameleon’s strategy occasionally asking Mr Roberts to do specific administrative tasks. Emails to which his Honour referred supported the burden of Roberts’ evidence.

125 We do not accept the Grimaldi contention that he was negotiating under the control of the board notwithstanding that the share issue agreed required board action and shareholder approval. That he conducted these negotiations as he did was itself a good indicator that, in this company and in the circumstance under which it operated, he was acting in the position of a director. This was a junior mining company negotiating for the acquisition of a mine.

### (10) The ASX Announcement of the July Share Placement;

### (11) The Proposed Further Share Placement

126 As to the first of these, Mr Grimaldi drafted the ASX announcement; he procured its being lodged with the ASX; and he received and banked the proceeds of the placement. As to the second, Mr Grimaldi suggested to Mr Roberts in early August 2004 that Chameleon should do a further placement and he indicated the number of shares that should be issued and to whom and in what numbers. The placement was announced to the ASX on 11 August 2004.

127 Neither of these matters received much attention in submissions. Nor will they here. We consider they have contextual significance. Both involve the doing of acts which properly could be done by a person acting in the position of a director. In their setting they support his Honour’s de facto director conclusion.

128 We would interpolate that we do not consider it necessary to deal with the trial judge’s additional references to activities that evidenced Mr Grimaldi’s involvement in the day-to-day running of Chameleon.

### (12) “Acting as a Director”

129 A refrain in the Grimaldi contentions has been that his Honour referred on occasion to Mr Grimaldi “acting as a director” – as have we in these reasons. The burden of this was to suggest that the wrong question was being asked: the proper question was whether he was “acting in the position of a director”. In our view, the trial judge was doing no more than using an easy shorthand to avoid a somewhat clumsy formula used to describe what were often enough discrete acts which had been disaggregated for the purposes of convenient exposition and analysis. We would add that it cannot properly be said that his Honour lost sight of the general question raised by the de facto officer inquiry. Necessarily he considered individually a procession of acts and functions performed to assist in answering that question of characterisation.

### (13) The Perception of Others

130 We have already indicated that the perceptions of others can themselves be of some contextual evidentiary significance in arriving at the characterisation that a person is a de facto director: see “The Applicable Legal Principles” at [61]. His Honour properly used such evidence in this matter on a number of occasions as, for example, when he observed that the most telling evidence that Mr Grimaldi was reasonably perceived by outsiders to have acted as a director or officer of Chameleon is to be found in a letter from Chameleon’s auditors that Mr Grimaldi was their main source of information and, although he was not a director, he appeared to them to be “the manager of the company”.

131 We refer to this matter because it was raised in the Grimaldi reply submissions (at para 2[4]). Accordingly we reject the proposition there advanced that the perception of outsiders dealing with a corporation are only relevant to the extent that the corporation has held out the person as having acted in the position of director.

### (14) A Functioning Board

132 In alleging that the primary judge misapplied the test or else applied the wrong test, as to whether Mr Grimaldi was a de facto director: see Grounds of Appeal 1; considerable emphasis was placed upon the alleged facts that Chameleon was an ASX listed company with a properly constituted board of directors, the members of which were not shown to have regarded Mr Grimaldi as a director or to have so held him out or agreed to his acting, or allowed him to act in the position of a director.

133 We have already indicated; “The Applicable Legal Principles” [72]; that because a company has a properly constituted and apparently “functioning” board (whatever that might signify in a given setting) does not, as the decided cases illustrate, preclude the making of a finding that the person in question could be a “director”. We readily accept that Chameleon had a properly constituted board; that the board had minuted meetings from time to time at which decisions were taken and that it had two executive directors who, in differing ways dealt with aspects of the companies business. Nonetheless, we consider there was a considerable degree of informality in decision making. There are, for example, no minutes approving some number of the transactions entered into by Grimaldi which were of significance to it. We do not dissent from his Honour’s view that Chameleon’s affairs were managed in an informal (indeed unorthodox) manner. We accept that the Board members seem only to have allowed Mr Grimaldi’s attendance at Board meetings by invitation and did not appear to regard him as a director as such. However, while they did not hold him out as a director *eo nomine*, they clearly authorised him on occasion to perform functions such as would lead a reasonable third party dealing with him to believe he was acting as a director of Chameleon. His authorisations to negotiate the acquisitions of the Fijian mining interests and of the Chilean copper mine, instance this and demonstrate that in these matters he stood on an equal footing with them in directing the affairs of the company. More, generally, Mr Grimaldi was allowed either to perform functions, for example fund raising and share placements, or to arrogate to himself functions in which at least either or both of the executive directors acquiesced with knowledge. His dealings with the Priders and Mr Barnes in relation to the Zenith transactions or his contriving the Northern Alliance share placement nominations illustrate this.

134 Mr Grimaldi was obviously a resourceful and experienced person and the extent of his participation and intrusion into Chameleon’s affairs could hardly have gone unnoticed. There is little room for doubt that the executive directors knowingly and willingly utilised his skills and experience over a diverse range of matters, acquiescing in, if not always authorising, what he did. We have not been informed of the intent behind Mr Barnes’ use of the term “pseudo directors” in the following letter of 11 November 2004:

Next week I should be in Sydney for three to four days. I would like to call a meeting on Tuesday or Wednesday for all directors, pseudo directors etc to sort out Chameleon’s future. In other words, all in the same room.

Such a meeting would include me, yourselves, Grimaldi and Landan.

The description’s application to Mr Grimaldi, if apparently jaundiced, captures a certain reality about his roles in the affairs of Chameleon.

135 As we have already indicated, we do not consider that giving of prior authorisation to act for Chameleon or the need for subsequent board action to effectuate what he had done, changed the character of what he was allowed to do in circumstances where what he did was what a person acting in the position of a director would be expected to do. His negotiation of the acquisition of the Fijian mineral interests exemplifies this.

### (15) “Consultants”

136 We have indicated our view that a person’s consultancy with a corporation does not preclude a finding that that person is a director (de jure or de facto) of that body: see “The Applicable Legal Principles”: [66]. Entering into consultancy arrangements, especially but not only with the companies of its own executive officers was part of Chameleon’s modus operandi. This is one aspect of the unorthodox manner in which it conducted its affairs. It had a consultancy with Mr Barnes’ Pinnacle and Mr Roberts’ Chameleon Ventures and one personally with its Fijian director (who has played no part in this matter). The reason for this practice has not been revealed to us. It is, though, clear from its annual reports (eg those of 2003 and 2004) and from Board minutes (eg those of 17 November 2003) that these consultancies provided the medium for the remuneration of the directors (usually by way of a share issue to their company) in lieu of directors’ fees. We were not taken to any of the consultancy agreements. That with Chameleon Ventures upon which the Grimaldi submissions place such stock, was not in evidence. In the case of Chameleon Ventures we are asked to infer that (i) it had a funding function for Chameleon in 2003-2004 in consequence of a pre-registration resolution of Chameleon’s “Pro-Tem Officers” (Mr Roberts and a Mr Whitbread) that Chameleon Ventures would meet all its “funding needs”; (ii) it had a management function because of its appointment in May 2002 as “Management Consultants” for the limited purpose of preparing a prospectus for capital raising; and (iii) it had a company secretarial function because of its appointment in the same instrument in May 2002 to provide “company secretarial duties” to Chameleon. We again note that Mr Roberts was Chameleon’s Secretary. There is no evidence of Chameleon Ventures sending correspondence to Chameleon or to third parties in its consultant capacity.

137 To anticipate matters, we are not satisfied on the scant material before us that Chameleon Ventures’ roles in relation to Chameleon were other than minor ones. It probably performed some functions in relation to the Prospectus, but with Mr Grimaldi’s assistance. Beyond that it may well have, as Mr Roberts’ alter ego, performed routine company secretarial functions for Chameleon. We would note in passing that, unsurprisingly, there are instances in the evidence of Mr Roberts performing purely administrative functions sometimes at the direction of Grimaldi as, for example, in relation to the Cadetta transaction’ see Agreed Chronology [268]-[270]. Chameleon Ventures, we would add, may have been the vehicle to provide remuneration to Mr Grimaldi for his services to Chameleon. Mr Grimaldi, we would re-emphasise, did not become a director of Chameleon Ventures until 31 October 2003, ie after many of his actions dealt with in the preceding pages had been performed.

138 Mr Grimaldi’s own arrangements with Chameleon Ventures are not in evidence. We have only the bald statement in Chameleon’s Board minutes that “Chameleon Ventures Limited seeks the assistance of Mr Phillip Grimaldi in the preparation of the Prospectus”. There is no evidence that he ever acted expressly on behalf of Chameleon Ventures in third party dealings or that he rendered it invoices or otherwise in relation to his services. There is some evidence, though, in the Agreed Chronology that he was, in November 2003, being paid in shares but by whom and for what is not revealed. There is clear evidence, as we have found, that he acted on behalf of Chameleon in at least some number of significant dealings as, for example, in acquiring the Fijian mining properties and the Chilean copper mine acquisition. Chameleon’s own board minutes of 30 August 2002 described him as “the company’s consultant”. And there is the evidence in the Agreed Chronology (at [230]) that Mr Roberts told ASIC in March 2004 that he operated as a consultant to Chameleon (there is a footnote to [230] that Mr Roberts agreed in his cross-examination that this was a fair and accurate description at the date of the ASIC investigation). Yet there is the Chameleon Board minutes of 17 November 2003, under the heading “Payment to Related Parties”, that:

Mr Roberts advised that Mr Grimaldi performed his services to the company via his association directly with Chameleon Ventures Limited.

This, though, was only weeks after he had been appointed to the board of Chameleon Ventures.

139 The trial judge appears to have accepted that Mr Grimaldi acted as a consultant for Chameleon but for the limited purposes identified in Board minutes. The minutes, he considered, dealt with only “a very small part of the wide range of his activities”. He went on to observe, correctly, that the description of him as a consultant did not necessarily inform the conclusion as to whether he was a director. His Honour’s conclusion has been criticised, though, for not taking appropriate account of Chameleon Ventures’ consultancies with Chameleon and of Mr Grimaldi being a director of the company.

140 Putting to one side what may have been Mr Grimaldi’s relationship with Chameleon Ventures after to 31 October 2003 when he became a director, the functions he performed until that date were performed in the affairs of, and on behalf of, Chameleon. Chameleon Ventures may have sought his assistance in the preparation of the Prospectus: Board minutes of 31 May 2002; but even in that matter he was, nonetheless, Chameleon’s advisor and “consultant”: Board minutes of 30 August 2002. There are very marked uncertainties left in the evidence which preclude our making the findings sought in Mr Grimaldi’s submissions which would link his activities to Chameleon Ventures and not to Chameleon either before or after he became one of its directors. We are unprepared to find that Chameleon Ventures was engaged to, and did, perform the fund raising functions of Chameleon at all. Even the appointment of Chameleon Ventures to prepare a Prospectus for fund raising did not refer in any way to its being engaged for the subsequent fund raising activity as well: see Chameleon’s Prospectus, p 119 and Chameleon’s Board minutes of 31 May 2002. The pre-registration meeting resolution in 2001 alone cannot sustain such a finding, the more so because it is quite clear as, for example, in the Zenith fund raising, that Mr Barnes and the Chameleon Board involved themselves in that activity to some degree. The evidence simply does not admit of a positive finding that Chameleon Ventures actually performed that function. Equally the various property or corporate acquisitions Mr Grimaldi negotiated, or was involved in, were outside any of Chameleon Ventures alleged consultancies whether before or after he became a director of it. There was little in what he did at any time which fell within what could be called providing no more than “company secretarial duties” to Chameleon: see “The Applicable Legal Principles”, [73]. This according to the annual reports of 2003 and 2004 was the enduring consultancy Chameleon Ventures had with Chameleon. There is no evidence to support that in doing what he did, he in fact acted on behalf of Chameleon Ventures in any event. It may well have been the case that for the purposes of remuneration, Chameleon Ventures made provision for him through share issues. This would appear to have been consistent with the contrivance adopted in the remuneration of Mr Barnes and Mr Roberts as well. Finally, even if everything he did was through Chameleon Ventures (which was not at all the case), what he did was to act in the position of a director of Chameleon. As we have indicated, s 201B(1) of the Act does not permit Chameleon Ventures to be used as a screen to avoid that conclusion.

## 5. Conclusion

141 Even though not authorised to be a director, Mr Grimaldi was either given, or had arrogated to himself with the acquiescence of at least the two executive directors, Barnes and Robert, functions in the affairs of Chameleon which would properly be expected to be performed by a director of that corporation given its circumstances. Given the extent and the significance of those functions, he so acted in the position of a director as to warrant the imposition on him of the liabilities, statutory and fiduciary, of a director. The trial judge committed no appellable error in his conclusion. We reject Ground 1 of the Grimaldi appeal. It is unnecessary to consider Ground 2 as it has no bearing on our conclusion.

142 There is one additional comment which should be made. While some of the acts done by Mr Grimaldi which evidenced his acting in the position of a director, were done at the request or with the authorisation of the board, others were not. The Agreed Chronology illustrates action being taken without request and on his own initiative. We emphasise this because of its importance, as will be seen, in determining the scope of the “subject matter over which [his] fiduciary obligations [to Chameleon] extend”: *Birtchnell v Equity Trustees, Executors and Agency Co Ltd* (1929) 42 CLR 384 at 408.

143 While we have focussed on whether Mr Grimaldi was a director in deference both to the manner in which the case was run and to the trial judge’s conclusion, we do emphasise that the question whether he was a director was, in a sense, a distraction. The nature of the decision making in which he participated and the demonstrable capacity he had to affect significantly Chameleon’s financial standing both in negotiations conducted on its behalf and as a decision maker in it (as in the Cadetta transaction), demonstrably brought him within the definition of an “officer” for s 9(b)(i) and (ii) purposes. We so find. That finding, which raised a far less complex inquiry than the de facto director one, was all that Chameleon needed for the purposes of this litigation.

# III. AN EVIDENTIARY PRELUDE: ACQUIRING THE IRON JACK TENEMENTS

144 Because of the way Chameleon pleaded its case in relation to the Cadetta transaction, it is necessary to refer to the genesis of the Winterfall/Murchison acquisition of the Iron Jack Tenements. Chameleon’s case at trial, rejected by his Honour, was that the Cadetta transaction was orchestrated by Mr Barnes and Mr Grimaldi so as to enable Murchison to receive 5 million shares in Chameleon which it could then sell for the purpose of raising funds to assist in the acquisition of Winterfall which was experiencing financial difficulties in completing its purchase of the Iron Jack Tenements. In its Notice of Contention, in the Grimaldi appeal and in Grounds 2 to 4 of its own appeal, Chameleon again advances its case as at trial.

### (i) Introduction

145 As Mr Grimaldi concedes in his Amended Notice of Appeal, he had at all relevant times a significant shareholding and financial interest in Murchison. So it was also with Mr Barnes, although his interest appears to have been held through Pinnacle.

146 A transaction, which was given attention at trial, but not addressed by his Honour in his reasons except to note it was “background”, involved the ultimate acquisition by Murchison of nickel interests through its acquisition by way of a share issue of an interposed company, ATL Exploration Pty Ltd, in December 2003 (the ATL transaction). It was Mr Barnes who introduced Murchison to this transaction after a chance meeting with a Mr Zuks who, as will be seen, was a central figure in Murchison’s acquisition of the Iron Jack Tenements.

147 The ATL transaction was, apparently, worked out for Murchison by Grimaldi and Barnes, Barnes signing one agreement with Zuks on behalf of Murchison (though Barnes was never a director of it). The nett effect of the deal was that Zuks received 3 million shares in Murchison; Barnes was entitled to 3.9 million shares and 1 million options in Murchison; and Grimaldi, 3 million shares and 1 million options (via a company belonging to him).

148 We refer to this for three reasons: (i) to indicate the accretion the ATL transaction made to the shareholdings of Barnes and Grimaldi in Murchison; (ii) to illustrate their relationship inter se and in this instance Barnes’ participation in Murchison’s affairs; and (iii) to note that Mr Zuks had been involved with them in a dealing prior to their dealing in relation to the Iron Jack Tenements.

### (ii) Winterfall and the Iron Jack Vendors

149 In December 2003, Zuks began negotiating on behalf of Winterfall with a number of companies and individuals who together later became the vendors of what inaccurately will be called the Iron Jack Tenements. At the time Mr Zuks held 90 per cent of the shares in Winterfall and was a director. His brother, Ruslan Zuks, held the remaining 10 per cent.

150 An agreement between Winterfall and the Iron Jack Vendors was entered into on 19 February 2004. It provided for the purchase of the tenements for a total consideration of $1 million payable by instalments and a royalty of 80 cents per tonne of iron ore removed from the tenements. The stipulated instalments were (1) $100,000 on signing the agreement; (2) $400,000 within 60 days thereafter (ie 19 April 2004); (3) $500,000 within 24 months of execution. Time for payment in each instance was stated to be of the essence. Winterfall was also obliged to pursue at its cost the grant of the tenements (which were at the time in the form of applications for exploration licences: see below “A Question about ‘Mining Tenements’”.

151 Zuks paid the first instalment when due but did not have the money to make the $400,000 second payment. He secured two persons, Robert Vagnoni and Paul Kopejtka, to contribute $75,000 each with a further $250,000 to be paid when Winterfall was sold to a public company. However, Mr Zuks had not been able to find the additional money required to meet the instalment or a public company to which Winterfall could be sold. In mid April he negotiated an extension of time to pay the instalment to 5 May 2004, though $50,000 plus GST was still to be paid on 19 April. It was provided by Mr Kopejtka leaving a balance of $350,000 payable.

152 The Winterfall/Iron Jack Vendors agreement was renegotiated on 28 July 2004. That document is considered later in these reasons: [445].

### (iii) The Murchison/Winterfall Agreement

153 As noted above, Mr Zuks knew Mr Barnes and Mr Grimaldi from their involvement in the ATL transaction. The three again met at the Windsor Hotel in Perth in April 2004 in relation to the Iron Jack Project. The following is drawn from the Agreed Chronology relied upon by the primary judge.

154 Mr Zuks knew that Mr Grimaldi was a director of Murchison and Mr Barnes, the managing director of Chameleon. At the meeting Barnes and Grimaldi suggested to Zuks that Murchison “do the Winterfall deal”; Zuks told them both that time was ticking on his requirement to get money to complete the deal; and Grimaldi told him that he would like to do the deal, and that he had the money to do it.

155 His Honour went on to note that it was not clear from Mr Zuks’ evidence whether Mr Barnes and Mr Grimaldi raised the question of a “spotter’s fee” at the Windsor Hotel meeting. His Honour characterised the significance of the Windsor Hotel meeting to Mr Grimaldi and Mr Barnes as being that there was a valuable opportunity for Murchison to acquire an interest in the Iron Jack Project provided it could come up with the funds and that the acquisition of an interest in that project had the potential to increase the value of their shares in Murchison.

156 We would note in passing that on 30 April 2004 Murchison issued a reporting statement for the quarter ended 31 March 2004 which disclosed it had $46,000 cash on hand and $789.82 cash at the bank. We also note from the Agreed Chronology that on 17 April 2004 Mr Roberts sent emails to potential investors of a projected float for “an Iron Ore Venture”. On 10 May 2004 he sent further emails to prospective investors in Murchison attaching an outline of the Iron Jack Project.

157 As his Honour found, at some time between April 2004 and 30 May 2004, when the Murchison/Winterfall Heads of Agreement was executed, Mr Grimaldi and Mr Barnes agreed with Mr Zuks as to the structure of the transaction. Murchison was to pay the instalment of $350,000 due to the Iron Jack Vendors and there was to be a reverse takeover through an exchange of shares between the companies. Further, prior to the execution of the Heads of Agreement on 30 May 2004, (or at latest when the Addendum was signed in early June), Mr Zuks agreed to pay Mr Grimaldi and Mr Barnes a spotter’s fee in the form of shares in Winterfall, to be exchanged for shares in Murchison upon completion of the transaction. That fee, his Honour observed, was quite plainly for the benefit of Mr Grimaldi and Mr Barnes but the receipt of that benefit was dependent upon Murchison making payment of the instalment of $350,000 to the Iron Jack Vendors.

158 In early May 2004, Mr Zuks successfully negotiated a further extension of the time to pay the balance of the second instalment until 1 June 2004. This agreement, dated 5 May 2004, stated that if the deadline for payment of the $350,000 was not met, all the tenements would “come back” to the Iron Jack Vendors and no payments to date would be refundable. The trial judge commented that the urgency of the situation and the difficulty in which Winterfall found itself was emphasised in that statement.

159 On 30 May 2004 Murchison and Winterfall entered into a Deed described as Heads of Agreement by which Murchison agreed to provide Winterfall with the sum of $350,000. His Honour observed that, although it was not stated in the Deed, both parties were aware that those funds were required by Winterfall to meet the instalment due to the Iron Jack Vendors. The Heads of Agreement provided for Murchison to pay the sum of $350,000 to Winterfall on signing the Agreement, that is to say, two days before Winterfall was due to pay that sum to the Iron Jack Vendors; see cl 3(b). Clause 3(c) provided for a form of “reverse takeover” of Winterfall with that company to be converted to a public company and then to be taken over by Murchison, subject to Mr Zuks and his partners receiving 40 per cent of the issued capital of Murchison. What was to take place was, then, an exchange of shares with the shareholders of Winterfall exchanging their shares in that company for an issue of 40 per cent of the share capital of Murchison.

### (iv) Failure to pay and the Addendum to the Murchison/Winterfall Heads of Agreement

160 Murchison failed to pay the $350,000 due to Winterfall on 30 May 2004 so putting itself in breach of the Heads of Agreement. Mr Zuks complained immediately to Mr Grimaldi. His Honour characterised Mr Zuks’ evidence and the significance of the situation as follows:

Mr Zuks attempted in his evidence to downplay the seriousness of the situation. He said he was “disappointed” and “anxious” but that he did not threaten Mr Grimaldi at that stage.

In my view, the situation was very serious for both Mr Zuks and Mr Grimaldi. Mr Zuks stood to lose Winterfall’s interest in the Iron Jack and Weld Range tenements and the $100,000 he had thus far invested. Mr Grimaldi stood to lose the benefit of the commercial opportunity that he was keen for [Murchison] to take up.

161 Mr Grimaldi asked Mr Zuks to wait because he was confident he could provide the money. Zuks agreed and after negotiations with the Vendors (which resulted in an agreement to pay a $50,000 penalty and to purchase further tenements for a consideration which included $60,000), an extension of time to 1 July 2004 was agreed. Mr Grimaldi agreed to pay the extra $110,000.

162 Distinctly and significantly, in early June an Addendum to the Murchison/Winterfall Heads of Agreement was executed. Two clauses (cll 3(b) and 3(d)) are of present note:

(b) [Murchison] will provide Winterfall with the sum of $350,000 which will be invested as capital in Winterfall equal to 10% of the issued capital of that company.

…

(d) In accordance to clause (c) of the original agreement Winterfall Pty Ltd agrees to issue new shares to various shareholders nominated by [Murchison] and other participants in the venture to form a public company structure. Winterfall also agrees that the nominated shareholders will include nominees of Phillip Grimaldi at nil cost in consideration for introducing [Murchison] to Winterfall Pty Ltd., with the limitation that Nikoljas Zuks and his partners will always remain with majority control and receives 40% of the final issued capital of [Murchison] on the completion of the takeover.

163 The primary judge’s comment on cl 3(d) is that it was plain from it and from Mr Zuks’ cross-examination, that Mr Grimaldi and Mr Barnes raised the question of the spotter’s fee with Mr Zuks before the execution of the Heads of Agreement, or at the very latest before the Addendum was signed. As to the number of shares to be issued to Mr Grimaldi’s nominees, Mr Zuks’ evidence was that this “may have been discussed”. His Honour considered that the evidence was such that he could infer that Mr Grimaldi raised this, at least in general terms. We would note that in the Agreed Chronology (at [215]) it was indicated that “[s]ometime soon after the April meeting” there was a general discussion about the transaction and that most of Mr Zuks’ discussions regarding the terms of the transaction were with Mr Grimaldi.

164 The Heads of Agreement and the Addendum are examined in more detail later in these reasons: [435] and following.

### (v) Murchison’s Financial Situation: February to June 2004

165 We referred earlier to Murchison’s reporting statement of 30 April 2004. The trial judge considered it was plain on the evidence that Murchison did not have the funds to pay the instalment due on 30 May 2004. As his Honour indicated, its financial reports for the period showed it had little or no operating revenue and very little cash and its lack of funds was to be inferred from its failure to make the payment due under the Heads of Agreement and the circumstances in which payment was ultimately made: see “The Cadetta Transaction”. We would add to this that by 5 May, and after an extension, by 31 May, Murchison failed to reach the minimum subscription under its March 2004 Prospectus of $1.5 million. During the period the prospectus remained open Mr Grimaldi told Mr Roberts that it was a difficult time to raise money for a resource project: Agreed Chronology [272] and [276].

### (vi) Winterfall was due to pay $385,000 to the Iron Jack Vendors on 1 July 2004.

166 That instalment was not paid because Murchison had failed to pay that money to Winterfall under their Heads of Agreement. This failure was the prelude to the “Two Cheques” issue considered separately below.

# IV. THE CADETTA TRANSACTION

## 1. The Grimaldi and Murchison Appeals and Chameleon’s Notice of Contention in relation to the Cadetta Transaction

167 There is only one significant issue which arises in relation to his Honour’s conclusions concerning the Cadetta transaction. That is the finding that Mr Grimaldi owed and breached fiduciary duties to Chameleon in this matter: see Grounds 11 and 12 of the Grimaldi appeal. However, several other matters which we deal with shortly, have been contested in the appeals.

168 Some months after the hearing of final submissions and in consequence of correspondence between his Honour’s Associate and the parties, Chameleon filed a Notice of Motion to amend its pleading. Chameleon’s primary case at trial was that the Cadetta Transaction was orchestrated by Barnes and Grimaldi so as to enable Murchison to receive 5 million shares in Chameleon which it could then sell for the purpose of raising funds to assist in Murchison’s acquisition of Winterfall and the Iron Jack Tenements.

169 The amendment sought – and for which leave was granted – was that if (which was denied) the 5 million Chameleon shares were paid to Mr Grimaldi (or on his behalf to Murchison) as a commission, the receipt of the shares constituted a breach of Mr Grimaldi’s duties to Chameleon under s 181(1)(a) and (b) and s 182(1)(a) of the Corporations Act and his fiduciary duties to the company.

170 The trial judge rejected Chameleon’s primary “purpose” claim. Nonetheless, he found that the 5 million shares transferred to Murchison were an illicit commission to Mr Grimaldi. His Honour considered that this characterisation of the shares was, in any event, “in the arena” in the conduct of the proceedings and fell within the material facts pleaded in the Statement of Claim. It clearly fell within the amendment he allowed after the hearing in any event.

171 In the Grimaldi and Murchison appeals it is claimed that his Honour erred both in allowing the amendment and in concluding that the “commission” claim fell within Chameleon’s case as pleaded (and conducted: the Murchison appeal) prior to the amendment. Additionally, in the Grimaldi appeal, attack is made on his Honour’s finding that Mr Grimaldi owed and breached fiduciary duties to Chameleon.

172 In its Notice of Contention, Chameleon re-asserts its primary “purpose” claim which the trial judge rejected.

## 2. Applicable Legal Principles

173 For ease in exposition we will here refer generally to those aspects of fiduciary law which are applicable to liability issues which arise on the appeals and cross appeal, although more will be said about fiduciary law and remedy when we consider relief below.

### (i) The Fiduciary Idea: Setting Standards of Conduct and Ensuring Proper Fiduciary Decision Making

174 There are two discrete parts to modern Australian fiduciary law. The better known and understood part is concerned with the setting of standards of conduct for persons in fiduciary positions. Its burden, put shortly, is with exacting disinterested and undivided loyalty from a fiduciary – hence, for example, its focus on conflicts between duty and undisclosed personal interest, conflicts between duty and duty and misuse of a fiduciary position for personal gain or benefit. The other part serves a different function and is often overlooked in discussion of fiduciary law. Its essential concern is with judicial review of the exercise of powers, duties and discretions given to a fiduciary to be exercised in the interests of another (“the beneficiary”) where the beneficiary does not have the right to dictate or to veto how the power, discretion, etc is exercised by the fiduciary. Here the law channels and directs how “fiduciary discretions” are exercised. Unsurprisingly, there is quite some similarity between the grounds of judicial review of the decisions and actions of fiduciaries entrusted with such powers etc – for example, trustees, company directors and executors – and the grounds of judicial review of administrative action.

175 Though our principal concern is with the first of these two bodies of law, it is necessary to note both because of an issue which arises in one of the Grimaldi grounds of appeal.

### (ii) Standards of Conduct: Fiduciaries and Fiduciary Duties

176 There is no issue in this matter as to when a person will be found to be a fiduciary and as to what are the duties imposed upon him or her if found to be such.

177 As to who is a “fiduciary”, while there is no generally agreed and unexceptionable definition, the following description suffices for present purposes: a person will be in a fiduciary relationship with another when and insofar as that person has undertaken to perform such a function for, or has assumed such a responsibility to, another as would thereby reasonably entitle that other to expect that he or she will act in that other’s interest to the exclusion of his or her own or a third party’s interest: on who is a fiduciary, see *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 (“*Hospital Products*”) at 96-97; *News Limited v Australian Rugby Football League Ltd* (1996) 64 FCR 410 at 538-541; and see generally Conaglen, *Fiduciary Loyalty*, Ch 9 (2010).

178 As Australian law presently stands, the obligation of loyalty imposed upon a fiduciary is expressed in two overlapping proscriptive “themes” which govern the fiduciary’s liability to account to his or her own beneficiary. The best known formulation of these is that of Deane J in *Chan v Zacharia* (1984) 154 CLR 178 at 198-199:

The first is that which appropriates for the benefit of the person to whom the fiduciary duty is owed any benefit or gain obtained or received by the fiduciary in circumstances where there existed a conflict of personal interest and fiduciary duty or a significant possibility of such conflict: the objective is to preclude the fiduciary from being swayed by considerations of personal interest. The second is that which requires the fiduciary to account for any benefit or gain obtained or received by reason of or by use of his fiduciary position or of opportunity or knowledge resulting from it: the objective is to preclude the fiduciary from actually misusing his position for his personal advantage.

See also *Breen v Williams* (1996) 186 CLR 71 at 113.

179 The concept of “duty” in the “conflict of duty and interest” formula of the first of these is convenient shorthand. It refers simply to the function, the responsibility, the fiduciary has assumed or undertaken to perform for, or on behalf of, his or her beneficiary. What that function or responsibility is, is a question of fact. It may be narrow and circumscribed, as is often the case with specific agencies; it may be broad and general, as is characteristically the case with the functions of company directors; its scope may have been antecedently defined or determined; it may have been ordained by past practice; it may be left to the fiduciary’s discretion to determine; and it may evolve over time as is commonly the case with partnerships. 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: *Birtchnell v Equity Trustees, Executors and Agency Co Ltd* at 408. As Lord Upjohn noted in *Phipps v Boardman* [1967] 2 AC 46 at 127:

Having defined the scope of those duties [undertaken or assumed by the fiduciary] one must see whether he has committed some breach thereof by placing himself within the scope and ambit of those duties in a position where his duty and interest may possibly conflict. It is only at this stage that any question of accountability arises.

180 One comment should be made about the term “interest” as used in the conflict formula. Put compendiously, the term signifies the presence of some personal concern of possible pecuniary value in a decision taken, or a transaction effected, within the scope of a fiduciary’s duties. Importantly for present purposes, it may be a contingent or expectant one, as where a trustee uses a trust’s shareholding in a company to vote himself onto the company’s board from which position he will be likely to derive directors’ fees: see eg *In re Macadam*; *Dallow v Codd* [1946] Ch 73 at 81; or where a dealing with an agent proceeds on the assumption that a success fee is to be paid if a transaction is effected: *McCann v Switzerland Insurance Australia Ltd* (2000) 203 CLR 579.

181 The second “theme” - that of misuse of a fiduciary position - overlaps with the first to a considerable degree. The agent who successfully solicits (or “extorts”) a secret commission will characteristically transgress both the conflict of duty and interest and the misuse of position proscriptions. Importantly, though, misuse of position has an area of independent operation – an area which does not require it to be shown that the fiduciary has assumed some responsibility to his or her beneficiary in relation to the matter in issue. Its concern, as Deane J indicated, is to preclude the *misuse* of the position the fiduciary has, or of knowledge or opportunity derived from it. A longstanding exemplification of this is to be found in the Partnership Act which renders a partner liable to the firm for any benefit derived from any use made of the partnership property, name, or business connection: see eg *Russell v Austwick* (1826) 1 Sim 52 57 ER 498; *Partnership Act 1892* (NSW), s 29.

182 Reference will be made to both of these matters when Ground 9 in the Grimaldi appeal is considered.

183 A fiduciary’s liability to account to the beneficiary for breach of either of the above proscriptions can take a variety of forms. *First*, at the beneficiary’s election and subject to considerations of “appropriateness”: *John Alexander’s Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1 (“John Alexander’s Clubs”) at [126]-[129]; the fiduciary will hold on constructive trust any property or benefit derived in breach of fiduciary duty to the extent that that property or benefit remains extant or can be traced in the fiduciary’s hands. This species of liability is conventionally regarded as deriving from the decision in *Keech v Sandford* (1726) Sel Cas Ch 61; 25 ER 223; *Keith Henry & Co Pty Ltd v Stuart Walker & Co Pty Ltd* (1958) 100 CLR 342 at 350; and see below on “Bribes and Secret Commissions”.

184 The constructive trust is of some importance in the Grimaldi appeal. Its potency is well illustrated in the High Court’s decision in *Furs Ltd v Tomkies* (1936) 54 CLR 583. Its facts can be stated briefly. Furs Ltd’s managing director, Tomkies, who was authorised to negotiate the sale of a part of a business, arranged for its sale to a company to be formed. In the course of negotiations he demanded to be paid £5,000 by the purchaser. This was agreed to and was to take the form of £4,000 in promissory notes and 1,000 in shares. This payment was not disclosed to Furs Ltd. Tomkies also arranged for his future employment by the purchaser. This was disclosed. Furs Ltd brought proceedings against Tomkies seeking a declaration that the shares belonged to it and an order that they be transferred to it. It sought as well an order that he pay to it all moneys received by him. The progressive documentation of the transactions betrayed considerable creativity in the view taken of the nature of the payment of £5,000. As was said in the joint judgment of Rich, Dixon and Evatt JJ (at 597):

… [t]he documents represent it successively as a remuneration for procuring the sale [ie a procuration fee], as a lump sum consideration for entering into the service agreement, and as the price of the formulas and the secret processes.

What mattered was not the precise “complexion” of the payment but the circumstances of its derivation. Tomkies “occupied an exceptional situation” when stipulating for his payment: at 597-599.

185 In making the orders and declarations sought against Tomkies – they were considered to be “appropriate”: at 600 – equity’s “inflexible rule” was applied (at 592):

[E]xcept under the authority of a provision in the articles of association, no director shall obtain for himself a profit by means of a transaction in which he is concerned on behalf of the company unless all the material facts are disclosed to the shareholders and by resolution a general meeting approves of his doing so, or all the shareholders acquiesce. *An undisclosed profit which a director so derives from the execution of his fiduciary duties belongs in equity to the company.* It is no answer to the application of the rule that the profit is of a kind which the company could not itself have obtained, or that no loss is caused to the company by the gain of the director. It is a principle resting upon the impossibility of allowing the conflict of duty and interest which is involved in the pursuit of private advantage in the course of dealing in a fiduciary capacity with the affairs of the company.

(Emphasis added.)

See also *Keith Henry & Co* at 350 (“any property acquired, or profit made, by him in breach of this rule [ie in *Keech v Sandford*] is held by him in trust for his *cestui que trust*”: *Hospital Products* at 107-110 per Mason J; *Chan* at 198-199 per Deane J; and see below “Bribes and Secret Commissions”.)

186  *Secondly*, the wrongdoing fiduciary can be held liable in an *in personam* claim to account for profits he or she derived which are attributable to the breach of fiduciary duty: see *Warman International Ltd v Dwyer* (1995) 182 CLR 544 (“Warman”). We later consider the intricacies, complications and limitations of this form of account. They arise acutely in the Murchison appeal as will be seen.

187  *Thirdly*, a defaulting fiduciary will be liable, at the beneficiary’s election, to pay equitable compensation to a beneficiary who has suffered loss thereby, the object of the remedy being to restore the beneficiary to the position in which he or she would have been had there been no breach of fiduciary duty: see eg *O’Halloran v R T Thomas & Family Pty Ltd* (1998) 45 NSWLR 262 at 272-279. It is unnecessary for the purposes of the Grimaldi appeal to further consider this remedy. While his Honour made findings that Mr Grimaldi was liable to pay equitable compensation to Chameleon, no orders to that effect were made against him and no appeal has been made against this omission.

### (iii) “Bribes and Secret Commissions”

188 Because the “commission” amendment was made after final submissions, his Honour was not addressed on the extensive body of law relating to bribes and secret commissions: see Dal Pont, *Law of Agency*, [12.7]-[12.19] (2nd ed, 2008); *Bowstead and Reynolds on Agency*, 6.084-6.089 (19th ed, 2010); Millett, “Bribes and Secret Commissions” [1993] Restitution LR 7; *Restatement of Agency, Second* §8.02; 3 Am Jur 2d, “Agency”, §226; and see *United States v Carter* 217 US 286 (1910) (“Carter”); and, as reference was made to it in submissions, Finn, *Fiduciary Obligations*, paras 495-515. His Honour was addressed, though, on the general principles relating to conflict of duty and interest and misuse of a fiduciary position of which the bribe/secret commission rules are an accepted sub-set: see Dal Pont, at [12.7]; *Shipway v Broadwood* [1899] 1 QB 369 at 373.

189 Save in relation to the remedies available against a fiduciary in receipt of a bribe or secret commission (see “Relief” below), the principles governing the paying or giving of bribes and secret commissions to fiduciaries have been settled since at least the late nineteenth century: see eg *Boston Deep Sea Fishing & Ice Co Ltd v Ansell* (1888) 39 ChD 339; *Hovenden & Sons v Millhoff* (1900) 83 LT 41; *Industries & General Mortgage Co Ltd v Lewis* [1949] 2 All ER 573; *Peninsula and Oriental Steam Navigation Co v Johnson* (1938) 60 CLR 189 at 214-215.

190 One of the better known descriptions of bribes and secret commissions is that of Slade J in *Industries & General Mortgage Co* at 575. It warrants quotation:

[A] bribe means the payment of a secret commission, which only means (i) that the person making the payment makes it to the agent of the other person with whom he is dealing; (ii) that he makes it to that person knowing that that person is acting as the agent of the other person with whom he is dealing; and (iii) that he fails to disclose to the other person with whom he is dealing that he has made that payment to the person whom he knows to be the other person’s agent.

191 Though secret commissions commonly are paid by way of gift, they may in fact have been earned by the fiduciary for services rendered to the payer, notwithstanding that the fiduciary is acting in the matter at the same time for his or her principal: “[an] agent must not take remuneration from the other side without both disclosure to and consent of his principal”: *Rhodes v Macalister* (1923) 29 Com Cas 19 at 27. While secret commissions usually take the form of money payments, they need not necessarily do so. Of present relevance, they may, for example, take the form of a gift of shares: see eg *Eden v Ridsdale’s Railway Lamp & Lighting Co* (1889) 23 QBD 368.

192 While secret commissions often are given with the corrupt purpose of influencing, such is not a necessary characteristic of them in civil proceedings. As Lawrence Collins J observed in *Daraydan Holdings Ltd v Solland International Ltd* [2005] Ch 119 at [53]:

In proceedings against the payer of the bribe there is no need for the principal to prove (a) that the payer of the bribe acted with a corrupt motive; (b) that the agent’s mind was actually affected by the bribe; (c) that the payer knew or suspected that the agent would conceal the payment from the principal; (d) that the principal suffered any loss or that the transaction was in some way unfair; the law is intended to operate as a deterrent against the giving of bribes.

193 Finally, as both of the above quotations make plain, the payer of a secret commission to a person known to be acting in the matter on behalf of another, is taken to have assumed the risk of the payee having not obtained his or her principal’s informed consent to receipt of the payment: *Grant v Gold Exploration and Development Syndicate* [1900] 1 QB 233 at 249. Knowing that the payee is acting on another’s behalf is sufficient of itself to attract liability, unless full disclosure is made by the payer or “agent” and consent is given by the principal to the payment. Importantly, the payer’s liability does not turn on his or her knowing or suspecting that the agent has not received the principal’s informed consent to the payment: *Daraydan Holdings* at [53]; *Bartram & Sons Ltd* (1904) 90 LT 357 at 359-360.

## 3. The Fiduciary Issue: Was Mr Grimaldi Chameleon’s Fiduciary?

194 The trial judge expressed the view that there were “real difficulties” in characterising the role played by Mr Grimaldi in the Cadetta Transaction. Nonetheless, he concluded (at [173]) that:

It is sufficient to observe that there is force in the view that Mr Grimaldi’s role in the negotiations of the Cadetta Transaction was one that would typically be carried out by a director. It is clear in my view that he was acting on behalf of Chameleon in negotiating the transaction. Whether he was a director or a consultant, he owed fiduciary duties to Chameleon.

195 The conclusion that Mr Grimaldi owed Chameleon fiduciary duties is, in our view, an unassailable one and follows inexorably from the findings on credit and of fact made by his Honour.

196 Put shortly, the relevant facts were as follows.

197 (i) A Mr Skook, who is described in the Grimaldi submissions as “a share investor and a mining entrepreneur”, had interests in gold mining tenements in Western Australia.

198 (ii) According to Don Evans, a mining consultant whose evidence the trial judge preferred over that of Mr Skook as to genesis and terms of the transaction, it was he who alerted Skook to Chameleon’s interest in acquiring gold tenements. He did so after meeting Mr Grimaldi in Perth (at Mr Barnes’ office) by whom he was told that Chameleon needed gold tenements.

199 (iii) A meeting was arranged at Mr Skook’s office and was attended by Skook, his business partner, Mrs Hardie, Grimaldi and Evans. Grimaldi again indicated “we are looking for gold tenements”. At a subsequent meeting a proposal was put by Skook to acquire what were called the Desert Resources tenements.

200 (iv) A further meeting was held at Mr Barnes’ office between Skook, Evans, Grimaldi and Barnes where a figure of 22.5 million shares was asked for these tenements. Mr Barnes said that would be difficult to do. “Importantly” (to quote his Honour), Evans attributed the following words to Mr Skook at that meeting: I expect a strong value for these shares and I have to look after Phil Grimaldi and Don [ie Evans] in this process:emphasis added.

201 (v) At a subsequent meeting, the acquisition of the Cadetta Tenements in lieu was proposed. Skook, Evans, Barnes and Grimaldi were all present. According to Mr Evans, Skook asked for 15 million shares and he (Evans) referred to the same need to look after Grimaldi and himself.

202 (vi) In early May 2004 Evans was informed a deal had been struck with Chameleon to take the tenements for 13 million shares, 8 million of which were to go to the Skook interests. Mr Skook was to pay a commission of 2.666 million of these to Mr Evans as a commission (seemingly an introduction fee).

203 (vii) On 4 May 2004 Cadetta Resources Ltd was incorporated for the purpose of selling the Cadetta Tenements which Skook transferred to it.

204 (viii) On 5 May 2004, Heads of Agreement were executed by Chameleon and Cadetta, Chameleon agreeing to the takeover of Cadetta by the issue of 13 million shares and 13 million options in exchange for all of Cadetta’s shares. By 7 May Chameleon announced to the ASX that it had received 100 per cent acceptance of its offer to the shareholders of Cadetta for their shares. The 13 million Chameleon shares were transferred to Cadetta shareholders.

205 (ix) Subsequently Mrs Hardie was instructed by either Barnes or Grimaldi to transfer to them the 5 million extra Chameleon shares then held by Cadetta shareholders. She arranged for one of the shareholders, Jamora Nominees, to execute transfers for that number of shares, leaving the buyer’s name blank. These were sent to Barnes. On Grimaldi’s instructions the transfers were redone in ten parcels of 500,000 shares. This occurred on 10 June 2004. Consideration for the shares was described as nil and the forms were sent again to Mr Barnes’ office. Mr Grimaldi hand wrote Murchison’s name as the purchaser of the shares and signed the transfer.

206 (x) Grimaldi immediately arranged both for the sale of the Chameleon shares received from Jamora and for the funds from those sales to be provided to Winterfall. The sales began on 17 June 2004. The sum of $125,090 in payments made by Murchison to Winterfall under the agreement between them (see below) was sourced from the proceeds of sale of the Chameleon shares.

207 (xi) As the trial judge indicated, and as reflected in the Agreed Chronology (at [243] and [244]), Skook formed the view that Grimaldi was a director of Chameleon and was working with Mr Barnes on the Cadetta Transaction.

208 His Honour accepted Mr Evans’ evidence that there were negotiations for the sale price. Mr Skook initially asked for 15 million shares; 13 million were agreed; 8 million were to go to the Skook interests with 2.666 million of these going to Mr Evans as commission. The “effect of” Mr Evans’ evidence was that the remaining 5 million shares were to go to Mr Grimaldi. As his Honour commented (at [490]):

[T]he payment of a commission to Mr Grimaldi (whether lawfully or not) provides the only rational explanation for the way in which the transaction was arrived at.

209 Mr Grimaldi did not have the fully informed consent of Chameleon to his having that commission.

## 4. Conclusion on the Grimaldi Appeal

210 We agree with the primary judge’s conclusions that (i) Mr Grimaldi acted on Chameleon’s behalf in the Cadetta Transaction; (ii) the 5 million shares he directed to Murchison constituted a commission given him by Cadetta and Mr Skook and Mr Grimaldi treated them as such; (iii) the suggestion that the payment of the 5 million shares was a gift was no answer to the claim of breach of fiduciary duty – and we would again emphasise that secret commissions and bribes commonly take the form of gifts; (iv) Chameleon not having given its fully informed consent to Grimaldi’s commission whether through its directors or otherwise, there was a clear breach of fiduciary duty; and (v) Grimaldi’s fraud was, in the circumstances, at least in part for the benefit of Murchison which received the shares and benefited from their sale.

211 Given our conclusions we necessarily reject the Grimaldi contention that he was acting in the negotiations for Murchison. While Murchison may ultimately have derived a benefit as a result of the Cadetta Transaction by virtue of its being designated the buyer of the Chameleon shares, it was not in any relevant sense negotiating an outcome for itself in the transaction. There is evidence that when Mr Grimaldi first met Mr Evans he indicated he was looking for “nickel and copper” tenements for Murchison and “gold tenements for Chameleon”. Evans arranged a meeting with Skook who later told Grimaldi that he did not have copper and nickel tenements but did have gold ones. Thereafter the negotiations were conducted by Grimaldi and Barnes for gold tenements for Chameleon. As counsel for Chameleon properly put it, Murchison had nothing to do with that transaction. His Honour’s finding that Barnes and Grimaldi were negotiating for Chameleon was clearly correct.

212 To the extent that it was suggested that a “gift” could not constitute a secret commission, the submission flies in the face of long standing case law. As we have indicated, bribes and secret commissions commonly take the form of gifts made to a fiduciary. Whether or not it is a gift or has been earned by the recipient does not matter. What are important are the circumstances in which the gift or payment is made: see *Hovenden & Sons v Millhoff* at 43 per Romer LJ. In this matter, the making of it was clearly an aspect of the overall transaction negotiated. It need hardly be said that a gift given to a fiduciary in the course of a transaction can give rise to an acute conflict of duty and interest.

## 5. Conclusion on Chameleon’s Appeal

213 Having rejected Mr Grimaldi’s appeal, we necessarily reject Grounds 2 to 4 of Chameleon’s appeal. These allege that his Honour erred in declining to find that a substantial purpose of Mr Grimaldi and Mr Barnes in undertaking the Cadetta transaction was to acquire funds for the purpose of Murchison’s completing the acquisition of Winterfall. Reliance was placed upon the facts said to be found by his Honour that:

(a) by the time of the Transaction, Barnes and Grimaldi had a direct personal interest in the completion of Murchison’s acquisition of Winterfall and stood to gain significant benefits should Winterfall acquire the Iron Jack Tenements and Murchison acquire Winterfall;

(b) on and from the time the Transaction was entered into, Murchison did not have the funds to pay the amount required by Winterfall;

(c) Mr Grimaldi, in fact, did not take the shares himself but arranged for their allocation to Murchison which immediately sold them and paid the proceeds to Winterfall;

(d) both Grimaldi and Barnes were prepared to act dishonestly (a finding made in relation to the “two cheques” transaction considered below); and

(e) both failed to give evidence.

214 Chameleon’s rejected improper “purpose” argument was, in the context of the trial, premised on the 5 million shares transferred to Murchison not being paid as a commission to Murchison. His Honour considered the purpose of the transaction was to be gleaned primarily from the evidence of the negotiations which culminated in the execution of the Cadetta Heads of Agreement. He did not consider it open to him to infer that the Murchison/Winterfall transaction was so advanced by 5 May 2004 (when the Cadetta Heads of Agreement were executed), that the purpose of it was to provide funds for Murchison to apply towards Winterfall. The Murchison/Winterfall agreement was not executed until 30 May 2004.

215 His Honour noted that the share transfers from Jamora to Murchison were dated 10 June 2004 and that when the transfers were prepared by Mrs Hardie on or about 7 May 2004, Mr Grimaldi requested that the name of the transferee be left blank. The inference he drew from this was that Mr Grimaldi did not know at the time the identity of the person or persons to whom the shares would be transferred. It did not follow from Grimaldi’s instruction to leave the share transfers blank that his purpose was to provide Murchison with funds for the acquisition of Winterfall. Murchison’s sale of the Chameleon shares only commenced on 17 June 2004.

216 As with his Honour, we likewise are unable to draw the inference that Chameleon’s appeal requires of us. We acknowledge that both Mr Barnes and Mr Grimaldi had substantial personal interests in Murchison and stood to benefit directly (through the “spotter’s fee”) and indirectly as shareholders from Murchison’s takeover of Winterfall should Winterfall acquire the Iron Jack Tenements. We also acknowledge that Murchison did not have the money required to pay Winterfall when it fell due on 30 May 2004, but we have no basis for inferring that Mr Grimaldi adverted to and doubted during the negotiation and execution of the Cadetta Transaction that he would not otherwise have, or be able to raise, the funds so needed. Further, we note that in mid-March, Murchison issued a prospectus offering 30 million shares at $0.20 per share plus one free option for every three issued and having a minimum subscription of $1.5 million. On 17 April 2004 Mr Roberts emailed potential investors about this public raising and foreshadowed a third float for an “Iron Ore Venture”. On 5 May the closing date was extended until 20 May as the minimum subscription had not been achieved. On 10 May 2004 further emails were sent to prospective Murchison investors which attached an outline of the Iron Jack iron ore project.

217 Despite Chameleon’s submission to the contrary, we do not consider these matters individually or collectively facilitate the drawing of the inference the submission requires. They simply add to the cross-currents of conjecture, as do, for example, the genesis of the Cadetta Transaction which began in Mr Grimaldi’s seeking tenements separately for Murchison and for Chameleon; the course of negotiations disclosed by Mr Evans; the acumen in fund raising attributed to Mr Grimaldi and his apparent optimism in this – as witness his response to Mr Zuks after Murchison’s 30 May 2004 default in paying Winterfall; Murchison’s ongoing public floats and its expectations of them; the blank share transfers; the significant delay between the execution of the agreement and the sales of the shares (beginning 17 June 2004) provided to Murchison; etc.

218 The form the Cadetta Transaction took may have induced Mr Grimaldi to apply his commission in the way he did because of Murchison’s lack of funds. The circumstances, though, do not support the inference that Barnes and Grimaldi devised and executed the Transaction for that purpose. That cannot be said to be the most probable deduction that can reasonably be drawn from the established facts: *Holloway v McFeeters* (1956) 94 CLR 470 at 477.

219 We will deal separately below with the liabilities of Mr Grimaldi and Murchison which arise in consequence of Grimaldi’s breach of fiduciary duty and Murchison’s liability as an accessory under the first and second limbs of *Barnes v Addy* for knowing receipt or knowing assistance in relation to the 5 million shares.

## 6. Was the “commission case” either pleaded or actually in issue? Was leave properly given to amend the pleading to raise it explicitly?

220 These two matters can be dealt with together. They reflect Ground 10 and part of Ground 12 of the Grimaldi appeal and Grounds 1 and 2 of the Murchison appeal. Put shortly and compositely they assert, first that the commission arrangement claim was not pleaded and that the case as pleaded and at trial with respect to the 5 million shares was entirely different; and, secondly, that leave to amend Chameleon’s Statement of Claim so as to include it ought to have been refused.

221 The trial judge described Chameleon’s primary case (at [401]-[402]) as being that the Cadetta Transaction:

… was orchestrated by Mr Barnes and Mr Grimaldi so as to enable [Murchison] to receive 5 million shares in Chameleon which [Murchison] could then sell for the purpose of raising funds to assist in the acquisition of Winterfall and the Iron Jack Tenements.

The claim is one of dishonesty on the part of Mr Barnes and Mr Grimaldi who are alleged to have procured the purchase of the Cadetta tenements at an overvalue in order to enable [Murchison] to receive 5 million shares in Chameleon for no consideration and for no benefit to Chameleon.

222 We agree both with this description and with his Honour’s later observation (at [503]) that, on a literal reading of the pleading, the allegation made was that the share transfer to Murchison was for the improper purposes stated in paras 87(a) to (f) of the Statement of Claim. Those purposes (here abbreviated) were as follows: (a) the shares in Cadetta were purchased at an overvalue for the purpose of enabling Murchison to be given 5 million shares by Jamora; (b) this provided Murchison with tradeable shares which it could use to assist in providing funds for the payment due to be made under the Iron Jack Agreement; (c) the purpose was carried out; (d) it also enabled or entitled Barnes to obtain 10 million Winterfall shares under a share issue Winterfall was to make later in the year; (e) these purposes were not in the best interests of Chameleon; and (f) an intelligent, honest person in the position of Barnes or Grimaldi could not have reasonably believed the Cadetta Transaction was for the benefit of Chameleon.

223 The entering into the Transaction was pleaded to constitute breaches by Grimaldi and Barnes of their statutory duties under the Corporations Act and of their fiduciary duties under the general law: see Statement of Claim paras 86-90.

224 His Honour went on to say (at [503]) that on “a fair reading” of the pleading, Chameleon’s allegations were broad enough to encompass a claim that the Cadetta Transaction constituted a breach by Grimaldi and Barnes of their duties to Chameleon, even if the share transfer to Murchison constituted a commission arrangement between Mr Grimaldi and Mr Skook.

225 We are unable to agree with this proposition, though we accept both that Chameleon’s pleading put in issue the proper characterisation of Grimaldi’s and Barnes’ conduct in entering into the Cadetta Transaction and that that conduct was said to constitute breaches of statutory and fiduciary duty.

226 Chameleon did not open its case alleging there was a commission agreement. Its witness, Skook, advanced an account – not accepted by the trial judge – of how the 5 million shares came to be part of the transaction which denied a commission was being given. Given Skook’s evidence, it was unsurprising that Chameleon’s case at trial was run as it was and that the “no commission” view was put forcefully in final oral submissions.

227 That the share transfer was a commission was not pleaded by any of the respondents. Nonetheless it was raised in opening by Murchison and Mr Barnes and, as his Honour indicated (at [504]), by Mr Grimaldi and Mr Barnes in answer to the claim; it was put by Mr Grimaldi’s counsel to Mr Skook; and it was, as we earlier indicated, the evidence of Mr Evans (who was called by Mr Barnes) which his Honour accepted. Further, his Honour was able to discern in two paragraphs ([206] and [208]) of Chameleon’s written closing submissions claims broad enough to include recovery of the share transfer if it should be characterised as a commission. However, we consider that these paragraphs, when read with para 207, do no more than reiterate with slight variation what was said in para 87(a)-(f) of the Statement of Claim. We cannot accept they have the amplitude his Honour attributes to them.

228 His Honour saw the issue before him as being whether it was open to Chameleon to contend, in the alternative, that Murchison and Grimaldi were liable to account for the commission. He concluded (at [513]) Chameleon was entitled to do so “on the case as pleaded, or at least, on the case as run at the trial”.

229 We are unable to accept that the pleaded case gave that entitlement. Nonetheless, we consider the proper characterisation of the transfer of the 5 million shares to Murchison as a commission to Grimaldi was “in the arena” (to use his Honour’s words at [511]) in the conduct of the proceeding. Chameleon gave its own explanation as to why this extraordinary transfer (which required explanation) constituted breaches by Grimaldi of his statutory and fiduciary duties. Grimaldi asserted a quite different explanation in his counsel’s cross-examination of Skook and in final submissions. That explanation was supported by Mr Evans and was accepted by his Honour as explaining the true character of the transfer. That was the fundamental issue raised in relation to the Cadetta Transaction and “[t]he competing factual contentions were fully litigated”: at [524]. The irony in the denouement of the issue is that it revealed a legal position that could give no comfort to Mr Grimaldi and Murchison. The secret commission itself gave rise to breaches of statutory and fiduciary duties.

230 There was, then, a disharmony between the pleading as cast and the controversy the case as pleaded actually generated in the course of the trial. In these circumstances, we consider his Honour acted prudently, first, in raising with the parties the pleading issue through his Associate’s correspondence with them and, then, in entertaining and acceding to Chameleon’s amendment application to plead the commission claim in the alternative. This brought the pleading into alignment with the factual issues ventilated at trial: cf *Leotta v Public Transport Commission* (1976) 9 ALR 437 at 446.

231 Murchison and Mr Grimaldi have raised predictable objections to the grant of leave: Chameleon had ample opportunity to plead their case; it is too late for a further amendment; they were prejudiced by the amendments; no explanation for the delay was given; Chameleon made the deliberate decision not to plead an alternative case raising the “commission” explanation; no opportunity was given to make submissions on the alternative case, to amend defences or to re-open their cases; and Chameleon did not run the “commission” case at trial.

232 The legal centrepiece of the submissions of Mr Grimaldi and Murchison was, understandably, the High Court decision in *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175, though it was accepted that *Aon* was not a case of “one size fits all”: *Cement Australia Pty Ltd v Australian Competition and Consumer Commission* (2010) 187 FCR 261 at [51]. We would also emphasise what was said in *Aon* (at [75]) and reiterated in *Cement Australia* at [51]) that statements made in cases concerning amendment of pleadings are best understood by reference to the circumstances of those cases, even if they are stated in terms of general application.

233 The circumstances of this case are indeed distinctive. Chameleon had its pleaded case in relation to the 5 million shares rejected. The respondents, Grimaldi and Barnes, in contesting that case exposed themselves to, and crystallised, an alternative case for Chameleon in relation to those shares. In that alternative case, the transfer, considered in light of the Cadetta Heads of Agreement, itself raised the issue of statutory and fiduciary wrongdoing.

234 The trial judge, we would emphasise, rejected the submissions that Chameleon deliberately refrained from seeking an amendment during the course of the trial, and that it failed to explain the reason for the late amendment. His Honour accepted that Chameleon was under a mistaken apprehension as to what was comprehended within the pleading. We are of the same view. If, as *Aon* suggests (at [103]), it is generally to be expected of the party seeking a late amendment that it will provide an explanation, we consider that that given by Chameleon’s counsel both at trial and to us suffices for that purpose in this matter.

235 Amongst the trial judge’s reasons for bringing the pleadings into alignment with “the factual issues ventilated at the trial” were that those issues were fully litigated and that there was no prejudice to the then respondents. As to the latter of these we simply note that Mr Grimaldi submitted on the amendment application that the payment was in the nature of a gift from Mr Skook. This was contrary to the basis on which his own counsel cross-examined Mr Skook. Mr Grimaldi also contended that he might have gone into the witness box if he had known a commission claim was being made. His Honour noted of this that the affidavit sworn by Mr Grimaldi containing the evidence he intended to adduce if he entered the witness box stated that he received the 5 million shares as a commission. His Honour otherwise rejected the possible prejudice claimed by Mr Grimaldi. We accept the reasons he gave. Additionally he indicated that the case was not one in which considerations of case management, delay or inconvenience played any part. His Honour was doubtless correct in this given his vantage point.

236 We are not satisfied that any case has been made out that would establish, in accordance with the principles in *House v The King* (1936) 55 CLR 499 at 505, that some error was made by his Honour in exercising the discretion to give leave to amend the Statement of Claim.

237 Accordingly, in the Grimaldi appeal, we reject Grounds 10, 11 and 12 of the grounds of appeal. In the Murchison cross-appeal, we reject Grounds 1 and 2.

# V. CHAMELEON’S JULY 2004 PLACEMENT AND ITS PROVISION OF CHEQUES FOR $152,750 TO THE IRON JACK VENDORS

238 As his Honour noted (at [55]) the July 2004 placement of Chameleon shares was suggested by Mr Grimaldi in late June 2004 and announced to the ASX on 12 July 2004. It was for a capital raising of $360,000 by the issue of 8 million shares in Chameleon at 4.5 cents per share. The stated purpose was exploration activity at the Palm Springs Gold Mine. This placement founded alternative Chameleon claims.

239 The first was that it was arranged and organised by Mr Grimaldi and Mr Barnes for the purpose of raising funds to assist Murchison to fulfil its obligations to pay, on behalf of Winterfall, the instalment of the purchase price which was payable to the Iron Jack Vendors. His Honour rejected this claim finding that there was no evidence that the capital raising was for the alleged purpose. There has been no appeal from this conclusion.

240 The second claim relates to the drawing on Chameleon’s bank account of two cheques for $56,250 and $96,500 respectively and their provision to the Iron Jack Vendors. Put shortly, claims were made against Mr Grimaldi and Mr Barnes for breaches of s 180 and s 181 of the Corporations Act and for breach of fiduciary duty in respect of Mr Grimaldi’s procuring of the cheques and of Mr Barnes’ provision of them; against Murchison both under the two limbs of *Barnes v Addy* (with Mr Grimaldi’s knowledge of the wrongdoing being attributed to it) and under the accessory liability provisions of s 79(a) and (b) of the Corporations Act; and against Winterfall, under the receipt with knowledge limb of *Barnes v Addy*.

241 To foreshadow matters, 7 of the 20 grounds in the Grimaldi appeal relate to issues arising in relation to the two cheques matter as do 5 of the 10 grounds in the Murchison and Winterfall appeals and Ground 1 of Murchison’s Notice of Contention. Murchison additionally refers to and adopts 4 of the Grimaldi grounds that are presently relevant.

## 1. The Applicable Legal Principles

### (i) Third Party Liability: A Digression

242 It is accepted in this country that Lord Selborne’s ex tempore observations in *Barnes v Addy* did not provide an exhaustive statement of the circumstances in which, and the bases on which, a third party’s participation in another’s breach of fiduciary duty or breach of trust, could render that person accountable in equity as a “constructive trustee” (to use the commonly adopted but often unhelpful formula): *Farah Constructions*, at [161].

243 The fact findings made in this case reveal, potentially, four quite different manifestations of such participation. Each type warrants present note. The *first*, is where the third party is the corporate creature, vehicle, or alter ego of wrongdoing fiduciaries who use it to secure the profits of, or to inflict the losses by, their breach of fiduciary duty: see eg *Cook v Deeks* [1916] AC 554 (“Cook”) at 565; *Queensland Mines Ltd v Hudson* (1975-1976) ACLC 28, 658 at 27,709, revsd on other grounds (1978) 18 ALR 1; *Timber Engineering Co Pty Ltd v Anderson* [1980] 2 NSWLR 488 (“Timber Engineering”) at (11); *Green & Clara Pty Ltd v Bestobell Industries Pty Ltd (No 2)* [1984] WAR 32 (“Green v Bestobell”); *Gencor ACP Ltd v Dalby* [2000] 2 BCLC 734 at [26]; *CMS Dolphin Ltd v Simonet* [2001] 2 BCLC 704 (“CMS Dolphin”) at [97]-[105]. In these cases the corporate vehicle is fully liable for the profits made from, and the losses inflicted by, the fiduciary’s wrong. The liability itself is explained commonly on the basis that “company had full knowledge of all of the facts”: *Cook*, at 565; it is the alter ego of the fiduciary with a “transmitted fiduciary obligation”: *Timber Engineering*, at (11); or that it “jointly participated” in the breach: *CMS Dolphin* at [103]. Liability does not turn on the need to show “dishonesty”, although it often provides the reason for the interposition of the company. Proof of a breach of fiduciary duty will suffice; *Green v Bestobell*, at 40. And, as was said in *CMS Dolphin* (at [104]), it is “rather artificial” to use *Barnes v Addy* to explain this liability.

244 The *second* is where an agent of a company (often a director) has knowledge of fiduciary or trust wrongdoing (be it his or her own or a third party’s) which can be imputed to the company, the wrongdoing itself affecting a transaction or dealing involving the company: see eg *John v Dodwell & Co* [1918] AC 563 at 569. Though the liability of the corporation here results from the imputation to it of knowledge of wrongdoing, the corporation’s own wrong for which it is held accountable is characteristically under one or other of the two limbs of *Barnes v Addy*. We refer later to the limits to the imputation of knowledge and, when considering relief, to the nature of the liability imposed in such cases.

245 The *third* is where the third party knowingly induces or procures a breach of trust or breach of fiduciary duty whether for his or her own, or for another person’s, benefit. As with corporate alter ego cases, it is not necessary to show any dishonest or fraudulent design here: see *Elders Trustee and Executor Co Pty Ltd v E G Reeves Pty Ltd* (1987) 78 ALR 193 at 238-239; *Farah Constructions*, at [161]; and see generally Harpum, “The Stranger as Constructive Trustee” (1986) 102 LQR 114 at 141-144.

246 The *fourth* is where the third party deals with a known agent (or fiduciary) in a projected transaction with the agent’s principal (or beneficiary) and in the course of so dealing offers and has accepted, or agrees to the agent’s solicitation of, a commission, introduction fee or other collateral benefit without the informed consent of the principal. In such a case the third party’s liability is founded on the assumption of the risk that the agent has not obtained the informed consent of the principal to the receipt of such a benefit and hence is acting in breach of fiduciary duty: see *Grant v Gold Exploration and Development Syndicate* at 249; *Daraydan Holdings*, at [53]; and, above, “Bribes and Secret Commissions”.

247 What the above appears to illustrate is that participatory liability as it evolved in equity in cases prior and subsequent to *Barnes v Addy* was not based on inflexible formulae. Given the variety of circumstances in which, and bases on which, a third party could be characterised as a wrongdoer in equity – and we have not here referred as well to third party participation, for example, in a breach of confidence or the abuse of a relationship of influence: see eg *Bank of New South Wales v Rogers* (1941) 65 CLR 42 – varying importance has been given to three matters: (i) the nature of the actual fiduciary or trustee wrongdoing in which the third party was a participant; (ii) the nature of the third party’s role and participation, eg as alter ago, inducer or procurer, dealer at arm’s length, etc; and (iii) the extent of the participant’s knowledge or, assumption of the risk of, or indifference to, actual, apprehended or suspected wrongdoing by the fiduciary.

248 While the distinctive circumstances of this case has prompted this digression, we are relieved of the need to explore the above categories further. Under the shadow of *Farah*, the present case, understandably, has been pleaded and run solely as a *Barnes v Addy* case though, as will be seen, it could in part have been run as a “procurement” case and a “bribe/secret commission” one. Necessarily we limit ourselves to what is to be derived from *Barnes* as it is now understood in Australia.

### (ii) Barnes v Addy: The Liabilities for Knowing Receipt and Knowing Assistance

249 The extent of discord both within and between common law jurisdictions as to what should be taken to be the contemporary burden of the principles enumerated by Lord Selbourne is marked to the point of being Babel-like: for a survey see Ananian-Cooper, “The Liability of Third Parties for Breaches of Trust or Fiduciary Duty: A Comparative Look at Five Themes Across Four Jurisdictions”, in Weaver and Cragie, *Banker and Customer*, vol 5, 25-1701; and cf Underhill and Hayton, *Law of Trusts and Trustees*, Ch 24, 18th ed (2010), *Waters’ Law of Trusts in Canada*, 492-500, 3rd ed (2005), Butler (ed), *Equity and Trusts in New Zealand*, Ch 18, 2nd ed (2009) and *Jacobs’ Law of Trusts in Australia*, [1333] ff, 7th ed (2006). It stands in stark contrast to the apparent simplicity of what was said in *Barnes v Addy* (at 251-252):

… strangers are not to be made constructive trustees … unless [they] receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees.”

250 Because of the distinctions which are drawn not only in what follows, but also elsewhere in these reasons, it is necessary that certain general comments be made at the outset about trust law, property law and fiduciary law.

251 The starting point is the proposition that a third party who acquires legal title to trust property as a purchaser in good faith for value and without notice of any breach of trust or prior equitable interest has a defence in equity to any claim for specific restitution of the property or for compensation for its value to restore the trust property: see generally Ford and Lee, *Principles of the Law of Trusts* [22.10320]-[22.10340]. Importantly notice here extends beyond actual notice and includes constructive notice in its traditional equitable sense. Such constructive notice will attribute notice of a fact to a person who, while lacking knowledge of it, had knowledge of facts which would put a reasonable person on inquiry. This species of notice is considered below. What requires present note is that a third party who has *only* this form of notice when receiving trust property in breach of trust cannot avail of the bona fide purchaser defence. In consequence that person will be liable in proprietary, *in rem*, proceedings to make specific restitution to the “true owner” of such trust property (or its traceable proceeds) as remains in his or her hands. While this type of claim is, potentially, available to be made in *Barnes v Addy* “knowing receipt” cases, it is a separate and distinct liability. It is, in essence, a claim to priority.

252 The need to distinguish it from *Barnes v Addy* liabilities was rightly emphasised by Megarry VC in *Re Montagu’s Settlement Trusts* [1987] 1 Ch 264 at 272-273:

… the doctrines of purchaser without notice and constructive trusts are concerned with matters which differ in important respects. The former is concerned with the question whether a person takes property subject to or free from some equity. The latter is concerned with whether or not a person is to have imposed upon him the personal burdens and obligations of trusteeship. I do not see why one of the touchstones for determining the burdens on property should be the same as that for deciding whether to impose a personal obligation on a man. The cold calculus of constructive and imputed notice does not seem to me to be an appropriate instrument for deciding whether a man’s conscience is sufficiently affected for it to be right to bind him by the obligations of a constructive trustee.

253 This exposes what has long been recognised as the essential characteristic of the *Barnes v Addy* liabilities: they expose the persons to whom they apply to personal, to *in personam*, liabilities: see eg Lewin, *Law of Trusts*, 1026-1029 (9th ed, 1891); Ashburner, *Principles of Equity*, 187-200 (1901) where the difference between the proprietary and the personal remedy is emphasised; Snell, *Principles of Equity*, 141-142 (15th ed, 1908); for contemporary views, see eg Ford and Lee, *Principles of the Law of Trusts*, [22.10440) ff; Jacobs’ *Law of Trusts in Australia*, [1333]-[1334] (7th ed, 2006); and see generally Dietrich and Ridge “‘The Receipt of What?’: Questions Concerning Third Party Recipient Liability in Equity and Unjust Enrichment”, (2007) 31 Melb UL Rev 47 at 51-55; Harpum, “The Stranger as Constructive Trustee” (1986) 102 LQR 114 at 118 ff. In knowing receipt cases, the recipient can be required to pay compensation for loss arising from the misapplication of the trust property, or to account for gains made from it. These liabilities do not depend upon the third party retaining any part of the property received (or its traceable proceeds) in his or her hands although, if such property is retained, it must be accounted for specifically: see Mitchell and Watterson, “Remedies for Knowing Receipt” in Mitchell (ed), *Constructive and Resulting Trusts*, 132 ff (2010); see also *Morlea Professional Services Pty Ltd v Richard Walter Pty Ltd* (1999) 96 FCR 217 at [75]-[76]. But in the usual case, as Lewison J observed in *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch) (“Ultraframe (UK)”), the personal remedy “is needed precisely where the recipient has not retained the property.”

254 Distinctly while the proprietary liability referred to depends upon the existence of trust property in the strict sense, “trust property” for *Barnes v Addy* purposes extends beyond it to property held or controlled subject to a fiduciary obligation. Most importantly for present purposes, it extends to corporate property, ie property subject to the control and the fiduciary responsibilities of a company’s directors. If the directors dispose of corporate property in a dealing which is beyond their authority, whether actual, ostensible or usual, the dealing ordinarily is void and no interest passes to the third party donee, purchaser, etc. However, if the dealing occurs in a transaction which is within the directors’ authority but which is not in the company’s interests (ie is an abuse of power) or is otherwise in breach of fiduciary duty, the transaction will only be voidable: *Richard Brady Franks Ltd v Price* (1937) 58 CLR 112 at 142. As Australian law now stands, even if the third party recipient falls within the knowing receipt limb of *Barnes v Addy*, the company will not ordinarily be able to bring a proprietary claim against the recipient as distinct from a personal one, unless and until the transaction itself has been avoided: see *Daly v Sydney Stock Exchange* (1986) 160 CLR 371 (“Daly”); *Hancock Family Memorial Foundation Ltd v Porteus* (2000) 22 WAR 193 (“*Hancock Family Memorial Foundation”)* at [173]-[206]. Though we later question the correctness of this particular requirement, what needs to be emphasised is that it still allows that a knowing recipient can be held accountable *in rem* for such of that property (or its traceable proceeds) as remains extant in that person’s hands.

255 Finally, it is well accepted in this country that, where property is acquired from another by theft, proprietary relief by way of imposition of a constructive trust should be granted if appropriate: *Black v S Freedman & Co* (1910) 12 CLR 105.

256 The above are all cases where the property or interest sought to be recovered (or its traceable proceeds) is, or had been, the property of the claimant. Distinct from these are those cases where a constructive trust is sought to be imposed by way of remedy on extant property which a delinquent fiduciary or a third party participant in fiduciary or trust wrongdoing has derived on their own account as a result of their wrongdoing. This use of the constructive trust as a remedy in addition to, or as an alternative to, the well accepted personal remedies available against fiduciaries and knowing participants in fiduciary wrongdoing, is very much in issue in the present matter.

257 Turning directly to *Barnes v Addy*, the first real cause of uncertainty with the “two limbs” is whether they are in fact two discrete types of liability or are merely different species of a single genus of liabilities. This is a matter we need to explore in some degree (though by no means exhaustively) as the Murchison/Winterfall Notice of Cross-Appeal, Ground 10 is premised, not only upon there being two distinct liability rules, but also upon their having differing knowledge/notice requirements. We would preface what we have to say with the comment that we do not consider that the important observations made by the High Court in *Zhu v Treasurer of the State of New South Wales* (2004) 218 CLR 530 at [121] about the purposes of legal intervention against third parties who obtain trust property in breach of trust or who obtain some advantage as a result of the trustee’s breach of trust or who knowingly assist other fiduciaries to breach their duties, were directed at the particular issue we are about to consider and do not assist in resolving it.

258 The conventional view in Commonwealth jurisdictions has been to treat the two limbs as distinct. This tendency has of recent times been exaggerated by the twin propensities of some judges in some jurisdictions to explain recipient liability in essentially property law terms and, as such, as being concerned either with rights of priority to property: see eg *Agip (Africa) Ltd v Jackson* [1990] 1 Ch 265 at 292-293; *Citadel General Assurance Co v Lloyds Bank Canada* (1997) 152 DLR (4th) 411 at [45]-[51]; or else with unjust enrichment/an obligation of restitution, arising from the circumstances of receipt of property: *Citadel General*, ibid; *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 at 386 (“[r]ecipient liability is based on restitution; accessory liability is not”); see also Nicholls, “Knowing Receipt: The Need for a New Landmark” in Cornish et al, *Restitution Past, Present and Future* (1998); Underhill and Hayton, 98.37 ff. Whatever sway the latter of these explanations may have in some common law jurisdictions notably in Canada and possibly New Zealand: *Equiticorp Industries Group Ltd v The Crown* [1998] 2 NZLR 481 at 632-633; and see Butler (ed), 18-14; courts still have shown little appetite in receipt cases – and appropriately so – for strict liability coupled with a change of position defence: see *Citadel General*, at [51]: but cf *Koorootang Nominees Pty Ltd v Australia and New Zealand Banking Group Ltd* [1998] 3 VR 16 at 105. The liability itself to that extent would seem to remain “fault” based, the level of fault turning on the particular level of knowledge of the breach of trust/breach of fiduciary duty required in the jurisdiction in question. So, for example, the currently accepted law in England is that:

… liability for “knowing receipt” depends on the defendant having sufficient knowledge of the circumstances as to make it “unconscionable” for him to retain the benefit or pay it away for his own purposes.

See *Charter plc v City Index Ltd* [2008] Ch 313 at 321; *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2001] Ch 437 at 448 and 455.

259 Put compendiously liability both for knowing receipt and knowing assistance turns on what the third party knew, or had reason to know, of the circumstances constituting the breach of “trust” (recipient liability) or the “dishonest and fraudulent design” (assistance liability). It is here, as justly observed in *Jacobs’* (at [1335]), that the whole topic has “become bedevilled by an obsessive refinement of distinctions between degrees of knowledge and notice”. What the authors have described as the “zenith of complexity” was attained by Peter Gibson J in *Baden v Société Générale pour Favouriser le Développment du Commerce et de l’Industrie en France SA* [1993] 1 WLR 509 at [250] where five categories of knowledge and notice were postulated. They were:

(i) “actual” knowledge;

(ii) the wilful shutting of eyes to the obvious (“Nelsonian” knowledge);

(iii) wilfully and recklessly failing to make such inquiries as an honest and reasonable man would make;

(iv) knowledge of circumstances which would indicate the facts to an honest and reasonable man; and

(v) knowledge of circumstances which would put an honest reasonable man on inquiry (that is, constructive notice as traditionally understood).

260 The comment that should be made at the outset about this five-fold classification is that it tends to invite the use of formulae to solve problems. Unsurprisingly judges have cautioned against treating each category as an exclusive and rigid one. That caution is justified and is illustrated in his Honour’s reasons as will be seen.

261 The first two categories of “knowledge” require no comment. The third involves such a calculated abstention from inquiry as would disentitle the third party to rely upon lack of actual knowledge of the trustee’s or fiduciary’s wrongdoing. The fourth reflects what seems to have been accepted provisionally by three judges of the High Court in *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373 at 398 and 412-413. It is, in essence, an understandable, objective, default rule designed to prevent a third party setting up his or her own “moral obtuseness” as the reason for not recognising an impropriety that would have been apparent to an ordinary person: *Consul*, 398. It is the surrogate of actual knowledge. The form of constructive notice used in category (v) derives from the bona fide purchaser for value without notice doctrine.

262 For the purposes of the “knowing assistance” liability, *Farah* has indicated beyond question in this Court that “knowledge/notice” falling within the first four categories, but not the fifth, represents Australian law. The matter we would emphasise is that that limb of *Barnes v Addy* is based manifestly on the third party’s own wrongdoing in the circumstances.

263 When one turns to “knowing receipt” a more complex picture emerges. It is necessary to refer initially to English law. Prior to the abandonment of the *Baden* categories in England, first in relation to “knowing assistance” in *Royal Brunei Airlines*, and then in relation to “knowing receipt” in *BCCI (Operations)*, there were two distinct lines of cases on recipient liability. One expressed the view that cases typically falling within categories (iv) and (v) would not suffice for liability: see eg *Re Montagu’s Settlement Trusts* at 285; *Eagle Trust plc v SBC Securities Ltd* [1992] 4 All ER 488 at 509; *Cowan de Groot Properties Ltd v Eagle Trust plc* [1992] 4 All ER 700 at 758-761. What has been called the third party’s “want of probity” needed to be shown. The other line, which Millett J’s observations in *Agip (Africa) Ltd v Jackson* at 292-293 typify, founded the knowing receipt liability on protection of “rights of priority in relation to property”. Hence would accommodate constructive notice, ie categories (iv) and (v), as a basis for liability: see also *Westpac Banking Corporation v Savin* [1985] 2 NZLR 41.

264 We do not seek to express a view on which line carried the weight of authority, though Underhill and Hayton (at 98.29) suggest the latter did. All that needs emphasis is that English case law revealed two rationales for recipient liability – fault and property protection – and depending on which was accentuated would contrive the extent to which, if at all, constructive notice sufficed for liability to ensue: see generally the discussion in Dietrich and Ridge, at 57-62. We should add that Winterfall, as will be seen, relies upon cases in the “want of probity” line to challenge his Honour’s reliance upon category (iv) notice in a recipient liability case.

265 The orthodox view in this country has been that there was a difference for knowledge/notice purposes between knowing receipt and knowing assistance, with constructive notice (encompassing both categories (iv) and (v)) sufficing for the former: see eg *Ninety Five Pty Ltd (in liq) v Banque Nationale de Paris* [1988] WAR 132 at 175-176.

266 In *Consul* Stephen J was prepared to countenance category (iv), but not category (v), notice in a knowing assistance claim: at 412. However, his Honour had earlier observed that the distinction between the two liabilities had been said to be based on the acceptance of constructive notice (a reference, seemingly, to traditional or category (v) constructive notice)) for receipt but not for assistance. Of this he commented that:

It is not clear to me why there should exist this distinction between the case where trust property is received and dealt with by the defendant and where it is not; perhaps its origin lies in equitable doctrines of tracing, perhaps in equity’s concern for the protection of equitable estates and interests in property which comes into the hands of purchasers for value.

267 We share the doubt expressed here. We do not consider that a property protection rationale for recipient liability (beyond a proprietary claim to a subsisting equitable interest in property, or its proceeds, in the third party’s hands) of itself provides a sufficient justification for imposing *a personal liability to account*. That liability arises as a matter of conscience not of property. As with assistance liability, recipient liability should be seen as fault based and as making the same knowledge/notice demands as in assistance cases. We need not pursue this particular matter further because the weight of authority in this country appears now to draw no distinction between the two types of liability in this respect: but see generally, Dietrich and Ridge, above.

268 The High Court in *Farah* did not settle the knowledge/notice requirement in relation to recipient liability. Nonetheless, from at least the 1990’s and in the wake of the *Baden* classification, judges had begun in recipient liability cases to generalise from what had been said both by Gibbs J (at 398) and by Stephen J (at 412) with whom Barwick CJ agreed, about the insufficiency of traditional, or category (v), constructive notice – though not of category (iv) notice – as a basis for personal liability. To allow that, as Stephen J commented, would be “to disregard equity’s concern for the state of conscience of the defendant”: at 412; see eg *Equiticorp Finance Ltd (in liq) v Bank of New Zealand* (1993) 32 NSWLR 50 at 103G; *Koorootang Nominees Pty Ltd v Australia and New Zealand Banking Group Ltd* at 105; *Hancock Family Memorial Foundation* at 209; *Tara Shire Council v Garner* [2003] 1 Qd R 556 at [66]-[72]; *Spangaro v Corporate Investment Australia Funds Management Ltd* (2003) 47 ACSR 285 at [54]-[60]; see also *United States Surgical Corporation v Hospital Products International Pty Ltd* [1983] 2 NSWLR 157 at 252-254. In *Kalls Enterprise Pty Ltd (in liq) v Baloglow* (2007) 63 ACSR 557 – a decision which post-dates *Farah* – the New South Wales Court of appeal applied *Baden’s* categories (i)-(iv), but not category (v) to a knowing receipt claim. *Kalls Enterprise* in turn has been applied subsequently: see eg *Horfman v M G Kailis Pty Ltd* [2009] WASC 166; *Fodare Pty Ltd v Shearn* [2011] NSWSC 479.

269 There is, in other words, an established line of judicial decision and opinion both at first instance and in intermediate courts of appeal spanning at least 20 years adhering to the view taken in the above cited cases. We do not consider that that view is plainly wrong and should be rejected. On the contrary! Finally, for the sake of completeness, we should note we do not consider that what was said by Bryson J in *Maronis Holdings Ltd v Nippon Credit Australia Pty Ltd* (2001) 38 ACSR 404 at [469]-[478] is inconsistent with that view. Commendably, his Honour emphasised the fault based character of recipient liability: “[u]nconscionability cannot be fictionalised, and the grounds on which constructive trust liability is imposed should be real and substantial”: at [471].

270 Accordingly, we do not consider the primary judge erred in law in finding that knowledge falling within category (iv) of *Baden* was sufficient for the imposition of liability for knowing receipt. We reject Ground 10 of the Murchison/Winterfall Amended Notice of Cross-Appeal.

### (iii) “Trust Property”, Void and Voidable Transactions and Breach of Fiduciary Duty

271 Ground 1 of Murchison’s Notice of Contention is that the two cheque payment of $152,750 by Chameleon to it was, contrary to his Honour’s finding, a loan. As such, unless and until Chameleon avoided the loan by seeking an order for rescission (which it did not do), it could not assert equitable title to the relevant funds or to the assets into which they may be traced, or seek relief against third parties by way of tracing.

272 Later in these reasons we consider the principles informing third party liability and the remedies to which it can give rise: see [553].

273 While supporting his Honour’s finding that the payments made were not loans: Reasons [687]-[688]; Chameleon appears to accept, as Murchison/Winterfall put in their Amended Notice of Contention, that if they were in fact loans, then, on the authority of *Daly* and *Hancock Family Memorial Foundation* at [173]-[206], it could not assert equitable title to the funds or otherwise trace them unless and until the loan was rescinded.

274 The correctness of this aspect of the Notice of Contention has not been put in issue as we understand it. However, there are several comments we should make here in anticipation of what we have to say in relation to remedy.

275 It is well settled as already noted that, though a company is the beneficial owner and not the trustee of its own funds, those funds are treated for the purposes of *Barnes v Addy* as “trust property” and this because of the fiduciary character of the duties of the directors under whose control those funds are held: *Belmont Finance Corporation v Williams Furniture Ltd (No 2)* [1980] 1 All ER 393 (“Belmont Finance”) at 405.

276 As Australian law now stands, a curious consequence flows from this seemingly counterfactual state of affairs. As Mason P observed in *Robins v Incentive Dynamics Pty Ltd (in liq)* (2003) 175 FLR 286 (“Robins”) at [65]-[67], if a recipient takes corporate funds in a transaction taking the form, for example, of a loan or purchase and does so with the requisite knowledge or notice that that transaction itself involved a breach of fiduciary duty (ie it was a “breach of trust”) on the part of the company’s officers, the mere form of the transaction “cannot stay the hand of equity” for the purposes of recipient liability under *Barnes v Addy*.

277 Even though the constructive trust is a discretionary remedy in this setting – a topic addressed later in these reasons – it might be thought that in the case of a loan or purchase in breach of fiduciary duty equity could, if it were necessary and/or appropriate, simply impose a constructive trust over funds acquired under a contract of loan or purchase with the claimant being put on such terms as are necessary to do equity to the other party recipient. However, as Giles JA noted in *Robins* (at [82]): “[t]hat is not done”. Rescission of the contract is required if proprietary relief is being granted though not if a personal remedy, ie compensation, is sought: *Greater Pacific Investments Pty Ltd (in liq) v Australian National Industries Ltd* (1996) 39 NSWLR 143 at 153E-154. As it was put by Mason P in *Robins* (at [73]-[74]):

[R]escission is essential for cases (like the present one) where the loan transaction is at best voidable for breach of fiduciary duty or an analogous statutory duty: *Greater Pacific Investments Pty Ltd (in liq) v Australian National Industries Ltd* (1996) 39 NSWLR 143; *Halifax Building Society v Thomas* [1996] Ch 217 at 228; *Hancock Family Memorial Foundation Ltd v Porteous* (2000) 22 WAR 198 at 210 ff. Affirmation, delay, intervention of third party rights and inability to give counter-restitution may cause any right to rescission to be lost.

In some situations, an order for rescission will be at least a practical necessity (*Greater Pacific* at 153). If such an order is sought independently or as a step towards a remedial constructive trust based upon the process of tracing the “trust” money into the hands of the recipient or into the property acquired by the recipient with that money, the remedy is discretionary. In general, the court will need to be satisfied that a remedial constructive trust (or charge if that suffices) is necessary to protect the legitimate rights of the plaintiff and does no injustice to the rights of third parties, such as creditors see *Daly v Sydney Stock Exchange Ltd* (1986) 160 CLR 371; *Australian Securities Commission v Melbourne Asset Management Nominees (Receiver and Manager Appointed)* (1994) 49 FCR 334 at 358-9; *Giumelli v Giumelli* (1999) 196 CLR 101 at 113-4.

Or as Giles JA explained (at [82]):

Requiring rescission is a way of ensuring that account is taken of the rights of third parties before equity grants a proprietary remedy, and of guarding against recovery under the contract of loan as well as having the proprietary remedy.

278 The rescission requirement stems from *Daly’s* case which, while involving breaches of fiduciary duty, was not one where the recipient took property with knowledge/notice of another’s fiduciary wrongdoing. Chief Justice Gibbs who wrote the majority judgment was clearly aware of this. His Honour referred expressly to the then vol 48 of *Halsbury’s Laws of England*, para 585 (4th ed) to identify the “two clear categories of constructive trusts, ie those involving profits made by fiduciaries and those created by the intermeddling of strangers”. His Honour then commented (at 378) “[t]he present case does not fall within either of those categories”. The relevant footnote in *Halsbury* referred in turn to paras 591-596 which dealt with *Barnes v Addy* type liabilities. Manifestly on the facts of *Daly* the intending investor who made a loan to the firm advising him was not transferring, and his adviser was not, receiving trust property. The circumstances in *Daly* were simply not ones in which Gibbs CJ considered it necessary to find that a constructive trust existed. The separate judgment of Brennan J equally does not address a *Barnes v Addy* liability. It reaffirmed the well established proposition that if a contract under which property is transferred is voidable whether for breach of fiduciary duty or otherwise the vendor, seller or lender cannot insist on an equitable interest in the property or its traceable proceeds until he or she elects to avoid the contract: see eg in relation to a contract obtained by fraudulent misrepresentation, *Lonrho Plc v Fayed (No 2)* [1992] 1 WLR 1 at 11-12.

279 The extension of *Daly*, and of Brennan J’s rescission requirement, to knowing receipt cases seems to have occurred in *Greater Pacific Investments*. This was a case in which (inter alia) legal title to corporate property was transferred under a contract of sale made in breach of fiduciary duty owed to the vendor by one of its directors, the purchaser knowingly participating in that breach. In the words of McLelland A-JA (Priestley and Meagher JJA agreeing) at 153:

In general, where there is a contract for the sale of property by A to B made in breach of a fiduciary duty owed to A by B (or by C in whose breach B knowingly participated), pursuant to which the legal title to the property has been transferred from A to B, the transaction is in equity voidable at the instance of A, who may (if necessary) obtain an order for rescission setting it aside. Unless and until A effectively avoids the transaction and (if necessary) obtains an order for rescission, B’s property rights as a result of the transaction remain unaffected. However if A does effectively avoid the transaction and (if necessary) obtain an order for rescission, the parties will be treated in equity as if the transaction had never been effected; in other words equity will treat B as if he had held the property in trust for A, that is, as a constructive trustee, *ab initio*. A constructive trust arises in such circumstances as a consequence of the effective avoidance or rescission of the transaction. Where, for whatever reason, the transaction has not been and cannot be effectively avoided and rescission is unavailable, it remains effective and no constructive trust can arise: see generally *Daly v Sydney Stock Exchange Ltd* (1986) 160 CLR 371 at 386-390, per Brennan J.

280 Here the constructive trust is the consequence of effective rescission. The function of *Barnes v Addy* is simply to provide a personal remedy to compensate for loss suffered. As McLelland A-JA later commented (at 153F):

An order for the payment of equitable compensation is a remedy available to the victim of a breach of fiduciary duty against both the fiduciary and any other person who knowingly participated in that breach and has thereby become subject to a personal liability as a “constructive trustee” by application of the principles derived from *Barnes v Addy* (1874) 9 Ch App 244, as expounded by Gibbs J in *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373 at 395-398.

281 Understanding of the use of “the constructive trust as a remedy”: cf *Bathurst City Council v PWC Properties Pty Ltd* (1998) 195 CLR 566 at 585; has evolved of recent times. It may be that it will lead to a review of the rescission requirement in this setting. For the moment, though, we should as a matter of comity adhere to the approach endorsed both in *Robins* and by the Full Court of the Western Australian Supreme Court in *Hancock.* As we have noted, this has not been put in issue. Nonetheless, it appears to have little to do with the question whether, irrespective of whether the claimant can claim (after rescission) to be able to assert a prior title to the property, that person should be entitled to a constructive trust over the property in question because it is, in the circumstances, the appropriate remedy. This was the question addressed by Gibbs CJ in *Daly*, but which his Honour answered in the negative in the circumstances of that case. That question still stands.

### (iv) The Imputation of Knowledge to a Corporation

282 This matter can be dealt with shortly. As Murchison put it in its submission, it was common ground that, subject to one exception, Mr Grimaldi’s knowledge with respect to the matters in issue in the case was at all material times to be imputed to Murchison. The exception relied upon was that knowledge of a director’s own fraud committed upon his or her company was not to be imputed to that company: *Re Hampshire Land Co* [1896] 2 Ch 743. It was not the knowledge of that company.

283 This “fraud exception”, as it has been called, has been controversial in a number of common law countries: see Watts, “Imputed Knowledge in Agency Law – Excising the Fraud Exception” (2001) 117 LQR 300; 3 Am Jur 2d “Agency” 280; Dal Pont, *The Law of Agency* [22.57]-[22.59], 2d (2008); *Nathan v Dollars & Sense Finance Ltd* [2007] 2 NZLR 747 at [99]-[108]; and see *In re Parmalat Securities Litigation* 659 F Supp 2d 504 (SDNY 2009) at 519 for the view taken in some number of US States jurisdictions:

… the principal suffers imputation as long as the agent in some respect served the principal or, stated another way, unless the agent totally abandoned the principal’s interests. The rule of imputation absent total abandonment, moreover, is not simply a matter of mechanics or rhetoric. It embodies a determination that it would be undesirable to permit principals to avoid responsibility for an agent’s actions or knowledge whenever an agent could be said to have acted even in part for the agent’s own interest notwithstanding that the agent simultaneously served the interests of the principal.

See also *Restatement of Agency 3rd* §504.

284 The fraud exception to imputation has not only been accepted in first instance decisions in this country: *Beach Petroleum NL v Johnson* (1993) 43 FCR 1 esp at 22.14-22.35; it also has been extended beyond knowledge of fraud to that of breach of fiduciary duty “at least where the fiduciary’s conduct is morally reprehensible”: *Aequitas v AEFC* (2001) 19 ACLC 1,006 at 1,062; see also *Farrow Finance Co Ltd (in liq) v Farrow Properties Pty Ltd (in liq)* (1997) 26 ACSR 544 at 587. Nonetheless, the exception itself has been qualified in a fashion which resonates with that suggested in the *Parmalat* quotation above. As von Doussa J observed in *Beach Petroleum* (at 22.34), while a director’s knowledge will not be imputed to a company where the director’s activities are directed against the interests of the company, it will be otherwise if his or her conduct is not totally in fraud of the company if, “by design or result the fraud partly benefits the company”: see also *Canadian Dredge & Dock Co Ltd v The Queen* (1985) 19 DLR (4th) 314 at 351 which von Doussa J considered provided “compelling guidance”.

285 In the present matter the primary judge imputed Grimaldi’s knowledge of the vices in the two cheque payments to Murchison, as the drawing of the cheques was partly for its benefit: Reasons [701]-[704]. We agree. Later in his reasons, having refused to find Murchison liable to account for Mr Grimaldi’s profits from the 10 million Winterfall or Murchison shares made by the receiving vehicle, Pinnacle, his Honour had no need to consider the question whether Mr Grimaldi’s actions in relation to the spotter’s fee constituted a fraud on Murchison. This is a matter we are required to consider because of Chameleon’s appeal and Murchison’s Notice of Contention.

286 In *Bowstead & Reynold’s* discussion of the “fraud” exception, while questioning the need for a general exception, it is accepted that a defendant who is sued for knowing assistance to the fraud of the claimant’s agent cannot assert by way of defence “that the claimant is deemed to know the fraud of its own agents”: at 8-213 (19th ed, citing inter alia *Belmont Finance, Houghton v Notard*, *Lowe and Wills* [1928] AC 1 and *Stone & Rolls Ltd (in liq) v Moore Stephens* (2008) 2 BCLC 461, see esp at [65] ff. In the converse case, where the company is being sued as a knowing participant, the same principle obtains, at least in cases where the agent/director has received a bribe or secret commission in fraud on his or her principal. If, in fact, the principal had no notice that a secret commission was paid, or to be paid, the payer cannot defend or enforce the transaction affected by the commission “by proving that he believed that the agent had disclosed the circumstances to his principal”: *Grant v Gold Exploration and Development Syndicate* at 248-249 (a leading case); see also *Logicrose Ltd v Southend United Football Club (No 2)* [1988] 1 WLR 1256*;* Dal Pont, *Law of Agency,* [22.54] ff, esp [22.56] (2nd ed, 2008); a like conclusion is proposed in the *Restatement of Agency, Second,* §5.04 Illustration 3 and “comment”. In such cases the principal is “the target, or the victim, of its agent’s dishonesty”: *Stone & Rolls* at [73].

## 3. The Factual Setting and Findings in relation to the Liabilities of Mr Grimaldi and Murchison

287 For ease in exposition the claims against Mr Grimaldi and Murchison will be considered separately from that against Winterfall despite their obvious connectedness. The latter raises quite discrete issues. Because of the number and range of factual disputes, it will be necessary to outline at some length the factual setting and findings out of which they arise.

### (i) The Factual Setting

288 We begin with a matter which is something of a distraction from the matters in issue in this part of the appeal. This relates to the “running loan account” kept between Chameleon and Murchison, the creation of which was suggested by Mr Grimaldi to Mr Roberts around 30 June 2002 in the aftermath of the New Millenium Transaction: see above [88]. As a result of that transaction a loan remained owing by Chameleon to Murchison. Roberts and Grimaldi kept records of the balance outstanding between the two companies at any time, but their totals frequently did not reconcile. Chameleon would often pay Murchison’s expenses but Mr Grimaldi would not include those in Murchison’s account. Over the succeeding years, after the loan account was established, a practice developed whereby if Roberts was unsure where to record a transaction, he would ask Grimaldi about it and Grimaldi would instruct him as such if it related to Murchison. It was, for example, used to record Murchison’s agreed consideration for allocation to it of 750,000 shares in the March 2004 Share Placement. As will be seen, the two cheques drawn on Chameleon for Murchison’s benefit have been characterised by Mr Grimaldi and Murchison as loans made to Murchison. Mr Roberts’ evidence is that when he asked Mr Grimaldi what the cheques were for he was told they were for Murchison and he was asked to code them to Murchison.

289 Chameleon’s ledger containing its version of the loan account was not produced in evidence. Mr Chambers’ evidence was that he did not have it save for a few printouts. There was secondary evidence from Mr Roberts that the loan account existed in its ledger at all material times. Murchison’s General Ledger seems to have contained a “Chameleon Mining Loan Acc” entry. Pages of it were in evidence which itemised sequentially two payments made to Winterfall in the amounts of the two cheques in issue, the entries purportedly being made on 29 July 2004. No evidence was given as to the preparation and maintenance of these pages at the times of present relevance. The primary judge gave no evidentiary significance to these ledger entries. As noted below, there is considerable uncertainty in the evidence as to what were, or may have been, the balances of indebtedness between Chameleon and Murchison in early to mid 2004.

290 However, it is important to recognise that in the period 1 July 2003 to 11 November 2004, it seems there were at least 32 transactions between the two companies in which moneys paid by one on behalf of, or for the benefit of, the other. Schedules of transactions placed before his Honour indicate that these transactions were agreed for the purposes of the proceeding. The transactions themselves (other than the two cheque payments) were not dissected before us. Nonetheless we accept their existence provides some evidence of the intercorporate relationship over the period to which they relate.

291 The following factual account and the findings made are drawn primarily from the primary judge’s reasons and the Agreed Chronology. It assumes, insofar as relevant, background material contained in the “Evidentiary Prelude: Acquiring the Iron Jack Tenements” given earlier in these reasons.

292 On 1 July 2004 Winterfall was due to pay the balance of the second instalment of purchase price to the Iron Jack Vendors ($350,000 plus GST) in accordance with the extension of time that had previously been granted. Winterfall failed to meet the extended deadline, as Murchison failed to pay the sum pursuant to their Heads of Agreement. In early July 2004 Chameleon had only very small amounts of cash in its bank accounts. One of its accounts, that with the St George Bank, was in credit on 5 July 2004 in an amount of approximately $4,700. Notwithstanding this, in early July 2004 Mr Barnes and/or Mr Grimaldi told Mr Zuks (of Winterfall) that some of the payments due to the Iron Jack Vendors would be met by Chameleon.

293 Prior to 8 July 2004 Mr Grimaldi prepared a document entitled “Resolution of Directors of Chameleon Mining NL as at 8 Juli [sic] 2004” which he provided to Mr Dondas for signature. It bears as well the signature of Mr Roberts. The terms of the Resolution were as follows:

Loan [Murchison] Metals Ltd: The company owned [sic] [Murchison] Metals Ltd approximately $75,000. The two companies had from time to time loan [sic] funds to each other. It was resolved to pay [Murchison] Metals the sum of $56,500 as a short term loan which would be repaid within 14 days.

The original Resolution is a faxed document with a fax imprint at the top. His Honour inferred from the fax header that Mr Dondas signed the Resolution on, or shortly before, 9 July 2004 and that he faxed it to Mr Roberts on that date. Mr Roberts’ evidence was that he did not sign the document until August or September 2004. His Honour rejected that evidence. He considered it to be far more likely that it was signed on or shortly after 9 July 2004 and that it was shown to Mr Zuks at the time to give him “comfort” for reasons which will appear when we consider the claim against Winterfall.

294 It is common ground that the figure of indebtedness of $75,000 in the Resolution does not reflect the then accounts of Chameleon. No evidence was given as to how that figure came to be inserted in the document. The trial judge accepted that by March 2004 the balance of the loan account had decreased to “a small debt of less than $8,000”. There was no evidence or any record indicating how or why Chameleon’s indebtedness could have increased to $75,000. Finally, the evidence in the form of a schedule of transactions that took place between Chameleon and Murchison in the period 1 July 2003 to 11 November 2004 (which was agreed between the parties prior to closing addresses) demonstrated that by 9 July 2004 Murchison was indebted to Chameleon by (at least) $45,838.76 or (at most) $79,431.76. The audited accounts of both companies as at 30 June 2004 show the amount outstanding from Chameleon to Murchison as $38,250.

295 On 9 July 2004 Mr Barnes signed a cheque for $56,250 drawn in favour of Data Mapping, which was one of the Iron Jack Vendors. The cheque was drawn on Chameleon’s account at the St George Bank and was countersigned by Mr Barnes’ secretary, Ms Janine Walker. The details on the cheque butt record the amount of the cheque and describe the funds as “Loan to [Murchison] re Jack Hills Project”.

296 It appears that at around that time Chameleon had received some funds from investors in advance of the announcement of Chameleon’s July Placement but those funds had not been cleared when Data Mapping presented the cheque for payment. The cheque was dishonoured by the Bank on 12 July 2004.

297 The same day as the cheque for $56,250 was dishonoured, Mr Grimaldi sent an email to Mr Barnes and Ms Walker. Mr Grimaldi said in it that he had banked some funds from the Share Placement into the St George account so “we have $225,000”. He said another $45,000 was on the way. Mr Grimaldi’s email attached a draft ASX announcement of Chameleon’s Share Placement. The draft, although prepared by Mr Grimaldi, was to be signed by Mr Barnes. The draft stated that the funds raised in the Placement were to be used for exploration activity at the Palm Springs Project. Mr Barnes appeared then to have written to the ASX announcing the Placement. The copy of the letter that was in evidence was unsigned, but Mr Barnes’ name was under the space that was left for the signature.

298 By a letter dated 14 July 2004 addressed to Mr Barnes at his facsimile number, Mr Grimaldi confirmed the advance of $56,250 (although he referred to an advance of $56,500), and requested a further advance. His Honour indicated it was not clear whether the letter was sent on that date, or whether it was sent at all. The letter was written on the letterhead of Murchison and was signed by Mr Grimaldi as “Executive Director”. The letter was as follows:

Re: Loan from Chameleon to [Murchison] Metals Ltd

We hereby confirm that Chameleon Mining N.L. has advanced this company the sum of $56,500 as a short term loan, to be repaid within 10 days.

This company would like to request a further advance of $96,500 to paid [sic] on Friday 16th July on the same terms and conditions.

299 On 15 July 2004 Chameleon wrote to Registries Ltd, which was apparently the company’s share registry, stating that it had made a placement of 8 million ordinary shares at 4.5 cents per share to private professional investors as per the attached list. The letter bears the signature “L Roberts”, but Mr Roberts’ evidence was that he did not sign it. His Honour inclined to the view that he either signed it or that his signature was an electronic copy. The effect of the letter of 15 July 2004 was that the amount raised by Chameleon in its July Placement was $360,000 (8 million x 4.5 cents).

300 The evidence also included a letter bearing the date 16 July 2004 which contains a signature that appears to be the signature of Mr Roberts. His evidence was that he did not sign the document and that it contains an electronic copy of his signature. The text of the letter was as follows:

We hereby agree to advance [Murchison] Metals Ltd on a short term loan basis the sum of $96,500 the funds are to be used to finalize the Jack Hills iron ore project. We also advise that the funds must be repaid within 10 days.

This letter was from Chameleon to Murchison. Its author is not revealed.

301 On 20 July 2004 Mr Barnes and Ms Walker signed a cheque for $96,500 in favour of Zeedam Enterprises Pty Limited, one of the Iron Jack Vendors. The cheque was drawn on Chameleon’s account at the St George Bank. Mr Zuks gave evidence that he collected the cheque from Mr Barnes’ office. The cheque butt of the cheque for $96,500 contained the following information:

Zeedam Enterprises Pty Ltd (loan refer Nik Zuks/Phil Grimaldi)

302 By 22 July 2004 Winterfall had failed to meet its obligation to pay $385,000 to the Iron Jack Vendors. On that date, Mr Hitch sent a fax to Mr Zuks stating that Winterfall’s “exclusive period” had come to an end and “we are now dealing with the other offers”. The letter went on to say:

… you still have a few days until we will be responding to these offers …

303 Following the receipt of the fax from Mr Hitch there were urgent discussions between Mr Zuks and Mr Grimaldi. On 26 July 2004 Mr Grimaldi sent a fax to Mr Zuks which included the following statement:

We have paid to you and made available to you via Chameleon Mining NL, a total of $318,000 we have ready to be paid to you $32,000 plus the GST of $35,000 on the original total sum of $350,000.

304 On the same day, 26 July 2004, Mr Zuks sent a letter to Mr Hitch. The letter attached Mr Grimaldi’s fax of the same date. The letter went on to say that “you hold a cheque that can be re-presented”. This was apparently a reference to the dishonoured cheque for $56,250. The letter also stated that Mr Zuks held $126,250 with a further $130,000 currently “in an account in Sydney”.

305 On 27 July 2004, Mr Hitch sent a fax to Mr Zuks which concluded with a statement in bold that the cheques must be ready tomorrow (ie 28 July 2004) and “no further extension of time will be granted”. According to the Agreed Chronology, though Mr Roberts and Mr Grimaldi had been wholly focussed in July 2004 on finding investors for the Iron Jack deal, they had, Roberts recalled, found themselves on 28 July to be $25,000 short of what was required with the 5 pm deadline approaching. Grimaldi was said by Roberts to have told him that they had to pay the money by 5 pm or they would lose the deal and by that time they had completely exhausted their contacts. While they were at lunch that day, reflecting on the situation, Grimaldi saw a business acquaintance whom he approached in the hope of raising the additional funds. That person was Trevor Lobb. Grimaldi secured the remaining $25,000 from Lobb and deposited it directly into Zuks’ account. The cheque for $96,500 was collected on the 28th. The cheque for $56,250 was then re-presented by the Iron Jack Vendors, together with the cheque for $96,500. The two cheques were debited to Chameleon’s account at the St George Bank on 29 July 2004. The second instalment was paid in full.

306 There are two additional pieces of Mr Roberts’ evidence that should be noted. First, both in his affidavit evidence, and in his oral evidence in chief, Mr Roberts said that he did not find out about the cheques for $56,250 and $96,500 until he reviewed the bank statements for Chameleon’s account at St George Bank in August or September 2004. He said he asked Mr Grimaldi what the cheques were for and Mr Grimaldi told him they were related to Murchison and he (Mr Roberts) was asked to code them to Murchison. Secondly, Mr Roberts said that Mr Grimaldi did not say, at the time when he presented the “8 Juli” Resolution, that Murchison would repay the money; he said only that he needed some supporting documentation regarding the cheques.

### (ii) The Primary Judge’s Findings and Conclusions

307 His Honour considered it to be plainly the case that Mr Grimaldi and Mr Barnes knew the purpose of drawing the first cheque was to meet part of the instalment of purchase price payable by Murchison for the acquisition of an interest in the Iron Jack Project. He inferred that Mr Grimaldi discussed the drawing of the cheques with Mr Barnes shortly before 9 July 2004. Murchison did not have the funds. Accordingly his Honour found that “Mr Grimaldi procured Mr Barnes to draw the cheque”. He later described Mr Grimaldi as the cheque’s “procurer” on a number of occasions. This use of language is noteworthy. In our view, the description given was deliberate and was accurate.

308 It was inferred that both Mr Barnes and Mr Grimaldi believed there were moneys in Chameleon’s bank account at the time the cheque drawn on 9 July 2004 was dishonoured. Having regard to Chameleon’s financial position, the only possible source of funds was from the capital raising which Mr Grimaldi was arranging on Chameleon’s behalf.

309 That Mr Grimaldi was acting on behalf of Chameleon was said to be plain from his email to Mr Barnes and Ms Walker of 12 July 2004. He was collecting the proceeds of the capital raising and depositing them in Chameleon’s bank account. The purpose of the capital raising appears to have been to fund the acquisition of Chalceus although Mr Grimaldi’s draft announcement on 12 July 2004 described the purpose as being for the Palm Springs Project. Whether the purpose of the capital raising was for Chalceus or Palm Springs was not clear. But what was clear was that there was no evidence that the capital raising was for the purpose of enabling Murchison to fund the acquisition of Winterfall.

310 In relation to the second cheque, his Honour found that Mr Grimaldi and Mr Barnes were aware of the fact that the cheque for $56,250 was drawn by Chameleon to assist Murchison, which they must have known was short of funds. They were also to be taken to know that Chameleon was short of funds and that the “loan” to Murchison was to be made out of funds raised by Chameleon for an entirely different purpose. Most importantly, they knew that the funds were to be advanced to Murchison to assist in completing an acquisition, the successful completion of which would entitle them to an introduction fee. The evidence did not establish that, by this time, Mr Zuks had agreed to provide them with a specific number of shares, but the inference drawn from the evidence was that the arrangement was for a substantial number of shares to be allocated to Messrs Barnes and Grimaldi.

311 Though the primary judge concluded Mr Roberts knew of the advances around the time they were made, he was satisfied that Roberts was not told of the personal interest of Mr Grimaldi and Mr Barnes in the acquisition. Further, there was no basis for finding they disclosed their personal interest to any of the other directors of Chameleon.

312 The primary judge’s conclusions reflected the tenor and substance of his findings. Put in précis form they were that:

313 (i) Mr Grimaldi as a de facto director of Chameleon and Mr Barnes as a director breached their statutory duties to the company under each of the provisions of the Corporations Act relied upon by Chameleon. (His Honour later particularised the breaches of s 181(1)(a), s 181(1)(b) and s 182(1).)

314 (ii) In substance what was done was that they diverted more than $152,000 of funds raised by Chameleon for its own corporate purposes, to Murchison for Murchison’s benefit and, in particular, for their respective personal benefit through the introduction fee.

315 (iii) Neither went into the witness box to assert that he was acting honestly. Both acted dishonestly.

316 (iv) While the directors apparently sought to characterise the moneys as a loan, the advances were not loans. They were, as in *Robins*, diversions of Chameleon’s funds to Murchison for the purpose of enabling, or at least assisting, Murchison to acquire for its own benefit, and not for the benefit of Chameleon, an interest in the Iron Jack Project through the acquisition of Winterfall. Moreover, they were advances which were procured by Mr Grimaldi and Mr Barnes in circumstances in which they had a direct conflict of interest and duty by reason of their entitlement to a fee for the successful consummation of the acquisition of Winterfall.

317 (v) Even if Mr Grimaldi was not a *de facto* director of Chameleon, he stood in a fiduciary relationship with it because of his role in the July Placement. The evidence makes it clear that he raised the funds for the July Placement on behalf of Chameleon. He remitted those funds to Chameleon’s bank account at St George’s Terrace, Perth. In carrying out this role, he undertook to act in the interests of Chameleon and not in his own interests. This is sufficient to give rise to a fiduciary relationship even if Mr Grimaldi was not a director: *Hospital Products* at 71-72 per Gibbs CJ; *News Limited v Australian Rugby Football League Limited* at 538-541 per Lockhart, von Doussa and Sackville JJ. In procuring funds which he raised for Chameleon’s purposes to be used for his benefit in a transaction in which he was personally interested, Mr Grimaldi breached his fiduciary duties to Chameleon.

318 (vi) For the same reason, the drawing by Mr Barnes of the two cheques totalling $152,750 constituted a breach by Mr Barnes of his fiduciary duties as a director of Chameleon.

319 (vii) Mr Grimaldi and Mr Barnes were liable to account to Chameleon for the personal benefits or gains obtained by them by the misuse of their fiduciary capacities. The principles were well established and were stated in well known authorities such as *Chan v Zacharia* at 198-199.

320 (viii) The findings made about the involvement of Mr Grimaldi and Mr Barnes in the drawing of the cheques were sufficient to give rise to liability on the part of Murchison under both limbs of *Barnes v Addy*. The cheques were relevantly “trust property”; they “passed through [Murchison’s] hands”; Mr Grimaldi had actual knowledge both of their misapplication and of the personal interest he and Barnes had in securing their introduction fee; and his knowledge was to be attributed to the company; and Grimaldi’s actions were not totally in fraud of Murchison but were partly for its benefit: *Beach Petroleum NL*, at 24-32.

321 (ix) Murchison was also liable for aiding and abetting the contraventions of ss 181 and 182 of the Corporations Act committed by Mr Barnes as was Mr Grimaldi.

## 3. The Grounds of Appeal: Contentions and Conclusions

322 The primary judge’s conclusions have been subject to systematic challenge in both Grimaldi’s appeal and Murchison’s cross-appeal and Notice of Contention. Save in relation to one ground, Murchison has simply adopted the presently relevant Grimaldi grounds of appeal. As to the excepted ground, Murchison’s Notice of Contention deals with the same subject, albeit more elaborately. In consequence we will deal synoptically with the contentions advanced by both parties and in doing so follow the order of the Grimaldi grounds.

### (i) Was Mr Grimaldi a de facto director or an officer of Chameleon (Ground 1)?

323 We have already indicated our finding that such were the extent and the significance of Mr Grimaldi’s functions in the affairs of Chameleon, that he properly was found to have so acted in the position of a director of Chameleon as to warrant the imposition on him of the liabilities, statutory and fiduciary, of a director. We also found that while some of the functions he performed were performed at the request, or with the authorisation of, the board, others were undertaken without request and on his own initiative.

324 It is appropriate that we here relate this finding to Mr Grimaldi’s participation in the Cadetta Transaction and the payment of the two cheques. In relation to the former, the primary judge made no explicit finding that Mr Grimaldi acted as a director of Chameleon in the negotiations of the Transaction: Reasons [173]; but did find he clearly acted in them as Chameleon’s fiduciary: at [543]. His Honour nonetheless considered there was force in the view that in those negotiations his role was one that would typically be carried out by a director. As we earlier indicated, we agree with the fiduciary finding. However, we would add that, having regard to his role in the genesis and negotiation of the Transaction, Mr Grimaldi could properly be said to have then acted, as he had otherwise done in 2004, in the position of a director. We say this without further elaboration in light of para 4 in Chameleon’s Amended Notice of Contention (“De facto director-officer”), given that in the Grimaldi appeal only the fiduciary finding is in issue: Ground 12. We deal with that separately below.

325 In relation to the two cheques matter, the trial judge made the express findings that Mr Grimaldi was a de facto director: [667]; and that, “because of his role in the July Placement”, he was in a fiduciary relationship with Chameleon: at [689]; and he and Mr Barnes were liable to account for “benefits and gains obtained by them by the misuse of their fiduciary capacities”: at [693]. The separate challenge to this fiduciary finding (Grimaldi appeal: Ground 9) is considered below.

326 Mr Grimaldi’s participation in the July Placement grew out of a suggestion he made in late June 2004. Consistent with his prior conduct in 2004 his conduct in relation to the Placement and its sequel was that of a person acting in the position of a director until he procured the use of the moneys raised in the placement. Considered from Murchison’s standpoint, his role in that procurement may also have been on its behalf and for its benefit. Nonetheless, it was his continuing position as an “insider” in Chameleon which enabled him to do what he did. He and Mr Barnes together could ordain how Chameleon would use – or misuse – its funds. They were acting in the positions of a director. It did not matter that Grimaldi had no authority to draw cheques on Chameleon’s account. Barnes did. Both were in the position to take together a very significant decision that would affect Chameleon’s financial position. We reject the suggestion that the “decision” to authorise the first loan was taken de facto by Dondas and Roberts as evidenced in the “8 Juli” resolution. That resolution had no legal effect. Clearly neither advance was authorised by the board. We also reject that he was acting in the matter for Murchison alone. He, with Barnes, were the driving forces in Chameleon in this matter. So significant was his position in Chameleon’s affairs at that time that, to use his Honour’s description with which we agree, he could “procure” Chameleon to draw the cheques.

327 We agree with his Honour’s conclusion that here again Mr Grimaldi was acting as a de facto director.

328 He acted in a fund raising capacity and participated in its effectuation in the Placement down to banking of the proceeds and orchestrating the ASX documentation and its lodgement. He prepared the “resolution” of “8 Juli” and, the Murchison letter of 14 July, the objects of both being to assuage Mr Zuks about Chameleon’s involvement in providing funds for Murchison.

### (ii) Were the two payments by cheque payments on a loan account? (Grimaldi: Ground 3; Murchison: Notice of Contention, Ground 2)

329 To recapitulate, the trial judge’s finding (at [688]) was that the two advances to Murchison “were not loans”. They were, “as in *Robins*, diversions of Chameleon’s funds” to Murchison to assist it “to acquire for its own benefit and not for the benefit of Chameleon” an interest in the Iron Jack Project. We note in passing that this language is redolent of that used in *Robins*. Further, his Honour concluded the advances were “procured” in circumstances in which Grimaldi and Barnes had a direct conflict of duty and interest by reason of their entitlement to a success fee.

330 It is important to appreciate that in reaching these conclusions, his Honour was viewing the matter through the prism of allegations of what can only be described as egregious breaches of statutory duty and of fiduciary duty. The language of “not loans” but “diversions of funds” ought in some degree be seen in that light.

331 A considerable part of the submissions of both Mr Grimaldi and of Murchison were directed at establishing that the advances were payments made on the running loan account between Chameleon and Grimaldi. While his Honour accepted such an account was kept, he clearly did not accept that true character of the advances as loans was to be discerned in the documentation – ie from the cheque butts; the “8 Juli” resolution (which Mr Grimaldi told Mr Roberts he needed as some supporting documentation for the cheques); the 16th July Roberts’ “authorisation”; Murchison’s ledger; or the correspondence between the two companies which described them as, or which suggested they might be, loans made and/or entered on the running account.

332 We have referred already to the running loan account and the “8 Juli” resolution. Having regard to the evidence that the balance outstanding between the companies at any time frequently did not reconcile; to the considerable uncertainty in the evidence as to what were, or may have been, the balances of indebtedness between Murchison and Chameleon in early to mid-2004; to the lack of Chameleon’s ledger and the lack of explanation and proof of Murchison’s ledger and of entries relating to intercompany dealings and dealings by one company on behalf of, or for the benefit of, the other; to the lack of any explanation of the figure of $75,000 in the “8 Juli” resolution; and to the fact that Mr Grimaldi, who did not give evidence, created some number of the documents referred to above and notably the resolution and the 14 July Murchison letter requesting a further loan, it is unsurprising that his Honour paid scant regard either to such documentary descriptions as there were of the advances, or to the running account itself, as providing an explanation of their legal character. We too have a like reticence in relation to these.

333 What we consider to be important are that (i) the money advanced was a large part of Chameleon’s funds; (ii) it was raised for an entirely different and proper corporate purpose in the July Placement; (iii) Chameleon was under no obligation to make advances to Murchison and derived no benefit from so doing; (iv) the absence of evidence of any inquiry by Mr Grimaldi or Mr Barnes as to whether Chameleon was indebted to Murchison at 8 July in the sum of $75,000; (v) only Grimaldi and Barnes were fully aware of the purposes, and personal benefits that could result from, the advances (the “conflicts”); (vi) they were the effective decision makers in the matter; (vii) the advances of Chameleon’s moneys were made precipitately; (viii) Barnes knew the advances were to be made at a time when Chameleon was short of funds; (ix) Grimaldi may well not have known the actual balance in Chameleon’s account (the finding at [571] to the contrary is in error: see Agreed Chronology [300]) though his initiation of, and participation in, fund raising activities at this time would suggest at least a general knowledge of Chameleon’s circumstances, but he would have known when the 9 July cheque was dishonoured that the advances could only be paid out of the proceeds of the Placement; (x) Murchison did not have the funds to pay the Winterfall instalment; (xi) under Chameleon’s Financial Reporting Procedures (July 2003), Mr Barnes was required to get board authorisation “[p]rior to … making large or unusual commitments”; the advances in their context had that character; and no such board authorisation was given; (xii) a running loan account might describe a matter as a loan but does not as such make it a loan if it does not in fact have that character; (xiii) while Grimaldi’s $56,500 “short term loan letter” from Murchison to Mr Barnes was shown to Mr Zuks, it was not clear that it was sent on that date, or was sent at all; (xv) Mr Roberts’ purported authorisation of the $96,500 “short term loan” to Murchison (which his Honour accepted provided some evidence of Roberts’ knowledge of the second cheque) was not given with knowledge of Mr Grimaldi’s and Mr Barnes’ personal interests in the Iron Jack acquisition; (xv) the absence of reliable evidence of a “meeting of the minds” between Barnes on behalf of Chameleon and Mr Grimaldi on behalf of Murchison to enter into a contract of loan and the failure of Grimaldi and Barnes to give evidence; (xvi) the supposed time for the 8 Juli ten day loan to be “repaid” had passed well before the dishonoured cheque had been represented; and (xvii) the payments made were, in aggregate, disproportionately larger than any other of the agreed 32 payments said to have been made by one company for, or for the benefit of, the other which are referred to in the Schedules noted above.

334 His Honour’s conclusions in relation to the fiduciary and statutory wrongdoing of Mr Grimaldi and Mr Barnes were inevitable as was his finding of dishonesty against them. We deal separately with these in considering other grounds of appeal. The present ground relates simply to whether the two cheque payments were loans to Murchison on the running account.

335 The finding that they were not loans but were diversions of Chameleon’s funds discloses no error, although as we indicate below we do not consider it to be necessary, given the distinctive circumstances of this case, to differentiate between “loans” and what we would describe as “deliberate misapplications” of Chameleon funds.

336 It could not properly be said on the evidence that Mr Grimaldi and Mr Barnes misappropriated Chameleon’s funds without any intention that they be repaid if Murchison had the means later to do so. Their actions were not those of thieves: cf *Black v Freedman*; *K&S Corporation Ltd v Sportingbet Australia* (2003) 86 SASR 312. Nonetheless, the funds were misappropriated. As a matter of formal legal characterisation, and subject to what is said below on authorisation, the payment gave rise at law to an obligation on Murchison’s part to repay them and to that extent they gave rise to debts. In consequence the provision of the moneys for Murchison’s benefit – they were paid directly to the Iron Jack Vendors and not via any Murchison account – could for want of a better description, be described as a loan though it was not in our view founded on any overt loan transaction. The money was used because it was there and it was needed. And so it was taken for the benefit of Murchison and, prospectively, of Mr Grimaldi and Mr Barnes through their spotter’s fee. We do not consider any terms for the loan were agreed. The documents prepared by Mr Grimaldi, the first of which described the terms of the first “loan” and the second, requested a further “loan” – ie the “8 Juli” Resolution and the 14 July letter – were shown to Zuks to “comfort” him for reasons later mentioned. We are not prepared to infer that either embodied the actual terms of actual loans made. The purposes of their creation and of their being shown to Mr Zuks were plain enough and were differently directed. The more probable inference is that Zuks’ concerns were the catalyst to their creation and that they were created, not to record the actual terms of an inter-company agreement, but to assuage Mr Zuks. They concealed rather than revealed breaches of fiduciary and statutory duty. It is unsurprising that it was Mr Roberts’ evidence that, when Mr Grimaldi presented the 8 Juli Resolution, he did not say Murchison would repay the money; he said only that he needed some supporting documentation regarding the cheques.

337 The most likely explanation of Chameleon’s accounting treatment of the payments as loans on the running account is that it provided a default position in the absence of any other explanation of them. There is every reason to doubt that the loan account did more than to provide a vehicle to regularise for accounting purposes, and thus appear to explain, what had been done. Its purpose was to provide what Southwell J in *Linter Group Ltd v Goldberg* (1992) 7 ACSR 580 at 618 described as “respectable clothing” for a discreditable transaction. In saying this we consider that the evidence is wanting as to an actual agreement between the two companies on agreed terms. Of the two intercompany letters – that of Grimaldi of 14 July, and of Roberts of 16 July – the evidence that the first was ever sent at all was, according to his Honour, “not clear” and, in relation to the 16 July letter, Mr Roberts attempted to distance himself (unsuccessfully) from any knowledge of its contents at the relevant time. Both, in context, invite the real suspicion of being self-serving. No weight should be placed on them for contractual purposes. His Honour obviously attributed no contractual significance to them at all.

338 Before dealing with the consequences of the “no loan” conclusion, there are two further conclusions of the primary judge that need to be mentioned. The first was the finding that the advances made to assist Murchison were not, in the circumstances, within the range of permissible corporate purposes of Chameleon and even if they were, the making of them was “vitiated” by the failure of Mr Grimaldi and Mr Barnes to disclose their personal interest in the advances. The second finding (at [678]-[679]) – and it is somewhat cryptic – is that if the advances would have been permissible if full disclosure had been made and consent given, such had not occurred. For this reason, his Honour indicated (at [679]): “I do not need to decide whether such a use of the funds was authorised”.

339 We should indicate that we do not understand his Honour in the above to be considering authorisation in the agency-like sense of whether a managing director has actual or usual authority to do an act which binds his or her company: cf *Entwells Pty Ltd v National and General Insurance Co Ltd* (1991) 5 ACSR 424 at 427-428; *Ford’s Principles of Corporations Law*, [13.070]. Rather, and in this context, we consider he was addressing a quite different issue to which we return when considering Grounds 4 (“Dishonesty”) and 5 (“Authorisation”) of the Grimaldi appeal.

340 It has been necessary to refer to the above because, in responding to the Murchison Notice of Contention Ground 1 and in oral submissions, Chameleon has contended that Mr Barnes had no usual authority (in the agency sense) to pay away Chameleon’s funds as he did. This contention was not raised in Chameleon’s submissions in the Grimaldi appeal. The submission we apprehend is made with an eye to circumventing *Daly*, ie the advances were in the circumstances void, s 129 of the Corporations Act notwithstanding. This issue of “authority” seems not to have been before his Honour. It was, on our reading of his reasons, not considered by him. Murchison has not engaged with it in its reply submissions. And, given the view we have taken of the loan issue, it is unnecessary to deal with it. We would add, as we read his Honour’s reasons particularly in relation to relief, that it is clear that he was considering relief appropriate for breaches of fiduciary and statutory duty and for *Barnes v Addy* liabilities and not so as to unravel the consequences of void transactions.

341 While agreeing with the primary judge that the present case was one involving improper diversions of money and did not in any meaningful sense involve loans, it is one in which the advances themselves were not nullities. They were not entirely without legal effect. They gave rise to an obligation to repay and they involved the receipt of “trust property”. They could – and did – attract the *personal* liability of a knowing recipient for *Barnes v Addy* purposes and this cannot in circumstances such as the present be avoided by the expedient of repaying the advances: see *Robins* at [79]. We return later to the issue of repayment: “The ‘Repayment’ of the Cheque ‘Loans’”.

342 However we recognise that the making of a *proprietary* claim might still be problematic because of the application of the *Daly* “rescission” requirement to corporate transactions in such a case. That requirement could well be said to be quite anomalous in “corporate loan” cases where the purpose of the loan itself is known by the recipient to be to achieve an improper purpose to its advantage, as, for example, in *Paul A Davies (Aust) Pty Ltd v Davies* [1983] 1 NSWLR 440*, Robins,* and the present case. We make this observation conscious of the fact that in *Hancock Family Memorial Foundation*, the Full Court of the Western Australian Supreme Court took a contrary view. We consider the availability of proprietary relief later in these reasons.

343 Even if we are wrong in the view we take and that the advances were loans on the running account, this would make no real difference. They would still have involved the same egregious breaches of fiduciary and statutory duty. They would still attract *Barnes v Addy personal* liability to a knowing recipient. They would, though, as Chameleon accepts, raise the *Daly* need for rescission of the loan before proprietary relief could be granted.

344 We reject Ground 3 of the Grimaldi appeal. We dismiss in part Ground 1 of Murchison’s Notice of Contention. Grounds 1(b) and (c) do not arise.

345 We should add for the sake of completeness that we find that Murchison was relevantly a knowing recipient of Chameleon’s “trust property” for the purposes of the first limb of the rule in *Barnes v Addy*. Mr Grimaldi’s knowledge of the vices in the making of the advances was to be imputed to Murchison for the reasons we gave earlier. When we consider the question of proprietary relief, we will deal with the “fraud exception” relating to the imputation of knowledge to Murchison concerning the 10 million share spotter’s fee and with whether Murchison can be said to have participated in a dishonest and fraudulent design in relation to that fee. We also agree with his Honour’s conclusion that Murchison was liable for aiding and abetting the contraventions of ss 181 and 182 of the Corporations Act committed by Mr Barnes. We consider both Barnes and Grimaldi’s liability under the Corporations Act later in these reasons.

## 4. The Liability of Winterfall: Factual Setting, Findings and the Appeal

346 By way of background it should be noted that the claim against Winterfall was not made in the original Statement of Claim. Leave to amend was sought and granted after Mr Zuks had given evidence and the amendment itself was obviously prompted by what was elicited from him in cross-examination.

347 The claim made against Winterfall was that prior to the issue of the two cheques, Mr Zuks agreed with Mr Grimaldi and Mr Barnes that each would receive a payment for introducing Murchison to Winterfall. The amendment para 130C alleged that Winterfall through Zuks knew a substantial number of facts which showed the unlawfulness of the payments. These included: (i) Murchison had not been able to make the payment due to Winterfall under their Heads of Agreement; (ii) Mr Grimaldi and Barnes were arranging for Chameleon to provide funds to assist Murchison; (iii) they both had a conflict of interest with respect to the provision of the cheques because of their entitlement to an introduction fee; and (iv) the evidence provided to Winterfall did not demonstrate that the Board of Directors of Chameleon had authorised the cheques with knowledge of the benefits to be received by Barnes and Grimaldi.

348 Winterfall having been unsuccessful in resisting the claim made, appeals on four grounds. The first three challenge individual findings by the primary judge that Mr Zuks had such knowledge/notice of the circumstances giving rise to Mr Grimaldi’s and Mr Barnes’ breaches of fiduciary and statutory duty as would satisfy categories (ii), (iii) and (iv) of the *Baden* knowledge/notice quintet: Grounds 4 to 6. To establish these errors, it is said, requires a “careful review of the evidence”. We were provided with that by counsel for both Murchison and Chameleon. The fourth ground alleges that category (iv) *Baden* notice was not sufficient for the imposition of liability for “knowing receipt”: Ground 10.

349 We have already rejected Ground 10 in our consideration of *Barnes v Addy*: see ante (circa) [225]-[245].

### (i) The Factual Setting

350 Because of its significance in the appeal it is necessary to begin with two observations made by his Honour about Mr Zuks. The first was that while certain aspects of his evidence were to be rejected – and these were strategically important – the findings made by his Honour were based on the objective probabilities gleaned from the evidence of Roberts and Zuks as well as the documentary evidence. His Honour later commented he did not consider Zuks to be a dishonest person. He went on to observe that Mr Zuks seemed to be experienced and capable and to have a good level of knowledge of directors’ duties. This could be taken into account in assessing whether Mr Zuks had the necessary degree of knowledge to establish *Barnes v Addy* liability.

351 We have referred to much of the relevant evidence earlier in the “Evidentiary Prelude”: [144]-[166]; and in the course of our narration of the factual background to the claims against Grimaldi and Murchison. There are a number of additional matters we need to refer to, or to re-emphasise, here. The following is taken primarily from his Honour’s reasons with some addition from Mr Zuks’ oral evidence.

352 (i) Mr Zuks’ dealings with Mr Barnes and Mr Grimaldi (who was introduced to him by Barnes) pre-dated the Murchison/Winterfall transaction: see the ATL transaction at [137]-[139]. In his cross-examination Mr Zuks revealed a reluctance to deal with Chameleon – “I didn’t want any relationship with Chameleon” – because of Mr Barnes, but this, he said, was because of issues of “process” and not because he was suspicious of him.

353 (ii) The question of an introduction, or spotter’s fee, was not raised at the Windsor Hotel meeting in Perth but, according to Mr Zuks, “it was some time soon thereafter”. His view of the matter was:

Now, from Barnes’ side, he was the one who originally introduced Grimaldi to me, and I didn’t object to him getting a fee – an allocation of some shares, and from Grimaldi’s point of view, he put to me that – that he doesn’t have – that first off he would like a – like a fee for this introduction and that he doesn’t own a significant stake in [Murchison], which he would also like to be able to benefit from the development of the project. So in payment of a fee for – for – this so-called service or introduction to me he was a – was reasonable. How they structured it, it was their own business.

354 (iii) When Mr Zuks was told by Mr Grimaldi that the funds to meet Murchison’s instalment under the Heads of Agreement were to come from Chameleon he said he was “surprised”. He explained his response in the following exchange:

And you knew that Mr Barnes had a substantial personal interest in the outcome of the arrangements between [Murchison] and Winterfall in relation to the Iron Jack Tenements, correct?---Yes, and it was on that basis that I put it to Mr Grimaldi and Barnes – I put it to them that this is a related party – may be a related party transaction, *because of Barnes and Grimaldi’s involvement*, and I asked for them to give me some evidence that this can be done.

When did you ask for that?---At this time, when it would have been – at the time when I was told that the money would come via Chameleon.

(Emphasis added.)

He knew if it was a related party transaction, the payments by Chameleon may require shareholder approval.

355 (iii) Mr Zuks described Mr Barnes’ reaction in the conversation in which he, Zuks, was told that the money was coming from Chameleon:

… one thing I do remember is that in that conversation I had with Barnes, Barnes just felt uncomfortable, if I could put it that way.

How long before - - -?---Referring to - - -

When you say he felt uncomfortable, can you tell his Honour what your best recollection is that Barnes said or did from which you drew the conclusion that he was uncomfortable?---His body language and his face, sir. He – because I asked for this – well, this – some evidence relating to the related party part of the deal, and it’s one of the times, and it’s stuck in my mind, where Barnes sort of – his words weren’t flowing clearly. He just felt uncomfortable with it. Why, that was his business, but I could see that something was not right. I asked for this evidence to show that the two companies were allowed to do this.

356 (iv) According to Mr Zuks, he received a minute from Chameleon and a letter (probably that of Mr Grimaldi of 14 July) before the first payment (ie on 9 July 2004). He described the minute, which he could not produce, as providing his “main bit of comfort”. In his affidavit he described it as being very similar to the “8 Juli” minute. He did not claim to have received or have been shown the “8 Juli” minute. The content of the minute on which he said he relied was anything but similar to that of “8 Juli”. It was, he said, a minute signed by Mr Barnes (“that is the one I was really looking for”) and the other directors; and it was a minute which “in general terms said that [Murchison] and Chameleon had an arrangement where they could loan money to each other if required”. In his affidavit he said it referred to a loan of the whole sum of $152,750 (not just $56,500). We would note in passing that the document so described did not respond expressly to his “related party” concern.

357 (v) The Grimaldi letter of 14 July addressed to Mr Barnes was later identified by Mr Zuks as the letter he received. He described it as indicating that “the two companies had the authority to do this”.

358 (vi) On 10 June 2004, one of the Iron Jack Vendors (Zeedam Enterprises) wrote to Mr Zuks about Winterfall’s default on the second payment due on 4 June. It expressed preparedness to continue their Agreement extending time for payment to 1 July; it imposed a penalty of $50,000 and $60,000 in shares (both due on 14 June); and it cautioned:

If payment is not forthcoming for any money due by the due date then all tenements will revert back to the Vendors and all payments made to date will not be refundable.

Mr Zuks’ acknowledged there was “a risk” of Zeedam taking this course but he “didn’t expect that to be the case. He communicated the risk to Mr Grimaldi. He was “very anxious”, but not “desperate”, about missing the deadlines.

359 (vii) It was put to Mr Zuks that when he did his deal with Murchison, he was content not to inquire at all as to the propriety of what was taking place. He responded:

No, it’s not correct. I certainly let Grimaldi do what he had to do; I didn’t have to sit there breathing over his shoulder and checking everything that he was doing. I was very happy to see that Barnes and Grimaldi – or whoever, for that matter within their group or companies – would receive a fee for introduction and also capital raising and doing all those things that had to be done. Now - - -

360 (viii) Ten million Winterfall shares in Winterfall were issued to Pinnacle on 26 October 2004. These constituted the payment of the introduction fee to Mr Grimaldi and Mr Barnes as initially agreed with Zuks in April or May 2004, although the precise number of shares to be issued was not finally agreed upon until October 2004.

361 His Honour’s fact findings included the following.

362 (i) While Mr Zuks said on a number of occasions in cross-examination that he was told by Mr Grimaldi and/or Barnes that the first two payments would be coming from Chameleon, it was more likely that the initial discussions were only about the first payment. This was supported by the fact that the “8 Juli” Resolution referred only to the first payment.

363 (ii) Mr Zuks conceded that he knew Mr Barnes and Mr Grimaldi stood to benefit from the successful completion of Winterfall’s acquisition of the Iron Jack Project.

364 (iii) It was accepted that (a) Mr Zuks was concerned that the involvement of Mr Barnes and Mr Grimaldi made the payments a related party transaction; and (b) he asked them for evidence that Chameleon was authorised to provide the funds which were the subject of the first cheque. That finding was reflected in the genesis of the “8 Juli” resolution.

365 (iv) The 8 July document was shown to Mr Zuks on or shortly after 9 July 2004 to give him “comfort” but whether he was entitled to take comfort was a different question.

366 (v) The evidence that Mr Zuks received the Chameleon minute which referred to the sum of $152,750 was rejected. No such document could have existed before the cheque for $56,250 was collected by Zuks. The additional advance was not requested by Mr Grimaldi until at least 14 July 2004. Likewise his Honour did not accept that Mr Zuks was shown a minute in general terms providing that Chameleon and Murchison had an arrangement for inter-company loans.

367 (vi) Mr Zuks knowledge (if any) of the breach of fiduciary duty by Mr Barnes and Mr Grimaldi turned on the matters of which he was aware in relation to the loan (or purported loan) of $56,250.

368 (vii) Mr Zuks knew the funds for the first cheque were being provided by Chameleon; he knew the successful completion of the Iron Jack acquisition would entitle Mr Barnes and Mr Grimaldi to an introduction fee; and while the specific number of shares to be provided had not been agreed, the arrangement agreed to was for a substantial number of shares to be allocated to them.

369 (viii) It was accepted that Mr Grimaldi showed the 14 July letter to Mr Zuks shortly after that date and that Mr Zuks said that he did not place as much reliance on it as he did on “the minute”.

370 (ix) It was plain from the letters of 26 July 2004 and 27 July 2004 between the Iron Jack Vendors and Mr Zuks, and between Mr Grimaldi and Mr Zuks that by then the situation was desperate. His Honour considered Mr Zuks’ evidence that he was anxious about the missed deadlines as an understatement: “Even for an experienced businessman such as Mr Zuks, his anxiety levels must have been high”.

371 (x) The only document provided to Mr Zuks that purported to authorise any part of the transaction was the “8 Juli” Resolution. It related only to the first cheque and was signed only by two directors. It contained no disclosure of the personal interest of Mr Barnes or Mr Grimaldi. Mr Zuks, we would add, denied receiving this document. We would note again that Mr Zuks did not claim to have received or been shown the “8 Juli” minute although he described it as very similar to the minute upon which he relied. The claimed similarity is, we would interpolate, not convincing.

372 Turning to the primary judge’s conclusions on Mr Zuks’ “degrees of knowledge” of the circumstances which constituted the “breach of trust” for knowing receipt purposes, his Honour, first, was satisfied that Mr Zuks had actual knowledge of all of the matters pleaded in para 130C. His reasoning thereafter we can put in proposition form:

373 (1) Most importantly, Mr Zuks knew Mr Grimaldi and Mr Barnes had a personal interest in the provision of the cheques because he had agreed they would be paid an introduction fee upon completion of the transaction. We would add that, as the evidence from his cross-examination betrayed, he considered this payment to be “reasonable”.

374 (2) The only evidence Mr Zuks had of any corporate authorisation of the advance was the 8 Juli Resolution which he received prior to the dishonour of the first cheque. We note again he denied having received this Resolution.

375 (3) By the time he received the second cheque the time for repayment of the first advance had expired and he knew the first cheque had been dishonoured. There was no resolution authorising a new advance of $56,250 or an advance of $96,500.

376 (4) He knew of the personal interest of both Barnes and Grimaldi in the transaction. While it was not put to him that this knowledge made him aware of their position of conflict. His Honour did not think it was critical to do so. It was sufficient that he knew of their personal interest “through the introduction fee which he had agreed to pay them”: [715].

377 (5) He made no inquiry of the other directors of Chameleon as to whether they were aware of, or approved, those personal interests. This was particularly evident, his Honour said, in his answer when it was put to him that he was content not to enquire as to the propriety of what was taking place. We have quoted that answer above at [359]. In the primary judge’s opinion (at [718]-[719]):

… this answer, when read in light of Mr Zuks’ knowledge of the circumstances in which the cheques were drawn and presented, fell within the second, third and/or fourth categories of knowledge in *Baden*. Mr Zuks wilfully shut his eyes to the obvious, or wilfully and recklessly failed to make such enquiries as an honest and reasonable man would make, or, at very least, he had knowledge of circumstances which would indicate the facts to an honest and reasonable man.

The relevant circumstances were, Mr Zuks’ knowledge of the entitlement of Mr Grimaldi and Mr Barnes to an introduction fee, the dishonouring of the first cheque, the obvious inability of [Murchison] to meet its contractual commitment to Winterfall and the increasingly anxious, if not desperate position in which Mr Zuks found himself by late July 2004 … Mr Zuks had no evidence of any corporate resolution of Chameleon on which he could rely.

378 (6) After discussing what types of knowledge *Baden* categories (ii), (iii) and (iv) envisaged, his Honour enlarged on his conclusion in terms we should quote in full given the challenges made in the appeal. He said (at [721]-[727]):

Although I have rejected certain aspects of Mr Zuks’ evidence, I did not consider him to be a dishonest person. Rather, he seemed to me to be experienced and capable and indeed to have a good level of knowledge of the duties of directors. He had a sufficient understanding of the laws of related party transactions as to raise that issue with Mr Grimaldi and Mr Barnes. I am entitled to take this into account in assessing whether he had the necessary degree of knowledge: *Bell Group* at [933].

In my opinion, I am entitled to infer from Mr Zuks’ knowledge of the personal interest of Mr Grimaldi and, in particular, Mr Barnes, that Mr Zuks knew of the conflict of interest and duty. Mr Zuks knew that Mr Barnes was the Managing Director of Chameleon. Even if Mr Zuks was not aware of Mr Grimaldi’s role as a *de facto* director of Chameleon, or of his fiduciary relationship to Chameleon, Mr Zuks’ knowledge of Mr Barnes’ interest is sufficient.

Any person with Mr Zuks’ level of understanding would have known that Mr Barnes had a duty to disclose his interest in the [Murchison]/Winterfall transaction in order for the Board of Chameleon to give a valid approval of the “loan” to [Murchison].

It is no answer to this to say that Mr Zuks was not aware of what passed between Mr Barnes and the Board of Chameleon. The authority on which Murchison relies to make good this proposition, namely *Cowan de Groot Properties Ltd v Eagle Trust Plc* [1992] 4 All ER 700 at 767 is distinguishable from the facts of the present case.

Here is [sic] seems to me that Mr Zuks’ knowledge of, at least, Mr Barnes’ personal interest and the other circumstances I have described, including the fact that Mr Zuks did not have a Board resolution authorising the loans of $152,750, were sufficient to constitute knowledge falling within the second and third categories in *Baden.*

In any event, it is not necessary to prove that a stranger who participated in a breach of fiduciary duty with knowledge of all the circumstances did so actually knowing that what he was doing was improper: *Consul* at 398. Gibbs J went on to say:

It would not be just that a person who had full knowledge of all the facts could escape liability because his own moral obtuseness prevented him from recognizing an impropriety that would have been apparent to an ordinary man.

Here Mr Zuks had knowledge of all the facts. Even if he was “morally obtuse”, the impropriety of the drawing of the cheques would have been apparent to an ordinary person. That is sufficient to satisfy the fourth category of knowledge in *Baden*.

379 It was concluded that, as the cheques had passed through Mr Zuks’ hands, this satisfied the requirement of receipt of trust property. Hence Winterfall was liable as a knowing recipient. The primary judge also concluded that the authorities applying to accessory liability under s 79 of the Corporations Act were also satisfied as Mr Zuks had actual knowledge of the contraventions.

## 5. Winterfall Conclusions

380 The principal strands in Winterfall’s appeal are that his Honour erred (i) in rejecting the uncontradicted evidence of Mr Zuks that he received a minute signed by all of Chameleon’s directors authorising the total payment; (ii) in failing to address (a) whether Mr Zuks appreciated that the “spotter’s fee” which Mr Barnes was to receive created a legal conflict of interest and (b) whether Mr Zuks was put on inquiry as to whether the interest of Barnes was not disclosed to the Chameleon board; (iii) in making findings adverse to Mr Zuks without Chameleon’s case being properly put to him; and (iv) in applying category (iv) *Baden* notice to Mr Zuks.

381 As to the last of these we have already dealt with it insofar as it involves the submission that, as a matter of Australian law, category (iv) notice will not suffice to attract recipient liability.

382 The primary judge’s rejection of the minute was justifiable in the circumstances. His Honour did find that Mr Zuks was not a dishonest person but he nonetheless rejected significant aspects of his evidence – of which the minute was one – based on the objective probabilities. He accepted that Mr Zuks raised his related party concern prior to the receipt of the first cheque. From a careful analysis of what transpired thereafter and from what properly could be inferred in the circumstances, Mr Zuks’ “minute” evidence was rejected. There was no error made in its rejection. It had no support in the documentary evidence; it was inconsistent with the burden both of the “8 Juli” resolution which, contrary to his evidence, Mr Zuks was found to have been shown and of Mr Grimaldi’s 14 July letter to Mr Barnes, the significance of which Mr Zuks downplayed; no such minute was in any party’s possession; and none relied upon that minute to propound a loan authorised by all of Chameleon’s directors.

383 The conclusion reached on the minute was not glaringly improbable: cf *Fox v Percy* (2003) 214 CLR 118 at [29]. Rather the improbability inhered in Mr Zuks’ evidence itself.

384 We can deal in a composite way with Winterfall’s remaining contentions. We preface what we have to say with the comment that his Honour concluded, and Winterfall has not contested, that Mr Zuks had “a good level of knowledge of the duties of directors”. It was proper and appropriate to take that into account in making findings about what, in the circumstances, Mr Zuks knew or had reason to know: cf *Bell Group Ltd (in liq) v Westpac Banking Corporation* (2008) 70 ACSR 1 at [933]; *Restatement of Contracts, Second*, §19b.

385 Mr Zuks acknowledged that Mr Barnes and Mr Grimaldi had personal interests in the payments being made. Importantly, it was he who agreed that Winterfall would pay them an introduction fee upon completion of the transaction. He may, as he said, have thought this fee “reasonable”. But he was himself the author of the interest they so had. It was his own action which gave the transaction the legal character it bore as one infected with a conflict of duty and interest. Distinctly, as his answers concerning Mr Barnes’ reaction when telling him that moneys were coming from Chameleon indicated, he had otherwise been alerted to the possibility “that something was not right”. He asked for evidence relating to the related party part of the deal. The best he got was to be told the companies had loan arrangements.

386 A refrain in his evidence was that the dealings *inter se* of Barnes and Grimaldi and their dealings with their companies, were “their business”. We do not suggest that he was designedly taking refuge in the “indoor management” rule of *Royal British Bank v Turquand* (1856) 6 EI&BI 327; 119 ER 886. What we do consider is that his own action in agreeing to the introduction fee, his sense that something was not right when Mr Barnes explained Chameleon’s participation to provide money, and the objective inadequacy of the documentary response he received to assuage his related party concern, put him beyond being able to now invoke *Turquand* as a shield. It is this which distinguishes the present case from *Cowan de Groot Properties Ltd v Eagle Trust plc* at 766-767 – a decision which the primary judge correctly held was distinguishable on its facts.

387 His Honour inferred from Mr Zuk’s knowledge of the personal interests of Mr Grimaldi and, in particular, of Mr Barnes, that he knew of the conflict of duty and interest. We agree with this inference for the reasons we gave above. His agreement to give the introduction fee was the source of it.

388 His Honour went on to say (at [723]) that any person with Mr Zuks’ level of understanding would have known that Mr Barnes had a duty to disclose his interest in the Murchison/Winterfall transaction in order for Chameleon’s Board to give a valid approval of the “loan” to Murchison. Again, and consistent with what we earlier said about the significance of Mr Zuks’ knowledge of director’s duties, we consider this was a conclusion open to his Honour.

389 Winterfall, though, has suggested that Mr Zuks had no duty to inquire whether the board had given a valid approval to the loan. We disagree. By his participation in the giving of the introduction fee he had made the regularity of the cheque transactions Winterfall’s problem. It was implicated in the conflict itself. As the circumstances unfolded – with Mr Barnes’ “reaction”, the related party concern and the dishonouring of the first cheque – the need to inquire became the more obvious. Winterfall could not wash its hands of this matter.

390 It was put to Mr Zuks in cross-examination that in doing the deal with Murchison he was content not to inquire at all as to the propriety of what was taking place. He denied this. And he denied he was “utterly indifferent” to the source of the money coming from Murchison. Yet he made no inquiry of the other directors of Chameleon as to whether they were aware of, or approved, the personal interest of Mr Barnes and Mr Grimaldi in the transaction. The tenor of his evidence on the introduction fee is that he assumed the risk of irregularity; he did not check; it was Barnes and Grimaldi’s business. And, to quote the primary judge, by late July 2004, Mr Zuks found himself in an “increasingly anxious, if not desperate position”.

391 We need not explore in detail why Mr Zuks acted as he did though we note the following. First, it is probable that the prospect of the loss Winterfall would suffer if the Iron Jack Vendors terminated the agreement was an immediate and real concern to him and exaggerated the importance of securing whatever financial assistance Murchison could muster in July 2004. Secondly, his repeated comment that the spotter’s fee was “reasonable” may well have betrayed that he was oblivious to what should have been obvious to him in the circumstances. That he may not have comprehended the significance of what he was agreeing to, provides no ground of exculpation.

392 The primary judge, as we have said, considered that Mr Zuks was not a dishonest person. He nonetheless found his knowledge of the circumstances constituting the breaches of “trust” of Mr Barnes and Mr Grimaldi, fell in the alternative, within categories (ii), (iii) and (iv) of the *Baden* quintet. For our part, we doubt whether it is necessary or helpful in this matter to force the facts into the strait-jackets of those categories. His Honour’s findings in the alternative suggest a like view. The knowledge Mr Zuks either had or which should be attributed to him by reason of what he had reason to know, or would have known had he not abstained from inquiry, straddled categories (ii), (iii) and (iv) of *Baden*. What is clear is that, for whatever reason, Mr Zuks engaged in calculated abstention from inquiry. His conduct was unconscionable, or to use Megarry VC’s description, it revealed a “want of probity” in the circumstances. This, it should be emphasised, is not a finding of dishonesty or fraud on his party.

393 Winterfall was, in consequence, a knowing recipient of “trust” property.

394 Finally, the *Browne v Dunn* (1894) 6 R 67 contention that the case against Mr Zuks was not fairly and properly put to him. By way of background, we reiterate that the claim against Winterfall was not made in the original Statement of Claim. Leave to amend was sought and granted *after* Mr Zuks had given evidence. The amendment was prompted by what was elicited from him in cross-examination. He was not recalled to give further evidence.

395 The essence of the complaint made is that it was not fairly and openly put to Mr Zuks in cross-examination that Mr Barnes was in a position of conflict of duty and interest. Nor was he asked about disclosure of interests or whether he thought to enquire if a proper disclosure had been made by Barnes.

396 The primary judge acknowledged it was not put to Mr Zuks expressly that his knowledge of Mr Barnes’ and Mr Grimaldi’s personal interest made him aware of a position of conflict. His Honour did not think it was critical to do so. It was sufficient “that he knew of their personal interest in the transaction through the introduction fee *which he had agreed to pay them*”: [715] emphasis added. As we earlier indicated, Mr Zuks was himself the author of this conflict as his Honour clearly appreciated. In these circumstances no unfairness was done to Mr Zuks by not having the fact of a conflict put to him expressly.

397 We likewise disagree with the contention that he was unfairly treated by not being asked directly about disclosure and consent. As we have indicated, by agreeing to the introduction fee he made disclosure and consent Winterfall’s problem. We consider that, in light of his understanding of director’s duties, Mr Zuks could have been under no misapprehension as to what was being put to him in cross-examination which was that he was turning a blind eye to whether there was a lack of propriety in what Mr Barnes and Mr Grimaldi were doing. As to the pleaded case, all of the matters particularised in para 130C were either common ground or were established by the evidence given prior to the amendment.

398 The circumstances are unusual but they do not bespeak any unfairness or prejudice to Winterfall. Mr Zuks own conduct in the circumstances made the case against him.

399 We reject Grounds 4 to 6 of Winterfall’s appeal.

## 6. Grounds of Appeal 4 and 5 and the Finding of “Dishonesty”

400 At [641] of his reasons the primary judge made the observation that Mr Grimaldi and Mr Barnes were aware when the first cheque was drawn that both Murchison and Chameleon were “short of funds” and that the “loan” was to be made by Chameleon out of funds raised “for an entirely different purpose”. Later, his Honour characterised the action of Grimaldi and Barnes as a diversion of funds raised by Chameleon for its own corporate purposes, to Murchison for its benefit and, in particular, for their own benefit through the introduction fee. They failed to act in good faith in the best interests of Chameleon so contravening s 181(1)(a) of the Corporations Act. He went on (at [675]):

Neither Mr Grimaldi nor Mr Barnes went into the witness box to assert that he was acting honestly. In my opinion, both acted dishonestly.”

401 This finding is itself challenged as also is the failure of the primary judge to “specify with any appropriate clarity or precision what he was finding was the dishonesty and what was the basis for that finding”.

402 The finding was said to be significant in a variety of ways:

(i) It was relevant to the claim against Murchison that it participated in the dishonest and fraudulent design of Grimaldi and Barnes in the two cheque payments.

(ii) It affected his right to claim indemnity as a director of Murchison in accordance with the rights given him by the company’s constitution.

(iii) It provided the basis of Mr Grimaldi’s liability to account to Chameleon.

(iv) It adversely affected his standing and reputation.

403 It is also said that the finding was dependent on a number of other findings which were themselves erroneous. The *first* of these is that Mr Grimaldi was in a fiduciary relationship with Chameleon “because of his role in the July Placement”: Reasons at [680]-[690]. The challenge to this is an independent ground of appeal (Ground 9) which we reject below.

404 The *second* further error was the inference that his Honour drew, in the absence of Mr Grimaldi and Mr Barnes giving evidence, that they knew or “at least” failed to inquire whether Chameleon was not indebted to Murchison in the amount stated in the “8 Juli” Resolution. That inference, considered in context, was one properly drawn in our view. We have made sufficient comment elsewhere on this “resolution” and its purposes.

405 The *third* alleged error was that Mr Grimaldi and Mr Barnes “authorised” the two advances: Reasons at [676]. His Honour’s conclusion is consistent with our own characterisation of their conduct: they were the decision-makers; Grimaldi procured the cheques; and Barnes drew them.

406 The *fourth* alleged error was said to inhere in his Honour’s observation (at [679]) that he did not need to decide whether the use of the funds was authorised by Chameleon. This founds Ground 5 of the Grimaldi appeal. Considered in context, his Honour’s observation was quite unobjectionable. All he was saying was that he did not have to decide whether a transaction which otherwise would have involved a clear breach of the conflict rule would, if the conflict was properly authorised, itself be one for proper corporate purposes. The reason he did not have to decide that was because it was clear that Mr Grimaldi and Mr Barnes “made no disclosure to the other directors of their personal interest in the ‘introduction’ … fee”: at [679]: see “The Fiduciary Idea etc”, above.

407 The remaining two alleged errors are covered by other findings we have made about the character of the two cheque transactions and about Mr Grimaldi’s status as a de facto director or fiduciary. We would also add that, while we have accepted that his Honour erred in concluding from an email of 12 July 2004 that Mr Grimaldi knew Chameleon’s then actual bank balance, the error was a non-material one.

408 As to the alleged error in making the dishonesty finding, we consider the evidence amply supported his Honour’s conclusion. The case was a plain one, not simply of a bare conflict of duty and interest, but of a blatant self-interested misappropriation of Chameleon’s funds which provided no benefit to it which funds Grimaldi well knew had been raised for quite different corporate purposes.

409 As to the pleading point, the finding of dishonesty was the corollary of the finding that Mr Grimaldi did not act in good faith and for the proper purposes as required by s 181(1)(a) and (b).

410 We also agree with Chameleon’s submission that a finding of dishonesty could properly have been made on the evidence. Mr Grimaldi’s failure to give evidence reinforces this.

411 We reject Grounds 4 and 5 of the appeal.

## 7. Grimaldi Ground 6; Murchison and Winterfall Ground 7: “But for” the Cheques the Acquisition of the Iron Jack Project would have Collapsed

412 At [809] of his reasons the primary judge found that “but for” the receipt of the proceeds from the sale of the shares it received from the Cadetta Transaction and the two cheques for $152,750 drawn on Chameleon’s funds:

(i) Murchison would not have been able to pay the instalment due to Winterfall under the Murchison/Winterfall Heads of Agreement;

(ii) Winterfall’s acquisition of the Iron Jack Project would not have been made;

(iii) the reverse takeover of Winterfall by Murchison would not have been undertaken; and

(iv) Murchison would not have obtained ownership, through Winterfall, of the Iron Jack Tenements.

413 In the Grimaldi appeal it is alleged that this finding was contrary to Mr Zuks’ evidence in cross-examination and was not otherwise proven.

414 We have referred to the chronology of events between 22 July and 28 July 2004 at [302]-[304] above. We do no more here than re-emphasise, first, the peremptory tone of Mr Hitch’s fax of 27 July 2004 which concluded with the statement in bold that the cheques must be ready “tomorrow” and that “no further extension of time will be granted”; and, secondly, Mr Grimaldi’s fortuitous obtaining of the $25,000 “shortfall” from Mr Lobb of funds needed if the 5 pm deadline on 28 July 2004 was to be met.

415 Mr Zuks’ evidence was set up seemingly to counter this. It related in the main (a) to whether he told Mr Grimaldi the deal would be off if the 9 July cheque was not received (he denied saying this while making clear that there was a deadline to be met); and (b) to his being “anxious” but not “desperate” to receive money from Mr Grimaldi, his reason for this being he was confident the Iron Jack Project would not be taken away both because of his relationship with the person acting for the project and because of that person’s familiarity with Mr Grimaldi.

416 In reaching his conclusion his Honour relied upon the history of defaults by Murchison in meeting its obligation to Winterfall to pay the $350,000 instalment; the circumstances in which the cheques came to be provided to the Iron Jack Vendors on 28 July 2004; the chance meeting with Mr Lobb at lunchtime on that date; and Mr Hitch’s emphatic statement in his 27 July fax that no further extensions would be granted.

417 His Honour obviously preferred the “objective probabilities” to Mr Zuks’ evidence: cf Reasons [613]. No error in so doing has been disclosed. We reject Ground 6 of the Grimaldi appeal.

418 The Murchison/Winterfall ground of cross-appeal is somewhat differently focussed as it has been presented in submissions. It relies upon Mr Grimaldi’s “resourcefulness” in raising funds and on the contention that the finding that, so far as the Iron Jack Vendors were concerned, if Mr Grimaldi did not come up with the money on 28 July 2004, “the deal was off”, was not supported by the evidence.

419 The first of these can be rejected shortly. It was Murchison which ascribed the quality of “resourcefulness” to Mr Grimaldi. In dealing with the New Millenium Transaction in 2002 the primary judge did, though, make the observation that the evidence in the proceedings demonstrated that “Mr Grimaldi was not one to stand by idly when a corporate opportunity presented it”. From such matter Murchison goes on to contend that it was apparent from the evidence that his Honour ought to have inferred that, had it become necessary to do so, Grimaldi would have secured alternate sources of funds. His Honour actually rejected a submission to that effect and went on to comment that, in the period leading up to the 28 July deadline, “[i]t is plain that Mr Grimaldi’s ‘resourcefulness’ was exhausted”.

420 For its part, Murchison pointed to the significant funds ($830,100) raised for it through Mr Grimaldi from 30 August to 14 December 2004 and to his “resourcefulness” in securing the $25,000 from Mr Lobb at the “chance meeting” sometime prior to the 5 pm deadline of 28 July 2004. We note in passing that Murchison has sought to diminish the reliability of Roberts’ evidence that that meeting in fact occurred on 28 July. Nonetheless, it was Mr Lobbs’ evidence that the meeting occurred “on or shortly before” that date but, importantly, his cheque was drawn on 28 July 2004.

421 His Honour’s finding related only to a particular period (ie July 2004) during which Mr Grimaldi was having difficulty in raising the funds needed to meet the Winterfall obligation. That difficulty was evidenced in Murchison’s failure to meet the 1 June 2004 deadline Zuks had negotiated and then the 1 July deadline after a further extension had been granted. It was also reflected in Murchison’s ongoing failure to meet the minimum subscription due under its prospectus, the close off date again being extended from 19 July 2004 to 30 August 2004.

422 Whatever improvements may later have occurred in Mr Grimaldi’s fund raising fortunes, the finding the primary judge made that Mr Grimaldi’s resourcefulness was spent in the July period was clearly open. The Lobb cheque of 28 July is, contrary to Murchison’s submission, testament to the adventitious, not to the astutely planned and organised. The evidence does not at all suggest that, had Chameleon’s funds not been misappropriated, a like sum would have been garnered from elsewhere by Mr Grimaldi. We agree with his Honour’s conclusion.

423 There remains the question whether, if the instalment money was not paid on 28 July 2004, the Iron Jack Vendors would have called off the deal.

424 It is the case that the original Iron Jack Vendors/Winterfall sale agreement made “time of the essence” and that the 5 May and 10 June 2004 extensions provided that if the deadline for payment was not met then all of the tenements would come back to the Vendors and no payments already made would be refundable. Notwithstanding these provisions and the 1 June and 1 July 2004 defaults by Winterfall, the Vendors did not terminate the sale agreement. Founding themselves on this, Murchison contends that, in the absence of clear evidence to the contrary, the inference to be drawn was that they wanted to proceed to completion defaults notwithstanding. Mr Zuks’ evidence of his own view about the likelihood of further extensions, was prayed in aid of this.

425 To be set against this were the history of defaults, the escalating tone of dissatisfaction and threats in the communications from the Iron Jack Vendors culminating in Mr Hitch’s “no further extension of time will be granted”, the imposition of a significant penalty for the extension to 1 July and his Honour’s appreciation that the Vendors were not “likely to have been persons who could be trifled with”. His Honour considered that the Hitch statement demonstrated beyond argument that there would be no extension. Again we can see no error in his Honour’s drawing this inference which is the most reasonable and probable given the known facts.

426 We reject Ground 7 of the Cross-Appeal.

## 8. Ground 8: The Breaches of s 181 and s 182 of the Corporations Act

427 The primary judge found, as has been foreshadowed, that Mr Grimaldi (a) breached s 181(1)(a) of the Corporations Act in procuring Chameleon to draw the two cheques: at [674]; (b) breached s 181(1)(b) by authorising Chameleon’s funds to be used for a collateral purpose of assisting Murchison to complete a transaction in which he had a personal interest: at [676]; and (c) breached s 182(1) by improperly using his position to gain an advantage for himself: at [680].

428 The essence of the Grimaldi challenge to these findings, which parallels but does not rely upon the challenge made to the finding he was a de facto director, was that he did not “exercise powers” or “discharge duties” (for s 181(1)(a) and (b) purposes) for Chameleon or “improperly use” his position with Chameleon, because he did not in any way purport to authorise the two advances made by Chameleon. Hence he did not breach any duty as pleaded by Chameleon. Moreover, it is claimed, his Honour should have found Mr Grimaldi was acting for Murchison, not Chameleon, in obtaining the advances.

429 It is not entirely clear whether a pleading issue is concealed in the ground of appeal. The brief written submissions suggest it might have been and counsel has reiterated on a number of occasions on the appeal that it has been the pleaded case which has been fought. Be this as it may, it is clear that as the evidence evolved it told its own story. If it departed from the case as pleaded it did not for that reason necessarily cease to be the case that was heard and determined by the primary judge. We make these observations especially in respect of the breaches of the Corporations Act found by his Honour.

430 It may be accepted that in securing the advances from Chameleon, Mr Grimaldi did act for Murchison which was a, but not the only, beneficiary of the transaction. This, though, by no means precludes a finding that he acted as well for Chameleon in the matter or that he made improper use of his position in Chameleon for his own benefit when so doing. It is a common, and rightly often deprecated, practice for persons to act in a dealing in which they owe conflicting duties to the several parties to the dealings. Though not an issue in this proceeding, it is clear on his Honour’s findings that Mr Grimaldi was so circumstanced and that he sacrificed Chameleon’s interests in the matter.

431 We have already indicated our view that the persons who made the decision for Chameleon to make the two advances were Mr Barnes and Mr Grimaldi. The advances were the consequence of their decisions and actions. We equally have indicated in concluding Mr Grimaldi was a de facto director that, while some of the responsibilities and functions he assumed were at the request or with the authorisation of the board, others were assumed without request and on his own initiative. Whether requested or not, Mr Grimaldi participated in the management of Chameleon’s affairs and in the exercise of its powers in utilising Chameleon’s funds in the cheque transactions.

432 We have commented on several occasions that the primary judge’s repeated description of him as the “procurer” of the cheques was deliberate and apt. He was acting as an insider – a de facto director – in securing the making of the advances.

433 It was plainly open on the facts found by his Honour that ss 181(1)(a). 181(1)(b) and 182(1) were, respectively, breached in the manner specified.

434 We dismiss Ground 8 of the appeal.

## 9. Ground 9: Mr Grimaldi’s Separate Fiduciary Obligation to Chameleon

435 By way of a finding in the alternative, the primary judge found that even if Mr Grimaldi was not a de facto director of Chameleon, he stood in a fiduciary relationship with it because of his role in the July Placement. His Honour then found Mr Grimaldi breached his fiduciary duties in procuring the funds to be used for his benefit in a transaction in which he was interested and he was liable to account to Chameleon for the gains obtained by the “misuse” of his fiduciary capacity.

436 The ground of appeal, considered in light of the submissions made on it, challenges these conclusions in two respects. The first is that the fiduciary finding was outside the pleaded case; the second, that there was no evidence to justify the imposition of a fiduciary obligation in respect of the use of Chameleon’s funds raised in the July Placement.

437 First, the pleading point. Chameleon pleaded at para 3 that if Mr Grimaldi was not a “director” or “officer” within the meaning of s 9 of the Corporations Act, he was a person who “performed such tasks in relation to the business of Chameleon” for the relevant period as to owe it fiduciary duties at general law. In paras 8(v), (vi) and (vii) of the pleading those “fiduciary duties” are pleaded. They were essentially the “two duties” stated by Deane J in *Chan v Zacharia* as well as a duty not to misappropriate Chameleon’s property for his personal, or a third party’s, benefit. And they were clearly incorporated into para 3 of the pleading. The pleading point is without merit.

438 As to the scope of the fiduciary relationship, it is claimed that there was no evidence that Mr Grimaldi’s role in the July Placement extended to involvement in the application of the funds raised. This claim in other words was, essentially, a *Birtchnell* one: ie the application of the funds fell outside the scope of the subject matter over which his fiduciary obligation extended: *Birtchnell*, at 408.

439 His Honour’s reasons on Mr Grimaldi’s separate fiduciary status border, for understandable reasons, on the cryptic. Consistent with what we have said on the issue of Mr Grimaldi’s position as a de facto director and on his breaches of the Corporations Act, it would have been open to the primary judge to find on the evidence that Mr Grimaldi, having performed tasks for Chameleon in the July Placement, then assumed a responsibility to participate in the utilisation of the proceeds so bringing this within the subject matter covered by his fiduciary duty. We rather doubt, though, that this was what his Honour contemplated.

440 Rather, we consider the reasons, fairly read, indicate, first, that Mr Grimaldi was found to be a fiduciary in respect of the Placement and the banking of the proceeds and, secondly, that he misused *that* fiduciary position for his personal advantage in procuring the use of funds raised for his own advantage. He misused the “opportunity or knowledge” his position had given him, to use the language of Deane J in *Chan v Zacharia* (at 198-199), to obtain the benefit he did. Significantly, his Honour referred without quotation to the above pages in *Chan*. In other words, his liability turned, not on the conflict of duty and interest limb of fiduciary law (which raises a *Birtchnell* inquiry), but on the misuse of position limb (which does not necessarily do so): see above “Standards of Conduct: Fiduciaries and Fiduciary Duties” [176].

441 It was open to the primary judge to find that the function assumed by Mr Grimaldi in relation to the July Placement was such as brought him into a fiduciary relationship with Chameleon in its performance. What he did may have fallen outside the performance of that function, but it involved a misuse of the opportunity it gave him, ie to procure the misappropriation of the funds he raised.

442 It is unnecessary for us to further enlarge on this matter. It has no bearing on the outcome of this appeal.

443 We reject Ground 9 of the Grimaldi appeal.

# VI. RELIEF: GENERAL

## 1. Preliminary Matters

444 There is a variety of matters, factual and otherwise, to which reference should be made either to provide context for issues which arise in relation to the grant of relief or to explain what might otherwise seem to be silences or oversight in relation to our treatment of some aspects of the appeals and cross-appeals.

### (i) The Murchison/Winterfall Agreement and Addendum and their Implementation

445 This may be of some importance in relation to the claim for proprietary relief against Murchison in respect of the cheque transactions.

446 To reiterate, the Murchison/Winterfall Heads of Agreement of 30 May 2004 formalised, initially at least, how Murchison was to become a participant in the acquisition by Winterfall of the Iron Jack Tenements. It is necessary to note precisely what the key provisions envisaged. They were:

(i) Murchison was to provide Winterfall with capital of $350,000 on the signing of the agreement to cover necessary expenditure to keep the exploration licences in good stead and for other “working capital requirements” in the short term: cl 3(b) (“the working capital provision”);

(ii) Winterfall agreed to issue new shares to various shareholders nominated by Murchison and other participants in the venture with the limitation that Mr Zuks and his partners would remain with majority control and would receive 40% of the issued capital of Murchison on the takeover of it by Murchison: cl 3(c) (“the envisaged corporate structure provision”);

(iii) Murchison would call a shareholders’ meeting to approve the takeover of Winterfall and further agreed to raise an additional $2.5 million in capital to provide funds for Winterfall: cl 3(e) (the “fund raising provision”);

(iv) Murchison agreed to appoint Mr Zuks and Mr Kopejtka as directors (Kopejtka and Vagnoni, not Zuks, were in fact appointed on 10 November 2004 which was the day before the reverse takeover was completed): cl 3(f);

(v) Clause 4 was the machinery provision under which Murchison was to acquire 90% of Winterfall shares via the issue of 100 million shares to Winterfall shareholders. This share for share transaction required both the approval of Murchison shareholders (ie to the takeover terms) and of Winterfall’s shareholders (ie to sell their shares on the proposed terms);

(vi) When the above provisions are considered in light of cl 2, the real purpose of the arrangement is laid bare. In that clause Winterfall declared its intentions for the future. It had acquired two exploration licences “with the view to further explore these leases then develop an iron ore mine to initially export lump and fines”.

We will refer to that intent as “the Project”.

447 What the agreements reveal, when considered in light of the parties prior dealings and under the shadow of the Winterfall/Iron Jack Vendors agreement, is that the parties were marrying their resources and were making future commitments for the Project. Moneys were being paid, assets were being committed and fundraising was to be undertaken. They were in short becoming “co-adventurers”. Murchison’s payment of $350,000 has to be seen in that light. It could properly be described as an “investment” in the Project and, as will be seen, his Honour did so describe it as an “investment”. What manifestly is the case is that Murchison was not advancing money for the purchase of an asset as such – though the well understood object of the payment was to allow Winterfall to pay its instalment under the Winterfall/Iron Jack Vendors agreement. That was its need and that was how it applied its newly received “working capital” – a description to which we will later return.

448 It is important to note that the parties who were to make the reverse takeover possible – Winterfall’s shareholders at the time the offer was to be made – were not parties to the Heads of Agreement. And it was their property, not Winterfall’s, that was to be acquired. Murchison was being given a contractual right to make a bid for the shares: cl 4(g); Winterfall in turn assumed the obligation to “arrange for all its shareholders to enter into respective ‘Form of Acceptance and Transfer’ with [Murchison] and assist [Murchison] in all ways possible to complete such agreements in a timely manner.” Murchison, in other words, had the opportunity, but not the right, to acquire the shares of the shareholders. In practical terms, though, it was a virtual certainty that the shares would be acquired if the agreements were otherwise completed given the identities of the shareholders and their support for the Project: Winterfall shareholders ended up owning nearly two thirds of the shareholding in Murchison. As will be seen, our view of the effect of the agreements differ somewhat from his Honour’s but is less favourable to the case put by Chameleon. A matter we would emphasise in passing is that the Agreement envisaged that Murchison would make a financial advance to Winterfall as part of the consideration it was providing to secure Winterfall’s cooperation to procure its shareholders to agree to a share swap with Murchison.

449 The Addendum to Heads of Agreement signed in early June 2004 varied the original Agreement in several respects. First, seemingly in lieu of the original cl 3(b) (the working capital provision), the Agreement had added to it a new cl 3(b) which provided:

Murchison will provide Winterfall with the sum of $350,000 which will be invested as capital in Winterfall equal to 10% of the issued capital of that company.

This would seem to envisage, as Chameleon noted in its cross-examination of Mr Zuks, that Murchison was to get 10% of Winterfall’s pre-takeover issued capital as a quid pro quo for the $350,000 advance. Put in the language of tracing, the money advance was to undergo a metamorphosis and be represented in shares.

450 Clauses 3(c) and (d) have been mentioned earlier in these reasons. They were an elaboration of that part of the original cl 3(c) which provided for a 10% share issue to Murchison or its nominees. Clause 3(d) now made explicit that Mr Grimaldi’s nominees were to obtain shares at “nil cost” in consideration of his introducing Murchison to Winterfall. The “spotter’s fee” was coming into the open.

451 The understanding between Murchison and Winterfall as to how the $350,000 advance was to be applied, though unstated in the documents, was clear. It was to be used in satisfaction of Winterfall’s obligation to pay the second instalment to the Iron Jack Vendors. If the immediate stipulated benefit to Murchison was to take the form of shares, the object of the parties agreement was to secure Murchison the contingent right to takeover Winterfall on the terms set out in the two documents. It, as his Honour appreciated, had the capacity as a public company to raise substantial funding for the Project. That contingent right was acquired *before* the misappropriation of Chameleon’s moneys. This is of no little importance to the view we take about tracing against Murchison.

452 The final comments we would make about the Agreement and the Addendum is that we have not been taken to any evidence to suggest that the 10% of Winterfall shares was issued to Murchison. Murchison in its submissions in the Chameleon appeal suggests that the shares were issued to third parties who took for value and against whom there is no allegation of notice. This seems consistent with what Mr Grimaldi had to say about the provision made for seed capital investors in his letter to Mr Zuks of 24 October 2004. Murchison, in other words, seems never to have had those 10% of shares as traceable assets in its hands. What does seem plain is that the share issues were not effected as envisaged by the Addendum.

### (ii) The 28 July 2004 Winterfall/Iron Jack Vendors Agreement

453 We refer to this matter because of the constructive trust/accounting claims made by Chameleon against Winterfall and Murchison. Reference has earlier been made to the agreement of 19 February 2004 between Winterfall and the Iron Jack Vendors under which Winterfall purchased the Iron Jack Tenements for a consideration of $1 million (payable by instalments) and a royalty of 80 cents per tonne. The tenements were at that time no more than applications for exploration licences made under the *Mining Act 1978* (WA). The agreement was subject to the consent of the Minister of Mines; it required Winterfall actively to pursue the grant of the tenements; as the royalty provision (cl 4) indicated, the agreement clearly envisaged the tenements were being sold and purchased with subsequent ore production in mind; and it required both the written consent of the parties for any party to assign all or any of its rights and that the assignee execute a deed in which it agreed to be bound by the Winterfall/Iron Jack Vendors agreement.

454 On 28 July 2004 – the day before Chameleon’s bank account was debited with the two cheques advanced to Winterfall – Zuks executed replacement sale agreements with the Iron Jack Vendors.

455 The first of these agreements altered and added to the February agreement in significant respects. The consideration payable for the tenements was increased so as to include 6,000,000 shares in Murchison; the mining project aspect of the agreement was accentuated – the royalty provision was more elaborate and under cl 5.6 Winterfall undertook –

… to spend $500,000 per annum on the tenements or any associated mining lease conversion for the first three years from the date of grant of E25/535 (not including any payments to the Vendors pursuant to Clause 3.2 of this agreement or government rents and fees). Any shortfall will be paid to the Vendors within 60 days of the anniversary date of the grant of E25/535;

and the Vendors were obliged to provide Winterfall with executed transfers upon satisfaction of all of the instalment payments and the issue of the Murchison shares “and upon granting of the Tenements”.

456 The second agreement – between Winterfall and three of the Iron Jack Vendors – related to the sale of additional tenements. The consideration for these again was made up of a cash payment, shares in Murchison and a royalty. The terms of the agreement otherwise mirrored the first, save it did not contain a clause similar to cl 5.6 above.

457 What is quite apparent from these agreements is that they were made with knowledge of Murchison’s future involvement in the anticipated exploitation of the tenements; that that “Project” provided the *raison d’être* of the contracts; that the Iron Jack Vendors, as shareholders, were to be participants in it; and that they were obliged to cooperate with Winterfall to give it the benefit of the Tenements “upon [their] granting”: cl 16 in each agreement.

458 As noted above, the last of the instalments was paid in February 2005. The evidence also suggests that the Murchison shares were issued in November 2004/March 2005. The Agreement did not provide for them being issued to the Vendors until after Murchison had been re-listed on the ASX. This occurred on 30 March 2005. The shares were traded the following day and closed at 25.5 cents.

459 We note the above matters for two reasons. The first relates to the royalty payment.

460 Murchison and Winterfall asserted in their Defence, that the royalty payable under the agreement between Winterfall and the Iron Jack Vendors was relevant to the terms of any relief ordered in favour of Chameleon. The effect of the assertion was that if it was ordered that Murchison or Winterfall holds on trust for Chameleon either Murchison’s interest in Winterfall, or Winterfall’s interest in the Iron Jack Project, the present value of the royalty payable by Winterfall to the Iron Jack Vendors should be brought to account in the order.

461 His Honour took the view that the royalty payable was irrelevant to the relief sought in the proceedings. He observed in relation to Winterfall (at [822]-[823]) that:

It is true that the consideration payable by Winterfall to the Iron Jack Vendors included the contractual obligation to pay a royalty of 80 cents per tonne on the iron ore removed from the mines. But it does not follow from this that in determining the proportionate interest which Winterfall holds on trust for Chameleon, Winterfall is entitled to bring to account the present day value (as at February 2004) of the royalty stream.

This is because Chameleon’s claimed entitlement to an interest in the Iron Jack Project is to either *an interest in the Project itself* (through Winterfall) or to an account of the profits of the Project.

(Emphasis added.)

462 We will return to this when we consider Chameleon’s claim to a proportionate interest in the tenements.

463 What is to be emphasised here is that no appeal has been made against the trial judge’s conclusions concerning the relevance of the royalty payments. We have in consequence no reason to consider his Honour’s views on the relevance of the royalty or to address the question whether there is any other proper basis upon which account ought be taken of the significance of the royalty: contrast *Primeau v Granfield* 184 F 480 (1911) (“Primeau v Granfield”) at 487-488 (a case in which trust funds were improperly used in developing a gold mine held under a lease).

464 The second matter we would note is that while his Honour referred to the Murchison shares issued to the Iron Jack Vendors as part of the consideration for the tenements, no account was taken of the value they represented in acquiring the tenements.

465 Ground 3 of Murchison’s Notice of Contention is that the value of the Murchison shares issued under the two agreements is to be counted in calculating the total value of the consideration provided to the Iron Jack Vendors. The evidence on this matter is that the total number of shares which were issued to the Vendors was 8,555,445. The books and records of Murchison record the shares as having been issued at a nominal 10 cents each. So it is contended the sum of $855,544.50 ought be added to the total consideration provided under the agreements. Chameleon in contrast submits that the shares were valueless at the time they were issued.

### (iii) The Reverse Takeover, Pinnacle and Grimaldi

466 On 1 September 2004, Mr McLennan’s company, Rupert Co Ltd, commenced proceedings to wind up Chameleon on the grounds, inter alia, that it was insolvent. On 22 December the Supreme Court of New South Wales ordered that it be wound up and a Mr John Vouris was appointed liquidator.

467 On 20 September 2004 Murchison lodged with ASIC a bidder’s statement for the acquisition of Winterfall. The statement recorded that there were 66,000,000 shares on issue as at its date. On 18 October Mr Grimaldi sent the takeover documentation to Mr Zuks at Winterfall.

468 On 24 October, Mr Grimaldi wrote to Mr Zuks a letter which stated amongst other things that:

As per agreement I need 10,000,000 shares for Greg and I and 12,343,000 for the seed investors.

In discussions with Grimaldi, Zuks insisted that the number of shares in Winterfall needed to be increased from 66,000,000 to 80,000,000.

469 On 26 October 2004, 10 million Winterfall shares were issued to Pinnacle. The shares constituted the payment of the introduction fee to Mr Grimaldi and Mr Barnes agreed some time after the Windsor Hotel meeting in April 2004, though the precise number of shares to be issued was not then agreed. For the reasons we give below it is important to emphasise the timing of this issue to Pinnacle.

470 On 31 October 2004, Mr Barnes on behalf of Pinnacle signed a form of acceptance of Murchison’s offer to acquire Pinnacle’s 10 million Winterfall shares. The terms of the takeover were for the issue of one new fully paid Murchison share in exchange for each share in Winterfall. Provision was also made for the issue of Murchison options to accepting shareholders.

471 On 10 November Mr Kopejtka and Mr Vagnoni, both directors of Winterfall, were appointed directors of Murchison. Such appointments were envisaged by cl 3(f) of the Winterfall/Murchison Heads of Agreement of 30 May 2004.

472 At a board meeting of Murchison on 11 November 2004, it was resolved to issue 80 million new fully paid shares and a number of attaching options. These were to be allocated to Winterfall shareholders.

473 Again on 11 November 2004 a facsimile to “The Directors” of Murchison was sent under Pinnacle’s letterhead and signed by Mr Barnes which gave the direction to Murchison that the 10 million ordinary shares and 12 million associated options which were to be issued to it by Murchison were to be issued to nine nominated parties with the respective number of shares and/or options each was to receive being specified. Pinnacle was to receive 3,800,000 shares and 5,000,000 options. Two companies, IOS Management Pty Ltd and MGG Capital Pty Ltd, which were said to be “associated with” Mr Grimaldi (whatever that description may signify for present purposes) received in aggregate 4,064,000 shares and 5,770,000 options. The ASIC material to which we were referred in the Grimaldi submissions did little to elucidate what that “association” was other than to reveal in the case of MGG Capital that Mr Grimaldi and Mr Roberts were at the relevant time two of the directors of it and that it had been owned variously by Mr Grimaldi, by Murchison and by three of its directors (including Mr Grimaldi). We were taken to no evidence which illuminated either who the other “nominees” were or what, if any, was their relationship to Grimaldi or Barnes. We were simply asked to infer, which we decline to do, that they were “seed investors”. It is apparently the case that the Murchison shares and options were issued to the nine nominated parties.

474 On 28 February 2005, Murchison announced that it had made the final payment of $550,000 due to the Iron Jack Vendors pursuant to the agreement between them and Murchison’s now wholly owned subsidiary Winterfall (now named Iron Jack Ltd).

### (iv) Mr Grimaldi’s Departure

475 This event is significant to the extent that changes in the board and in Murchison’s shareholding and capitalisation have some bearing upon the exercise of the Court’s discretion in determining what is the appropriate remedy to be awarded against Murchison for the wrongs in which it participated.

476 It need hardly be emphasised that Mr Grimaldi was the cause of Murchison’s being implicated in the wrongs canvassed in this proceeding. It is a small irony that on the date the reverse takeover of Winterfall by Murchison was completed he was asked to remove himself from Murchison’s board. On 10 November 2004, Mr Kopejtka and Mr Vagnoni were appointed as directors of Murchison. At the board meeting of 11 November, Mr Grimaldi was told by Kopejtka and Vagnoni to resign. As Mr Kopejtka explained, there was feedback coming from the underwriters that they wanted both himself and Mr Vagnoni on the board, but not Mr Grimaldi.

### (v) Murchison’s Knowledge of the Issue of 10 Million Winterfall Shares to Barnes and Grimaldi

477 We referred earlier to the principles governing the attribution of a director’s knowledge to his or her corporation and to the fraud exception to this: see above [282]-[286]. Murchison has invoked that exception to avoid any potential liability in respect of Grimaldi’s receipt of the spotter’s fee.

478 The primary judge found that on 11 November 2004, when the Murchison board resolved to issue 80 million new fully paid shares and a number of attaching options which were to be allocated to Winterfall shareholders, that Mr Kopejtka knew that 10 million of those shares and their options were to be issued for the benefit of Mr Grimaldi and Mr Barnes. Mr Kopejtka freely admitted to this in cross-examination. The same conclusion, we consider, can properly be inferred in relation to Mr Vagnoni.

479 Mr Kopejtka had seen the Murchison/Winterfall Head of Agreement and Addendum and both he and Mr Vagnoni had been sent copies of Mr Grimaldi’s 26 October 2004 letter and its attachments which plainly disclosed that Grimaldi and Barnes were entitled to “free shares” in Winterfall.

480 As noted above, Mr Kopejtka and Mr Vagnoni became directors of Murchison the day before the Murchison share issue to Winterfall shareholders. While it is obvious they had knowledge that Mr Grimaldi was to be a recipient of these in virtue of arrangement previously made with Winterfall, it has not been suggested, and we have been taken to no evidence which suggests, that they had reason to know that the arrangement was an improper one vis-à-vis Murchison. Neither has it been suggested that, knowing of the share issue to Grimaldi, they were giving a full informed consent to, or were ratifying, what would otherwise constitute a breach of fiduciary duty when they made the share issue.

### (vi) The “Repayment” of the Cheque “Loans”

481 Whether Murchison repaid the cheque “loans” shortly after these moneys were misappropriated may only become relevant in the event that it is appropriate to order it to pay compensation to Chameleon for the misappropriation. Whether repayment has been made would not preclude Chameleon either from tracing the “trust moneys” into an asset in Murchison’s hands, or from requiring Murchison to account for profits made which are attributable to the moneys misused.

482 Murchison’s case, which we have rejected, was that the money advances were by way of loan. It then relied upon the running loan account to contend that “(at least) a substantial portion of the loan funds owing to Chameleon was subsequently repaid by [it] through a number of transactions on the loan account”. Chameleon disputed whether any, or any substantial portion of, the $152,750 was repaid and contends that Murchison has not explained how the repayment is said to have been done.

483 As we earlier noted, three schedules were prepared for the purposes of submissions at the trial which purported to cover transactions between Chameleon and Murchison or between one of them and a third party for the benefit of the other, which resulted in an entry being made in the “running loan account” as a credit to the payer. Murchison relies upon this schedule and to the parties agreement that there were at least 32 such transactions in which moneys were so paid. These schedules were said to disclose agreed payments by Murchison to, or for Chameleon’s benefit in the sum of $96,320 in the period between 29 July (when the second cheque was paid) and 29 November 2004.

484 Murchison bore the onus of proving the repayment no less than proving the original advances were loans. The transactions relied upon by Murchison were not explained or dissected in any way (other than those involving the two cheques). We were simply asked to accept both their regularity and, because they were contained in the running loan account, they operated in pro tanto discharge of Murchison’s indebtedness recorded in that account including the Chameleon loans. No one was called by Murchison either to explain the entries or to give evidence to suggest that any of the “repayments” had this purpose in respect of the indebtedness said to be attributable to the cheques. No evidence has been given to indicate the amount of the cheque “loans” that allegedly have been repaid in this manner, although several entries in the schedule state that payments are being made by way of repayment of unspecified borrowings as, for example, “CHM Repay Loan”.

485 Notwithstanding that Chameleon has agreed that payments have been made to it after 29 July 2004 in the order of $96,320, we are not prepared to infer that some still unspecified part of Murchison’s debt to Chameleon arising from the cheque transactions was actually repaid. Murchison has not discharged the onus on it of demonstrating the extent of any such repayment made.

### (vii) Changes in Murchison’s Shareholding, the Trading of its Shares and its Fundraising post-11 November 2004

486 The matters briefly referred to here are of possible contextual and discretionary significance in determining the relief which it is appropriate to award against Murchison.

487 It follows from what we have said earlier that, while Murchison may have been fixed, for some purposes, with Mr Grimaldi’s knowledge for *Barnes v Addy* purposes, the directors of the company after Mr Grimaldi’s resignation were not themselves possessed of that knowledge. Their actions on and from 11 November 2004 need to be seen in that light. They were not seeking, knowingly, to optimise the advantage to be derived from wrongdoing of which they were aware. The Murchison directors were put on notice of a possible claim by Chameleon against it in respect of the acquisition of the Iron Jack Tenements by letter on 21 November 2006.

### (a) Murchison’s shareholding

488 The following is drawn primarily from Murchison documents tendered at trial.

489 Murchison is a public company incorporated in 1997. It was listed on the ASX but was suspended from trading in late 2001 for failure to maintain a sufficient spread of shareholders. On 26 August 2004 it was delisted from the ASX because of its failure to pay its listing fees for the ’04-’05 year. On 30 March 2005 it was re-admitted to the official list of the ASX.

490 By way of snapshot of its issued fully paid shares, on 1 March 2001, 1,909,000 shares were issued. Primarily as the result of a number of share allotments, this figure grew to almost 50 million by January 2004. A subsequent share consolidation in February 2004 reduced that number to 28,276,685. The 11 November 2004 share placement and several (probably related) placements took that figure to 125,726,685 by the end of 2004. In the period 17 February 2005 (when the new board began capital raising) to October 2006 (prior to Chameleon’s notice of a claim), the number of issued fully paid shares increased to 296,979,498. When it was relisted with the ASX, they traded at $0.32. Between October 2006 and 9 September (shortly prior to the commencement of the trial), the issued shares had risen to 416,860,768 and the share price was $1.87.

491 The evidence of the number of shareholders over time is sparse. In 2004, it was 675 on 17 March 2004 and 710 on 28 October 2004. The figures provided by Chameleon (drawn from Murchison’s annual reports) for the years 2006 to 2009 were, as at September each year, 2787 (2006), 8560 (2007), 9188 (2008) and 10,080 (2009). Further, as the trial judge observed, the development of the Iron Jack Project appears to have encouraged a great deal of investor interest in Murchison shares. From November 2006 to November 2007, for example, more than 562 million shares were traded on the ASX at a total value of over $2 billion. The share price in that period rose as high as $6.24.

### (b) Murchison’s Investment in the Project and the Mitsubishi Joint Venture

492 In its half yearly financial report filed with ASIC in 2005 Murchison made clear its fund raising intent and purpose. It foreshadowed a rights issue to raise $5.5 million and a share placement to raise $675,000 in operating capital. From its acquisition of Winterfall until 28 November 2007, Winterfall spent $52,695,159 on the development and working of the Project. Mining commenced in the last quarter of 2006 and the first shipments of iron ore occurred in February 2007. Murchison’s Annual Report for the year ended 30 June 2009 records that Winterfall had spent $93,221,000 in the exploration of, and feasibility studies for, the Iron Jack Tenements.

493 An important capital injection into the Project came via a Share Subscription Agreement Murchison made with Mitsubishi Development Pty Ltd on or about 19 September 2007. Under it Mitsubishi agreed to subscribe for 80 million partly paid shares in Winterfall for a total subscription amount of $150,000,000. The shares were to become fully paid upon Mitsubishi making “residual contribution” in accordance with the Agreement.

494 On 27 September Murchison transferred its 80 million shares in Winterfall to Jack Hills Holding (the third respondent in the Grimaldi and Chameleon appeals) for a nominal consideration. The same day Winterfall issued 80 million partly paid shares to Mitsubishi.

495 Importantly for present purposes, it is apparent that both Murchison and Mitsubishi were aware of the prospect of claims against Murchison prior to the execution of the Share Subscription Agreement on 19 September 2007. Clause 14.2 of that Agreement contained an indemnity for both Mitsubishi and Winterfall against Chameleon’s foreshadowed, or similar, claims against Murchison.

### (viii) A Question About “Mining Tenements”

496 We earlier noted that while the Winterfall/Iron Jack Vendors agreements related to some number of applications for exploration licences, we have dealt as a matter of convenience with them as if only one tenement was involved. They were not differentiated for any relevant purpose before the trial judge. No issue was then made that they took the form of “applications for exploration licences” under the *Mining Act 1978* (WA). It was not suggested that they were not capable of being the subject matter of a constructive trust. The only Mining Act issue raised by Murchison in its defence was that Chameleon could not claim an interest in any tenement because of the Statute of Frauds type writing requirement of s 119 of the Act. That defence was not the subject of submissions at trial and was not advanced on appeal.

497 What did emerge for the first time on appeal is whether an “application for an exploration licence” is property, or real property or an interest in land. In any event, it is now said, the exploration licences were not granted until well after the Winterfall/Iron Jack Agreement was entered into.

498 We would note in passing that the fates of the various applications have not been revealed to us save that it is said that one of these has since metamorphosed into a mining lease over the area known as Jack Hills upon which mining is currently being conducted.

499 It is not altogether clear what is the precise issue, founded on the Mining Act, that Murchison seeks to raise. It seems to be conceded that, even if an application for an exploration lease was not property and was not itself capable of being the subject matter of a constructive trust this would not preclude the imposition of a constructive trust on such a licence once granted. We would also note that the Iron Jack Vendors had contractually bound themselves to execute transfers of such tenements to Winterfall upon their being granted and, seemingly, have done so. Such a contractual stipulation would, prima facie, be specifically enforceable.

500 Chameleon, understandably, has raised some number of issues against our entertaining any consideration of the Mining Act issues at all: Murchison raised a Mining Act defence at trial (which it practically abandoned); the trial was conducted on the basis that no issue was being raised as to the fact that the tenement existed as applications for exploration licences and Murchison should be held to the course it then adopted: *Whisprun Pty Ltd v Dixon* (2003) 200 ALR 447 at [51]-[52]; and the circumstances surrounding the agreement and the details etc of the applications and their subsequent history were not specifically the subject of evidence at trial: *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418.

501 For our part, we are not prepared to allow the issue to be raised at the tail of the appeal. While we do not consider that there is real substance in the *Suttor v Gundowda* submission, we do consider Murchison ought be held to the course it adopted at trial – the more so, in our view, because the issue as raised has paid no regard at all to the significance of the terms of Winterfall/Iron Jack Vendors agreements. They contemplated the possible need for ministerial approval. It could be said they recognised that what was being sold could be an expectancy and that the conditions required to satisfy *Tailby v Official Receiver* (1888) 13 App Cas 523 (ie the consideration had been executed) had subsequently occurred. We do not consider it appropriate to invite further argument on an issue the present elaboration of which neither reveals its burden nor suggests its prospects.

502 Because mining operations are presently being conducted in consequence of a mining lease under the Act having been issued, we would wish to note that under s 85 of the Mining Act the lessee is authorised (a) to work and mine the land subject to the lease; (b) to take and remove from the land any minerals and dispose of them; and (c) owns all minerals lawfully mined from the leased land.

## 2. Legal Principles Applicable to Relief

### (i) “Practical Justice” and “An Appropriate Remedy”

503 In *Warman* at 559 the High Court emphasised of the grant of equitable relief that:

It is necessary to keep steadily in mind the cardinal principal of equity that the remedy must be fashioned to fit the nature of the case and the particular facts.

That is not a novel idea. It is informed by the intent that the Court should, by the exercise of its powers “do what is practically just”: *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218 at 1278-1279; see also *Vadasz v Pioneer Concrete (SA) Pty Ltd* (1995) 184 CLR 102 at 113-114; and that is manifest, for example, in the requisition that a party who seeks equity must do equity: see *Bridgewater v Leahy* (1998) 194 CLR 457 at [125]-[127]; or, more specifically, in the recognition (*Warman* at 561) that:

… the stringent rule requiring a fiduciary to account for profits can be carried to extremes and that in cases outside the realm of specific assets, the liability of the fiduciary should not be transformed into a vehicle for the unjust enrichment of the plaintiff.

It is the case that, in many instances and for many types of equitable wrong, the remedy that is the most appropriate will self select absent unusual circumstances. This is not to suggest some hardening of the discretionary arteries. Rather it is an acknowledgement that a “mixture of learning, intuition and experience” and also the purpose of the particular doctrine in issue can bring a level of predictability to the award of remedy in routine cases. As Gummow J has indicated (extra-curially), this is not to suggest that “the course of decision has rendered discretion in equity so settled as to make it appropriate to speak of ‘rights’ to particular remedies”: Gummow, “Equity; too successful?” (2003) 77 ALJ 30 at 40-41. We would note in passing that an expectation of such entitlement does inform aspects of Chameleon’s claims.

504 Perhaps the greatest recent emphasis on the need to award the remedy that is “appropriate” in the circumstances, has been in cases where relief by way of the *remedial* imposition of a constructive trust upon property has been sought. We emphasise the remedial use of the constructive trust so as to exclude from consideration those classes of case where, on the proof of particular facts in a given context (eg the death of one party to an agreement for mutual wills: *Birmingham v Renfrew* (1937) 57 CLR 666; or the entitlement under contract to an expectancy after the consideration for it is executed: cf *Tailby v Official Receiver*, the circumstances are “construed” as giving rise to a constructive trust.

505 To illustrate the contemporary convergence in constructive trust claims of what we would call the “principle of appropriateness” and the requirement to do “practical justice” we refer to a number of recent observations of the High Court on these two themes.

506 (i) In *Bathurst City Council v PWC Properties Pty Ltd* at [42], it was commented that:

… before the court imposes a constructive trust as a remedy, it should first decide whether, having regard to the issues in the litigation, there are other means available to quell the controversy.

507 (ii) In *Giumelli v Giumelli* (1999) 196 CLR 101 at [10] (an equitable estoppel case), the plurality observed:

Before a constructive trust is imposed, the court should first decide whether, having regard to the issues in the litigation, there is an appropriate equitable remedy which falls short of the imposition of a trust. At the heart of this appeal is the question whether the relief granted by the Full Court was appropriate and whether sufficient weight was given by the Full Court to the various factors to be taken into account, including the impact upon relevant third parties, in determining the nature and quantum of the equitable relief to be granted.

508 (iii) In *John Alexander’s Clubs* at [128]-[129] (an alleged breach of fiduciary duty case), the Court reiterated that:

A constructive trust ought not to be imposed if there are other orders capable of doing full justice …

[I]t is not a complete answer to Walker Corporation’s reliance on *Giumelli* that remedies other than a constructive trust may lack practical utility because of the impecuniosity of those against whom they are sought. One point made in the *Giumelli* line of cases is that care must be taken to avoid granting equitable relief which goes beyond the necessities of the case. Another point in those cases is that third party interests must be borne in mind in deciding whether a constructive trust should be granted. That line of cases does not permit a constructive trust to be declared in a manner injurious to third parties merely because the plaintiff has no other useful remedy against a defendant.

509 We should acknowledge immediately that the purpose (or imperatives) served by the individual doctrine giving rise to a constructive trust claim may have large bearing on the question of what is appropriate in the circumstances of a given case. So, for example, the deterrent function served by the fiduciary principle – with its imposition of strict standards to “protect the principals of fiduciaries by nullifying temptation”: *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298 (“Harris v Digital Pulse”) at [407] – finds its expression in the well-accepted proposition that:

Thus, it is no defence [to the liability to account] that the plaintiff was unwilling, unlikely or unable to make the profits for which an account is taken or that the fiduciary acted honestly and reasonably.

See *Warman*, at 558. Or, for that matter that the plaintiff suffered no loss: *Warman*, at 562. In contrast, and reflecting that the doctrine of equitable estoppel can require, variously, the protection of the “reliant” party’s expectation or reliance interests and that it can apply in quite disparate settings, the relief given needs to be more finely calibrated than in fiduciary cases, as *Giumelli v Giumelli* illustrates with the consequence that proprietary relief can be expected to be given more guardedly.

510 The considerations of principle and pragmatism which can bear on the award or refusal of a constructive trust are various. We note the following. (i) As our consideration of “Bribes and Secret Commissions” indicated: [188]-[193]; the presumptive rule applied to a fiduciary to whom an advantage has accrued in breach of fiduciary duty or by misuse of the fiduciary position is, as Mason J indicated in *Hospital Products* at 108, that:

… he must account for it and in equity the appropriate remedy is by means of a constructive trust.

(ii) However, a like rule in relation to the award of proprietary relief, has not as yet been enunciated in relation to a knowing assistant, notwithstanding that it is well accepted that an assistant “is liable to account … for any benefit he has received as a result of [knowing] participation” in a breach of fiduciary duty: *Consul Development*, at 397. The likely reason for reluctance in the too ready equation of a third party assistant with a fiduciary is that the fiduciary has undertaken to act in the interests of the person he or she has then wronged. The assistant has not: but cf Ridge, “Justifying the Remedies for Dishonest Assistance”, 460 ff. This is not to say that a constructive trust, rather than an account of profits, may not ordinarily be the appropriate remedy in receipt cases. (iii) A knowing recipient will ordinarily be liable to hold what is trust property in the strict sense (or its traceable proceeds) as well as any profit received which is attributable to the trust property, to the extent that these remain extant and to return these to the claimant: see eg *Commissioner of Taxation v Macquarie Health Corporation Ltd* (1998) 88 FCR 451 at 497-498. As was said in *Zhu v Treasurer of New South Wales* at [121]:

Intervention against a third party who obtains trust property from a trustee in breach of trust is based on the need to protect the proprietary interests of the beneficiaries. Intervention against a third party who obtains some other advantage as a result of a trustee’s breach of trust is based on the need to ensure that the trust receives property which, if it were to be acquired at all, should have been acquired for the trust.

However, where the “trust property” is corporate property and is misapplied in breach of fiduciary duty a somewhat more complicated situation obtains. This is discussed separately below: see “Corporate Property, the Constructive Trust and ‘Tracing’”. (iv) An account of profits, rather than a declaration of a constructive trust over part of a business, may be ordered where the latter would “thrust the parties into a continuing business relationship when it was clear there was no confidence or comity between them”: *Warman* at 554 and see also 564. This, we would note, is an important but little discussed consideration in those cases where the imposition of a constructive trust can result in forcing parties into a long term business relationship which is likely to be undesirable or unworkable or, if it involves an innocent third party, would require that person to be in an unwanted relationship with the claimant. This problem was implicit, but not considered, in the decision of *Keech v Sandford* itself. (v) The interests of innocent third parties who would be affected by the award of proprietary relief whether as unsecured creditors: *Muschinski v Dodds* (1985) 160 CLR 583 at 623; because legitimate rights, interests or expectations have been generated in them in relation to the property in question because of subsequently occurring events: *Giumelli v Giumelli* [49]-[50]; or otherwise: *John Alexander’s Clubs*, at [129]; must be borne in mind. (vi) Would the award of a constructive trust be a disproportionate response having regard to the degree of wrongdoing of the respondent and the extent to which the benefit derived was attributable to his or her breach of duty or wrongdoing? Would it go “beyond the necessities of the case”?: see *John Alexander’s Clubs* at [129]; see also Ridge, at 462-463.

511 There is, in our view, much to be said for the view of Prof Austin (as he then was) in his piece, “Constructive Trusts” in Finn (ed), *Essays in Equity* at 240 (1985) that:

[A] proprietary remedy should not ever be regarded as mandatory. It should be possible for a court to exercise a discretion against decreeing proprietary relief if the circumstances suggest that it would be unwise to do so.

512 In the present appeal and cross-appeal, the remedial reach of the constructive trust is in issue in a variety of contexts. In the Grimaldi appeal, the constructive trust and account of profits awarded against Mr Grimaldi in respect of the spotter’s fee of 10 million shares and the associated options have been challenged. The Chameleon appeal contests the trial judge’s refusal to grant proprietary relief against Murchison in respect of (a) all, or a percentage of, the shares in Winterfall and (b) the 10 million shares in Winterfall obtained by Mr Grimaldi upon the reverse takeover of Winterfall. It also contests his Honour’s refusal to grant a constructive or resulting trust in by way of proportionate interest in the Iron Jack Tenements.

### (ii) The Liability to Account and the Account of Profits

513 The principle that a fiduciary is liable to account for a profit or benefit obtained in breach of his or her duty as a fiduciary is integral to the formulation of the fiduciary principle itself, as is evident in the formulations of it by Deane J in *Chan* at 198-199 and of Mason J in *Hospital Products* at 107-108. The relief which is appropriate to effectuate this liability can take a variety of forms – the imposition of a constructive trust on an asset which constitutes the benefit in question; compensating the fiduciary’s principal for the loss inflicted on it, that loss being the commensurate with benefit derived; the avoidance of a transaction between the two; an account of profits; etc. In determining what is the appropriate relief and its extent require two questions to be answered: (i) what is the breach of fiduciary duty – the misappropriation of “trust” property; the improper diversion of an opportunity; an undisclosed personal interest in a sale or purchase, etc?; and (ii) what is the profit or benefit which the fiduciary has made in consequence of that breach: *Hospital Products* at 110.

514 There is an established jurisprudence which informs the answering of these questions both in general, and for particular contexts. As to the former, there are some well accepted propositions. Among these, are:

(i) the liability is not penal: *Vyse v Foster* (1872) LR 8 Ch App 309 at 333; “equity does not … punish a fiduciary for misconduct by making him account for more than he actually received as a result of his breach of duty”: *Hospital Products*, 109; see generally *Harris v Digital Pulse* per Heydon JA;

(ii) it is no answer to the liability that the fiduciary’s principal suffered no actual loss as a result of the breach of duty; or that it was unwilling or unable to obtain the benefit or gain itself; or that it was not the fiduciary’s duty to acquire the profit or benefit as an incident of his or her duty to the principal; *Hospital Products*, at 108; *Regal (Hastings) Ltd v Gulliver* [1942] 1 All ER 378; *Boardman v Phipps* [1967] 2 AC 144;

(iii) of fundamental importance, the remedy must be fashioned to fit the nature of the case and the particular facts: *Warman*, at 559. By way of corollary, a particular remedy will not be granted where it is inappropriate (eg a constructive trust: *John Alexander’s Clubs*, at [129]) or where “it would be unconscientious to assert it” (eg an account of profits): *Chan* at 204-205; and

(iv) the stringent rule requiring a fiduciary to account for profits ought not be carried to extremes: “the liability … should not be transformed into a vehicle for the unjust enrichment of the plaintiff”: *Warman*, at 561.

515 In many contexts the identification of the breach and of the benefit or profit resulting from it will be straightforward and uncontroversial, as where a trustee improperly purchases a house with a mixed fund of his own and trust moneys. In such a case, where a proportionate interest in the property itself is not sought, then, apart from his liability to account for the moneys misused, the fiduciary will be liable in the usual case for the same proportion of any profit from the purchase as the trust moneys bore to the total purchase price: *Scott v Scott* (1963) 109 CLR 649. This will be because the sole source of profit will generally be the capital outlaid: for examples in other fiduciary contexts where the calculation is simple see *McKenzie v McDonald* [1927] VLR 134 (profit made on a purchase and resale) and *Attorney-General v Edmunds* (1868) LR 6 Eq 381.

516 We would note in passing that Chameleon asserts that the identification of the benefits for which both Winterfall and Murchison are respectively accountable for their knowing receipt of trust property is such a simple and straightforward matter.

517 The Courts have long recognised that benefits or the profits derived by a misbehaving fiduciary may be attributable to multiple sources only one of which was the breach of fiduciary duty or trust; personal skill, expertise and exertion, goodwill or the financial contributions of the fiduciary and of third parties may have played their part as well in generating profits. In such circumstances, the assessment of the actual profit or benefit derived may involve a difficult, complex and costly exercise of attribution. If such an exercise is to be undertaken – and at best it can only result in some reasonable approximation of the profit for which the fiduciary must account: *My Kinda Town Ltd v Soll* [1982] FSR 147 at 159 – the remedy invoked will be by way of an account of profits. What requires emphasis is that the profits inquiry in cases involving, variously, the establishment of a competing business by utilising the resources of the fiduciary’s former employer: *Timber Engineering*; using “trust” moneys in the fiduciary’s own business: *Willett v Blanford* [1841] 1 Hare 253; 66 ER 1027; reviving a trust business for the fiduciary’s own benefit: *Re Jarvis*; *Edge v Jarvis* [1958] 1 WLR 815; or misappropriating an opportunity: *Green v Bestobell*; raise their own particular concerns. They are not resolved by the application of a common “general rule”: cf *Re Jarvis*, at 820. And, in some degree they have established their own jurisprudence for their own purposes, as will be noted below.

518 In the present matter, the breaches involved the misappropriation of money (the two advances) and the issue of 5 million shares (then sold by Murchison) which in form, if not in substance (in the cases of the advances), “passed through” Murchison’s hands and were used by Winterfall as part of a mixed fund to pay an instalment under the Winterfall/Iron Jack Vendors agreement. That agreement subsequently was completed; tenements were acquired by Winterfall; the Project established; and an operating mine developed.

519 One possible characterisation of what transpired is that the “trust money” in question was used with the assets of others to acquire an asset – the tenements. An alternative characterisation is that the money was used in the course of the establishment and conduct of a mining business operated to be by Winterfall, but ultimately owned wholly by Murchison (until it entered into the joint venture agreement with Mitsubishi Development which gave it a 50 per cent interest in). The latter characterisation, which is what we earlier indicated was the appropriate one vis-à-vis Murchison’s use of the moneys: “The Murchison/Winterfall Agreement and Addendum and their Implementation”; would bring it within that category of case where profits are sought to be recovered from trust moneys improperly introduced into a trade or business either at its inception or afterwards although, as we will indicate, it is well recognised that mining businesses have their own distinctive characteristics. The cases in this category are instructive.

520 The leading authority is *Docker v Somes* (1834) 2 My & K 655; 39 ER 1095 (“Docker v Somes”) which established that, if trust moneys were improperly employed in a trustee’s own trade or business, the beneficiaries were entitled to insist upon having a proportionate share of the profits instead of, as previously, interest only on the amount of the trust moneys so employed. Though of some length Lord Brougham’s reasoning is revealing. He began with what was the then orthodoxy (at 664-665; ER 1098):

Wherever a trustee, or one standing in the relation of a trustee, violates his duty, and deals with the trust estate for his own behoof, the rule is that he shall account to the *cestui que trust* for all the gain which he has made. Thus, if trust money is laid out in buying and selling land, and a profit made by the transaction, that shall go not to the trustee who has so applied the money, but to the *cestui que trust* whose money has been thus applied. In like manner (and cases of this kind are more numerous), where a trustee or executor has used the fund committed to his care in stock speculations, though the loss, if any, must fall upon himself, yet for every farthing of profit he may make he shall be accountable to the trust estate. So, if he lay out the trust money in a commercial adventure, as in buying or fitting out a vessel for a voyage, or put it in the trade of another person, from which he is to derive a certain stipulated profit, although I will not say that this has been decided, I hold it to be quite clear that he must account for the profits received by the adventure or from the concern. In all these cases it is easy to tell what the gains are; the fund is kept distinct from the trustee’s other monies, and whatever he gets he must account for and pay over. It is so much fruit, so much increase on the estate or chattel of another, and must follow the ownership of the property and go to the proprietor. So it is also where one not expressly a trustee has bought or trafficked with another’s money. The law raises a trust by implication, clothing him, though a stranger, with the fiduciary character, for the purpose of making him accountable.

We would note in passing the final two sentences which expresses an embryonic version of the first limb of *Barnes v Addy*.

521 His Lordship went on to explain why the then orthodoxy was that profits could not be claimed where money had been mixed (at 665; ER 1098-1099):

The reason which has induced Judges to be satisfied with allowing interest only I take to have been this: they could not easily sever the profits attributable to the trust money from those belonging to the whole capital stock; and the process became still more difficult, where a great proportion of the gains proceeded from skill or labour employed upon the capital.

522 Confronted by counsel with an example which was designed to deter him permitting apportionment (“from taking the course which all principle points out”), Lord Brougham made the important comment (at 667-668; ER 1099):

[Counsel] feigned the instance of an apothecary buying drugs with £100 of trust money, and earning £1000 a year by selling them to his patients; and so he might have taken the case of trust money laid out in purchasing a piece of steel or skein of silk, and these being worked up into goods of the finest fabric, Birmingham trinkets or Brussels lace, where the work exceeds by 10,000 times the material in value. But such instances, in truth, prove nothing; for they are cases not of profits upon stock, but of skilful labour very highly paid;  *and no reasonable person would ever dream of charging a trustee, whose skill thus bestowed had so enormously augmented the value of the capital, as if he had only obtained from it a profit.*

(Emphasis added.)

523 Apportionment was permissible. The profits “which might be supposed to come from the money misapplied [could be severed]from the rest of the capital embarked”: 666; ER 1099. Nonetheless an escape route was left (at 673; ER 1101):

Should in any case a serious difficulty arise in tracing and apportioning the profits, this may be a reason for preferring a fixed rate of interest in that case.

524 A significant body of nineteenth century case law built on *Docker v Somes*: see eg *Wedderburn v Wedderburn* (1838) 4 My & Cr 41; 41 ER 16; *MacDonald v Richardson* (1858) 1 Giff 81; 65 ER 833. Many of the cases involved the shares of deceased partners being improperly left in the new partnership: see *Lindley & Banks on Partnership*, 26-40 – 26-41 (19th ed, 2010); see also *Lewin on Trusts*, 20-33 (18th ed, 2008).

525 The subsequent case law did not attempt to trace the precise application of the moneys misused. It had been “mixed up with the consequences and liabilities” of the business: *Flockton v Bunning* (1872) LR 8 Ch App 323 n at 326 n; and see also *Primeau v Granfield* – a tracing/accounting case. That was sufficient. Nor was it the case, where the trustee/fiduciary started a business on his own account using a mixed fund, or used trust moneys in an existing business, that the profits should necessarily be apportioned according to the respective contributions of his own and trust moneys to the business’ capital.

526 As was affirmed in *Vyse v Foster* (a “classic case”: *Scott v Scott* at 661) by James LJ at 331:

… there was no rule for apportioning the profits according to the respective amounts of the capital, but that the division would be affected by considerations of the source of the profit, the nature of the business, and the other circumstances of the case. It is obvious that it must be so, for it would be easy to suggest a number of instances in which the profit of a business has no ascertainable reference to the capital – e.g. solicitors, factors, brokers … Indeed, in almost every case where the business consists of buying and selling, the difference between prosperity and ruin mainly depends on the skill, industry, and care of the dealers.

See also *Willett v Blanford*.

527 The need to apportion commonly requires the court to direct inquiries concerning the sources of profit in the particular business concerned and then to determine the profits which are attributable to those sources: see *Manley v Sartori* [1927] 1 Ch 157; *Page v Rattiffe* (1896) 75 LT 371; a like need to apportion can arise, we note in passing, where intellectual property is misused in another business: see eg *Colbeam Ltd v Stock Affiliates Pty Ltd* (1968) 122 CLR 25 at 42; see also Ricketson, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, [2.75].

528 Contemporary Australian authority conforms to the above: where a portion of the profits made is “not the product or consequence of the plaintiff’s property but the product of the fiduciary’s skill, efforts, property and resources”, it would be inequitable to order an account of the “*entire* profits”: *Warman*, at 561. However, it is for the fiduciary to establish that inequity: ibid.

529 The courts have on occasion sought, understandably, to short-circuit the apportionment inquiries by resort to the device of awarding “just allowances” to the fiduciary. This can take the form of dividing between the fiduciary and the principal all the profits made in the proportions that the fiduciary’s own and the trust’s money bore to the total capital, but only after making an allowance to the fiduciary for his or her own skill and exertion: see *Yates v Finn* (1880) 13 Ch D 839; *Lord Provost of Edinburgh v Lord Advocate* (1879) 4 App Cas 823 at 838-839. The same just allowances device has been employed where the capital or business used when generating the profit represented, or was constituted by, the trust property misused: see *Boardman v Phipps* at 104; *Timber Engineering* at (13)-(27); *Paul A Davies (Aust) Pty Ltd v Davies* at 448 and 451; *Re Jarvis*; *Edge v Jarvis* at 820; or, for that matter, in exceptional circumstances where, without misusing trust property at all, but in consequence of a breach of fiduciary duty, the fiduciary has made profits by deploying his or her own knowledge, skill and experience: cf *O’Sullivan v Management Agency and Music Ltd* [1985] QB 428. In cases of the latter two varieties, the courts have shown quite some reticence in granting just allowances, as of course.

530 As was said in *Warman* (at 562):

Whether it is appropriate to allow an errant fiduciary a proportion of profits or to make an allowance in respect of skill, expertise and other expenses is a matter of judgment which will depend on the facts of the given case. However, as a general rule, in conformity with the principle that a fiduciary must not profit from a breach of fiduciary duty, a court will not apportion profits in the absence of an antecedent arrangement for profit-sharing but will make allowance for skill, expertise and other expenses.

531 Allowances are not granted as of right and it is here that a court will exercise its powers to do what is “practically just”. Considerations such as whether the fiduciary has acted honestly or dishonestly; how and for what has the fiduciary been remunerated; would the denial of an allowance leave the principal unjustly enriched; what risk has been borne by the principal; etc, come into play: see generally *Harris v Digital Pulse* at [311]-[336] and see Ford and Lee, *Principles of the Law of Trusts*, vol 2 [17.2650]. It is unnecessary for reasons we later give to enlarge upon when allowances will be granted or refused.

532 There are two related final comments we would make concerning the account of profits. The first is to note the caution that has been sounded about this remedy where what is sought is the apportionment of the profits of a *business*: “the apparent benefit decreed to the Plaintiff is frequently much diminished, if not lost in the attempt to enforce it”; see *Wedderburn v Wedderburn* at 55; ER at 22; and the second is to recall Lord Brougham’s comment that “[s]hould … a serious difficulty arise …, this may be a reason for preferring a fixed rate of interests”: *Docker v Somes*, at 673; ER 1101.

533 Importantly for the present matter there is one dimension to the account of profits which the courts have emphasised. In highlighting that the obligation imposed is not penal the courts have stressed in cases involving both delinquent fiduciaries and infringers of intellectual property rights, that “[a]n account of profits is confined to profits *actually made*, its purpose being not to punish the defendant but to prevent its unjust enrichment”: *Dart Industries Inc v Décor Corporation Pty Ltd* (1993) 179 CLR 101 (“Dart Industries”) at 111, emphasis added. Or as Mason J observed in *Hospital Products* at 110:

In each case the form of inquiry to be directed is that which will reflect as accurately as possible the true measure of the profit or benefit obtained by the fiduciary in breach of his duty.

See generally *Harris v Digital Pulse* at [306]-[310].

534 Where several parties are involved in the wrongdoing, for example, as directors, trustees or partners, the same principle is applied but with some adjustment which the partnership cases seem clearly enough to illustrate. If, in a course of transactions involving the same wrongdoing each partner derives several profits from one or more of those transactions, that partner will be liable alone to account for the profits he or she so derived: see eg *Parker v McKenna* (1874) LR 10 Ch App 96 at 115, and 123-124. However, if a partner secures an illicit profit in a dealing involving the partnership and the profit is shared with his or her co-partner who is cognisant of the dealing, both partners are jointly and severally liable for the profit obtained and not merely for their respective share of it. In *Imperial Mercantile Credit Association v Coleman* (1873) LR 6 HL 189 a partner in a two person stockbroking firm arranged for a commission to be paid to the firm on a share and debenture placement. The commission was payable by a contractor of the company making the placement. The partner was a director of the company. The commission was not disclosed. In considering the liability of the partner who secured the commission Lord Cairns made an observation that has some present relevance to the liability of Mr Grimaldi for the spotter’s fee he and Mr Barnes secured (at 208):

The profit on the transaction was obtained by Mr *Colema*n … Whether he desired or whether he determined to reserve it all to himself or to share it with his firm appears to me to be perfectly immaterial. The source from which the profit is derived is Mr *Coleman*. It is only through him that his firm can claim. He is liable for the whole of the profits which were obtained; and it is not the course for a Court of Equity to enter into the consideration of what afterwards would have become of those profits. I may meet the argument by a very familiar case, which occurs constantly in a Court of Equity, where a trustee, who is a solicitor, and a member of a firm, without authority, charges for his professional services and trouble, although he is a trustee. It has been held repeatedly that if that charge is made and not paid, it must be disallowed; that if paid, it must be refunded; and that which is to be refunded is the whole of the charge and not merely the share of the trustee in the profits of the concern of which he is a member.

535 The *Coleman* type of case is in turn to be contrasted with that where a trustee/partner uses trust moneys in breach of trust in the partnership business. That trustee will only be liable to account for his or her respective share of the profits made from the trust moneys (ie the primary rule we have spoken of). The trustee’s co-partners, for their part, are only liable for their respective share of the profits made by the money misused to the extent that they were aware of, or were implicated in, their partner’s breach of trust: see eg *Bass Brewers Ltd v Appleby* [1997] 2 BCLC 700 at 710-711; *Dubai Aluminium Co Ltd v Salaam* [2003] 2 AC 366 at [110]; and see generally *Lindley & Banks on Partnership*, 26-38 ff (19th ed).

536 We will refer below to the difficulty that can arise because of the interposition of a corporate vehicle into the derivation of profits derived as a result of a fiduciary’s breach of duty or breach of trust. What we wish to caution about here is the easy assumption – and it has been made in this matter – that because trustees, partners, directors and the like may be jointly and severally liable for *losses* occasioned by their breaches of trust or of fiduciary duty: see eg *In re Oxford Benefit Building and Investment Society* (1887) 35 Ch D 502; *In re National Funds Assurance Co (No 2)* (1878) 10 Ch D 118 (directors); Williams, *Joint Obligations* Ch 8 (1949); Ford and Lee [9.11110] (co-trustees); Lindley and Banks, Chs 12, 13 and 26; the same is true for *benefits and profits* made in consequence of wrongs in which they may have knowingly participated. As the primary proposition we have been discussing illustrates, joint and several liability for benefits and profits is the exception, not the rule.

537 One separate subject which is relevant both to the account of profits, but also to the operation of the doctrine of laches should also be noted. It relates to the character ascribed to mines and to mining operations over time by judges.

538 The first is the observation of Knight Bruce LJ dismissing a constructive trust claim to an interest in coal mines in *Clegg v Edmondson* (1857) 8 De G M&G 787 at 814; 44 ER 593 at 604:

A mine which a man works is in the nature of a trade carried on by him. It requires his time, care, attention and skill to be bestowed on it, besides the possible expenditure and risk of capital, nor can any degree of science, foresight and examination afford a sure guarantee against sudden losses, disappointments and reverses. In such cases a man having an adverse claim in equity on the ground of constructive trust should pursue it promptly, and not by empty words merely. He should shew himself in good time willing to participate in possible loss as well as profit, not play a game in which he alone risks nothing.

539 The second, in like vein, was that of Kindersley V-C in *Ernest v Vivian* (1863) 33 LJ Ch 513 at 517 (also a laches and constructive trust case):

The subject-matter of this suit is the right to mines. Mining operations are of a particular character; they are an uncertain and speculative and hazardous adventure. That observation applies more especially to mines unopened or recently commenced, the expense of which is only compensated by a long course of successful working. It is true as to every mine that the preliminary outlay, though the heaviest, is not the only one, for a large capital and an expenditure to a serious amount is necessary to meet the exigencies of the case. There is also a continual and an increasing risk, for a mine profitable to-day may to-morrow become worthless. Similar observations have repeatedly been made by other Judges.

Both of the above were approved and applied in *Boyns v Lackey* (1958) 58 SR (NSW) 395.

540 Quite apart from their significance in relation to Chameleon’s laches appeal, these comments have a direct bearing on the attribution of profits to capital, to expertise and exertion, to risks incurred in any accounting for profits.

### (iii) Primeau v Granfield 184 F 480 (S.D.N.Y. 1911)

541 The decision of Learned Hand J in *Primeau v Granfield* is no little interest for present purposes. It was a case of first impression decided by a distinguished United States jurist. While it was reversed on wholly unrelated grounds, it has been widely regarded as a leading authority in US jurisprudence on constructive trusts: see *Scott on Trusts*, vol 5 §517.1 (4th ed, 1989); Bogert, *Trusts and Trustees,* §865 n 5, 928 n 8 and 15 (2nd ed revised, 1995).

542 At issue was the remedy which a trust beneficiary was entitled to have against the trustee who, having a lease of a gold mining claim for a term of years, wrongfully used trust moneys as well as his own in developing the mine.

543 The circumstances of the breach of trust were described as “wanton”. The trust fund appears to have been returned 11 years later. The judge endorsed and applied *Docker v Somes* to permit a claim for the profits from the moneys misused. It is appropriate to quote at length how Learned Hand J dealt with the award of relief, having regard to issues that have been ventilated in this matter: at 486-487:

Having now traced a certain portion of Primeau’s money into the expenditures made to sink the shaft and open the Raaler lease, the question is whether Grandfield’s return from the mine was in law the proceeds of that money. That question involves what is meant by “tracing” money into another form. Literally Primeau’s money was used in buying machinery and paying the wages of men, to work the mine. The result of that work was to sink a shaft, discover and uncover certain bodies of ore and to bring them to the surface. As to one element – i.e., that of making the ore bodies accessible and bringing them to the surface – that added no more to their value than the actual work done. That is to say, assuming the existence of known ore bodies, their value in the soil is substantially only so much less than when brought out, as the cost of sinking the shaft and opening the drifts. There is no miraculous addition to them by the mere fact of cutting away the superincumbent rock so as to reach them.

As to the second element – i.e., the discovery of the ore – the matter is not so easy. On the one hand it is quite obvious that the ore was not created by its discovery; it was always there. Moreover, its presence was thought not unlikely, or else no one would have spent money looking for it at that place. The money was spent to see whether the conjecture would be verified. Still it is undoubtedly also true that the verification of this conjecture added value to the lease itself. To give value to such property, not only must it in fact have gold, and be suspected as having it, but it must be known to have it, because value exists in the known uses of a thing, not in the unknown. It cannot therefore be denied that the one cause of the increase in the value of the lease was because Primeau’s money went to discover it. However, it is not enough that the expenditure was one cause of the discovery to make the consequent value of the lease the product of that money. There might be a number of such causes running back in time and though the value of the lease was the product of all of them jointly it cannot be said to be the product of any one. How much is to be attributed to the ore itself, for example, and what proportion shall be assigned between the money spent to discover the ore and the ore? Certainly it would be absurd to say that the ore which gave all the value when discovered should not count at all. Therefore, so far as I know the law has never gone into such metaphysics to ascertain how much such expenses contributed to the ore; certainly not, when as here, there is a very much more simple way of ascertaining what the product of the money was. If Granfield had owned the land in fee, and had used the money to explore, these questions might have arisen, but he did not. He had purchased these rights, and they were therefore produced, as rights anyway, by the money which he paid for them under the lease itself. If Primeau’s money was but part of what he paid, then pro tanto it produced the rights which became so valuable. What then did Granfield have to pay for these rights?

544 His Honour adverted in passing to the speculative character of gold and to “the risks of loss in its transportation”. He concluded:

In my judgment, therefore, the lease was procured by the payments not only to open up the mine originally, but by all the royalties paid and by all the subsequent work of operation. On the other hand, the value of the rights acquired was not Granfield’s net winnings, but the total gross value of all the ore, as it lay in the ground and before it was taken out. What Granfield got was the right to take it out, and that is the right into which Primeau has traced his money. Whatever it cost to take it out he must be allowed, for even a defaulting trustee is allowed for beneficial expenditures. Nor does it make any difference that those expenditures were likewise a part of the consideration for the right itself.

This opinion will require a new calculation, but not, I hope, a new reference. Primeau will be entitled to that proportion of the value of the ore in situ, as is represented by his contribution to the total expenses of working, plus the total rentals or royalties paid the lessor. Interest upon these sums from the date of their receipt by Granfield will also be allowed.

545 There are several comments we would make about this decision. First, it involved misuse of “trust property” in its strict sense and not, as here, corporate property. The significance in this in the award of relief will be seen below: “Corporate Property, the Constructive Trust and ‘Tracing’”. Secondly, the actual remedy awarded was a personal, not a proprietary, one for the misuse of trust money in acquiring rights to explore for, extract and transport and sell gold. The benefit obtained from the money misused and for which the defendant was held accountable was that derived from the pro tanto contribution made to the consideration to acquire those rights after taking account of the expenditures made on exploration, extraction, etc which gave those rights their value from time to time.

546 What we would emphasise is that the account ordered by the primary judge against Murchison, as will be seen, has distinct similarities with that ordered by Learned Hand J, save that the accounting liability in *Primeau v Granfield* would seem, rightly, to be a continuing one not limited to the date of judgment.

### (iv) Interest Awards and Presumed Profits

547 This matter requires mention because there is an appeal against how interest was to be compounded. For present purposes the applicable principles are uncontroversial: see generally Ford and Lee, *Principles of the Law of Trusts* [17.2210]-[17.2250].

548 The historical approach adopted in England and then in this country as to the award of interest on “trust moneys” misused in breach of trust or of fiduciary duty was to award a fixed base rate of simple interest on the amount misused *from the time of misuse.* The basis for this liability is that the trustee or fiduciary was irrebuttably presumed to have made a profit on the money at the base rate set: see eg *Attorney-General v Alford* (1855) 4 De G, M&G 873 at 851; 43 ER 737. Nonetheless, the courts have stressed that in making this presumption they were not exercising a penal jurisdiction: *Vyse v Foster* at 333-334.

549 We need not concern ourselves with the modern approaches taken to setting the *rate* of interest: but see eg *Hagan v Waterhouse* (1991) 34 NSWLR 308 at 391-393; Ford and Lee, [17.2230]. In the present matter there is no contest as to the rate selected. There is as to how interest is to be compounded.

550 One of the circumstances in which compound interest is awarded with or without periodic rests (eg weekly, monthly, quarterly or yearly), is where trust money is misused by a trustee or fiduciary in his or her own trade or business. The informing principles here reflect those employed in accounting for profits. So in one of the foundational modern cases, *Burdick v Garrick* (1870) LR 5 Ch App 233, where an agent to receive money paid it into the common account of a firm of solicitors of which he was a partner, Lord Hatherley LC observed (at 241-242):

,,, that the money received has been invested in an ordinary trade, the whole course of decision has tended to this, that the Court presumes that the party against whom relief is sought has made that amount of profit which persons ordinarily do make in trade, and in those cases the Court directs rests to be made … [I]t must not be forgotten that a solicitor’s business is not such a business as I have described; it is not one in which they could make compound interest on the money embarked, or in which half yearly rests, or yearly rests, as the case may be, would be made in making up the account. A solicitor’s profit arises from the time and labour which he bestows upon cases in which he is engaged. There is nothing like compound interest obtained upon the money employed by a solicitor … [No] case arises here in which you could say that a profit has been made, or necessarily is to be inferred, and consequently … there was an error committed in directing compound interest.

551 In this class of case, the object of a compound interest award and the use of periodic rests, is to reflect in the award a crude approximation of the profit likely to have been made by the fiduciary or trustee from the money misused where that profit could reasonably be supposed to exceed in value a simple interest award only.

552 It is this aspect of the use of compound interest and rests which gives the interest award its attraction where, as Lord Brougham acknowledged in *Docker v Somes*, at 673; ER 1101, there might be great difficulties in an account of profits in apportioning the profits of a business.

### (v) The Liabilities of Knowing Recipients and Assistants

553 The reasons informing the imposition of liability on knowing recipients or assistants and, more particularly, the nature both of their liability relative to that of the delinquent trustee or fiduciary and of the remedies available against them have been the subject of significant recent (mostly academic) debate: see eg Mitchell and Waterson, “Remedies for Knowing Assistance”; Ridge, “Justifying the Remedies for Dishonest Assistance” (2008) 124 LQR 445; Dietrich and Ridge, “‘The Receipt of What?’: Questions Concerning Third Party Recipient Liability in Equity and Unjust Enrichment” (2007) 31 Melb ULRev 47; Elliott and Mitchell, “Remedies for Dishonest Assistance” (2004) 67 MLR 16. What that debate reveals are now predictable divergences between English and Australian law (attributable in part to the prevailing restitutionary cast of mind in English law and to Australia’s acceptance of the constructive trust as a remedy). To be added to this, though, are the subsisting uncertainties as to whether and/or when the liabilities of the knowing assistant or recipient are only several, or are joint and several, with those of the delinquent fiduciary or trustee.

554 We can for the most part pass the controversies by. There is relative certainty in the law we need to apply to issues raised in the appeal.

555  *First*, it is uncontroversial that the liability of a third party under either limb of *Barnes v Addy* is a personal, fault-based, one. The available remedies are not limited to an account of profits made or to pay compensation to restore the trust or for the loss occasioned by his or her wrongdoing. They can extend, as earlier noted, to the award of proprietary relief where this is appropriate: see generally *Warman*.

556  *Secondly*, where the advantage of a fiduciary’s/trustee’s wrongdoing accrues to a third party (whether as a knowing recipient or an assistant) and the third party is the alter ego/“nominee” (usually corporate) of the fiduciary, its liabilities will be joint and several with the fiduciary’s: *Green v Bestobell* at 40; see *Gencor ACP Ltd v Dalby* (where the action was against the fiduciary for commission payments “diverted into his own creature company” and for which both the company and the fiduciary were held accountable). This principle, we note in passing, would explain why both Mr Grimaldi and Pinnacle could be held accountable for the 10 million Winterfall shares and the options.

557  *Thirdly*, where the third party is not the fiduciary’s alter ego, the fiduciary and the third party will ordinarily be only severally liable for the profits each makes in consequence of the breach of fiduciary duty or breach of trust in which it participated/was a recipient: see generally *Warman* at 569. Each is not responsible for the other’s profits as we earlier indicated – hence the burden of the observation of the plurality in *Michael Wilson & Partners Ltd v Nicholls* (2011) 282 ALR 685 (“Michael Wilson & Partners Ltd”) at [106]:

… this Court has held that liability to account as a constructive trustee is imposed directly upon a person who knowingly assists in a breach of fiduciary duty. The reference to the liability of a knowing assistant as an “accessorial” liability does no more than recognise that the assistant’s liability depends upon establishing, among other things, that there has been a breach of fiduciary duty by another. It follows … that the relief that is awarded against a defaulting fiduciary and a knowing assistant will not necessarily coincide in either nature or quantum. So, for example, the claimant may seek compensation from the defaulting fiduciary (who made no profit from the default) and an account of profits from the knowing assistant (who profited from his or her own misconduct). And if an account of profits were to be sought against both the defaulting fiduciary and a knowing assistant, the two accounts would very likely differ.

See also *Glandon v Tilmunda* [2008] NSWSC 218 at [108]-[109]; *Australian Medic-Care Co Ltd v Hamilton Pharmaceutical Pty Ltd* (2010) 261 ALR 501 at [681]; *Ultraframe (UK)* at [1589]-[1600]; see also Meagher, Gummow and Lehane, at [5-245] (4th ed); a contrary view obtains in Canada where there is authority suggesting that liability for profits is joint and several: see *Canada Safety Ltd v Thompson* [1951] 3 DLR 295 at 323; *D’Amore v MacDonald* (1973) 32 DLR (3d) 543 at 549; *Macdonald v Hauer* (1976) 72 DLR (3d) 110 at 130; this view has justly been criticised as “penal”: see *Ultraframe (UK)* at [1597]-[1600]; see *Regal (Hastings) Ltd v Gulliver* at 390. In *United States Surgical Corporation v Hospital Products International Pty Ltd* at 817, McLelland J held that:

… a person who knowingly participates in a breach of fiduciary duty by another may be both (i) liable to account to the beneficiary for any benefit he has received as a result of such participation and (ii) jointly liable with the fiduciary in respect of any pecuniary liability of the fiduciary to the beneficiary as a result of the breach.

If this is to be taken as suggesting that the liability for profits is joint and several (there are later textual indications to this effect: see Meagher, Gummow and Lehane, at [5.245]), we disagree and would not apply it.

558  *Fourthly*, beyond the corporate alter ego cases we referred to earlier, there may well be a further exception to the above general principle. It is that, if the fiduciary and the third party assistant or recipient *act in concert* to secure a mutual benefit, be this to misappropriate trust property for a particular mutually beneficial purpose or to participate in a breach of fiduciary duty to secure a mutual advantage (eg a business opportunity), they are jointly and severally liable to the wronged beneficiary/principal to restore the trust or to account for the profits made. In *CMS Dolphin*, directors were held equally liable with the corporate vehicle they formed to take unlawful advantage of business opportunities they provided to it: “[T]he reason is that they have jointly participated in the breach of trust”: at [103] emphasis added; *Green v Bestobell*; see also the facts in *Macdonald v Hauer*, above; but cf the criticism in *Ultraframe (UK)*, at [1561]-[1576]. One can readily understand why, when wrongdoers so entangle their affairs, that the law as a matter of legal policy might wish to make it their responsibility – and not a claimant’s – to untangle them for accountability purposes. We need not explore this matter further, as this issue does not arise directly in the present matter. However, to anticipate matters we have applied a principle of joint and several liability to Mr Grimaldi in respect of his liability to Chameleon for the 10 million Winterfall shares and options where he and his co-director and fellow fiduciary, Mr Barnes, both acted in breach of fiduciary duty to Chameleon in misappropriating its moneys to advance the Winterfall/Iron Jack Vendors transaction from which ultimately they derived their commission. They acted in concert as directors and fiduciaries for their mutual benefit.

559  *Fifthly*, in the case of knowing receipt, where some or all of the trust property received no longer exists (or is not traceable) and so cannot be returned, the knowing recipient is obliged (no less than the wrongdoing trustee) to restore the trust fund by way of monetary compensation for the assets which have been lost: on this form of equitable compensation see *Re Dawson (decd)*; *Union Fidelity Trustee Co Ltd v Perpetual Trustee Co Ltd* [1966] 2 NSWR 211; and see generally Mitchell and Waterson, at 132 ff. In this matter, Mr Grimaldi, Winterfall and Murchison are all exposed to such a claim in respect of the cheque advances at Chameleon’s. We have not been asked to determine whether this liability is joint or several or several only. We incline to the latter view. What we wish to emphasise, though, is that Chameleon cannot obtain double recovery for its loss and the trial judge’s orders are sensitive to this.

### (vi) Corporate Property, the Constructive Trust and “Tracing”

560 In his book *The Law of Tracing*, Prof Smith makes the important but elementary point (at 299) that:

The process of tracing is simply the proof of a series of exchanges. This process cannot create rights *ex nihilo*. What it can do is allow rights to be transmitted from one asset to another.

He goes on to indicate that, if you wish to trace from asset A into asset B (as its traceable proceeds), you must first establish you have proprietary rights in asset A. You must establish your “proprietary base. And thus is said (at 299-300) that:

[I]n making a proprietary claim, the plaintiff must separately establish (a) the source of his proprietary rights in the first instance, and (b) his ability to trace from the subject matter of his original proprietary rights into the subject matter to which he now makes a claim.

561 Despite Chameleon’s confident assumption to the contrary, the need to establish a proprietary base arises as a critical issue in its claim to trace its cheque money advances to Winterfall into a proportionate interest in the Iron Jack Tenements.

562 When trust property in the strict sense is transferred into the hands of a person other than a bona fide purchaser for value without notice, little difficulty arises in following the property into that person’s hand and in tracing it into other property which is its substitute. The *antecedent* entitlement of the trust beneficiaries will in the usual case permit both following and tracing because it will establish the required property base in the asset in the recipient’s hands.

563 The real difficulty arises where the property sought to be followed and traced is not trust property in the strict sense but is corporate property. The analogy between the two is an imperfect one. As Buckley LJ put it in *Belmont Finance* at 405:

A limited company is of course not a trustee of its own funds; it is their beneficial owner; but in consequence of the fiduciary character of their duties the directors of a limited company are treated as if they were trustees of those funds of the company which are in their hands or under their control, and if they misapply them they commit a breach of trust (*Re Lands Allotment Co* [1894] 1 Ch 616 at 631, 638, per Lindley and Kay LJJ). So, if the directors of a company in breach of their fiduciary duties misapply the funds of their company so that they come into the hands of some stranger to the trust who receives them with knowledge (actual or constructive) of the breach, he cannot conscientiously retain those funds against the company unless he has some better equity. He becomes a constructive trustee for the company of the misapplied funds.

564 So far as the recipient is concerned, it is its knowledge of the directors’ misapplication of the company’s funds, ie their breach of fiduciary duty, that can turn it into a constructive trustee and thus give the company its proprietary base justifying both following its property into the recipient’s hand and tracing into its substitutes: *Evans v European Bank Ltd* (2004) 61 NSWLR 75 at [159]-[160]. The constructive trusteeship envisaged here is what Lord Selbourne in *Barnes v Addy* described as that of a person who receives and becomes chargeable with the “trust property”: see also *Bell Group (No 9)*, at [4750]-[4779].

565 At the time of *Belmont Finance*, the received view in England and in Australia, as has been seen earlier in these reasons, was that constructive notice in its traditional equitable sense – or category (v) of the *Baden* quintet – sufficed: see eg *Ninety Five Pty Ltd (in liq) v Banque Nationale de Paris* at 173 ff. We have earlier concluded that that species of knowledge does not now suffice to attract the first limb of *Barnes v Addy* and that the liability imposed on the recipient is fault based.

566 If, then, a proprietary base sufficient to justify following and tracing corporate property turns critically on the court imposing a constructive trust on the property received (the company having no antecedent interest in it in the recipient’s hands), the fundamental question becomes whether the court has any discretion not to do so.

567 It may be conceded that a court would ordinarily as of course award proprietary relief against a knowing recipient where the property received (or its proceeds) was still extant. Such cases, though, are something of a rarity and tend to raise the *Robins* problem to which we have earlier adverted: but see *Linter Group Ltd v Goldberg* at 662 ff (tracing into shares purchased with misused corporate funds). Nonetheless, consistent with what we have said earlier in relation to discretion and the constructive trust as a remedy – and it is being used as such in this context – we consider that, both as a matter of binding authority and of proper principle, the court is not obliged to do so. The circumstances may be such as to make it appropriate to leave the company to its personal remedies of an account of profits or compensation in equity. As a practical matter, these are the remedies most commonly given in misuse of corporate property cases for the reason that the recipient no longer holds traceable proceeds of the property received.

568 The issue in the present case is whether proprietary relief should be denied, as Winterfall contends it should.

### (vii) Relief: Bribes and Secret Commissions

569 In the second half of the nineteenth century an anomalous limitation was placed upon the reach of the *Keech v Sandford* constructive trust in English law. This was in relation to agents where the property obtained by an agent in breach of fiduciary duty took the form of a *money* bribe or secret commission. The bribed agent was accountable to his principal in equity for the bribe received, not as a constructive trustee, but as a *debtor* in equity: *Lister & Co v Stubbs* (1890) 45 Ch D 1. The principal could not claim any proprietary interest in the bribe and could not trace into investments made using it. To allow otherwise, Lindley LJ commented in *Lister* (at 15) would involve a “confounding [of] ownership with obligation”. To compound the curiosity in this, it seems nonetheless to have been accepted that a trust of the bribe could later be created by a decree of the court vesting it in the beneficiary but the decree only operated prospectively: *Metropolitan Bank v Heiron* (1880) 5 Ex D 319 (“Metropolitan Bank”) at 324 and 325. Unsurprisingly, this was described in the first edition of Meagher, Gummow and Lehane, *Equity: Doctrines & Remedies* at [538] as an “even more astounding proposition” than the basic ruling in *Lister*.

570 To exaggerate the *Lister* anomaly – and it has been so described in Australian decision – see *DPC Estates Pty Ltd v Grey and Consul Development Pty Ltd* [1974] 1 NSWLR 443 at 470-471 – a like rule was not applied to property bribes (other than money). In *Eden v Ridsdales Railway Lamp and Lighting Co Ltd* (1889) 23 QBD 368, for example, a promoter gave 200 shares in the company to a director while questions were still outstanding under a contract between the company and the promoter. In stating a rule said to be “applicable to all agents”, Lord Esher MR commented (at 371):

In such a case the remedy of the principal is an option either to claim what the agent has received, or to sue for damages. If that which the agent has received is money he must hand it over to his principal, if it is not money, but something else, the principal may insist on having it, or, if he chooses, the value of it.

And in the view of Lindley LJ (at 372): “It would … be contrary to all principles of law and equity to allow the plaintiff to retain the gift … [T]he company has the option of claiming what is given, or its value, ie the highest value whilst held by the director.”

571 Some number of the property bribe cases such as *Eden* concerned gifts by promoters of shares in the company of which the fiduciary was a director. These could thus be later explained on the narrow ground that the constructive trust of such shares did no more than give back to the company what was its own (notwithstanding that the company could not at that time be a shareholder in itself). However, the matter to be emphasised is that the rule as stated and applied in cases such as *Eden* accords with what has long since been the general understanding in this country of a fiduciary’s liability to account for property and profits made in breach of fiduciary duty. *Furs Ltd v Tomkies*, which would seem to have involved a procuration fee (it mattered not to the Court how precisely the benefit derived was categorised), exemplifies this.

572 The findings in *Lister*, having regard to its facts, seem quite arresting to modern eyes. The facts as described by Lindley LJ were that Lister & Co through their agent bought goods from Varley at market prices and paid for them. Lister & Co became the owner of the goods purchased; the ownership of the money paid was in Varley. Varley had entered into a commission arrangement with Stubbs who ordered the goods and received payments thereunder. The first question posed by Lindley LJ was whether Stubbs could keep the money. And the answer given (at 15): “Obviously not … he is liable to account for it the moment that he gets it.” This liability, clearly enough, was founded on the then, and now, well accepted proposition that if “a profit has been made by an agent, without the knowledge of his principal, in the course and execution of his agency … for that profit [he] must … account to [his] principal”: *Parker v McKenna* at 118 per Lord Cairns; and see *Metropolitan Bank* at 323 and 325. Stubbs was a “fiduciary agent” and was accepted to be such in *Lister*. *Jacobs’ Law of Trusts* *in Australia* [1323] (7th ed) rightly recognises this. The case, in other words, has no bearing on the confusing and desultory debate as to whether all agents are fiduciaries: see eg *McKenzie v McDonald* at 144; *Hospital Products* at 71-72 per Gibbs CJ; and see generally Waters, *The Constructive Trust*, Ch IV (1964); Meagher, Gummow & Lehane, [5-190] ff (4th ed).

573 The second question Lindley LJ addressed was whether the relationship of Stubbs and Lister vis-à-vis the moneys received was that of trustee and beneficiary. For essentially consequentialist reasons relating to the effects which would ensue if the agent were either to become bankrupt or to make traceable investments using the moneys, that question was answered in the negative, but in a curious way as has been noted. Stubbs could become a trustee prospectively as a result of a later decree of the court, but not simply by virtue of the receipt of the bribe. This, as has been said in *Jacobs’*, at [1323] “can hardly be regarded as satisfactory”.

574 It may be that the exclusion of bribes at this time from the usual operation of what we have called the *Keech v Sandford* principle reflected the idea that a bribe could not be said to be property which the agent could or should have derived, if at all, for his or her principal. That idea had much contemporary significance in cases where agents, partners or directors appropriated opportunities which they should have pursued, if at all, for their principal, etc: eg *In re Cape Breton Co* (1885) 29 Ch D 795 at 804; *Dean v MacDowell* (1878) 8 Ch D 345 at 351; *Burland v Earle* [1902] AC 83. It was this idea which was embraced – unconvincingly in our view – by the English Court of Appeal in *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2011] 4 All ER 335 (“Sinclair Investments”) at [80] and [88] in its recent re-affirmation of *Lister*; though entitled to an equitable account in respect of any money or asset acquired in breach of fiduciary duty, a beneficiary was not entitled to claim a proprietary interest –

… unless the asset or money is or has been beneficially the property of the beneficiary or the trustee acquired the asset or money by taking advantage of an opportunity or right which was properly that of the beneficiary: at [88].

English law may have its own reasons for so contriving the limits to proprietary relief. We need not speculate about them. What we would emphasis, though, is that, unlike Australian law, it does not recognise that the constructive trust can be a discretionary remedy: see *Sinclair Investments*, at [37]; contrast *Bathurst City Council v PWC Properties Pty Ltd* at [42].

575 We have referred already to the quite different rule affirmed in *Furs Ltd v Tomkies*. Additionally, we would note by way of contrast with the approach taken in *Sinclair Investments*, the observations of Mason J in *Hospital Products* at 107-108 with which we respectfully agree:

Any profit or benefit obtained by a fiduciary [in breach of the proscriptions on conflict of duty and interest or on misuse of position] is held by him as a constructive trustee: *Keith Henry & Co Pty Ltd v Stuart Walker & Co Pty Ltd* [at 350]. *Neither principle nor authority provide any support for the proposition that relief by way of constructive trust is available only in the case where a profit or benefit obtained by the fiduciary was one which it was an incident of his duty to obtain for the person to whom he owed the fiduciary duty. Once it is established that the fiduciary is liable to account for a profit or benefit which he has obtained there can be no objection to his being held to account as a constructive trustee of that profit or benefit.* It can make no difference that it was not his duty to obtain the profit or benefit for the person to whom the duty was owed. What is important is that the advantage has accrued to him in breach of his fiduciary duty or by his misuse of his fiduciary position. The consequence is that he must account for it and in equity the appropriate remedy is by means of a constructive trust.

(Emphasis added.)

576 To exclude the bribed fiduciary from the deterrent effect of the constructive trust is, in our view, to make it unavailable in the very situations where deterrence is likely to be the most needed. Bribery at its most naked breeds the crudest form of fiduciary infidelity. To privilege the dishonest fiduciary in this way is to create an incentive which should not be tolerated. This is particularly so in relation to public sector fiduciaries. In combating the corrupt public official, the full range of equity’s remedies and techniques (including tracing and following illicit gains) are important instruments of deterrence. The courts in other common law countries have recognised this, as has the decision of the Privy Council in *Attorney-General for Hong Kong v Reid* [1994] 1 AC 324 (“Reid”); see eg *Carter*; *Sumitomo Bank Ltd v Kartika Ratna Thahir* [1993] 1 SLR 735 (Sing); *Insurance Corporation of British Columbia v Lo* (2006) 278 DLR (4th) 148 (applying *Reid’s* case).

577  *Lister* has been a cause of continuing controversy. It was followed in subsequent English Court of Appeal cases in the late nineteenth and early twentieth centuries. Its standing, as noted above, has very recently been reaffirmed in *Sinclair Investments*; see also *Cadogan Petroleum Plc v Tolley* [2011] EWHC 2286 (Ch); so exciting renewed scholarly dispute in the UK: see eg Hayton “Proprietary Liability for Secret Profits” (2011) 127 LQR 487; Goode, “A Reply” (2011) 127 LQR 493; Virgo, “Profits Obtained in Breach of Fiduciary Duty: Personal or Proprietary Claim?” [2011] Camb LJ 502. It has not been followed in Singapore primarily because of its inconsistency with the “property” bribe cases; because it has been overtaken by the developing vigour of the constructive trust in the last quarter of the twentieth century; and because the “money” bribe exception favours the dishonest fiduciary over the honest one: see *Sumitomo Bank Ltd v Kartika Ratna Thahir*,above. The Privy Council in *Reid* on an appeal from New Zealand disapproved both *Lister* and *Metropolitan Bank*. It relocated bribes and secret commissions within the ordinary fiduciary regime: “[a] bribe and the property from time to time representing the bribe are held on a constructive trust for the person injured”: at 336.

578 In Australia *Lister* has been the subject of long standing criticism by text writers: see eg *Jacobs’ Law of Trusts in Australia*, paras 1312-1314 (4th ed, 1977); the first edition of Meagher, Gummow and Lehane, at [532]-[540]; for the 4th edition, see [5-190]-[5-230]; Finn, *Fiduciary Obligations*, paras 511-513 (1978); Lehane, “Fiduciaries in a Commercial Context” in Finn (ed), *Essays in Equity*, 107. It is, in our view, inconsistent with orthodox, twentieth century Australian formulations of the remedial consequences of breach of fiduciary duty exemplified by the observations we have already quoted from *Furs Ltd v Tomkies* and those of Mason J in *Hospital Products* above.

579 This said, it has been cited approvingly by several judges of the High Court albeit in cases where the particular vice in *Lister* which we have been addressing had not been contested. As Meagher, Gummow & Lehane point out [5-220] (4th ed) it was cited by Isaacs J (with whom Powers J agreed) in *Ardlethan Options Ltd v Easdown* (1915) 20 CLR 285 at 292 for the proposition that an employee who took a bribe was not a trustee of it, but merely an equitable debtor. The contrary had not been argued.

580 In *Daly* Gibbs CJ commented (at 379) that the decision in *Lister* has been criticised as unjust:

… but the reasons of Lindley LJ appear to me to be impeccable *when applied to the case in which the person claiming the money has simply made an outright loan* to the defendant.

(Emphasis added.)

It is important to appreciate both the context and purpose of this comment. The matter in issue was not one in which a constructive trust was being asserted against property or profits acquired by a fiduciary in breach of fiduciary duty (at 378). Rather it concerned a loan by way of deposit of money to a firm of stockbrokers at a high rate of interest and on 90 days notice of call. The firm did not disclose from information in its possession that the transaction was likely to be most disadvantageous to the lender because of the firm’s own financial position. Accepting that the firm owed Daly a fiduciary duty and breached it by its non-disclosure, Gibbs CJ rejected the assertion that that breach resulted in the loan moneys being impressed with a constructive trust. While equity would, if necessary, assist the lender to be repaid by allowing the loan contract to be avoided within the 90 day call period, it would not transform Daly the creditor into Daly the beneficiary. It was not necessary to find a constructive trust in order to ensure that the firm was not unjustly enriched (at 379). Daly had his contractual right to be repaid and his right in equity to avoid the loan: a constructive trust was unnecessary to protect the legitimate rights of the lender and could lead to unjust consequences both to other creditors of the firm and to the firm itself (if it was found to be a trustee with the additional liabilities that might entail).

581 The Chief Justice’s comments, in other words, were addressed to the appropriateness of going beyond the relief equity would ordinarily give a lender in Daly’s position (avoidance of the loan contract) so as to transform “an outright loan” into a trust. The context, we would emphasise, was not one related in any way to the recovery of a profit made in breach of fiduciary duty. The endorsement his Honour gave to the circumscribed application of Lindley LJ’s comments in *Lister* cannot properly be regarded as expressing a view on the question whether a bribed fiduciary holds the money received as a constructive trustee for its principal. It was not addressed to that issue.

582 Whatever may be the reasons for English law’s continuing adherence to *Lister*, the weight of High Court decision and expressions of judicial opinion across the twentieth century preordain our rejection of it. We refer in particular to the judgment of Rich, Dixon and Evatt JJ (with which McTiernan J agreed) in *Furs Ltd*, to the joint judgment in *Keith Henry & Co* (at 350) and to the observations of Mason J in *Hospital Products* (at 107-108) and to Deane J in *Chan* (at 198-199). We simply note that in the result Australian law matches that of New Zealand (*Reid*), Singapore (*Sumitomo Bank*), United States jurisdictions (*Carter*) and Canada in accepting a proprietary remedy for bribes and secret commissions. Although the position in Canada appeared to remain uncertain for some time despite the considerable liberalisation of the constructive trust as a remedy in *Soulos v Korkontzilas* (1997) 146 DLR (4th) 214; see *Waters’ Law of Trusts* *in Canada*, 500-504 (3rd ed, 2005); the British Columbia Court of Appeal recently has accepted and applied *Reid’s* case: *Insurance Corporation of British Columbia v Lo*, above. However, Australian law departs from the law as stated in *Reid* in one important respect. *Reid* has the constructive trust arising the moment the bribe is received. In Australia, the constructive trust in this setting is a discretionary remedy.

583 There are two additional comments we should make. First, to accept that money bribes can be captured by a constructive trust does not mean that they necessarily will be in all circumstances. As is well accepted, a constructive trust ought not to be imposed if there are other orders capable of doing full justice: see *John Alexander’s Clubs* at [128] and the cases there footnoted. Such could be the case, for example, where a bribed fiduciary, having profitably invested the bribe, is then bankrupted and, apart from the investment, is hopelessly insolvent. In such a case a lien on that property may well be sufficient to achieve “practical justice” in the circumstances. This said, a constructive trust is likely to be awarded as of course where the bribe still exists in its original, or in a traceable, form, and no third party issue arises.

584 Secondly, we have referred to this body of law at some length notwithstanding that we have concluded that the secret commission obtained by Grimaldi and Barnes under the Winterfall/Murchison agreements, was not a secret commission vis-à-vis Chameleon. It was simply an undisclosed personal interest in the making of the advance of the two cheques. We have taken this course both because the parties have made reference to *Sinclair Investments* and to *Reid* and lest it be said that *Lister v Stubbs* ought nonetheless be applied analogically in relation to the commission received by Grimaldi and Barnes.

# VII. RELIEF: MR GRIMALDI

585 Having found Mr Grimaldi liable to Chameleon both for breaches of fiduciary duty and for breaches of the Corporations Act ss 181(1)(a) and (b) and 182(1) by his receipt of his commission in the Cadetta Transaction and by the misapplication of the two cheques for $152,750, his Honour then considered the relief that ought be ordered against him. Chameleon had claimed, at its election a constructive trust or an account of profits in respect of the 10 million Winterfall shares issued to Pinnacle as a “spotter’s fee” which were exchanged for shares and options in Murchison under the takeover. In the alternative equitable compensation was sought in respect of the commission received in the Cadetta Transaction and for the cheques misapplied. Relief was claimed, as well, under s 1317H(1) of the Corporations Act in respect of the contraventions of the Act found.

## 1. The Primary Judge’s Conclusions

*586 First, the constructive trust, and the account of profits.* His Honour accepted that the Winterfall shares were a benefit that Grimaldi and Barnes derived from their breaches of fiduciary duty and that that benefit, after the Murchison takeover, was represented in the 10 million Murchison shares and 12 million options. Those shares and options were, through Pinnacle, then allotted or transferred to Grimaldi or his nominees and to Barnes and his nominees. Though Mr Grimaldi did not thus receive all of the Murchison shares and options, his Honour nonetheless concluded he was liable to account to Chameleon for all of them. For the shares and options he actually received “in his own right” he was liable to account either as a constructive trustee or by way of an account of profits. In relation to the remaining shares and options he was liable to account as an accessory for the profit made on them or to pay equitable compensation in respect of them. His liability to account arose, in his Honour’s view, because he shared in the benefits flowing from the issue of the 10 million shares and options.

*587*  Grounds 14 to 16 in the Grimaldi appeal challenge all of the relief so given.

*588 Secondly, equitable compensation.* As an alternative to an account, the primary judge held that Chameleon was entitled at its election, to equitable compensation for the misapplication of its funds. He referred to the well-accepted proposition that the object of equitable compensation was to restore persons who have suffered loss to the position in which they would have been if there had been no breach of the equitable obligation in question: *O’Halloran v R T Thomas & Family Pty Ltd* at 272-273. His Honour went on to comment that the only relevant loss caused to Chameleon by the misapplication of the cheques was the loss of the use of that money and that no loss had been demonstrated by the issue of the 5 million shares in the Cadetta Transaction. His Honour concluded in consequence (at [1069]) that Mr Grimaldi was liable to pay equitable compensation in the misapplied sum of $152,750 with interest at commercial rates.

*589*  This liability is challenged in Ground 7 of the Grimaldi appeal. The ground is directed in substance to Mr Grimaldi’s being found liable either as a de facto director or as a fiduciary and not to the relief granted as such. We have already given our reasons affirming his Honour’s conclusions on liability in the course of rejecting Grounds 1 and 9 of the Grimaldi appeal. We would also note that, while orders to pay equitable compensation were made against Murchison and Winterfall by the trial judge, *no such order* was made against Mr Grimaldi. This said Order 3(c) made against Murchison provides that Murchison’s compensatory liability to Chameleon is to be abated by “any amount paid to Chameleon by [Mr Grimaldi] as equitable compensation for the … amount of $152,750 and interest thereon”. A like order was made against Winterfall – Order 5(c). It is unnecessary for us to decide whether there was an hiatus in the orders so made or whether the orders presupposed in Orders 3(c) and 5(c) were made in error. We have raised this matter with the parties. None has suggested that his Honour should be approached to amend his orders in any way. We have no need to consider it further.

*590 Thirdly, s 1317H(1) of the Corporations Act.* His Honour made an order under this provision (discussed below) that Mr Grimaldi pay compensation to Chameleon in an amount equalling the amount of profits obtained by him resulting from his contraventions of the Act though not so as to amount to double recovery of any profits paid under the orders made for the amount of profits. The making and the form of this order have been challenged in Grounds 18 and 19 of the Grimaldi appeal.

## 2. The Constructive Trust and the Account

### (i) Findings and Orders

591 Because Mr Barnes and Mr Grimaldi (given the findings made against him) each owed their own fiduciary and statutory duties to Chameleon, separate findings necessarily had to be, and were, made against each of them. Nonetheless, it is clear from the manner in which his Honour dealt with their actions that he regarded them as having acted in concert to a common end and that their respective wrongs bespoke this. Put shortly, they participated jointly in the matter. The primary finding made of statutory and fiduciary wrongdoing (at [669]-[671]) reflected this:

The circumstances attending the drawing of the cheques make it plain that each of Mr Grimaldi and Mr Barnes arranged for Chameleon’s funds to be paid to the Iron Jack Vendors for the express purpose of assisting [Murchison] to complete the acquisition of Winterfall and thereby to acquire an interest in the Iron Jack Project.

Mr Barnes drew the cheques. Mr Grimaldi requested him to do so …

But what is most telling is the personal interest of Mr Grimaldi and Mr Barnes. Each had a direct personal interest in the completion by [Murchison] of the acquisition of Winterfall because of their entitlement to the ‘introduction fee’ for introducing [Murchison] to Winterfall.

The personal interest of Mr Grimaldi and Mr Barnes in the successful completion of the transaction by [Murchison] gave rise to a real and substantial possibility of conflict between their personal interests and their duty to Chameleon in permitting Chameleon’s funds to be used to assist [Murchison] to complete the transaction.

592 For all presently relevant purposes, save the making of orders (the claim against Mr Barnes having been settled), the two were found to have acted together as co-wrongdoers. At no point did his Honour state explicitly that they were jointly and severally responsible for their wrongs in relation to the drawing of the cheques and the receipt of the “spotter’s fee”. Nonetheless, the primary judge’s reasons were clearly consistent with, if not informed by, such an appreciation of their respective liabilities. And this carried over into the relief ordered.

593 Having referred to what he described as the “profit principle” which applied to fiduciaries and which had been stated in landmark cases such as *Phipps v Boardman* and by Mason J in *Hospital Products*, his Honour then invoked it in the present case (at [982]):

It would seem to follow that the fundamental rule of equity ought to apply, namely that Messrs Grimaldi and Barnes *as fiduciaries* … ought to account as a constructive trustee for what they acquired in breach of their fiduciary obligations.

(Emphasis added.)

He later reiterated that they both “would have been liable to account to Chameleon” for the benefit in the form of the Winterfall shares issued to Pinnacle, and likewise for the Murchison shares in which those shares were later “represented”: [1072]-[1073].

594 We would interpolate that we consider his Honour clearly and unexceptionably identified the foundation and scope of the liabilities of Mr Barnes and Mr Grimaldi in the paragraphs to which we have referred.

595 His Honour then referred to the subsequent dispersal of the Murchison shares among the parties nominated in Pinnacle’s directions to Murchison (at [1076]-[1079]):

Mr Grimaldi did not receive all of the 10 million shares in Murchison but it seems to me that he is liable to Chameleon to account for the whole of that parcel of shares.

The shares which Mr Grimaldi received in his own right were the dishonest benefit derived by him by reason of his receipt of the commission and his procurement of the cheques for $152,750. It is plain on the principles I have previously discussed that Mr Grimaldi is liable to account for those shares, *either as a constructive trustee or by way of an account of profits*.

It is also clear in my view that Mr Grimaldi is liable to account for the remaining shares *as an accessory* or to pay equitable compensation in respect of those shares …

( Emphasis added.)

596 Later in his reasons, in discussing why Grimaldi should be accountable for all of the shares but why Murchison, as an accessory, should not be, his Honour commented (at [1094]-[1097]):

It is true that I have concluded that Mr Grimaldi is liable to account as an accessory for the profit made on the 10 million shares obtained by Pinnacle. But that is because he shared in the profits. He may not have shared in all of the profits but his failure to give evidence entitles me to presume against him that he shared in all of them.

In my view, this follows from the fact that the introduction fee arose from the discussions between Mr Grimaldi and Mr Barnes and Mr Zuks which culminated in the [Murchison]/Winterfall Heads of Agreement and the Addendum thereto. The Addendum provided for the issue of the shares to Mr Grimaldi or his nominees.

The evidence establishes that those shares were ultimately crystallised as the 10 million Winterfall shares allotted to Pinnacle but it is clear that Pinnacle was merely the vehicle through which those shares were to be distributed to Mr Grimaldi and Mr Barnes. In the absence of any evidence from either of them, I am entitled to assume against Mr Grimaldi as a wrongdoer, in assessing the benefit he received, or the quantum of compensation, that he shared in the benefits flowing from the issue of the 10 million shares.

The position is quite different in relation to the accessory liability of Murchison which, clearly, did not share in or receive any benefit from the issue of the 10 million shares.

597 The orders made to give effect to his Honour’s reasons were both proprietary and personal in character. Orders 9 and 10 required Mr Grimaldi to transfer and/or *to cause his nominees* to transfer within 28 days of the order, the 10 million shares and 12 million options in Murchison obtained by Pinnacle or its nominees or so many of those shares and options as Mr Grimaldi and/or “his” nominees presently hold. Order 11 provides for the like transfer of options that have been exercised and remain presently held by Mr Grimaldi and/or his nominees.

598 Orders 12(a)-(e) required Mr Grimaldi to account for the profits made by him *or his nominees* on the disposal of shares and/or options, the various subparagraphs envisaging differing types of disposal of shares/options and provision was made for the set off of the price paid to exercise the options.

599 Orders 13 and 14 obliged Mr Grimaldi to pay compound interest to Chameleon in all amounts payable under Order 12. Order 15 imposed a further general obligation to account for profits derived from Mr Grimaldi’s breaches of fiduciary duty over and above any monies payable under Orders 9-14. And Order 17 provided for allowance to be given Mr Grimaldi in reduction of his liabilities in respect (inter alia) of receipts from Mr Barnes (under his settlement agreement with Chameleon) to the extent they related to the same liabilities.

600 Save in one respect to be noted, no attack is made on these orders as such or upon the consequential orders made by his Honour (which include the appointment of a Referee to conduct an inquiry into and to determine the amount of profits payable pursuant to the orders, the Referee having liberty to apply to the Court for further directions as to the conduct of the inquiry). We merely note that the orders were the subject of lengthy debate before his Honour on 10 December 2010 before they were made. We make no comment upon them other than to say that the uncertainties we have already noted about the nature of Mr Grimaldi’s relationships with the various Pinnacle nominees who received shares and options, suggest the orders may not prove to be without difficulties for the Referee.

### (ii) The Appeal

601 Grounds 14, 15 and 16 of the Grimaldi appeal challenge his Honour’s conclusions that (i) Mr Grimaldi was liable to account to Chameleon for all of the 10 million Murchison shares (and, inferentially, the options), even though he did not receive them all; (ii) he was liable to account for the shares he received in his own right as a constructive trustee or by way of an account of profits these being the dishonest benefit he derived by reason of his receipt of the commission and his procurement of the loan; and (iii) he was liable to account for the remaining shares as an accessory.

602 The first of these is impugned on the basis of insufficiency of reasons given for finding Grimaldi liable as a fiduciary or constructive trustee for all of the shares; the second, as the basis of the dishonesty finding was not revealed and explained; and the third, because he was being held liable to account for shares he did not receive. The third of these, in particular, was given emphasis in the Grimaldi written submissions.

603 It is fair to say that the primary focus in the Grimaldi appeal generally, as at trial, has been on disputing his liability to Chameleon at all. Relatively little attention by comparison has been directed to the nature and extent of Mr Grimaldi’s liability in the event of his being found liable.

604 We would begin by emphasising the following. *First,* the spotter’s, or introduction, fee was not offered in, and was not a creature of, the so-called Chameleon-Murchison “loan” transaction. It was agreed, prior to the two cheques being drawn, in a distinct and separate dealing between Winterfall and Murchison. Three consequences flow from this. (i) The fee cannot properly be characterised as a secret commission or bribe offered as an inducement for the making of the money advances by Chameleon to Murchison. Equally the contingent “entitlement” of Mr Barnes and Mr Grimaldi to the fee was not itself an incident of the cheque transactions. Rather it derived from the terms of the Winterfall/Murchison Heads of Agreement and the Addendum thereto. (ii) Nonetheless it still could – and did – constitute an “interest” for the purposes of Mr Grimaldi’s fiduciary obligation to Chameleon. (iii) Because his Honour was not dealing with a bribe he had no need to venture any view at all as to whether the receipt of it *as such* was dishonest. Rather the “dishonesty” which infected the cheque transaction, as his Honour noted (at 1045), was that “involved in the misapplication, or malapplication of [Chameleon’s] funds”. It was this which led to Grimaldi’s receipt of Murchison shares being described as “the dishonest benefit derived by reason of his receipt of the commission and his procurement of the cheques”. His Honour properly identified the basis of his dishonesty finding: cf Ground 15 of the Grimaldi appeal.

605  *Secondly*, Murchison has claimed that Grimaldi’s knowledge of the “spotter’s fee” ought not be attributed to it because the 10 million Murchison share issue which ultimately paid for it was a fraud on it. Murchison did not make any claim against Mr Grimaldi on that account. In particular, it did not claim that he or Pinnacle held the shares as constructive trustees or were otherwise obliged to account to it for the fee received. In other words, we are not confronted with two conflicting constructive trust/account of profits claims being made to the same property/profits. In consequence we have no need here to comment further either on such claim as Murchison may have had, but did not make, against Mr Grimaldi or on how a conflict of claims by Murchison and Chameleon ought properly be resolved. Chameleon alone now occupies this field.

606  *Thirdly*, quite apart from the indirect personal interests Mr Grimaldi and Mr Barnes as shareholders in Murchison had in having the Winterfall/Murchison agreement carried into effect, they had a distinct personal interest in procuring and in drawing the two cheques. That interest can as a matter of convenience be said to consist of the expectation they had of deriving the spotter’s fee should Winterfall acquire the Iron Jack Tenements. This said, the immediate benefit they derived from the cheque and Cadetta transactions was that the Winterfall/Iron Jack and the Winterfall/Murchison contracts were kept on foot and thus their opportunity to obtain the fee. Viewed as a matter of causation Grimaldi and Barnes could, in the circumstances, only hope to derive the fee they did if they misappropriated Chameleon’s moneys: see Reasons [809]; Grimaldi Ground 6, above. And so they breached their fiduciary duty to Chameleon twice over – first by misappropriating the moneys; secondly, by having an undisclosed personal interest in their decision to so use the moneys. As to the latter, their expectation of a fee if they kept alive the Winterfall-Iron Jack Agreement ultimately was preserved. It is no answer for Mr Grimaldi to say either that the derivation of that fee depended on the occurrence of further contingencies, ie the performance of the outstanding obligations under both the Winterfall-Iron Jack Agreement and the Winterfall-Murchison Heads of Agreement and Addendum, or that it was a mere expectancy when the advances were made. It was still a hoped-for possible benefit of pecuniary significance that their breaches of fiduciary duty and misuse of fiduciary positions allowed them to derive.

These particular circumstances may seem uncommon in the usual run of secret profit cases but they provide no justification for protecting Mr Grimaldi from the inexorable operation of the profit principle to which his Honour had referred. Their actions involved both conflicts of duty and interest and a misuse of their fiduciary positions.

607  *Fourthly*, Grimaldi’s and Barnes’ “vehicle”, Pinnacle, was the recipient, first, of the Winterfall shares and, then, of their substitute the Murchison shares. As the primary judge correctly held (at [1073]), Grimaldi and Barnes “were liable to account to Chameleon” for the Winterfall shares and hence the Murchison shares. This, their “secret commission”, was a distinct benefit they received in consequence of the breach of fiduciary duty. We infer from his Honour’s reasons that the liability to account which his Honour envisaged was a joint and several one for the shares held by Pinnacle. Together, as directors and fiduciaries of Chameleon, they had acted in concert in breach of their fiduciary duties to preserve an expected mutual benefit.

608  *Fifthly*, the subsequent change in ownership of the shares did not, in our view, change the nature of the Barnes and Grimaldi liability to account for the shares: see *Imperial Mercantile Credit v Coleman*, at 208. However, it did affect the remedies that could appropriately be awarded against each of them in giving effect to that liability. Pinnacle ceased to hold the Murchison shares as a result of the implementation of its direction to Murchison: “some were allotted or transferred to Mr Grimaldi or his nominees and others to Mr Barnes or his nominees”: Reasons [1074].

609 While his Honour acknowledged that Mr Grimaldi continued to be liable to account for all of the shares (at [1076]) – and nothing could change that because the improper benefit had by then been received: see *Coleman*, at 208 – he recognised that there was a practical difference in how that liability was to be expressed given the dispersal of the shares. As to those Mr Grimaldi received in his own right he was liable to account “either as a constructive trustee or by way of an account of profits”. As for those he did not, he was liable to account, to use his Honour’s arresting description, “as an accessory”: at [1078]. His Honour went on to acknowledge the general principle stated in *Dart Industries* at 111 that “[a]n account of profits is confined to profits actually made” and for that reason, as will be seen, found that Murchison was not liable to account as an accessory for a profit made by Grimaldi in a related claim by Chameleon: that profit was not one made by Murchison. Nonetheless in Mr Grimaldi’s case he held he was liable “to account as an accessory for the profit made on the 10 million shares obtained by Pinnacle” because “he shared in the profits”: at [1094]. Having acknowledged the genesis of the introduction fee in discussions between Mr Zuks, Mr Grimaldi and Mr Barnes and its culmination in the Addendum to the Winterfall-Murchison Heads of Agreement, the primary judge, after referring to the share allotment to Pinnacle, went on (at [1096]):

… it is clear that Pinnacle was merely the vehicle through which those shares were to be distributed to Mr Grimaldi and Mr Barnes. In the absence of any evidence from either of them, I am entitled to assume against Mr Grimaldi as a wrongdoer, in assessing the benefit he received, or the quantum of compensation, that he shared in the benefits flowing from the issue of the 10 million shares.

610 It is open to question whether in this part of his Honour’s reasons he was invoking a distinct rule of liability to justify Mr Grimaldi’s liability to account, the more so given the clear earlier conclusions that Barnes and Grimaldi *as fiduciaries* ought to account as a constructive trustee for what they acquired in breach of their fiduciary obligation. What they actually acquired was, first, the Winterfall shares (via Pinnacle). It was then that they obtained their fee or commission. It was then that they became liable to account for it to Chameleon either as a constructive trustee of the shares, or by way of an account of profits. Having accepted on 31 October 2004 (via Pinnacle) the offer of Murchison shares and options pursuant to the Winterfall-Murchison Agreement, Chameleon was, on his Honour’s findings entitled to trace into that entitlement to shares and options and to hold Grimaldi and Barnes liable to account to it again as a constructive trustee or by way of an account of profits.

611 On 11 November, Pinnacle directed that the shares and options go to persons it nominated (including itself and several companies said to be associated with Mr Grimaldi). Chameleon doubtless could have followed some or all of the shares into the hands of the nominees some at least of which seem to have been the corporate creature, vehicle or alter ego of either Grimaldi or Barnes: see eg *Green v Bestobell* at 40; see also *Cook* at 565; see also *CMS Dolphin* at [98]-[104]. Others may have been volunteers or may not have been bona fide purchasers for value. His Honour’s Orders 9 and 10 seem to acknowledge these possibilities. Nonetheless, for the Murchison shares and options which could not be so claimed, Grimaldi and Barnes remained liable to account for the benefit (the value or the profit) those shares represented to them notwithstanding they had been disposed of to others.

612 The point to be emphasised is that merely because Mr Grimaldi did not obtain all of the shares and options “in his own right” did not mean he was thereby relieved of his liability to account for the benefit of the remaining shares and options: see *Coleman* at 208. What it did mean, as his Honour recognised, was that it was only the shares he (or his corporate vehicles) received that he held in specie as a constructive trustee. His liability to account for the other shares was a personal, not a proprietary, one.

613 The above is in substance what his Honour found. It involves no more than the application of orthodox equitable principles to a delinquent fiduciary and is consistent with the general burden of his reasons. Those principles do not necessarily require the invocation of “accessorial liability” to justify the liability to account for profits in a case such as the present. If his Honour considered that Mr Grimaldi’s liability to account for the shares which he did not hold, so depended on his being an “accessory”, then we consider he erred but it was an immaterial error. He had already, and correctly, identified not only the proper basis upon which Mr Grimaldi was liable to account, but also for what in the circumstances he was liable to account, ie the benefit of the shares and options. Whether that benefit could be claimed by way of a constructive trust, or only through an account of profits did not affect in any way the fact that Mr Grimaldi, as a joint participant in the breaches of fiduciary duty and the derivation of the shares: *Coleman;* see also *CMS Dolphin*, at [103]; was liable to account for all of the benefit of the shares and options he and Barnes derived from their breach of fiduciary duty.

614 This said and having regard to the totality of the primary judge’s reasoning, we are by no means satisfied his Honour committed the error we referred to in the previous paragraph. His Honour clearly was not wishing to subvert the *Dart Industries* rule to which he earlier referred – a rule recently reaffirmed, as has been seen, in *Michael Wilson & Partners Ltd* at [106] in relation to the liability of a knowing assistant in a breach of fiduciary duty: see above “The Liabilities of Knowing Recipients and Assistants”. As we understand what his Honour has said, though he describes Mr Grimaldi’s liability to account for the shares which he did not hold in his own right as being that of an accessory, he neither linked that liability explicitly to fiduciary wrongdoing “by another” (cf *Michael Wilson & Partners Ltd* at [106]) nor did he explain how Mr Barnes’ wrongdoing in turn would have differed in any way from his own. We consider it unlikely that his Honour was intending to suggest that Mr Barnes and Mr Grimaldi were each other’s accessory in the matter – the more so as both were then directors of Chameleon and were clearly joint participants both in securing the fee and in their fiduciary wrongdoing to Chameleon.

615 The ultimate assumption made – that Mr Grimaldi “as a wrongdoer … shared in the benefits flowing from the issue of the 10 million shares” – would seem to be equally applicable to Mr Barnes and accords with our own conclusion. They each were wrongdoers sharing together the benefits flowing from the share issue to them jointly (via Pinnacle) – a share issue which they previously contrived. We would regard the primary judge’s reference to the absence of evidence by Mr Barnes and Mr Grimaldi as indicating that, without evidence to the contrary, it was to be “assumed” (ie inferred) they intended to share the benefit of those shares as suited them. They were, after all, joint participants in securing Mr Zuks’ commitment to provide the fee and, through the cheque transactions, in keeping alive the opportunity to “earn” it.

616 We are comforted in the view we take of what his Honour intended to convey by what he said at [1072] and [1073]. As we have noted, he invoked the “profit principle” of fiduciary law as the basis for Grimaldi’s and Barnes’ liability to account to Chameleon for the benefit of the 10 million Winterfall shares when Chameleon received them and, when they were exchanged for the Murchison shares, they were then liable to account for them. How they later dealt with the shares may have affected how they were to account for the benefit received as we have indicated. It in no way changed the basis of their liability. Put shortly, they were liable as defaulting director-fiduciaries.

617 In saying this we emphasise that the principles relating to “accessorial liability” in its various manifestations simply do not arise here. Accordingly we have no regard to them or, relatedly, to Chameleon’s Ground 5 of its Amended Notice of Contention and to the Grimaldi submission criticising, and responding to, that ground. We have found it unnecessary to elaborate upon these.

618 We consider Mr Grimaldi is liable to account in specie for such Murchison shares as he holds or which he continues to have under his control for his own benefit. He is likewise liable to account for all of the value of, or the profits derived from, the balance of the 10 million Murchison shares and options (whether retained by a nominee or sold). Mr Grimaldi may well have still some residual right to seek contribution from Mr Barnes despite Order 17 and Mr Barnes’ Deed of Settlement. That is not a matter we need explore here.

619 We reject Grounds 14, 15 and 16 in the Grimaldi appeal. In light of the previous grounds we have rejected we reject as well the omnibus Ground 17.

## 3. The s 1317H Compensation Orders: Chameleon, Grounds 17 and 18 and Cross-Appeal Ground 1; Grimaldi, Grounds 18, 19 and 20; Murchison, Ground 3.

620 The primary judge made separate orders under this section against Mr Grimaldi and Murchison. Mr Grimaldi has appealed against the order against him; Murchison has cross-appealed; and Chameleon has appealed against the terms of the Murchison order and cross-appealed against the Grimaldi order. It is convenient to deal with all three appeals in the one place although the Grimaldi/Murchison appeals and the Chameleon appeal raise discrete issues.

### (i) The Section, its Provenance and its Curiosities

621 Insofar as presently relevant, s 1317H provides:

**1317H(1)** **Compensation for damages suffered.** A Court may order a person to compensate a corporation or registered scheme for damage suffered by the corporation or scheme if:

(a) the person has contravened a corporation/scheme civil penalty provision in relation to the corporation or scheme; and

(b) the damage resulted from the contravention.

The order must specify the amount of the compensation.

…

**1317H(2) Damage includes profits.** In determining the damage suffered by the corporation or scheme for the purposes of making a compensation order, include profits made by any person resulting from the contravention or the offence.

…

**1317H(5) Recovery of damage.** A compensation order may be enforced as if it were a judgment of the Court.

622 This provision was enacted in the *Corporate Law Economic Reform Program Act 1999* (Cth) by way of an amendment to Part 9.4B of the then Corporations Law. That Part in its original form had been inserted into the Corporations Law by an amendment in 1992 and bore the title of “Civil and Criminal Consequences of Contravening Civil Penalty Provisions”: on the 1992 amendment see *Ford and Austin’s Principles of Corporations Law* [8.360] and [9.280]-[9.290] (7th ed, 1995).

623 Notably, for present purposes, some of the statutory duties imposed on directors and officers in s 232 of the Corporations Law were declared to be civil penalty provisions and, as such, attracted the civil and criminal consequences for their contravention provided in the then Part 9.4B. One such consequence was imposed by s 1317HD. It provided (inter alia):

**1317HD(1) [Recovery of profit, loss or damage by corporation]** Where a person contravenes a civil penalty provision in relation to a corporation, the corporation may, by proceedings in a court of competent jurisdiction, recover from the person, as a debt due to the corporation:

(a) if that or another person has made a profit because of the act or omission constituting the contravention – an amount equal to the amount of that profit; and

(b) if the corporation has suffered loss or damage as a result of that act or omission – an amount equal to the amount of that loss or damage.

This is the apparent precursor of s 1317H.

624 This scheme of statutory duties coupled with statutory sanctions which s 232 applied to directors and corporate officers overlapped the obligations and remedies of the common law and equity as these applied to directors and corporate officers. Yet, as s 232(11) indicated, the civil penalty regime had “effect in addition to, and not in derogation of, any rule of law relating to the duty or liability” of a director or officer nor did it prevent the institution of proceedings in respect of a breach of such a duty or liability: see also s 1317HE of the 1992 Act which was to like effect in relation to (inter alia) s 1317HD.

625 The CLERP Act made significant amendments to the directors’ duties provisions of the Corporations Law and to Part 9.4B (which was carried forward into the Corporations Act): see *Ford’s Principles of Corporations Law* [3.400] ff (10th ed); Black et al, *CLERP and the New Corporations Law*, [4.69 ff]. Yet the features of the scheme noted above were retained. The statutory civil penalty scheme of ss 180 to 184 as it applied to directors and corporate officers remained in addition to, and not in derogation of the rules of common law and equity applying to such persons: see Corporations Act, s 185. And the Part 9.4B scheme of sanctions continued to envisage a corporation recovering profits *and* loss suffered from a person who contravened a civil penalty provision. But one presently important change was made. The clearly expressed provisions of s 1317HD were replaced with the opaquely worded s 1317H. Charitably, the 10th edition *Ford’s Principles of Corporations Law* at [3.400] described it as a “curiously drafted provision [which] seems to be intended to achieve the same result as the former provision”. Despite the significant volume of material explaining and analysing the CLERP reforms: see eg *Explanatory Memorandum, Corporate Law Economic Reform Program Bill 1998*; Black et al, above; there appears to be no explicit reason given for this change. The most probable explanation is that suggested in the *Explanatory Memorandum* at (2.40): the old provision was given “a plain English rewrite”. If, as Ford suggests (at 3.400), s 1317H reflected no more than “simplified” drafting, then under the section:

… the corporation or scheme still has the statutory right to recover from the contravening party an amount equivalent to profits made either by that party or by a third party from the contravention, regardless of whether the corporation or scheme has also suffered a loss. Doubt is created because the drafting treats profits as a component in the calculation of damages, and does not confer a specific right of recovery of profits. Nevertheless, it seems that the new drafting has not altered the law.

626 We have no need to express our general agreement with the *Ford* view given the particular issue of construction that has been raised. Nonetheless, the conclusion we have reached lends support to it so far as it goes. Section 1317H(2) is a poorly executed drafting contrivance.

627 The repealed s 1317HD did not, on its face, indicate explicitly whether or not the Court had a discretion to deny relief sought against a contravenor where a corporation had suffered loss and/or profit had been made. If this was a cause of uncertainty, the new s 1317H(1) has dispelled it. The decision to make a compensation order at all is in the Court’s discretion as the opening words of s 1317H(1) make plain. First instance decisions, correctly, have held this to be the case: see eg *Re HIH Insurance Ltd (in prov liq)*; *ASIC v Adler* at [119]. The parties have not questioned this.

628 The particular interpretative issue now raised – and it is in Grounds 17 and 18 of Chameleon’s appeal – is whether the formula of s 1317H(2) obliges or merely empowers the Court, if it awards compensation for damage suffered, to “include profits made by any person resulting from the contravention”.

629 Chameleon’s submission is that the language of the subsection is the language of obligation and requirement: if a compensation order is to be made it must include “profits” made by any person. Such a construction, as will be seen, would require the compensation order made against Murchison to include (which it does not) the profits made by Grimaldi and Barnes as a result of their 10 million shares commission.

630 Murchison’s contention is that the “include profits” formula is simply definitional in the sense that it brings with the compensatory scheme of the section a type of claim (ie for profits made) which would not otherwise necessarily fall within the formula “damage suffered by the corporation” as, for example, where the contravenor or a third person made profits as a result of the contravention, but without loss to the corporation. Put shortly, it empowers the Court to compensate for profits made from a contravention without proof of a corresponding loss.

631 Having regard (i) to the more obvious meaning of the precursor provision, s 1317HD; (ii) to the lack of any explanation for the new composite treatment of profits and loss save probably that it reflected “a plain English rewrite”; (iii) to the anomaly of giving a discretion to the Court to *make* a compensation order but then requiring it inexorably to order the contravenor to pay any and all compensation allowable under the subsection for damage actually suffered and for damage deemed suffered (ie for profits made by “any person”), whatever the inconvenience or injustice this might occasion in a given case and irrespective of whether other remedies, equitable or common law, have been awarded to compensate for particular damage or to recover particular profits; and (iv) to the fact that either of the proposed interpretations is arguable given the language of the subsection, we consider that Murchison’s interpretation is to be preferred. It is unlikely that the legislature would have intended so inconvenient a change in the pre-existing law without making that intention plain – the more so having regard to the close scrutiny that was given to Part 9.4B in the CLERP process.

### (ii) Chameleon’s Appeal and Cross-Appeal

632 Our conclusion, insofar as it turns on the language of s 1317H, is sufficient to dispose of Chameleon’s appeal against the Murchison s 1317H order and its cross-appeal against the like Grimaldi order. Chameleon has alleged that his Honour erred in Order 4 of his final orders in not including in the compensation payable by Murchison under s 1317H the profits made by Mr Barnes and Mr Grimaldi resulting from the contraventions of the Corporations Act. Order 4 required Murchison to pay compensation for the profits it obtained from the use of $277,840 being moneys derived as a result of the Cadetta transaction and from the two cheques. The basis of its s 1317H liability was his Honour’s finding that it was knowingly concerned in Mr Grimaldi’s contraventions of the Act.

633 The cross-appeal against the order made against Mr Grimaldi is that it did not order Grimaldi to compensate Chameleon under s 1317H for the profits made by all of the other respondents at the trial and in particular for profits made by them from the Murchison shares and options.

634 His Honour had indicated (at [1105]) that:

For the purposes of making a compensation order, the damage suffered by Chameleon includes the profit made by Mr Grimaldi or Murchison resulting from the contraventions.

Nonetheless, he had previously rejected a claim by Chameleon that Murchison was jointly and severally liable in equity to account for the profit made by Grimaldi and Barnes on the 10 million Winterfall shares and the options. It was liable only for its own profits, not for those made by others, and it did not participate in or receive any benefit from those shares. We later reject Chameleon’s challenge to this particular conclusion: see[709].

635 The point presently to be emphasised is that his Honour made separate orders against Murchison and Mr Grimaldi requiring them to compensate under s 1317H only for the profits each made from contraventions of the Corporations Act. While his Honour appears to have given no express explanation in his Reasons for not making Murchison liable under s 1317H for the profits made by Grimaldi, he signalled clearly enough at the time of making his Orders that it was not his intention to require Murchison to pay compensation under s 1317H in respect of Grimaldi’s profit, he having dealt with and rejected Murchison’s accountability for those profits as a matter of general law. The approach taken in relation both to Mr Grimaldi and Murchison for s 1317H purposes, was that each would be liable for each’s own profits but not for each other’s – or for the profits of any other person. This was a course open to his Honour to take in the exercise of his discretion and he did not err in doing so.

636 We reject Chameleon’s Grounds 17 and 18 and the cross-appeal Ground 1.

### (iii) Mr Grimaldi’s Appeal

637 Order 16 of the trial judge’s orders required Mr Grimaldi to pay compensation to Chameleon pursuant to s 1317H –

… in an amount equalling the amount of profits obtained by [Mr Grimaldi] resulting from [his] contraventions of the Act, with the amount of such profits obtained by [him] to be determined pursuant to the process provided for by orders 19-25 below, such amount not to amount to double recovery of any profits paid under orders 9 to 15.

The “process” referred to involved an inquiry to be undertaken by a referee, pursuant to s 54A of the *Federal Court of Australia Act 1976* (Cth) and the then O 72A of the *Federal Court Rules*, to determine the amount of profits payable as prescribed in the orders.

638 Three grounds of appeal challenge the order made – the first (Ground 18), because the relief in Order 16 is cumulative upon but incompatible with the remedies under the general law or else gives rise to an election between remedies; secondly (Ground 19), because the judge failed to specify “the amount of compensation” as required by s 1317H(1); and, thirdly (Ground 20), by not requiring Chameleon to elect between its claims for profits (Orders 9-15) and its claim for compensation (Order 16).

639 The submissions made in support of these grounds are slight and the issues the grounds themselves raise are misconceived.

640 To reiterate, the civil penalty provisions Mr Grimaldi was found to have contravened were ss 181 and 182 of the Corporations Act. Both are provisions imposing civil obligations on directors and other officers of corporations and the contravention of either can attract s 1317H. Importantly s 185 of the Act provides insofar as presently relevant that:

185 Sections 180 to 184:

(a) have effect in addition to, and not in derogation of, any rule of law relating to the duty or liability of a person because of their office or employment in relation to a corporation; and

(b) do not prevent the commencement of civil proceedings for a breach of a duty or in respect of a liability referred to in paragraph (a).

It is, in consequence, open to a corporation to make a claim in equity against a director or officer for an account of profits for breach of fiduciary duty and to claim profits under s 1317H against that person if the conduct in question also contravenes a civil penalty provision. This is what was done against Mr Grimaldi and he was found liable both in equity and for contraventions of the Act.

641 No orders were made against him either in equity or under s 1317H to compensate Chameleon for actual damage suffered which was caused by his breaches of fiduciary duty or which resulted from the contraventions. The orders made were directed at the profits he (or in the equity proceedings, he and his nominees) made. It is predictable that the profits recoverable in each such claim will to a considerable degree (if not wholly) be the same. What neither the equitable remedy nor s 1317H mandates is double recovery. In consequence to the extent that each of the orders may by his Honour have areas of independent operation (differing principles of attribution/causation under the Act and in equity may account for this), the orders each have their own work to do. The orders to that extent are complementary. However, to the extent each order would sweep up profits which would also be caught by the other, they cannot be enforced so as to produce double recovery: *Baxter v Obacelo Pty Ltd* (2001) 205 CLR 635 at [39]. While s 185 countenances cumulative remedies, it does not envisage double recovery: cf *Re HIH Insurance*; *ASIC v Adler* at [116]-[118].

642 The primary judge was acutely aware of all of this. Hence Order 16 was crafted so as to preclude double recovery of any profits paid under Order 9 to 15 (the equitable remedies). No issue of election between inconsistent remedies otherwise arose.

643 As to the objection that his Honour failed to specify the amount of compensation to be paid as required by s 1317H(1), the short answer is that Order 25 of the trial judge’s order has deferred the making of final orders with respect to the amount payable by Mr Grimaldi “including compensation orders pursuant to s 1317H of the Act”.

644 We dismiss Grounds 18, 19 and 20 in the Grimaldi appeal.

### (iv) The Murchison Appeal

645 The Murchison ground of appeal is a variant on one of the Grimaldi grounds. Order 4 of the orders made against Murchison required it to pay Chameleon compensation pursuant to s 1317H:

… in an amount equalling the amount of profits obtained by [Murchison] from the use of $277,840 … resulting from [Murchison’s] contraventions of the [Corporations] Act as referred to in paragraphs [674], [676], [680], [707], [1101] and [1103] of the Court’s Reasons for Decision:

(a) with the determination of the amount of such profits obtained by [Murchison] to be stood over until [Chameleon] elects for equitable compensation or the conclusion of the account under orders 1 and 3; and

(b) such compensation not to include double recovery under orders 1 and 3.

As enlarged on in its written submissions, the error said to inhere in this is that the trial judge made orders both in equity and under s 1317H in respect of the same compensation/profits. Chameleon, it is said, ought to have been put to an election as to which remedy it sought.

646 Unlike Mr Grimaldi, Murchison’s liability under s 1317H arises, not from its contraventions of ss 181 and 182 as a director or officer of Chameleon, but because it was “knowingly concerned in” Mr Grimaldi’s contraventions as such an officer: see s 79(c) of the Corporations Act. Similarly its liability in equity is not in respect of its own breaches of fiduciary duty, but because of its *Barnes v Addy* liabilities.

647 While s 185 of the Corporations Act envisages cumulative remedies in equity and under s 1317H as against directors and other officers, it understandably does not deal explicitly with persons involved in contraventions who might also attract liability in equity because of their conduct. Does this matter? It does not.

648 Murchison has been found to be liable in a particular factual context on two distinct bases each of which provides its own remedy system. While equity’s compensatory and accounting remedies and that available under s 1317H’s “compensation” scheme may well produce similar or at least overlapping outcomes in given instances, it has not been suggested that they necessarily provide identical relief in all instances. Indeed Chameleon’s case is premised in some degree on the contrary being the case. We are unable to appreciate why they cannot operate cumulatively subject, of course, to the preclusion of double recovery (against which the trial judge’s order safeguards).

649 While s 185 does not apply directly to the present situation, neither does it in terms preclude cumulative remedies. Murchison’s submission is that absent express statutory provision recognising the co-existence of other remedies, the statutory and the equity liabilities are alternatives. No principle of statutory interpretation necessitates this conclusion and the alleged reason for it is elusive. Why is it that a fiduciary can be sued to judgment both for a breach of fiduciary duty as a director or other officer and for contravention of a civil penalty provision, but a person involved in both the breach and the contravention cannot? The policy informing the former is in our view equally applicable to the latter. If it were necessary to do so – and we do not believe it is – we would apply the policy of s 185 analogically in the present case. Section 185 does no more than make clear what we consider would be the case not only in relation to a director or other officer but also, as with Murchison, in relation to other persons involved in both a contravention and an equitable wrong.

650 We reject Murchison’s Ground 3.

## 4. Mr Grimaldi’s Indemnity Claim against Murchison: Grounds 21 and 22

651 In his cross-claim against Murchison, Mr Grimaldi sought to enforce an entitlement he claimed he had under clauses 19.1 and 19.2 of Murchison’s Constitution to an indemnity in respect of his liabilities to Chameleon. The effect of those provisions was that he had an indemnity against any liability incurred by him in or arising out of the discharge of his duties or of the conduct of Murchison’s business but only to the extent Murchison was not precluded by law from indemnifying him. The indemnity did not extend to a liability incurred in, or arising out of, the conduct of the business of another corporation or in the discharge of duties in relation to another corporation.

652 Murchison was precluded by law, ie by s 199A of the Corporations Act, from indemnifying Mr Grimaldi (inter alia) from the following liabilities incurred as an officer of Murchison:

(b) a liability for … a compensation order under section 1317H …;

(c) a liability that is owed to someone other than the company … and did not arise out of conduct in good faith.

653 Under s 199A(3) Murchison was further precluded from indemnifying Mr Grimaldi against legal costs incurred in defending an action for a liability incurred as an officer of Murchison if the costs were incurred in defending or resisting proceedings in which he was found to have a liability for which he could not be indemnified under s 199A(2).

654 The primary judge, against the background of now lengthy reasons, stated bluntly (at [1131]) that:

Mr Grimaldi’s liability arises out of conduct which was not conduct in good faith: *Hall v Poolman* (2007) 65 ACSR 123 at [318]-[327], [412]. He is therefore not entitled to indemnity.

655 Given our clear endorsement of the primary judge’s findings of improper conduct by Mr Grimaldi in relation both to the Cadetta Transaction and the two cheques advances, there is little more that we need say. We would merely reiterate that in the Cadetta Transaction he was party to a fraud on Chameleon which, in the event, was partly to the advantage of Murchison which received the 5 million Chameleon shares and benefited from their sale. In the cheque advances he and Mr Barnes misappropriated Chameleon’s moneys for Murchison’s benefit.

656 We reject this ground of appeal.

## 5. Remaining Grounds

657 There is a number of consequential grounds challenging orders contingently on the success of other grounds. We need not refer to these as we have rejected all of the primary grounds of appeal. The only outstanding ground – Ground 23 – challenges the finding (at [1119]) that Mr Grimaldi was liable to make contribution to such sum found to be due by Murchison on the taking of accounts.

658 No submissions were made in support of this ground. In these circumstances we consider that, in the absence of its prosecution, it is unnecessary to engage with it.

659 We reject this ground.

## 6. Conclusion

660 We dismiss Mr Grimaldi’s appeal and order him to pay the costs of the appeal.

661 We dismiss Chameleon’s cross-appeal. We make no order as to costs.

# VIII. RELIEF: WINTERFALL

## Winterfall

662 In its Notice of Appeal (Grounds 19 and 20) Chameleon contends that the primary judge’s characterisation of the benefit Winterfall received from its receipt of trust property was erroneous. His Honour found it to be “the benefit of the investment of the funds [received] as part of a pool of working capital, comprising debt and equity”: [1099]. As will be seen, we disagree with this characterisation. It is alleged that the benefit, rather, was that proportion of the Iron Jack Tenements that the amount of the two cheques (ie $152,750) bore in relation to the purchase price of those tenements (ie $1,160,000).

663 The Murchison/Winterfall Notice of Contention Ground 3(iii) asserts that if a constructive trust or an account of profits is ordered against Winterfall in respect of the Iron Jack Tenements, the proportion should be assessed by dividing the amount of $152,750 by the *total* consideration paid by Winterfall. We earlier referred to the terms of the 28 July 2004 Winterfall/Iron Jack Vendors Agreement. The consideration there stipulated not only a monetary payment, but also the issue of shares which, in the event, totalled 8,555,445. The Notice of Contention is directed at his Honour’s failure to include their value in the total consideration for apportionment purposes.

664 The primary judge did not in his reasons give individual attention to the claims against Winterfall. It is to be inferred that he rejected the constructive trust claim on the same basis as, or at least in reliance upon similar reasoning, as the claim against Murchison was rejected. As to a claim against it for an account of profits, it seemingly was assumed that the benefit it obtained by its participation in the breach in respect of the $152,750 was to be calculated in a way similar to Murchison’s (in respect of its $277,840) and that the two claims would stand or fall together.

## 1. The Constructive Trust Claim

665 Because of our conclusion we should indicate at the outset that we have not considered the problems that the “avoidance requirement” of *Daly* could raise for a claim such as the present. That issue simply does not arise.

666 Put shortly, Chameleon contends that the property Winterfall received in consequence of the breaches involved in drawing the cheques was the Iron Jack Tenements which in part reflected the traceable proceeds of those cheques in its hands. That proportional interest in the tenements, it is claimed, were held on constructive trust for it from the moment of their receipt as of right.

667 There is a latent ambiguity in the terminology “constructive trustee”. In its strictest sense it refers to a person who, as a constructive trustee, holds specific property on trust for another. In its more general sense it can refer to a person who, whether or not he or she holds or has received, trust property, has so acted as to be exposed potentially to the same remedial consequences for his or her actions as would be a trustee who had acted similarly, ie that person as “a constructive trustee” may in appropriate circumstances be decreed, for example, to hold specific property as a constructive trustee, to be subject to an account of profits, or to be liable to pay compensation etc: see eg *Consul Development*, at 396-397. This latter usage is particularly prevalent both in claims against fiduciaries for breach of fiduciary duty or for misuse of fiduciary position and in *Barnes v Addy* claims where, having been described as being liable as a constructive trustee, personal relief *only* is awarded.

668 Chameleon’s claim, in essence, is that it is entitled *as of right* to the imposition of a constructive trust on the cheques Winterfall received and to trace their proceeds into the tenements. The assumption of entitlement made here is one with which we cannot agree.

669 We earlier indicated (i) the need to establish a proprietary base before one can follow or trace and the problem this gives rise to in relation to misapplied corporate property; and (ii) that for a constructive trust to be imposed to give proprietary relief (and in consequence to provide a proprietary base for tracing) in a case such as the present that form of relief must be appropriate in the circumstances of the case.

670 We also have acknowledged that in the usual case of knowing receipt, where the property received or its traceable proceeds are extant wholly or in part, proprietary relief may well be expected to be the appropriate remedy. So much is this so that judges commonly state the law in terms which suggest an entitlement to a constructive trust as of right and not by virtue of discretion: see eg *Macquarie Health Corp* at 497-498; but cf *Robins* at [75] (“full proprietary relief … is not automatic”). However, the present is an exceptional case and has been made so largely by what has transpired subsequent to the misappropriation of Chameleon’s moneys: cf *Streeter v Western Areas Exploration Pty Ltd* 82 ACSR 1 at [682] (because of significant later changes, “the imposition of a constructive trust … would ‘give … an unjust advantage’”).

671 Chameleon quite properly has contended that its constructive trust claim to an interest in the tenements must be considered separately from its claim against Murchison. It raises different considerations not the least of which is the claimed subject matter of the constructive trust. We agree with this.

672 There is quite a number of considerations which have, in aggregate, led us to the conclusion that proprietary relief by way of imposition of a constructive trust of a proportionate interest in the tenements is itself an inappropriate remedy. It ought not be granted. We will refer to these separately.

673 (i) While the specific transaction in which the cheque money was used can be said to be for the acquisition of a particular asset, in its setting its proper complexion was that it was simply part of the outlays being made and activities engaged in or foreshadowed in anticipation of the projected mining operation (which we will call the Project). We enlarge upon the significance of this when we consider the account of profits claimed against Murchison and Winterfall. For present purposes we merely note that the instalment payment (which the cheques helped finance) cannot be considered in isolation from the context in which it was made: cf *Primeau v Granfield*, at 486-488.

674 (ii) The claim itself is not being made against a misbehaving fiduciary who owed a duty of loyalty to its principal. It is made against a third party whose need drove it to accept money from a source from which it should not have accepted money in the circumstances. While Winterfall’s liability to account for the benefit it derived cannot be gainsaid, the reasons for the award of proprietary relief against it – not being to discipline a fiduciary – are not so compelling as to lead to the disregard of, or the giving of diminished significance to, other matters.

675 (iii) While Chameleon and Winterfall are the same legal persons as were involved in the cheque advances in 2004, as counsel for Murchison put it, the Murchison and Winterfall of today are not the same companies as in 2004. Murchison now has thousands of shareholders who have invested in it; it has billions of shares on issue; and it is a company worth several hundred of millions of dollars: see above “Changes in Murchison’s Shareholding, etc”. The “capital” base of Murchison and Winterfall was initially corrupted in some degree by the misconduct of each as a recipient of trust property. That base, though, was added to enormously by subsequent additions of debt and equity finance (which it has not been suggested was contributed otherwise than in good faith) and by reinvested profits. This is not a simple case of wrongdoers continuing knowingly to perpetuate their own wrongs to their own advantage behind a corporate form. Indeed Chameleon’s case as we understand it, at least as against Murchison, has not been fought on the basis that, after Grimaldi’s departure from Murchison’s board in November 2004, the new board set out on developing the Project in the conscious knowledge that their company was a wrongdoer benefiting from its wrong. Contrary to Chameleon’s submissions (made in relation to the giving of an allowance to Murchison on an account of profits), we do not consider that because Murchison was fixed with Grimaldi’s knowledge this must “count heavily” against Murchison in its later actions in developing the Project under a new board: cf *Harris v Digital Pulse*, at [324].

676 (iv) Neither is the case one in which an opportunity was misappropriated at Chameleon’s expense. The Winterfall/Murchison Heads of Agreement diverted no corporate opportunity to Murchison in breach of any duty to Chameleon to acquire such an opportunity for it. Nor is the case one of Winterfall acting over time to Chameleon’s detriment. Chameleon’s interests in mining were differently directed. Its primary focus was on gold tenements, not iron ore.

677 (v) The value of the Project has been enhanced enormously by investors (who in our view are properly to be considered in this setting as interested third parties).Expenditure to develop the Project and related capital raising dwarf the involuntary contribution made by Chameleon – the figures supplied by Murchison and Winterfall suggest that (a) by September 2007 (when notice of Chameleon’s claim was given), Murchison had repaid a loan of $86 million, and the same sum had been expended by Winterfall; (b) by the trial Murchison had issued a further $50 million in shares and Winterfall had spent a further $166 million; and (c) by the time of judgment outlays by Winterfall had reached $406 million.

678 (vi) Enterprise, expertise and risk-taking to which Chameleon did not contribute or, in the case of risk, to which it was not exposed, again added considerable value to the Project: cf *Streeter*, at [682]; as witness (a) the exploration and analysis costs incurred; (b) the expenditure on infrastructure; (c) the solving of infrastructing problems immediately (by trucking iron ore to Geraldton) and for the future (by participation in the Oakajee Port and Rail Infrastructure Joint Venture with Mitsubishi) and (d) the Project itself which, as is apparent from his Honour’s reasons, was undertaken in a climate of market volatility. These all helped give value to the tenement rights Winterfall acquired: cf *Primeau v Granfield*, at 486-488.

679 (vii) To give Chameleon a proportionate interest in the resource would be to “thrust the parties into a business relationship” (cf *Warman*, at 554) where there is unlikely to be comity or confidence between them. The consequences of this could be of real moment as the following exchange illustrates. Junior counsel for Chameleon was being questioned on the effect and consequences of the imposition of a constructive trust on a proportionate share in a mining lease:

PERRAM J: But if we impose the constructive trusts, a simple constructive trust of the kind you seek, that would give you an entitlement, subject to ministerial consent, to require Murchison to transfer to Chameleon the mining lease.

MR BENNETT: A share in the mining lease.

…

PERRAM J: Under Western Australian law, where the mining lease is held in shares by different parties, who has the right to extract?

MR BENNETT: The holders.

PERRAM J: Effectively as a form of joint tenancy of some type, or something like a joint tenancy.

MR BENNETT: Yes, it is like a – it is an unincorporated joint venture.

…

PERRAM J: So if the constructive trust were imposed, you would have legal reality of a group of people thrust together as joint venturers unexpectedly, by the order of the court. Who owns – well, sorry. The mine operation itself is made up of a number of fittings and fixtures, I imagine.

MR BENNETT: Yes.

PERRAM J: Who owns those?

MR BENNETT: Crosslands, at the moment.

PERRAM J: And I come back to the question I asked before; how will you extract the ore?

MR BENNETT: Well, by reaching an agreement with whoever has the equipment. I don’t want to say that is the next case, but it may be, I don’t – if your Honours imposed a constructive trust over the shares in Crosslands, those who sit on – behind, the clients that sit behind my friends on the far side, anticipated that very possibility, and I need, in a confidential manner, to show your Honours how they anticipated that, because we would be there for but a nanosecond, in the terms of the confidential exhibit. And I – but there was a deliberate structure. And that would be the next case, but the – these are matters that don’t need to trouble your Honour, in terms of the practical working out of how we then go about and mine. If we owned the shares and the tenement, then our percentage of the ore can’t be taken without our consent. People must approach us, and we must reach an agreement, and these are commercial entities that will reach a commercial agreement, one would hope.

PERRAM J: You could stop mining, I suppose.

MR BENNETT: Yes. Or we could bring in a digger and a truck. It is not a sophisticated operation to mine the open ore, it is a – iron ore, it is an open pit operation. You blow it up, you put it in a truck, you take it to a crusher, you crush it, and you send the ore as lump or fines to the port, so - - -

PERRAM J: Who owns the roads?

MR BENNETT: The roads are a mixture of state government facility, and there has been expenditure by Crosslands on the development of roads … some 90 odd million dollars has been sent on road development. It was unsealed, it has to be sealed to truck out 2 to 4 million tonnes a year.

PERRAM J: Presumably, they are crown roads of some description.

MR BENNETT: Yes. But - - -

PERRAM J: And what about the port?

MR BENNETT: The port hasn’t yet been built. Oakajee is a dream at the moment, developing a peculiarly Chinese flavour about the dream, but it is, at the moment, it is the town of Geraldton’s port, and that is the town of Geraldton’s port. It is too far to go to Port Headland, and Port Headland is a port designed for 2 million tonnes a year, and it exports 460 million tonnes, so you can’t get out, can’t get a ship into Port Headland, so we go to Geraldton.

The prospect for dispute, disruption and destabilisation of an established mining operation and of associated infrastructive developments are self-evident in this. We reiterate that the consequence of imposing a constructive trust may be to bring about an undesired and undesirable long-term business relationship.

680 (viii) Given that the increase in value of the tenement has been bought in large measure by the contributions, industry and risk taking of Murchison, Winterfall and its investors, the award against Winterfall of a constructive trust would be a punitive measure against it: cf *Harris v Digital Pulse*, per Heydon JA; and would transform Winterfall’s recipient liability into “a vehicle for the unjust enrichment of [Chameleon]”: *Warman*, at 561; see also *Primeau v Granfield*, at 486-488.

681 Proprietary relief in the form of a constructive trust is in the circumstances an inappropriate remedy. It goes well beyond “the necessities of the case”: *John Alexander’s Clubs*, at [129]. The refusal of proprietary relief prevents Chameleon from following the money Winterfall received into the Iron Jack Tenements. It is to be emphasised, though, that this is not to deny that Winterfall improperly benefited from that receipt in its acquisition of the tenements and is liable to account for it, albeit in a personal remedy only. We return to this when considering the account of profits claims against it and Murchison.

682 We reject Grounds 19 and 20 of Chameleon’s appeal. We consider Winterfall’s Notice of Contention when we deal with the account of profits awarded against it.

# IX. RELIEF: MURCHISON AND THE “COMMON” LIABILITIES WITH WINTERFALL

683 The primary judge refused to award a proprietary remedy against Murchison. Chameleon had claimed – and continues to claim in its appeal (Grounds 6 to 10) – that Murchison held on constructive trust for it as at 19 September 2007:

(i) all of the shares in Winterfall; or

(ii) alternatively, 25.3% of the shares in Winterfall (being the proportion that $277,840 bears to a total consideration of $1,110,000) or such other proportion as the court thinks fit;

(iii) further or alternatively the 10 million shares in Winterfall that Murchison obtained from Mr Grimaldi upon the reverse takeover of Winterfall by Murchison;

being shares that Jack Hills Holdings Pty Ltd now holds on constructive trust for Chameleon as a consequence of the implementation of the Murchison-Mitsubishi joint venture arrangement.

684 His Honour nonetheless ordered that Murchison and Winterfall account for the income they received as a consequence of the investment of Chameleon’s funds in the Iron Jack Project from 28 July 2004 to the date of judgment. Also, and at Chameleon’s election, Murchison and Grimaldi were held liable for equitable compensation in respect of the sum of $152,750 from 28 July 2004 to the date of judgment at mercantile rates. While in his reasons his Honour indicated that this liability was to be compounded on monthly rests, in the orders made the rests were made annual.

685 Murchison and Winterfall appeal against the order for an account of profits: Ground 9. Chameleon in turn appeals both against the form of account of profits ordered: Grounds 11 to 14; and against his Honour’s failure to hold Murchison jointly and severally liable with Mr Barnes and Mr Grimaldi for the profits they made from their breaches of fiduciary duty.

## The Constructive Trust

### (i) The 10 Million Winterfall Shares and 12 Million Options

686 His Honour indicated in response to objection made by Murchison, that Chameleon’s claim to a constructive trust over the Winterfall shares issued to Pinnacle was sufficiently pleaded. This said, as Chameleon has correctly indicated, none of the trial judge’s reasoning in the remedies section of the judgment touches on its claim to these specific shares. In saying this we need to observe that his Honour did deal with Grimaldi’s constructive trusteeship of those shares in Chameleon’s claim against Grimaldi and Barnes. We should also add that his Honour had an omnibus objection to imposing a constructive trust (at (977)-(978)):

Ordinarily, I would not consider whether to impose a constructive trust until after I have addressed the appropriateness of other forms of relief: *Farah* at [201]. However, in my opinion, it is clear in this case it would not be appropriate to impose a constructive trust over Murchison’s shares in Winterfall.

The essential reason why no constructive trust arises is that, whether one approaches the matter by reference to the “profit” rule or the tracing rules, the shares which Murchison acquired in Winterfall were not the profit or the property which Murchison obtained from the breach: *Hospital Products* at 110; *Maguire v Makaronis* (1997) 188 CLR 449 at 468.

687 The foundation of the claim made, and reiterated here, is that the Winterfall shares were the benefit Grimaldi and Barnes derived from their breach of fiduciary duty; it took them with full knowledge of that breach of duty; and it still holds them. Murchison’s subsequent dealing with them (through Jack Hills Holdings) is the subject of a separate order sought.

688 The somewhat arresting consequence of the claim is that Chameleon seeks to take advantage of the share-swap takeover provided for in the Winterfall/Murchison Agreement to obtain proprietary relief which would entitle it to the consideration received both by Pinnacle for Grimaldi and Barnes (ie the 10 million Murchison shares and options) and that received by Murchison (ie the 10 million Winterfall shares).

689 Apart from agitating again its pleading objection, Murchison’s contentions are (a) Chameleon had to elect whether to trace the profit derived by Barnes and Grimaldi or to follow the shares into the hands of Murchison for otherwise Chameleon would be allowed to recover twice in respect of the spotter’s fee and would, in effect, require Murchison to account for the profits made by Barnes and Grimaldi; and (b) Murchison was not a knowing recipient as Mr Grimaldi’s knowledge could not be imputed to it insofar as, in obtaining the shares, he was committing a fraud on it by acting adversely to its interests: Murchison had ultimately to issue 10 million of its own shares and 12 million options for the benefit of Barnes and Grimaldi.

690 There is a short answer to this claim. The foundation for Mr Grimaldi’s fraud on Murchison was laid when, prior to the execution of the Murchison/Winterfall Heads of Agreement (or at least when the Addendum was signed in early June), Mr Zuks agreed to pay Mr Grimaldi (and Barnes) the spotter’s fee. He was at that time, as counsel for Murchison accepts, the “controlling mind” of Murchison. The fee was agreed prior to the “two cheques advances” and, possibly before Mr Grimaldi had his share commission on the Cadetta Transaction appropriated to Murchison’s benefit.

691 There is no evidence to suggest that at any time prior to the effectuation of the reverse takeover in November 2004, Mr Grimaldi disclosed and received the fully informed consent of Murchison to his commission. It was, and remained vis-à-vis Murchison, obtained in breach of fiduciary duty and unapproved. There is evidence, and we have so found, that Mr Kopejtka and Mr Vagnoni were aware that 10 million shares and their options were to be issued for the benefit of Mr Grimaldi and Mr Barnes: see “Murchison’s Knowledge of the Issue of 10 Million Shares to Barnes and Grimaldi”. And they did participate in the issue of those shares having become directors the day before the share issue was made. Their knowledge – hence Murchison’s knowledge – of the share issue cannot be gainsaid. To show they had that knowledge, though, does not make out Chameleon’s case that Murchison was either a knowing recipient or assistant for *Barnes v Addy* purposes.

692 The evidence is lacking – and we are not prepared in the circumstances to infer – that they had the required knowledge of the impropriety of the transaction in which they were then engaging. Mr Kopetjka was made available and cross-examined by Chameleon’s counsel. His evidence on the matter does not discharge Chameleon’s onus: cf *J C Houghton & Co v Nothard, Lowe and Wills Ltd* [1928] AC 1 at 19.

693 In these circumstances, for Chameleon to make out its case it had to show either that Murchison knowingly received “trust property” in the form of the Winterfall shares or knowingly assisted in a dishonest and fraudulent design in issuing the Murchison shares to them. It could only do this if Mr Grimaldi’s knowledge could be imputed to Murchison. It cannot.

694 As we indicated earlier: “The Imputation of Knowledge to a Corporation”; where an agent/director accepts or solicits a bribe in fraud on his or her principal, the agent’s knowledge thereof is not imputed to the principal and the payer is taken to have “accept[ed] the risk” of the agent’s not disclosing the fact to his or her principal: *Grant v Gold Exploration and Development Syndicate Ltd* at 249.

695 The potential injustice to the principal if it were otherwise – and Chameleon’s claim requires disregard of this – is that it is a common characteristic of dealings infected with a bribe or secret commission that the consideration paid by the recipient’s principal is loaded at least by the amount of the bribe. So much so is this recognised, that in proceedings for damages by the principal against the payer in, for example, sales transactions, this will be damage presumed to have been suffered and is recoverable as such: see *Hovenden & Sons v Millhoff* at 43; *Industries & General Mortgage Co Ltd v Lewis* at 576-577; see also *Dobbs Law of Remedies*, vol 2, 699-700 (2nd ed, 1999). One need hardly note in the present matter that the share issue Murchison was required to make to effect the reverse takeover was “loaded” by 10 million shares and 12 million options which were required to obtain the Winterfall shares secured by Grimaldi’s and Barnes’s spotter’s fee.

696 We reject Ground 7 of Chameleon’s appeal and uphold Murchison’s Notice of Contention, Ground 2.

### (ii) The “Traceable” Proceeds of the Cadetta and Two Cheques Transactions

697 Chameleon’s claim to a proportionate interest in the Winterfall shares acquired by Murchison in the reverse takeover is put on two distinct bases. The first is as the traceable product of Chameleon’s money passing through Murchison’s hands; the second, as “profit” arising from misuse of that money. In consequence we need to deal with the claims separately. As with the claim to the spotter’s fee shares, it can be dealt with briefly.

698 There is one matter we should emphasise at the outset. What is being claimed by Chameleon is that it has an equitable proprietary interest in a proportion of the Winterfall shares which it could have asserted against Murchison (and can now assert against Jack Hills Holdings). The claims so made invoke the rules of tracing and following which, it is said, establish this present locus of Chameleon’s own property that was misused in the Cadetta and two cheques transaction. To that extent, it says it has an absolute interest in those shares.

699 As was commented by Lord Browne-Wilkinson in *Foskett v McKeown* [2001] 1 AC 102 at 109:

The rules establishing equitable proprietary interests and their enforceability against certain parties have been developed over the centuries and are an integral part of the property law of England. It is a fundamental error to think that, because certain property rights are equitable rather than legal, such rights are in some way discretionary. This case does not depend on whether it is fair, just and reasonable to give the purchasers an interest as a result of which the court in its discretion provides a remedy. It is a case of hard-nosed property rights.

700 What requires emphasis for present purposes is that these rules and the proprietary consequences they entail involve different issues in Australian law from those that ordinarily arise when proprietary relief is sought through the medium of the constructive trust against a delinquent fiduciary or a knowing participant in trust or fiduciary wrongdoing. The former necessarily involves recovering what is or was one’s own property; the latter, not so though it does involve an accounting for benefits or profits improperly acquired. The two separate bases noted above on which Chameleon makes its claim sharply illustrate this.

701 We reiterate that Murchison was properly found to be liable both as a knowing recipient and as a knowing assistant in relation both to the 5 million shares it received in the Cadetta Transaction and to the advances made by the two cheques. We equally draw attention to what we earlier said about “The Winterfall/Murchison Agreement and Addendum and their Implementation”: [446]. What we would emphasise here is that those agreements, while giving Murchison a contractual right to bid for Winterfall’s shares, did not give it a right to acquire them. Their sale was a matter for the shareholders. We agree with Murchison’s submission to this effect. We also consider that when his Honour spoke of Murchison obtaining “the right to takeover Winterfall on the terms set out in the documents”, he was using an understandable shorthand.

702 In commenting generally on Chameleon’s claim for proprietary relief in relation to Winterfall shares, the primary judge commented, as we earlier noted, that whether the matter be considered by reference to the “profit” rule or to the tracing rules, the shares acquired by Murchison were not the profit or property Murchison obtained from the breach: Reasons [978]. The authorities to which reference was made – *Hospital Products*, at 110 and *Maguire v Makaronis* (1997) 188 CLR 449 at 468 – suggest that his Honour was here focussing on the issue of whether there was “a sufficient connection (or ‘causation)”: *Maguire* at 468; between the breach and the property claimed.

703 Later, his Honour addressed tracing directly. He considered it plain that the shares Murchison obtained from the takeover did not represent the traceable proceeds of the cheques or the 5 million shares: the shares were not “substitutes” for these: [1014]; the 5 million shares and the cheques did not have “a continued existence, actual or notional” in them: *In re Diplock* [1948] Ch 465 at 521: Reasons [1016]. We agree. His Honour went on to observe that the cheques were trust moneys used in a mixed fund to pay Murchison’s obligation under the Winterfall/Murchison Heads of Agreement. They were then used by *Winterfall* in partial satisfaction of its obligation to the Iron Jack Vendors. They were not used by or for Murchison to acquire the shares in Winterfall. Again we agree. Vis-à-vis Murchison, Chameleon cannot trace directly into the shares via Winterfall – although, as we have noted earlier in relation to the unsuccessful constructive trust claim against Winterfall, the payment by Winterfall gave rise to a knowing receipt claim against it in respect of the benefit accruing to it from the payment.

704 Chameleon has sought to avoid this dead-end in its claim against Murchison by attempting to yoke its claim to Murchison’s “right” to acquire the shares under the Winterfall/Murchison Heads of Agreement. Seemingly, Chameleon claims it can trace into Murchison’s “right” to acquire Winterfall. That “right”, it is said, was the traceable proceeds of the funds acquired from the breaches of fiduciary duty and the fruit of the exercise of the right was equally the traceable proceeds of that right.

705 It may be accepted that one can trace into a chose in action. The myriad of cases involving tracing into bank accounts illustrate this. Nonetheless, the vice in Chameleon’s submission is in its first step. The inaccurately called “right to acquire Winterfall” was acquired by Murchison *before* the cheques were paid to Winterfall. That payment did not alter, add to, or require some subdivision of the right in Chameleon’s favour. There was no partial assignment of it. There was no novation. It remained Murchison’s. Murchison doubtless obtained a benefit from the payment to Winterfall. It enabled the Winterfall/Iron Jack Vendors agreement to be kept on foot and, hence, continued to secure Murchison’s rights to the opportunity to make a bid to Winterfall’s shareholders for their shares under its agreement with Winterfall. But no traceable residue in Murchison’s hands is to be found in this state of affairs.

706 The claim, as will be seen, may demonstrate part of a chain of “sufficient connection” for a constructive trust or an account of profits as against Winterfall. It is unrelated to identifying an existing equitable interest of Chameleon in Murchison’s hands.

707 It is unnecessary that we consider other difficulties with the submission. Nor is it necessary to engage in speculation about whether the payment made after the contractual right was acquired could give rise to “reverse tracing” – a topic now fashionable in other jurisdictions: see eg Conaglen, “Difficulties with Tracing Backwards” (2011) 127 LQR 432.

708 The final comment we should make given Chameleon’s focus upon it, relates to the primary judge’s description of the $350,000 paid by Murchison to Winterfall as “working capital” provided by Murchison. It was the part of the consideration paid under the Heads of Agreement (which described it as “capital” provided for “working capital requirements”) and the Addendum (which described it as “capital … equal to 10% of [Winterfall’s] issued shares”. Howsoever it might be described be it for corporate, general accounting, taxation or other purposes, the money was intended to be, and was, used by Winterfall as its own and for its own corporate purposes – although what in fact that use would be was well understood by all concerned. As has been seen, for the purposes of an account of profits, the money so received under the contract would be treated as “capital” for profit attribution purposes: see “The Liability to Account and the Account of Profits” above. This dispute over nomenclature is an unnecessary diversion. As senior counsel for Murchison asked rhetorically: “What else could it properly be called?”

709 We reject Grounds 7-10 of Chameleon’s appeal insofar as they relate to this claim.

### (iii) The Claim to All, or a Portion of, the Winterfall Shares

710 The second of the questions to be answered when determining the relief to be granted against a delinquent fiduciary – or for that matter a knowing participant – is, as Mason J indicated in *Hospital Products* at 110: What is the profit or benefit which the fiduciary or third party has made in consequence of their breach of fiduciary duty or knowing participation? The question itself, as is obvious from the context in which it was asked in *Hospital Products*, recognised that all of the benefit or profit derived by the wrongdoer may not, in the circumstances, be attributable to the breach – hence the references made by Mason J (i) to *Vyse v Foster* (a leading case on this subject) and to his own acknowledgement that the court does not assume jurisdiction to punish a fiduciary for misconduct by making him account for more than he actually received as a result of his breach of fiduciary duty; (ii) to *Brady v Stapleton* (1952) 88 CLR 322 and apportionment; and (iii) to *Re Jarvis* and its rival approaches to determining profits made from a business.

711 It is, in consequence, unsurprising that Mason J concluded by observing (at 110):

… each case depends on its own facts and the form of inquiry which ought to be directed must vary according to the circumstances. In each case the form of inquiry to be directed is that which will reflect as accurately as possible the true measure of the profit or benefit obtained by the fiduciary in breach of his duty.

712 We have said sufficient earlier about the attribution of profits to wrongdoing – but in particular to the misuse of “trust moneys” – to make it unnecessary to elaborate further on the justifications for the primary judge’s peremptory rejection of the proposition that all of the shares which Murchison acquired in Winterfall were the profit or the property which Murchison obtained from the breach: see “The Liability to Account and the Account of Profits”, above. All we would say is that, Chameleon’s claim, cast in this bald form wholly disregards the contribution and exertions of others to the value represented by, and inherent in, the shares. It would require in large measure the expropriation of innocent others. It was a claim to be unjustly enriched.

713 His Honour rejected the “ambit” constructive trust claim because there was no sufficient connection between all of the shares and the breach. The consequence of that was a like rejection of any proprietary claim to a proportionate interest in the shares. It is to such a claim that Chameleon’s appeal is now addressed. It challenges how his Honour characterised, and his reasons for his characterisation of, the benefit or profit that Murchison received from its involvement in the breaches of fiduciary duty by Mr Barnes and Mr Grimaldi: see Ground 8.

714 The ultimate characterisation that was ascribed to the benefit Murchison’s obtained was that it was not the shares in Winterfall. Rather –

… it was the benefit of its “investment” of the applicable portion of that sum in the working capital of Winterfall in accordance with the [Murchison] Heads of Agreement: Reasons [997].

715 We note immediately the consistency of this characterisation (a) with that adopted when “trust moneys” have been misused in a trustee’s or fiduciary’s own business: see “The Liability to Account Etc”, above; and (b) with our own characterisation of Murchison’s payment of the $350,000 as an “investment in the Project”: see [447] and [723]. To anticipate matters, his Honour’s view reflects our own appreciation of the benefit Murchison derived from participating in the misuse of Chameleon moneys and shares.

716 Chameleon’s challenge to his Honour’s reasoning proceeded on a broad front. The alleged errors include:

(i) undue weight was given to Murchison’s agreements with Winterfall as to the concept of “working capital”;

(ii) the conclusion that the substance of the agreements was that Murchison was to provide $350,000 for “working capital” particularly when, it is said no party contended for that factual finding or construction of the agreements;

(iii) the finding that the cheques were contributed to working capital when they were paid directly to the Iron Jack Vendors;

(iv) the finding that the relevant benefit, in a causal sense, which Murchison obtained was the ability to provide $350,000 of working capital;

(v) the holding that the payment of the $350,000 and the takeover were “separate steps” given the earlier finding that “but for” Murchison’s receipts from the Cadetta Transaction and the cheques none of the subsequent steps which resulted in Murchison obtaining ownership of the Iron Jack Tenements (through Winterfall) would have occurred;

(vi) the finding there was insufficient proximity or causal nexus between Murchison’s acquisition of an interest in Winterfall and the use of the funds obtained by Murchison; and

(vii) the conclusion that a constructive trust could not attach to Murchison’s shares in Winterfall “because the shares were not acquired with the funds improperly obtained from Chameleon”: Reasons [1020].

717 We should deal with the last of these first both because it is arresting and is seemingly at variance with the tenor of his Honour’s reasoning. The observation, as quoted above, can only be understood in light of his earlier and accurate comment (at [1017]) that:

It is true that the cheques were Chameleon’s “trust property” and that they were mixed with other moneys in completing [Murchison’s] obligation to pay the sum of $350,000 under the [Murchison]/Winterfall Heads of Agreement. Also, those funds were then paid at the direction of Winterfall in partial satisfaction of its obligation to the Iron Jack Vendors. But this is not a case in which a mixed fund was used by Murchison to acquire its interest in Winterfall because the cheques formed part of the working capital provided by Murchison. They were not used to acquire shares in Winterfall. Chameleon is not entitled to claim a proportionate interest in Murchison’s shareholding in Winterfall; cf *Scott v Scott* (1963) 109 CLR 649 at 664.

The allegedly offending comment may have been infelicitous but, in context, it should be interpreted to mean “the shares were not purchased [by Murchison] with the funds” etc, ie his Honour was repeating what he had stated more fully three paragraphs earlier.

718 The individual instances of alleged error do not require separate consideration as they do not separately or collectively disclose appellable error. While his Honour may have drawn distinctions and placed emphasis on, or given significance to, matters which we would not have to the same degree, his characterisation of the benefit obtained was unassailable. We have already commented upon the lack of significance of the references the primary judge made to “working capital”.

719 For the purposes of tracing, the payment by Murchison to Winterfall and then Murchison’s acquisition of the Winterfall shares did involve separate steps. We have earlier noted this. Absent a remedy founded on tracing, a proportionate interest in the shares has to be shown “to reflect … the true measure of the profit or benefit obtained” by Murchison: *Hospital Products* at 110. Only then can consideration properly be given to the imposition of a constructive trust on a proportion of the shares. For the reasons we give below in considering the account of profits ordered against Murchison, we do not consider there is any basis at all to assert that shares in the order of 25 per cent plus in the share capital of Winterfall reflect the “true measure” of Murchison’s benefit.

720 Murchison well knew how Winterfall was going to use the $350,000 when it obtained it – and it may well in that sense be said to have assisted Winterfall’s “design” (though no claim is made on this account). But Murchison did not *itself use* Chameleon-derived funds either to acquire an interest in the tenements or to effect the takeover. The takeover resulted from the exercise of the contractual rights it had under the Heads of Agreement – an agreement which pre-dated at least the cheque advances. Murchison’s misuse of funds conferred a benefit on Winterfall and a derivative benefit on itself insofar as it was thus enabled to participate in profits derived by Winterfall from the tenements. Its shareholding in Winterfall may well have provided a vehicle for that derivative benefit. We will return to this when considering the account of profits ordered against both Murchison and Winterfall. However, there is no sufficient connection as such between Murchison’s wrongdoing and its acquisition of those shares.

721 In contrast there is an obvious and sufficient connection between Winterfall’s wrong and the acquisition of the tenements. For the reasons we earlier gave, we consider that the award of a constructive trust giving a proportionate interest in the tenements to Chameleon is inappropriate, largely because of what transpired after Winterfall’s acquisition of them. Nonetheless, and we here disagree with his Honour (at [1099]), Winterfall did obtain a different “benefit” from using the funds received from Chameleon in purchasing the Iron Jack Tenements. The difficulty lies, as will be seen in quantifying that benefit.

722 Considered in terms of “connection” and in contrast with the claim against Winterfall, the claim against Murchison for proprietary relief on account of its use of Chameleon’s funds and shares can properly be said in the circumstances to be a claim against the wrong party for the wrong property.

723 Considerable attention was given by his Honour and by the parties to this appeal to the terms of the Winterfall/Murchison Heads of Agreement and Addendum and to their proper construction. Yet the case was not one for their enforcement. It is also clear that they were not implemented strictly in accordance with their terms. Nonetheless, as we have already indicated, what the agreements reveal when considered under the shadow of the Winterfall/Iron Jack Vendors Agreement and in light of the parties’ dealings and declared intentions, is that they were marrying their resources and were making future commitments to and for their Project. Murchison’s payment has to be considered in that light: it provided “working capital” to Winterfall. It was an “investment” in the Project. His Honour did not err in so describing the payment.

724 We reject Grounds 6, 8, 9 and 10 of Chameleon’s appeal.

## 2. The Account of Profits Ordered Against Murchison and Against Winterfall

### (i) The Accounts Ordered

725 The “benefit” the primary judge found that both Murchison and Winterfall received from their respective use of the cheque moneys was “the benefit of the investment of the funds as part of a pool of working capital, comprising debt and equity. The account [against each] is therefore to be determined on the same basis”: [1099].

726 In relation to Murchison the benefit so described was correct. In relation to Winterfall, it was not. In contrast with Murchison, Winterfall obtained an immediate but different “benefit”. Chameleon’s moneys were paid directly to several of the Iron Jack Vendor’s in discharge of Winterfall’s obligation to pay an instalment on account of the tenements which it had contracted to purchase under the Winterfall/Iron Jack Vendors agreement. In time Winterfall acquired ownership of those tenements and the rights they gave. Murchison did not.

727 We have, for discretionary reasons, refused to give Chameleon full proprietary relief by way of a proportionate interest in the tenements themselves. Nonetheless, Chameleon is entitled by way of a personal remedy to the benefit they provided to the extent that those benefits were referable to Chameleon’s proportionate contribution to their acquisition and to the rights they gave to ownership of, and to take, remove and dispose of, minerals mined from the leased land: Mining Act, s 58; and see also *Primeau v Granfield*. This is not a matter that has been addressed as such in relation to Winterfall.

728 His Honour’s focus in ordering the account was on Murchison alone. His reasoning in relation to Winterfall simply coat-tailed that in relation to Murchison. We imply no criticism in this. The parties seem to have given little detailed attention to this form of remedy and his Honour was, perhaps, given less assistance than was appropriate in the circumstances.

729 To reiterate, the relevant benefit in a causal sense which his Honour found Murchison to have obtained, was the ability to provide $350,000 of working capital to Winterfall. The “relevant profit” was derived:

the “investment” of Chameleon’s funds in Winterfall, which funds ultimately formed part of a much larger pool of working capital comprised of debt and equity in the Project. It was in effect an investment of capital in an income stream to be produced by the working of the Iron Jack Project. Accordingly, the benefit is the amount of the income stream produced by the “investment” of Chameleon’s funds in the carrying on of the Project.

The authorities to which I have referred earlier show that the form of an order for an accounting depends on all the circumstances, and the assessment of the profit may be difficult. What seems to me to be appropriate in the present case is to order Murchison to account for the income it received as a consequence of the investment of $277,840 in Winterfall from 28 July 2004 to the present time. The exercise will be a complex one. What will be required, in effect, will be an accounting of all of the funds, whether debt or equity, which Murchison (or its subsidiaries) invested in the Iron Jack Project from 28 July 2004 and a calculation of the net profits derived by Murchison (or the relevant subsidiary) from the venture: [1036]-[1037].

730 As is apparent from what the primary judge next said in relation to “allowances”, no question arose here as to whether “any allowance ought to be made in favour of Murchison” because no constructive trust attached to Murchison’s shares in Winterfall: [1040]. We infer from this that no part of the profits Murchison made was considered to be attributable to sources other than capital. To that extent, this order seems to mirror that made in *Primeau v Granfield*.

731 His Honour then went on to consider, contrary to his conclusion, what, if any, allowance ought be given Murchison if there was to be an account of profits referable, as Chameleon contended, “to a 24 per cent interest in the Project” through Murchison’s shares in Winterfall: [1048]. It had earlier been commented (at [1047]) that:

This in my opinion is … a case where it appears that a “significant proportion of an increase in (the) profits has been generated by the skill, efforts, property and resources” of Murchison and Winterfall: *Warman* at 561. It is, for the most part, not a case where risks have been taken to which Chameleon’s property was exposed. Rather, almost all of the risks are attributable to the expenditure of a sizeable sum of capital on the development of the Project.

So his Honour concluded, if there were to be an account:

there would be an allowance against that interest to reflect, in particular, the substantial investment of funds contributed to the Project by or on behalf of Murchison. It seems to me that this would be likely to produce a similar figure to that which would result from the accounting exercise to which I referred above: at [1048].

732 We have some difficulty with the analysis made of the respective forms of the account so considered. As to the order actually made against Murchison, it may be appropriate to conduct an account on the basis that the net profits made were all attributable to the funds (debt and equity) invested in the Iron Jack Project from 28 July 2004 and to award Chameleon such of the profits so made as its $277,840 bore to the total funds outlaid. This would be likely to produce no more than a fraction of one per cent of the profits. What would require explanation, though, in light of what his Honour later said (as quoted above) about skill, effort and risks, is why either some part of the profits made ought not to be attributed to this or, alternatively, that an allowance should not be given for it: see above “The Liability to Account and the Account of Profits”.

733 The alternative form of account against Murchison mentioned, but not ordered, by his Honour (based on Chameleon having a 24 per cent interest in the Winterfall shares) would be manifestly inappropriate for want of Murchison having any such an interest. But an account in some like form, as we noted above, could have been ordered in favour of Winterfall, but was not.

734 Any claim based on accounting by reference to proportions requires, as Learned Hand J indicated in *Primeau v Granfield*, at 482 that “there is no doubt what was the proportion of ownership in the funds actually invested”. In this matter the amount contributed by Chameleon towards the payment of the instalment to the Iron Jack Vendors was certain. It was $152,750. At trial the total cash consideration to purchase the tenements was put at $1,160,000. These two sums were used to provide the basis for ascertaining Chameleon’s proportionate interest in the tenements.

735 As we indicated when considering the terms of the 28 July 2004 Winterfall/Iron Jack Vendors Agreement, the total consideration for the purchase of the tenements included a royalty payment to the Vendors of 80 cents per tonne and an issue of Murchison shares upon its re-listing with the ASX which, in the event, totalled 8,555,445 shares. On the day after re-listing, ie 1 April 2005, trading in the shares closed at 25.5 cents. The primary judge considered the royalty payments to be irrelevant in computing Chameleon’s claimed interest or in an account of profits. We note in passing that Learned Hand J took a contrary view in *Primeau v Granfield* at 485 as to the royalty payable – a view with which we agree. No appeal has been made against the primary judge’s view.

736 No consideration having been given to the share component of the consideration in the purchase, Murchison in Ground 3 of its Notice of Contention claims that the shares should be counted in calculating the total value of the consideration provided. We agree. However, as we need in any event to remit to the primary judge for reconsideration of the accounts of profits ordered against both Winterfall and Murchison, we include as part of that the calculation of the cash value, if any, to be attributed to the shares.

### (ii) Chameleon’s Appeal

737 Chameleon’s relevant grounds in relation to Murchison are in Grounds 11 to 14 and in Grounds 19 to 20 in relation to Winterfall. In relation to his Honour’s characterisations of benefit received by Murchison and Winterfall we have already indicated our conclusions that his Honour’s view was correct in relation to the benefit Murchison derived (ie an “investment”) but was incorrect in relation to Winterfall. Objection to these conclusions are embedded in the above grounds and need no further consideration here.

738 The grounds we should mention asserted, in essence, that the account ordered neither was asked for nor was the subject of submissions. No profits were shown to have been earned (a matter disputed before us). And the account was limited in duration to the date of delivery of reasons without regard to expected future profits.

739 Irrespective of the correctness and significance of the first three of these, the last discloses an appellable error in both appeals. Whether an order for the payment of a royalty, the capitalisation of future receipts, or a lump sum as if on the sale of the “income stream”, Chameleon was entitled to relief in respect of expected future earnings which would be the product of the income stream (Murchison) or the tenements (Winterfall).

740 From what we have said earlier, though, the accounts ordered are defective and need to be set aside. That against Winterfall is misconceived. Put shortly, the benefit/profit to which Chameleon was entitled was its proportionate share in the net profits (providing the proportion itself was identifiable) from ore found, extracted, transported and marketed and sold which had been, or *would be*, extracted over the life of the Project less the costs of finding, etc that **ore and**, arguably, less any such allowance as Winterfall would be allowed for its skills and risk taking and for its exertion in finding, etc, the ore. We merely suggest that that benefit, if Chameleon elects to pursue it, may best be reflected in a royalty-like payment on ore extracted.

741 We have focussed on Winterfall rather than Murchison for the obvious reason that, until the Murchison/Mitsubishi joint venture, it was the party immediately involved in conduct of the Project both as owner of the tenements and as the operator (which it still remains). Murchison’s benefits, at least as indicated in his Honour’s reasons, were derived by virtue of its ownership of shares in Winterfall. We know nothing of the financial relationship of the two companies other than that they are subsidiary and parent and that Murchison was envisaged as having, and seemingly did have, a funding function.

742 Murchison, no less so than Winterfall, is only accountable for the benefit it actually derived from the Chameleon money/shares it misused and it is not liable for the benefit derived by Winterfall. Likewise, if allowances are to be given in either of the accounts, it can only be for the respective party’s own skill, etc.

743 We have earlier outlined the principles commonly applied where trust monies are misused in the conduct of a business and we have indicated above the respective difficulties we perceive with the accounts ordered. However, we are not presently in the position to determine what the appropriate orders should be as against either Winterfall or Murchison. Before such orders are made the parties must be given a further opportunity to make submissions on the matter. We necessarily, but regrettably, must remit further consideration of the orders for accounts of profit to the primary judge. Nonetheless, we would hope that the parties may be able to reach agreement on them without the further incurring of further significant and, possibly unrewarding expenditure.

744 We will order that the orders for an account of profits made, respectively, against Murchison and Winterfall be set aside and that the matter be remitted to the primary judge for further consideration in light of these reasons.

### (iii) Chameleon’s Grounds 15 and 16

745 It is alleged the primary judge erred in failing to hold Murchison jointly and severally liable with Mr Barnes and Mr Grimaldi for the profits these two made from their breaches of fiduciary duty.

746 We earlier outlined the principles governing the imputation of an agent’s/director’s knowledge to its principal/corporation: see “The Imputation of Knowledge to a Corporation”: [282]. We equally have indicated that we are unprepared to impute Mr Grimaldi’s knowledge of the spotter’s fee to Murchison and we are not satisfied that Murchison otherwise had the requisite knowledge of the impropriety of the spotter’s fee arrangement when it acquired the 10 million Winterfall shares or when it issued the 10 million Winterfall shares and options to Pinnacle.

747 Knowledge of Grimaldi’s fraud on Murchison was not to be imputed to Murchison. It could avail of the “fraud exception”. In this regard, it was “the target, or the victim, of its agent’s dishonesty”: *Stone & Rolls*, at [73].

748 The ordinary rule applied on an account of profits is that a fiduciary, *a fortiori* a third party participant, is not to be punished for misconduct by making him or her account for more than what was actually received by him or her as a result of the breach of duty or the third party’s participation therein: *Hospital Products*, 109; *Harris v Digital Pulse*; and see generally “The Liability to Account and the Account of Profits” at [515]**.** His Honour applied this rule in Murchison’s favour. While there are exceptions to it as, for example, where the company is the agent/director’s alter ego, or where a company acts in concert with the delinquent fiduciary for their mutual benefit: see [559]; the exceptions do not avail Chameleon. Notwithstanding that the larger transaction in which the spotter’s fee was given may have benefited Murchison. Murchison is to be taken to be an innocent victim in relation to the spotter’s fee itself.

749 We reject Chameleon’s appeal Grounds 15 and 16.

# X. OTHER ISSUES

## 1. The Interest Award

750 The appeal issue arises in Chameleon’s case (Grounds 24-25) in this way. In his reasons for judgment, the trial judge concluded that, at Chameleon’s election, Murchison, Mr Grimaldi and Winterfall were liable for equitable compensation in respect of the sum of $152,750 from 28 July 2004 to date at mercantile rates of interest, “compounded on *monthly* rests*”:* emphasis added.

751 When it came to making his orders, those orders made after the hearing of submissions was that the interest liability be compounded on *annual* rests. His Honour’s apparent reason for doing so is that, while he “thought it should be monthly rests” he considered that, having been shown a recent Supreme Court of New South Wales decision where annual rests were ordered, “there is a need for consistency in relation to the way in which courts impose orders for the payment of interest”.

752 At the end of the appeal hearing we were, in effect, invited by the parties – albeit for differing reasons – to exercise our own judgment in the matter.

753 The issue of the incidence of rests is not one of comity. The question is what by the use of compound interest and rests is likely to provide a crude approximation of the profits considered likely to have been earned from the money misused. His Honour’s own appreciation, having had the advantage both of hearing the matter and of long reflection on it, was that monthly rests were appropriate. We consider this likely to be far closer to the mark than annual rests.

754 We will allow this appeal and order that Order 3(b), 5(b) and 13 be varied by deleting the word “annual” and by substituting the word “monthly”.

## 2. Laches and Delay

755 The primary judge denied Chameleon proprietary relief on the basis of laches and in so doing paid particular regard to the rights of third parties including shareholders in publicly listed companies.

756 We have considered the claims for proprietary relief on their merits. Only in relation to the claim against Winterfall for a proportionate interest in the tenements did the appropriateness of proprietary relief arise as a serious issue. We refused the claim on discretionary grounds most, but not all, of which related to events occurring after the wrongdoing founding the claim and to the interposition of, and effects upon, third party rights and interests.

757 In these circumstances we do not consider it necessary to express a view on whether laches would constitute a defence to the proprietary claim against Winterfall.

## 3. Evidence Issues

758 Chameleon has objected to Mr Grimaldi’s referring in his appeal to 82 documents which were in the joint bundle tendered at trial but which were not referred to. The basis of the objection is that they were being used to raise a new point on the appeal: see *Multicon Engineering Pty Ltd v Federal Airports Corporation* (1997) 47 NSWLR 631. We need not deal with this particular brushfire. Notwithstanding the large volume of documentary evidence to which we have referred, we have not had regard to even one of the “offending” documents.

## 4. Procedural Issues

## *(i) Whether Chameleon should be granted leave to file an amended Notice of Contention*

759 During the first day of the hearing of this appeal the Court granted leave to the first respondent (‘Chameleon’) to file an amended Notice of Contention raising two new grounds 4 and 5. These were in the following terms:

**De facto director – officer**

4. If it be found that Mr Grimaldi was not a de facto director of Chameleon then the trial judge should have found that by reason of the terms of the definition of ‘officer’ in the *Corporation Act* and in particular paragraphs (b)(i) and (b)(ii) at all material times Mr Grimaldi was an officer of Chameleon [212] and thereby a fiduciary and accordingly liable to account to Chameleon.

**Knowingly concerned**

5. If it is found that Mr Grimaldi was not a de facto director of Chameleon and not an officer of Chameleon then the trial judge should have found that by reason of the findings of the facts properly found by the trial judge [667]-[694] Mr Grimaldi was knowingly concerned in the breach of fiduciary duty by Mr Barnes and accordingly liable to account to Chameleon.

760 The circumstances in which that leave was granted were unusual in that an earlier application by Chameleon for leave to file the amended Notice of Contention had been refused by Perram J on the Monday before the appeal commenced, that is, 1 August 2011: *Grimaldi v Chameleon Mining NL (No.1)* [2011] FCA 936. The application to this Court took the form not of a fresh application to amend the Notice of Contention, but rather as an application to revoke the order made by Perram J dismissing Chameleon’s original application to amend. That application was initiated within a few hours of the orders which dismissed Chameleon’s notice of motion seeking leave to amend. It came before Perram J on 2 August 2011 and his Honour directed that the application be put before this Full Court (which, it should be noted, includes Perram J).

761 Justice Perram refused the application to amend the Notice of Contention because it appeared to his Honour that the matters sought to be added to the Notice of Contention – allegations that Mr Grimaldi was an ‘officer’ within the meaning of s 9 of the *Corporations Act 2001* (Cth) or that he was knowingly involved in Mr Barnes’ breach of fiduciary duty – were matters which could rationally have been raised after the appellant (‘Mr Grimaldi’) first filed his notice of appeal which challenged the trial judge’s conclusion that he was a de facto director. Chameleon had pursued these allegations as alternate arguments before the trial judge. It was, therefore, possible for Chameleon to have put on a Notice of Contention raising them as soon as it received Mr Grimaldi’s notice of appeal.

762 The application to amend the Notice of Contention was made by a notice of motion dated 28 July 2011. Mr Grimaldi’s notice of appeal which challenged the finding that he was a de facto director was filed on 25 February 2011. There was, therefore, a period of several months before the application to amend was made. Before Perram J (and again before us), there was evidence that the raising of the two grounds in the proposed Notice of Contention so close to the appeal was apt to place some pressure and inconvenience upon Mr Grimaldi and his representatives.

763 On the amendment application before Perram J, Senior Counsel for Mr Grimaldi placed reliance on a well-known passage in the joint reasons in *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 at 215 [103]:

Generally speaking, where a discretion is sought to be exercised in favour of one party, and to the disadvantage of another, an explanation will be called for. The importance attached by r 21 [of the *Court Procedure Rules 2006* (ACT)] to the factor of delay will require that, in most cases where it is present, a party should explain it. Not only will they need to show that their application is brought in good faith, but they will also need to bring the circumstances giving rise to the amendment to the court’s attention, so that they may be weighed against the effects of any delay and the objectives of the Rules. There can be no doubt that an explanation was required in this case.

764 There was no affidavit evidence from Chameleon at the hearing of the application going to the issue generated by this paragraph (although it filed affidavits relating to other issues). This moved Senior Counsel for Mr Grimaldi to make this submission:

…Now, your Honour, there is no affidavit. There are two affidavits from Ms Lusty, but there is not a single word in those affidavits to explain the delay. Your Honour has been told from the Bar Table – and we object to this – that these matters are raised responsive to the amended notice of appeal and to the reply submissions that were recently filed.

Now, your Honour, there is no evidence to support that and thus no means by which I was able to test that proposition or to explore the question of when these matters were first given consideration to and whether they were, in fact, given consideration at the proper time. …

765 At the same hearing, Junior Counsel for Chameleon argued that the amendments to the Notice of Contention were responsive to amendments which had been made to the notice of appeal by Mr Grimaldi only the week before on 26 July 2011. Those amendments sought to articulate the challenge to the trial judge’s conclusions on the de facto director issue somewhat differently but they did not raise that challenge for the first time. At the time that Chameleon consented to those amendments its Senior Counsel, Mr Hutley SC, made clear that this would bring forth from its side of the bar table amendments to the Notice of Contention.

766 Justice Perram reasoned this way (at [14]):

I do not see that what Mr Hutley SC said on the transcript on the last occasion is capable of detracting from that proposition and I cannot, therefore, see a way in which the force of paragraph [103] of *Aon* may be avoided. For those reasons, it seems to me that it would be inappropriate to grant leave to amend the Notice of Contention in the fashion which is foreshadowed.

767 The basis of the application to re-open the orders is that Perram J was not taken to the recent decision of the Full Court of this Court in *Cement Australia Pty Ltd v Australian Competition and Consumer Commission* (2010) 187 FCR 261 at 277 [55] where the Court, having set out paragraph [103] and [106] in *Aon*, said:

It is apparent from these passages that their Honours were more concerned that there be an explanation as to how the late application comes to be made, than the form in which the explanation was proffered.

768 In light of this authority it was said to be wrong as a matter of law to proceed on the basis that the absence of any affidavit explaining the reasons for the delay in making the application meant that the application had to be refused. It was sufficient, on this view of things, that Junior Counsel for Chameleon had explained on the amendment application that the amendment had been raised as a result of Mr Grimaldi’s amendments to his notice of appeal; further, this was essentially what Mr Hutley SC had foreshadowed on 26 July 2011 when Chameleon had consented to Mr Grimaldi’s amendments to his notice of appeal.

769 This submission assumed that the basis upon which Perram J had concluded that the amendment should be refused was the absence of an affidavit explaining the delay. It was at the correctness of this assumption that Mr Bell SC, who appeared for Mr Grimaldi, then launched his attack. The paragraph in which his Honour reached the conclusion that leave should be refused was [14] and at no time in the reasons for judgment prior to that paragraph was the absence of an affidavit referred to as the motivating difficulty. His Honour had been actuated, therefore, not by the absence of an affidavit but by the absence of an explanation.

770 That submission is to be tested against a context which includes paragraph [18] of the reasons:

At the conclusion of my reasons, Mr Bennett applied for a short adjournment, possibly till tomorrow morning, to put on an affidavit of explanation of the kind contemplated by paragraph [103] of *Aon.* During the course of argument on the principle application Mr Bell SC made quite plain the submission he was putting on this matter. That is, that he was relying upon paragraph [103]. *During the course of further discussion between myself and Mr Bennett the difficulty with paragraph [103] and the need for an affidavit was ventilated.* It seems to me that it was at that point that Mr Bennett should have made his application for a brief adjournment to put on such an affidavit. It seems to me that it is not appropriate that that application be made after I have considered the evidence, heard the arguments and decided to dismiss the application.

(Emphasis added.)

771 The emphasised portion suggests that the default detected was the absence of an affidavit rather than the absence of an explanation. That reading of the reasons is consistent with the passage set out above from the submissions made by Mr Bell SC on 1 August 2011 in which his specific complaint was the absence of an affidavit. Four matters are then apparent: *first*, the Court was invited to dismiss the application on the basis that there was no affidavit of explanation; *secondly*, specific reference was made to [103] of *Aon*; *thirdly*, no reference was made by counsel for either side to the Full Court’s consideration of what that paragraph meant in *Cement; fourthly,* the reasons for judgment then proceeded to apply [103] of *Aon* to dismiss the application without being aware of the Full Court’s statement that an affidavit was not necessarily what [103] required.

772 One has, therefore, the appearance of an error of principle in the approach taken by Perram J generated by the failure of either party to take his Honour to the decision in *Cement*. The orders made by his Honour dismissing Chameleon’s notice of motion have not been taken out. The Court, therefore, has jurisdiction in principle to revoke or vary the orders which have been made: ‘The Court may vary or set aside a judgment or order before it has been entered.’ (*Federal Court Rules 2011* r 39.04). There is no doubt, as Mr Bell SC correctly stressed, that the jurisdiction to re-open orders is sparingly to be used. Citing the reasons for judgment of Mason CJ in *Autodesk Inc v Dyason (No.2)* (1993) 176 CLR 300 at 303 the Full Court of this Court recently observed that ‘[b]ecause of the importance of the public interest in the finality of litigation, it is a jurisdiction “to be exercised with great caution”’: *Davis v Insolvency and Trustee Service Australia (No.2)* (2011) 190 FCR 437 at 439 [6]. The procedure contemplated by r 39.04 (and indeed the undoubted inherent power of a superior court of record to do the same thing) must not be permitted to become an avenue whereby disappointed litigants (or their advisers) are permitted, in effect, a second chance before the trial judge. This is not only because it is contrary to the principle of finality of litigation; not only because it causes the successful party to incur costs which it has some expectation it ought not to have to incur having regard to its success in the suit; and not only because it ties up valuable court resources. It is also for the good reason that the civil litigation system does generally afford the class of disappointed litigants a second chance in the form of an appeal. The principles governing such appeals are highly formalised and, to an extent, constrained. It would be to put at nought those arrangements if there were to be permitted a form of de facto appeal on each occasion that a party alleged error in a trial judge’s processes of reasoning.

773 For that reason, mere error is not a sufficient touchstone of the jurisdiction at the instance of a disappointed party. ‘What must emerge, in order to enliven the exercise of the jurisdiction, is that the Court has apparently proceeded according to some misapprehension of the facts or the relevant law and that this misapprehension cannot be attributed solely to the neglect or default of the party seeking the rehearing.’ (*Autodesk Inc v Dyason (No 2)* (1993) 176 CLR 300 at 303 per Mason CJ). That statement is not the same as the notion that re-opening will be permitted only to a party who is blameless. That stricter standard was rejected by Mason CJ in *Autodesk* (at 301-302): ‘The exercise of the jurisdiction to reopen a judgment and to grant a rehearing is not confined to circumstances in which the applicant can show that, by accident and without fault on the applicant’s part, he or she has not been heard’. Although Mason CJ was in dissent, the correctness of that statement has been accepted by a majority of the High Court in *Aktas v Westpac Banking Corporation Ltd (No 2)* (2010) 241 CLR 570 at [6].

774 It is undoubtedly true that Chameleon did not bring the *Cement* decision to the attention of the Court on 1 August 2011 but is also just as true that Mr Grimaldi did not do so either. In that circumstance, it is not correct to say that the position arrived at by the Court was caused by a misapprehension for which Chameleon can be said solely to be responsible; it was caused by both parties. In principle, the jurisdiction should, therefore, be exercised.

775 Accordingly, it is appropriate to re-open the orders made by Perram J in dismissing the application to amend. His Honour was not bound, in light of the remarks made by the Full Court in *Cement*, to dismiss the application merely because there had been no affidavit. How then should the application be dealt with? Before us, but not before Perram J, Mr Hutley SC submitted that *Aon* had nothing to do with the present application because there was no delay which called for an explanation. The argument proceeded as follows:

1. It was true that Mr Grimaldi had challenged the correctness of the trial judge’s conclusion on the de facto director point in February 2011; it was also true that it would have been logically possible for Chameleon to have put on a Notice of Contention at that time.

2. To say, however, that it was possible for Chameleon to put on such a Notice of Contention at that time did not mean that Chameleon was bound to do so. The Court has made consistently clear that it expects parties to be discerning about the issues which are to be raised and not unnecessarily to proliferate them.

3. The trial judge’s reasoning on this issue was based on 11 particular factual matters none of which was challenged in Mr Grimaldi’s notice of appeal. When Mr Grimaldi delivered his written submissions in chief he did not seek to challenge those matters either. Chameleon was entitled to form the view that this aspect of Mr Grimaldi’s appeal had little in the way of prospects and that it would be wasteful to introduce the added complexity of the officer question or the alleged involvement by Mr Grimaldi in Mr Barnes’ breach of fiduciary duty.

4. Mr Grimaldi’s written submissions in reply, however, raised – for the first time – challenges to those findings. Chameleon consented to the amendment to Mr Grimaldi’s notice of appeal to allow the actual issues to be ventilated and because it was able to meet the case.

5. Doing so, however, meant that Mr Grimaldi’s appeal on the de facto director point was no longer to be regarded as de minimis and it was necessary for Chameleon now to put on a Notice of Contention in relation to the officer and *Barnes v Addy* (1874) LR 9 Ch App 344points.

6. So viewed, the amendments to the Notice of Contention were responsive to the amendments Mr Grimaldi made to the notice of appeal and there was, in that circumstance, no question of delay.

776 Mr Bell SC submitted, in response, that there was no affidavit to this effect put forward by Chameleon and that there was, therefore, unexplained delay since February 2011. For reasons already given we do not think that an affidavit was required. Mr Hutley SC proffered the explanation above and indicated that the tactical decisions in question had been his. Further, it is apparent to us – having now been taken to Mr Grimaldi’s written submissions in chief and in reply – that what Chameleon submits about Mr Grimaldi’s appeal is correct. Mr Grimaldi’s original notice of appeal and submissions in chief in support thereof disclose an attack on the trial judge’s conclusions on the de facto director’s point which is lacking in content. The first time anything of substance was said was in the submissions in reply and in the amended notice of appeal. It was quite proper that Chameleon elected not to burden the Court with unnecessary debate on the officer and *Barnes v Addy* issues when it must have been apparent to it that Mr Grimaldi’s case was not going anywhere. So viewed, the amended Notice of Contention was responsive and not in any way late. We accept the submission therefore that no *Aon* issue arose.

777 It was for those reasons that we vacated Perram J’s dismissal of Chameleon’s application to amend its Notice of Contention and permitted that amendment with costs in the cause.

## *(ii) Mr Grimaldi’s application to amend his notice of appeal*

778 On the second day of the appeal Mr Grimaldi applied for leave further to amend his notice of appeal to contend that the trial judge had gone outside the pleadings in deciding the de facto director case. That point was raised for the first time on the first day of the appeal at which time Chameleon objected to its ventilation without the notice of appeal being amended. Chameleon’s point was that it was quite apparent that the 11 matters which had been relied on by the trial judge were the subject of express submissions by both parties at trial. It was true that Mr Grimaldi’s submissions at trial had commenced with a statement that Mr Grimaldi expected the case to be conducted on the pleadings but it was just as apparent that that was not how the trial was, in fact, conducted. In particular, the parties had joined in an agreed chronology in which the matters the subject of the trial judge’s findings appeared.

779 It is obvious that if this ground were now to be permitted it would require a close analysis of the relationship between the way the case was pleaded and the way it was run. This appeal, which is complex, was originally set down for seven days; at the parties’ instigation that listing has been extended to eight days. All counsel were on strict time limits on identified topics. Now to permit such a case to be put would disrupt the hearing of the appeal in a way which does not commend itself to us. For that reason we refused the application.

# XI. CONCLUSION

780 Mr Grimaldi not having been successful in any of his grounds of appeal in NSD 68 of 2011, we will order that his appeal be dismissed with costs. Murchison in its cross-appeal in that matter adopted designated grounds of Mr Grimaldi’s appeal as its own. Those grounds being unsuccessful, we will order that the Murchison cross-appeal in NSD 68 of 2011 be dismissed with costs.

781 The joint and several appeals of Murchison and Crosslands (Winterfall) in NSD 73 of 2011 have been wholly unsuccessful save in relation to Ground 3 of Murchison’s Notice of Contention. While the orders for an account of profits made against each of them respectively have been set aside, this was not for the reasons they advanced. We have remitted this matter to the primary judge for reconsideration. We will order that the cross-appeals of Murchison and Crosslands be dismissed.

782 Chameleon has enjoyed a certain measure of success in its appeal in NSD 73 of 2011 notably in relation to (a) some of the various challenges it made to the account of profits ordered against Murchison and Crosslands respectively; (b) the benefit Winterfall was found to have received in using Chameleon’s two cheques in purchasing the Iron Jack Tenements; and (c) the annual rests ordered as part of the interest award made. However, we have dismissed the majority of its grounds of appeal and, in particular, its constructive trust claims and we have had no need to consider several other of its grounds. In these circumstances we consider that the appropriate order to be made in relation to costs in NSD 73 of 2011 is that Murchison and Crosslands pay 30 per cent of Chameleon’s costs of the appeal.

783 Finally, as we have concluded that Chameleon’s appeal must be allowed in part and that the matter be remitted in part, we direct Chameleon to prepare and file draft minutes of order to give effect to our reasons in NSD 73 of 2011 within 21 days of the date of publication of these reasons. Consent orders having been provided to the Court when judgment in this matter was to be pronounced, in lieu of the above direction we make orders in terms of those orders.

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| I certify that the preceding seven hundred and eighty-three (783) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Finn, Stone and Perram. |

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| Associate: |  |

Dated: 21 February 2012

**Annexure 1**

**Principal Corporations and Their Relevant Directors**

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| **Company Name** | **Name used in Judgment** | **Relationship to other Companies** | **Relevant Directors** |
| Chameleon Mining NL | Chameleon | 100% holding in Tembo Gold Holdings | Landan Roberts  16/11/2001 – 11/1/2006  Gregory Bennet Barnes  16/11/2001 – 11/1/2006  Manuel Nicholas Dondas  15/11/2002 – 11/1/2006 |
| Chameleon Ventures Limited | Chameleon Ventures | Management consultant to Chameleon | Phillip Felice Grimaldi 31/10/2003 – 26/6/2005  Landan Roberts 7/12/2001 – 26/6/2005 |
| Crosslands Resources Ltd  *Former Names:*  Iron Jack Ltd  10/2004 – 9/2007  Winterfall Ltd  9/2004 – 10/2004  Winterfall Pty Ltd  8/1993 – 9/2004 | Winterfall | Purchased the Iron Jack Tenements from the Iron Jack Vendors  Subject to a reverse takeover by Murchison on 11/11/2004  50% share subsequently sold to Mitsubishi  Murchison’s remaining 50% share transferred to Jack Hills, a wholly-owned subsidiary | Paul Kopejtka  23/9/2004 – 15/7/2011  Nikoljas Zuks  23/12/1993 – 18/4/2006 |
| Iron Jack Vendors | Iron Jack Vendors | Vendors of the Iron Jack Tenements to Winterfall |  |
| Jack Hills Holdings Pty Ltd | Jack Hills | Wholly-owned subsidiary of Murchison  50% shareholding in Winterfall | Paul Kopejtka  4/9/2007 – present |
| Mitsubishi Development Pty Ltd | Mitsubishi | Purchased 50% share in Crosslands |  |
| Murchison Metals Ltd  *Former Names:*  Nicu Metals Limited  27/1/2004 – 7/10/2004  Weboz Limited 16/10/2000 – 26/1/2004 | Murchison | Made a reverse takeover of Winterfall on 11/11/2004  Holds 50% of Winterfall through Jack Hill Holdings  Remaining 50% of Winterfall sold to Mitsubishi | Phillip Felice Grimaldi 18/4/1997 – 12/11/2004  Landan Roberts  1/7/2003 – 27/2/2004  Paul Kopejtka 10/11/2004 – present |
| Pinnacle Nominees Pty Ltd | Pinnacle | Owned and controlled by Barnes  Recipient of 10m shares in Winterfall  10m Winterfall shares subsequently exchanged for 10m Murchison shares and options which were allocated to other companies | Gregory Bennet Barnes (all relevant times) |
| Tembo Gold Holdings Pty Ltd | Tembo Holdings | Wholly-owned subsidiary of Chameleon | Phillip Felice Grimaldi 5/6/2002 – 15/1/2006  Landan Roberts 5/6/2002 – 15/1/2006 |