

BETWEEN:



STEPHEN JAMES HOWARD
Appellant

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and

COMMISSIONER OF TAXATION OF THE COMMONWEALTH OF AUSTRALIA
Respondent

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APPELLANT'S SUBMISSIONS

Part I: Publication

1. The Appellant certifies that these submissions are in a form suitable for publication on the internet.

Part II: Issues

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2. The principal issue in the appeal is whether a sum received by the Appellant by way of equitable compensation was received by him as constructive trustee for the company of which he was a director, such that the sum was excluded from the assessable income of the Appellant and included in the assessable income of the company.

3. Ancillary and subsidiary issues are:

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(a) Whether a fiduciary's duties to the beneficiary in respect of an opportunity to which the duty attaches are extinguished by frustration of the opportunity by misfeasance of a third party or extend to accounting to the beneficiary for any value recovered from the third party in respect of the opportunity; and

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(b) Whether the litigation agreement among the Appellant, the beneficiary and others had effect as a confirmation or constitution of a trust over the rights giving rise to the equitable compensation recovered, such that the recovery was income of a trust estate, and if so whether s 102B of the Income Tax Assessment Act 1936 ("the 1936 Act") had any application.

Part III: Judiciary Act 1903

4. The Appellant certifies that he considers that notice is not required pursuant to s 78B of the *Judiciary Act 1903*.

Part IV: Reports of reasons

5. The judgment of the Full Court of the Federal Court of Australia ([2012] FCAFC 149) is reported as *Howard v Commissioner of Taxation* (2012) 206 FCR 329, and also as 2012 ATC ¶20-355.
6. The decision of Jessup J at first instance ([2011] FCA 1421) is reported as *Howard v Commissioner of Taxation (No 2)* (2011) 86 ATR 753 and as 2011 ATC ¶20-298.

10 **Part V: Relevant facts**

7. The material facts are set out in the reasons of the Full Court at [6] and are stated in more detail in the reasons of the primary Judge at [11-77]. Succinctly stated, the essential facts are:
- (a) The Appellant and 5 others formulated a project to acquire, lease and resell to an "end-purchaser" the Kingston Links golf course ("the KLGC venture"). If successfully implemented, the KLGC venture would have realised a profit ("day 1 profit") on simultaneous completion of the acquisition and resale.
- (b) The Appellant and 2 other of the participants introduced the KLGC venture to Disctronics Ltd ("Disctronics"), a public company of which they were directors, and agreed that if the equity (net of mortgage) required to purchase the golf course was less than \$1.5 million, Disctronics would be the end-purchaser. Disctronics adopted the proposal. The participant directors agreed to account to Disctronics for any day 1 profit accruing to them if Disctronics took up the investment.¹
- (c) Subsequently joint venture terms were agreed among the six participants, not including Disctronics, to whose inclusion in the venture two of the participants ("the defendants") objected. Upon it being determined that equity of less than

¹ The day-1 profit depended on the difference between the cost of the golf course and the price at which it was sold to the end-purchaser, so that realization of any day-1 profit increased the cost of the course to Disctronics as end-purchaser and would be made by the directors at its expense.

\$1.5 million was required to acquire the golf course, the remaining joint venturers ("the plaintiffs") asserted the right of Disctronics to play the role of end-purchaser.

5 (d) The defendants, in breach of their fiduciary duty to the plaintiffs, clandestinely negotiated a purchase of the course, and its lease to the prospective lessee, by a syndicate comprising themselves and a third party.

10 (e) The plaintiffs and Disctronics brought proceedings for remedies consequent on the defendants' breach of fiduciary duties. The proceedings were funded by Disctronics, to whom the director plaintiffs (including the Appellant) assigned all benefits from the proceedings.

(f) Judgment was given in favour of the plaintiffs at first instance and upheld on appeal. The defendants were ordered to pay to the plaintiffs a sum by way of equitable compensation.

15 (g) Each of the directors, including the Appellant, accounted to Disctronics for his share of the award. Disctronics returned the amount as income for tax purposes.

8. The Appellant returned his income for the year of income on the basis that he had received his share of the award as constructive trustee for Disctronics, and was not assessable on it. The Respondent assessed him as having beneficially derived the award amount. In Part IVC proceedings, the primary judge held the Appellant to have received the amount as constructive trustee.

25 9. The Full Court, reversing the primary judge, held that the Appellant had received his share of the award for his own benefit, on the basis that he had observed his fiduciary duty to Disctronics by his exercise of "reasonable endeavours" to have Disctronics become the purchaser of the golf course, and so had not been in breach of his fiduciary duty to Disctronics.

Part VI: Appellant's argument

(a) The Appellant's submission in summary

10. From the time the investment in the golf course was put to and adopted by Disctronics as "a maturing business opportunity which [the] company [was] actively pursuing"² it was not open to the Appellant to appropriate for his own benefit either the investment or any benefit (including compensatory damages) which came to him arising from the investment or from the opportunity to invest. He was bound to account to Disctronics for, and was constructive trustee of, any benefit which accrued from the opportunity, and for the purposes of Division 6 of Part III of the 1936 Act, any benefit of an income character was income of a trust estate on which as trustee he was not liable to tax.³

(b) The Appellant's position as a fiduciary

11. That the Appellant became subjected to fiduciary obligations to Disctronics in relation to the KLGC venture from the time the venture was introduced to the company was not in issue in the Federal Court,⁴ nor was it in issue that he observed – rather than breached – those obligations.

12. The relationship between a director and company is a paradigm example of a fiduciary relationship,⁵ giving rise to duties that are "broad and general,"⁶ for the company can only act through its directors.⁷ While the scope of the fiduciary duty must be moulded according to the nature of the relationship and the facts of the case,⁸ a director as fiduciary is subject to an overriding obligation of undivided loyalty,⁹ and may not take a

² The language of Laskin J in the Canadian Supreme Court in *Canadian Aero Service Limited v O'Malley* [1974] S.C.R. 592, 606-7, (1973) 40 DLR (3d) 371, 382.

³ Section 96: "Except as provided in this Act, a trustee shall not be liable as trustee to pay income tax upon the income of the trust estate."

⁴ The principles were common ground, as the Full Court recorded at 206 FCR 329, 331 [4]

⁵ *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 96.9.

⁶ *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296 at [179].

⁷ *O'Brien v Dawson* (1942) 66 CLR 18, 32, citing *Ferguson v Wilson* (1866) LR 2 Ch App 77, 79 per Cairns LJ "The company itself cannot act in its own person, for it has no person; it can only act through directors."

⁸ *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 102.6 per Mason J.

⁹ The words of Vickery J in *Hodgson v Amcor Ltd* (2012) 264 FLR 1, 209; [2012] VSC 94 at [1356], citing *Gibson Motorsport Merchandise Pty Limited v Forbes* (2006) 149 FCR 569 at [11] per Finn J; *Beach Petroleum NL v Kennedy* (1999) 49 NSWLR 1, 47 [201] per Spigelman CJ, Sheller JA and Stein JA; *Bristol and West Building Society v Mothew* [1998] Ch 1 at 18 per Millett LJ.

profit arising from his office,¹⁰ even when the company itself is unable to do so,¹¹ except with the informed consent of the company.¹² This is an “inflexible rule of Equity.”¹³

13. The duty extends to an obligation not to exploit for the director’s own benefit an opportunity that either “belongs” to the company or “for which it has been negotiating,”
5 especially where the director “is a participant in the negotiations on behalf of the company.”¹⁴

14. Equity requires a director to account for any personal gain in circumstances where there is any possibility of conflict between personal interest and duty as a director, for reasons embodying “two themes. The first is that which appropriates for the benefit of the
10 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
15 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.”¹⁵

¹⁰ Like any other fiduciary, a director may take profits from activities unconnected with the fiduciary office, *Noranda Australia Ltd v Lachlan Resources NL* (1988) 14 NSWLR 1 at 15; but in the present case the investment in the golf course had been put to and adopted by Disctronics as, in the language of Laskin J in *Canadian Aero Service Limited v O’Malley* [1974] SCR 592, 606-7 “a maturing business opportunity which [the] company [was] actively pursuing.”

¹¹ *Phipps v Boardman* [1967] 2 AC 46, *Regal (Hastings) Ltd v Gulliver* (1942) [1967] 2 AC 134n; *Furs Ltd v Tomkies* (1936) 54 CLR 583, 592.

¹² *Hospital Products* at 103.2.

¹³ *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar The Diocesan Bishop Of The Macedonian Orthodox Diocese Of Australia And New Zealand* (2008) 237 CLR 66, 93 [69]; *Breen v Williams* (1996) 186 CLR 71, 108

¹⁴ *Canadian Aero Service Limited v O’Malley* [1974] SCR 592, 606-607 per Laskin J, in observations cited in numerous Australian cases, many of which are listed by Phillips JA in *Edmonds v Donovan* (2005) 12 VR 513, 537; more recent citations include *Mann v Able Tours Pty Ltd* [2010] WASCA 59 and *Omnilab Media Pty Ltd v Digital Cinema Network Pty Ltd* (2011) 285 ALR 63; [2011] FCAFC 166; *Nicholls v Michael Wilson & Partners Ltd* [2012] NSWCA 383 per Sackville AJA at [177]. The decision has also been influential in English jurisprudence, *Foster Bryant Surveying Ltd v Bryant* [2007] EWCA Civ 200 at [55-57]. See too R P Austin, H A J Ford and I M Ramsay, *Company Directors, Principles of Law and Corporate Governance*, LexisNexis Butterworths, 2005, at 368–9 [9.8].

¹⁵ *Chan v Zacharia* (1984) 154 CLR 178 at 198-9 per Deane J; *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 557-558; *Breen v Williams* (1996) 186 CLR 71, 113

15. The Appellant and his fellow directors brought to their company, Discronics, a "maturing business opportunity"¹⁶ which it adopted and set about actively pursuing. From that moment, until relieved of it by the informed assent of the company, they were under a duty to the company to pursue the opportunity for its benefit, and not to take any profit arising from it for their own benefit. When their co-venturers misappropriated the opportunity, the directors sought to recover it by taking proceedings in Equity, expressly for the benefit of Discronics,¹⁷ which itself was party to the proceedings.¹⁸

16. The default of the co-venturers did not discharge the directors of their fiduciary obligations to the company in respect of the opportunity; rather it added, to the subject matter in respect of which the obligations subsisted, a right to recover from the defaulters that which they had misappropriated, or if not, the value of what had been misappropriated. When the proceedings yielded an award of compensation, that award came to the director plaintiffs as the fruits of the venture – as the only fruits, but wholly as a gain from the frustrated opportunity – and it would have been entirely inconsistent with their fiduciary duties to the company for the directors to have retained the gain for their own benefit and not to have accounted for it to the company.

(c) *The Appellant was trustee for the company*

17. The holder of property in respect of which equity recognises and enforces a constructive trust is as much trustee of that property as is the trustee of property the subject of an express trust. In his seminal judgment in *Muschinski v Dodds*,¹⁹ Deane J observed that

¹⁶ *Canadian Aero Service Limited v O'Malley* [1974] SCR 592, 607; (1973) 40 DLR (3d) 371, 382.

¹⁷ The directors, acknowledging that they had "agreed that if [Discronics] exercised its Option then the directors would rebate to [Discronics] any entitlement (whether on revenue or capital account) they may have as a consequence of their participation in the joint venture," undertook the proceedings "in order to ensure that [Discronics] is afforded the opportunity of exercising its right to seek damages and compensation for the loss of its corporate opportunity and the wrongful appropriation of" the opportunity, and assigned to the company "any award ... made in their favour as a consequence of their participation in the joint venture or arising out of the proceedings," Ex SJH-4, recited in the judgments of Jessup at [52] and the Full Court at [6(j)]. Discronics' claim as co-plaintiff was dismissed at first instance but ultimately vindicated to the extent that its appeal against the trial Judge's order for compensation for wrongful lodgment of a caveat was allowed, *Edmonds v Donovan* (2005) 12 VR 513 at 546-552, esp at [96].

¹⁸ Even in the absence of the litigation agreement (set out by the Full Court at [6(j)]), the directors could not claim for themselves the fruits of the litigation at the expense of the company, which was party to the proceedings and claimed relief by way of transfer to it of the golf course property ([2002] VSC 454 at [103]).

¹⁹ (1985) 160 CLR 583; his Honour's reasons in this regard were adopted in *Baumgartner v Baumgartner* (1987) 164 CLR 137 and *Barns v Barns* (2003) 214 CLR 169 at [81], and endorsed in *Yeoman's Row Management Limited v Cobbe* [2008] 1 WLR 1752, [2008] UKHL 55 at [17], and are widely cited as

the express trust, as much as the constructive trust, “was essentially remedial in its origins ... imposed ... to enforce principle,” and that “the constructive trust is both an institution and a remedy of the law of equity. ... Viewed in its modern context, the constructive trust can properly be described as a remedial institution which equity imposes regardless of actual or presumed agreement or intention (and subsequently protects) to preclude the retention or assertion of beneficial ownership of property to the extent that such retention or assertion would be contrary to equitable principle. ... [E]quity regards as done that which ought to be done ... [and] there does not need to have been a curial declaration or order before equity will recognize the prior existence of a constructive trust.”²⁰

18. His Honour went on to note that “the principal operation of the constructive trust in the law of this country has been in the area of breach of fiduciary duty” but that “there is no reason to deny the availability of the constructive trust in any case where some principle of the law of equity calls for the imposition upon the legal owner of property, regardless of actual or presumed agreement or intention, of the obligation to hold or apply the property for the benefit of another.”²¹

19. The Appellant was obliged, both by virtue of his fiduciary duty to the company and the correlative obligation not to take any profit from the opportunity pursued by the company at its expense, and by virtue of his express acknowledgement that he would “rebate” to the company all benefits from the opportunity, to “hold or apply ... for the benefit of” the company all gains and benefits that came to him in connection with the golf course venture. Equity regarded him as so bound, to do what ought to be done, and as subject to at least a constructive trust, in favour of the company, of all his interest in and any gains that flowed to him from the venture. He was not entitled to retain for his own benefit any gain that came to him, however it accrued to him; and in particular was not entitled to retain the award of equitable compensation into which the interest in the venture had been effectively converted by the misdeeds of the co-venturers.

authoritative, see for example *Parsons v McBain* (2001) 109 FCR 120 at [13], *Lloyd v Tedesco* (2002) 25 WAR 360 at [7], *LHK Nominees v Kenworthy* (2002) 26 WAR 517 at [195], *Sei Mei Huen v Official Receiver* [(2008) 248 ALR 1 at [67], and at first instance *Kambouris v Tahmazis* [2012] VSC 432 at [14], *Speers Point RSL Club Ltd v The Returned and Services League of Australia (NSW Branch)* [2012] NSWSC 1011 at [184], *Layton v Miller* [2009] QSC 377 at [24], *Jones v Southall & Bourke Pty Ltd* [2004] FCA 539 at [56], *Ford & Marshall v Marshall* [2003] WASC 116 at [62].

²⁰ (1985) 160 CLR 583, 613, 614

²¹ (1985) 160 CLR 583, 616-7

(d) *The litigation agreement*

20. By an agreement²² made shortly before the commencement of the Supreme Court proceedings against the defendants, the Appellant and his fellow directors confirmed to Disctronics their agreement that if the "equity" required was less than \$1.5m and Disctronics chose to become the end-purchaser (conditions recited to have been satisfied on 4 August 1999) they "would rebate to [Disctronics] any entitlement (whether on revenue or capital account) they may have as a consequence of their participation in the joint venture," and agreed with the company that in consideration of its agreement to pay all costs of the proceedings, they would each "assign absolutely" to the company "any award of damages (whether on revenue or capital account) ... made in their favour as a consequence of their participation in the joint venture" and would "diligently prosecute the proceedings."

21. The agreement operated both as a confirmation of the directors' obligations to account to the company for any benefit accruing from the directors' rights and interest in the venture²³ and as an assignment of the right to any damages, whether capital or income of the venture, to Disctronics. Anything which flowed to the directors, including the Appellant, from the venture and the imminent proceedings flowed to them for the benefit of, and as trustees for, the company.

(e) *The tax consequences of the trust imposed on the Appellant*

22. Speaking of a resulting trust, Dixon J said "If liability for tax depends upon the existence or non-existence of a trust, the occasion seems to demand the application of the rules by which the determination of such questions is governed in Courts of equity."²⁴ The reasoning applies equally to a constructive trust imposed on a fiduciary.

23. The Appellant derived the gain comprising the award of equitable compensation not for his own use and benefit, but as trustee for Disctronics. It was not his assessable income,

²² Ex SJH-4, set out in the reasons of Jessup J at [52]

²³ And so as a declaration of trust: "No special words are necessary to create a trust" *Registrar of the Accident Compensation Tribunal v FC of T* (1993) 178 CLR 145, 165-6

²⁴ *Stewart Dawson and Co (Vic) Pty Ltd v FC of T* (1933) 48 CLR 683, 691; followed and applied in *Danmark Pty Ltd and Forestwood Pty Ltd v FC of T* (1944) 7 ATD 333, 360; 2 AITR 517, 564 (Williams J) and in *Macfarlane v FC of T* (1986) 13 FCR 356, 357 (Beaumont J: "The [Income Tax Assessment] Act, in my view, takes the taxpayer's income as it finds it – that is to say, subject to the general law in all its aspects. This will pick up the position at law and in equity, modified by any relevant legislation, including the provisions of the Act itself.") See also *Executor Trustee & Agency Co of South Australia Ltd v DFC of T* (1939) 62 CLR 545 at 561, 572.

but part of the net income of a trust estate, on which he personally was not liable to tax.²⁵

(f) The errors in the reasons of the Full Court

24. The principles governing the fiduciary duties of a director to his company were not in
5 contest before, and were accepted by, the Full Court: at [4-5].²⁶ That the circumstances
attracted those principles was also accepted: the directors intended "to make the
opportunity to purchase the golf course available to Disctronics. They made their
decision so to proceed in what were plainly the interests of Disctronics rather than of
themselves."²⁷

10 25. The Full Court held the obligations of the Appellant not to extend to one to account to
the company for the award received in satisfaction of the violated rights under the golf
course joint venture on two grounds:

(a) that the Appellant was not "in breach of his fiduciary duty owed to Disctronics,"²⁸
so that no constructive trust arose in favour of the company, and

15 (b) that the Appellant's "obligation to Disctronics only involved [him] using his
reasonable endeavours to have it become purchaser, which obligation he
discharged"²⁹ and "Disctronics could have had no expectation that Mr Howard
would work towards a certain price being accepted. Disctronics' only interest
arose when and if the equity required was less than \$1.5 million."³⁰

20 The Appellant submits that in each respect the Full Court was in error.

(i) There is no requirement of breach of fiduciary duty

26. A constructive trust is recognised by Equity, "regardless of actual or presumed
agreement or intention ... to preclude the retention or assertion of beneficial ownership
of property to the extent that such retention or assertion would be contrary to equitable

²⁵ Income Tax Assessment Act 1936, s 96, footnote [3] above.

²⁶ (2012) 206 FCR 329, 331

²⁷ (2012) 206 FCR 329, 334-5 [11-12], adopting Jessup J at [77]. The Court recorded at [3] that "The principles of law, and the factual context in which they are to be applied, are not in dispute."

²⁸ (2012) 206 FCR 329, 331 [3], 334 [7], 337 [20]

²⁹ (2012) 206 FCR 329, 336 [18]

³⁰ (2012) 206 FCR 329, 337 [19]

principle.”³¹ Where a person in a fiduciary position, such as a director of a company, holds rights which cannot be asserted against the interests of the beneficiary but only for its benefit, equity recognises – not simply as remedy but as institution in the sense of a subsisting recognised relationship – that the rights are held, if not on express trust, then on constructive trust for the beneficiary.³² The trust relationship extends not only to the rights but also to the fruit of the rights: so if the rights mature into a holding of property, or a receipt of money, that into which they mature is also subjected to the trust obligations.

27. Where as here such rights subsist and are vested in the fiduciary, the fiduciary from the time the potential for conflict between duty and interest arises holds the benefit of those rights not for his or her own benefit but on constructive trust for the beneficiary. The entitlement of the beneficiary to the benefit arising from the rights is not a consequence of equity’s intervention to hold the fiduciary accountable: it is the reason why equity intervenes to impose the constructive trust.

28. While he observed his fiduciary duties to Disctronics in respect of the KLGVC venture, the Appellant held his interest in the venture on trust for the company, and the income which accrued to him from the venture – not from its conduct, but from recovery from those by whom it was frustrated – accrued to him not for his own benefit, but for the benefit of the company. In holding that he committed no breach of his fiduciary duties and that “accordingly” the amount was not received as trustee for the company,³³ the Full Court was fundamentally in error, and the conclusion their Honours reached, that he was personally assessable on the gain, was wrong.

(ii) *The scope of the Appellant’s fiduciary duty*

29. The Full Court critically limited its delineation of the Appellant’s fiduciary duty to Disctronics by proceeding on the premises that the Appellant’s “obligation to Disctronics only involved [him] using his reasonable endeavours to have it become purchaser” (viz, “accepted as equity participant by the other joint venturers”) “which obligation he

³¹ *Muschinski v Dodds* (1985) 160 CLR 583, 614

³² The case where the trust is imposed on the fiduciary in respect of a gain which arises from no existing property (such as *Phipps v Boardman* [1967] 2 AC 46), or is imposed on a participant in a dishonest design on the part of a trustee or fiduciary (*Barnes v Addy* (1874) 9 Ch App 244 at 251–2), is not presently relevant; in the present case there were enforceable rights arising under the joint venture agreement.

³³ The Court’s conclusion and essential reasoning, 206 FCR 329, 337 [20-21].

discharged,”³⁴ and that “Disctronics could have had no expectation that [the Appellant] would work towards a certain price being accepted. Disctronics’ only interest arose when and if the equity required was less than \$1.5 million.”³⁵

30. This formulation of the directors’ fiduciary obligations to the company ignores the
5 relationship between the sale price to Disctronics or any other end-purchaser (which determined the amount of “equity” contribution) and the day 1 profit to the venturers, including both the defendants and the directors. Any increase in the equity contribution directly increased the profit to the venturers. On the reasoning of the Full Court, by setting (or acquiescing in) an equity contribution exceeding \$1.5 million, the directors
10 could have absolved themselves of any fiduciary duty in relation to the project, and secured for themselves (at the company’s expense) the benefit of the profit. The reasoning is wrong: a clearer case of conflict between duty to the company and personal interest is difficult to imagine. It was the duty of the directors to endeavour to secure a sale price and equity contribution which was within the reach of Disctronics; it was contrary to that duty to accede to a price which profited them and denied
15 Disctronics the investment opportunity it sought. When the investment was lost to Disctronics, it was no simple case of an objective condition as to the amount of equity needed not being met: the defendants had frustrated the venture by wrongfully procuring a sale of the golf course to a company in which they had an interest (and doing so at a price within Disctronics’ budget³⁶).

31. When the defendants misappropriated the opportunity presented by the joint venture it was within the scope of the directors’ duties³⁷ to take what action they could, in their own names as well as that of the company, to recover the lost investment or its value.³⁸ What came to them as a result of the action taken came to them in direct consequence
25 of their performance of their office and flowed to them directly from, and in substitution for the profit from, the venture which was the subject of their fiduciary duties, and was

³⁴ 206 FCR 329, 336 [18]

³⁵ 206 FCR 329, 337 [19]

³⁶ The company owned by the defendants and the equity contributor they introduced purchased the golf course for effectively the same price as Disctronics’ nominee, Corwin Grange Pty Ltd, offered to the vendor (Jessup J at 86 ATR 753, 774 [50]).

³⁷ Those duties were to “safeguard and further the interests of the company”, *Furs Ltd v Tomkies* (1936) 54 CLR 583, 592, and to do so with due care and diligence, Corporations Law s 232.

³⁸ The relief sought was a declaration that the defendants held the golf course on trust for the plaintiffs (including Disctronics), or alternatively damages, equitable compensation or an account of profits: *Disctronics Ltd & Ors v Edmonds & Ors* [2002] VSC 454 at [103]

impressed with the same obligations to account to Disctronics as would have been any other gain arising from the venture.

(g) *The Respondent's notice of contention*

5 32. The litigation agreement operated as a confirmation of the circumstances giving rise to a constructive trust in favour of Disctronics over the interest of the directors in the KLGK venture and, so far as was necessary, as an assignment or "rebating" to the company of all their entitlements,³⁹ "any entitlement (whether on revenue or capital account) they may have as a consequence of their participation in the joint venture." What vested in the company was, not merely any future income, but the beneficial interest in all rights giving rise to any amount flowing from the venture. Consequently s 102B of the 1936 Act, relied on by the Respondent in his notice of contention, has no present operation: that section applies only to a transfer of a right to receive income from property where the interest in property from which the right arose is owned and retained by the transferor.⁴⁰

15 33. *Booth v FC of T*,⁴¹ cited by the Full Court,⁴² likewise has no bearing on the position of the Appellant. That case concerned an assignment of a share in the rental income only, not an assignment of the right or property from which the income accrued.⁴³

(h) *Costs of the Supreme Court proceedings*

20 34. If contrary to the foregoing submissions the Court would otherwise dismiss the appeal, the amount assessable should be reduced by the Appellant's share of the legal costs incurred in prosecuting the Supreme Court proceedings. The gain made by the Appellant was diminished by the costs incurred in securing the equitable compensation, and only the net gain could be assessable to him.⁴⁴ Insofar as the gross compensation amount is assessable income under the Act, the costs (of which the Respondent's share

³⁹ The language of the meetings of 13-14 July 1999: Jessup J at 86 ATR 753, 765 [25]

⁴⁰ Section 102B(1), s 102B(2)(b).

⁴¹ (1987) 164 CLR 159, 167 (Mason CJ)

⁴² (2012) 206 FCR 329, 334 [9]

⁴³ Mason CJ expressly draws this distinction at 167 in discussing *FC of T v Everett* (1980) 143 CLR 440, *Norman v FC of T* (1963) 109 CLR 9 and *Shepherd v FC of T* (1965) 113 CLR 385

⁴⁴ The compensation amount was paid directly to Disctronics (Jessup J, 86 ATR 753 at 757 [2]); the costs were recouped from that payment.

\$301,689⁴⁴) were clearly incurred in gaining it, and are as much of a revenue nature as is the receipt.

Part VII – Legislation

5 35. The relevant statutory provisions as in force in the year of income (and as presently in force, unchanged) are sections 6, 96 and 102B of the Income Tax Assessment Act 1936, attached as Appendix A.

Part VIII – Orders sought

36. The Appellant seeks the following orders:

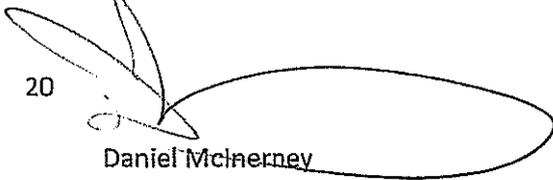
(a) Appeal allowed with costs.

10 (b) Set aside the orders of the Full Court of the Federal Court of Australia made 28 November 2012 in proceeding VID 78 of 2012, and in place thereof order that the appeal to that Court be dismissed with costs.

Part IX – Estimate

15 37. The estimate of hours required for the presentation of the appellant’s oral argument (including reply) is 2.5 hours.

Dated: 13 December 2013

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⁴⁴ The costs incurred by the plaintiffs were \$1,506,756 less costs recovered of \$300,000, net \$1,206,756: Howard 27.5.2010 at [7] and Ex SJH13, AB xx and xx. Discronics’ payment discharged the obligations of the plaintiffs.

BETWEEN:

STEPHEN JAMES HOWARD
Appellant

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and

COMMISSIONER OF TAXATION OF THE COMMONWEALTH OF AUSTRALIA
Respondent

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APPENDIX A TO APPELLANT'S SUBMISSIONS

Income Tax Assessment Act 1936

6 Interpretation

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(1) In this Act, unless the contrary intention appears:

trustee in addition to every person appointed or constituted trustee by act of parties, by order, or declaration of a court, or by operation of law, includes:

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(a) an executor or administrator, guardian, committee, receiver, or liquidator; and

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(b) every person having or taking upon himself the administration or control of income affected by any express or implied trust, or acting in any fiduciary capacity, or having the possession, control or management of the income of a person under any legal or other disability;

96 Trustees

Except as provided in this Act, a trustee shall not be liable as trustee to pay income tax upon the income of the trust estate.

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102B Certain income transferred for short periods to be included in assessable income of transferor

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(1) Subject to this section, where a right to receive income from property is transferred, otherwise than by a will or codicil, by a person (in this subsection referred to as the *transferor*) to an associate of the transferor for a period that will, or may for any reason other than the death of any person or the associate becoming under a legal disability, terminate before the prescribed date, any income that:

- (a) is derived from the property;
- (b) is paid to, or applied or accumulated for the benefit of:
 - (i) the associate; or
 - (ii) any other associate of the transferor to whom a right to receive income from the property has been transferred (whether by the first-mentioned associate or any other person) after the first-mentioned transfer; and
- (c) would, if the first-mentioned transfer had not been made, have been included in the assessable income of the transferor;

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shall be treated for the purposes of this Act as if the first-mentioned transfer had not been made.

(2) Subsection (1) (other than subparagraph (1)(b)(ii)) does not apply in relation to a transfer of a right to receive income from property where:

- (a) ...
- (b) the right arose from the ownership by the transferor of an interest in the property and, before or at the time of the first-mentioned transfer, the transferor transferred that interest to the transferee or another person; or
- (c)

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