matter of general law, a vendor's right to rescind a conveyance for fraud has been held capable of affecting third parties: see generally Meagher, Gummow & Lehane, *Equity: Doctrine & Remedies* (3rd ed.), at paras. 429–435. Finally, such an equity will undoubtedly be treated as a proprietary interest for the purposes of the new land registration legislation: see clause 114 of the Land Registration Bill, which restates the present law for the avoidance of doubt, and paras. 5.32–5.36 of *Land Registration for the Twenty-First Century* (Law Com No. 271).

The arguments advanced by Halifax would also produce a startlingly unattractive distinction between cases where co-owners are defrauded of their legal title to land, and cases where a sole beneficial owner is similarly defrauded. If Mrs. Collings had originally held legal title to the house as sole beneficial owner, she would not have had a separate equitable interest in the house. If Lee had then defrauded her of her legal title, she would have acquired an equity to rescind the transaction, but no more. If the arguments advanced on behalf of Halifax were correct, that equity could not have bound it. In other words, if those arguments were correct, Mrs. Collings only succeeded because she happened to be co-owner of the house at the time of Lee's fraud: as joint owners of the legal estate in their house, Mr. and Mrs. Collings necessarily held it on trust, and as beneficiaries of that trust, they had a full equitable interest in the house, which could and did bind a mortgagee. The simple solution to this anomaly is to recognise that a mere equity can bind third parties. The Land Registration Bill adopts this solution, as noted above. A more radical solution would be to assimilate the equity to rescind and the trust raised in favour of a defrauded party, though this might be much less radical than it appears at first sight: in the circumstances where an equity to rescind has already been accorded the status of a proprietary right, there is not much to distinguish it from a beneficial interest (see "Dispositions Involving Fiduciaries: The Equity to Rescind and the Resulting Trust" in *Restitution and Equity* (LLP, 2000, eds. Birks and Rose)).

RICHARD NOLAN

FIDUCIARY LIABILITY AND CONTRIBUTION TO LOSS

HAVING made a successful takeover bid for Western United, Kia Ora found that it had paid $25.7m in cash and issued 67.9m $1 shares in return for Western United shares worth only $6.4m. Kia Ora successfully sued several former directors. The High Court of

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Australia's decision in *Pilmer* v. *Duke Group Ltd. (in liq.)* (2001) 180 A.L.R. 249 concerns aspects of the liability of Kia Ora's accountants, Nelson Wheeler, for providing a report stating that the price proposed for the Western United shares was fair and reasonable. The report was prepared incompetently and Nelson Wheeler were held liable by the Full Court of the Supreme Court of South Australia for breach of contract, negligence and breach of fiduciary duty. The High Court allowed an appeal by Nelson Wheeler.

The judgments raise a number of interesting issues, including whether Kia Ora's share issue was a compensable loss. This note focuses on issues raised by the claim that Nelson Wheeler was liable for breach of fiduciary duty.

McHugh, Gummow, Hayne and Callinan JJ. considered there was no fiduciary relationship between Nelson Wheeler and Kia Ora. Kirby J. disagreed. A couple of issues seem to have been important to the majority's conclusion. Although Kia Ora was relying on Nelson Wheeler to prepare the report competently, Nelson Wheeler "were not guiding or influencing Kia Ora in the sense discussed in the cases dealing with fiduciary relationships" (p. 271; para. 75). This seems to hint at fiduciary duties arising where "advice" is provided, as distinct perhaps from mere "information". That distinction was raised in *South Australia Asset Management Corporation* v. *York Montague Ltd* [1997] A.C. 191, 214 regarding causation in professional negligence cases and has been criticised in that context as unworkable (O'Sullivan, [1997] C.L.J. 19, 20–21). The issue of whether the basic undertaking is to provide advice or information does not determine whether it must be provided subject to a fiduciary duty of loyalty. The majority's references to advice being provided in a fiduciary "sense" suggest recognition of this, but do little to help understand what "sense" is meant.

Also relevant for the majority was the proposition in *Breen* v. *Williams* (1996) 186 C.L.R. 71, 113 that fiduciary duties are proscriptive rather than prescriptive. This merits caution. First, no authority was provided for it in *Breen* or *Pilmer*; indeed, it appears to conflict with the express references to a (positive) fiduciary duty of disclosure in *Daly* v. *The Sydney Stock Exchange Ltd.* (1986) 160 C.L.R. 371, 377 & 385. The proscriptive/prescriptive dichotomy appears to have originated in Finn's academic writing on fiduciary duties (Finn, "The Fiduciary Principle" in Youdan (ed.), *Equity, Fiduciaries and Trusts* (1989), pp. 1, 28–29) but is gaining support both in Australia and England (*Attorney-General* v. *Blake* [1998] Ch. 439, 455—not discussed on appeal: [2001] 1 A.C. 268; Nolan, (1997) 113 L.Q.R. 220; Abadee, (2001) 29 A.B.L.R. 33). Secondly,

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its application is not as straightforward as might be supposed: a clear distinction between proscriptive and prescriptive duties may exist in some cases, but many situations could potentially be classified as involving duties of either kind. It is not clear that the point was necessary to the decision in either *Breen* or *Pilmer*. Nor is it clear that *Breen* precluded the finding of fiduciary liability in *Pilmer*, as Kirby J.'s (dissenting) view of the fiduciary duty owed by Nelson Wheeler in *Pilmer* was clearly proscriptive: they were obliged not to accept the retainer (p. 285; paras. 131–132). Finally, even Finn accepts that duties of disclosure can properly exist in fiduciary law where fiduciary loyalty is at issue (Finn, *op. cit.*, p. 25). The dichotomy can provide a useful guide in determining whether a particular duty is fiduciary as most, but not necessarily all, fiduciary duties are proscriptive. However, it is dangerous to treat it as a talisman: it does not identify the reason for the existence (and hence the nature) of fiduciary duties. Many other duties are proscriptive as well—it is the *reasons* for the proscription which identify the differences between duties and which require attention.

Pilmer also considers the availability of "contributory fault" as a response to claims for breach of fiduciary duty. In *Nationwide Building Society* v. *Balmer Radmore (Introductory Sections)* [1999] Lloyd's Rep. P.N. 241, 281, Blackburne J. held contributory fault unavailable where the breach of fiduciary duty involved conscious disloyalty. This leaves undecided its availability where the fiduciary breach did not involve intentional or conscious wrongdoing.

The majority did not need to consider this issue, having already concluded that there was no fiduciary duty or breach, although they made it clear that they thought *Astley* v. *Austrust Ltd.* (1999) 197 C.L.R. 1 (holding contributory negligence unavailable in contract claims) indicated severe conceptual difficulties with the argument that it should apply to breach of fiduciary duty. Kirby J. considered the issue more closely and also concluded that contributory fault is unavailable in the fiduciary context. The issue, however, remains unsettled for other jurisdictions. The prevailing English view on the application of the contributory negligence legislation to contract claims differs from that adopted in *Astley* (*Forsikringsaktieselskapet Vesta* v. *Butcher* [1989] A.C. 852), but even if one accepts *Astley*'s statutory interpretation regarding the availability of contributory negligence in contract claims, the majority decision in *Astley* explains neither (a) why equity should not develop its rules by analogy with the statutes (*Day* v. *Mead* [1987] 2 N.Z.L.R. 443, 451), nor (b) why a principal's contribution to her own loss is not reflected in equity's approach to causation.

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Blackburne J. noted in *Balmer Radmore* that his conclusion against contributory fault did not render the principal's conduct irrelevant as there may still be issues of remoteness or causation to contend with. Contributory negligence does not require the plaintiff to be in breach of a duty of care owed to the defendant; rather, it is concerned with issues of causation: was the plaintiff's failure to take reasonable care of her own interests a legally contributing cause in bringing about the loss suffered? Causation is not a matter of pure logic; rather, it involves policy judgments concerning the appropriate allocation of legal responsibility for loss suffered following certain conduct. It therefore depends heavily on the policy reasons underlying the rules in respect of which responsibility is being allocated.

As the majority had not found a breach of fiduciary duty in *Pilmer*, their judgment lacks that sort of analysis. Kirby J. commented that equity has not hitherto held a principal bound to protect himself against his fiduciary and that, traditionally, more is required of a fiduciary than merely taking reasonable care. This allows the principal to act quite unreasonably and simply rely on the fiduciary not to harm his interests. Other analyses are available. In *Canson Enterprises Ltd.* v. *Boughton & Co.* (1991) 85 D.L.R. (4th) 129, 161, McLachlin J. accepted that the high level of fiduciary duty justifies adopting a measure of compensation which ensures that fiduciaries are "kept up to their duty", but also suggested that if the principal acts wholly unreasonably then the losses stemming from that conduct will not be recoverable from the fiduciary. This is not necessarily inconsistent with the high standards expected of fiduciaries, especially when it is recalled that fiduciary law will provide allowances for work done in breach of fiduciary duty (*Boardman* v. *Phipps* [1967] 2 A.C. 46). The relevant policy issues require closer consideration.

MATTHEW D.J. CONAGLEN

CONSTITUTION OF TRUSTS—A NOVEL POINT

THOUGH it is unusual for a point of law to be decided by distinguishing a case apparently regarded as virtually having the authority of holy writ, that occurred in *T. Choithram International SA* v. *Pagarani* [2001] 1 W.L.R. 1 (P.C.).

It is trite law to state that an express trust is constituted in either of two ways, that is to say, by a settlor's transferring title to property to trustees to be held by them on trust for an indicated

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