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Breach of fiduciary duties by a solicitor- What is an appropriate equitable remedy? An analysis of Maguire and Tansey v Makaronis and Makaronis

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Breach of Fiduciary Duties by a Solicitor- What is an Appropriate Equitable Remedy? An Analysis of *Maguire and Tansey v Makaronis and Makaronis*

Judgment of the Supreme Court of Victoria (Appeal Division), 17 August 1995

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Equity - fiduciary relationship - solicitors and clients - mortgage in favour of solicitors - breach of fiduciary duty by non-trustee fiduciary - causation - restitution - setting aside transaction on terms

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Headings in this case note:

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1. Introduction

"I venture to assert that equity is cautious about absolutes, and perhaps I may add, the advice 'softly, softly catchee monkey' has merit."

{1}These were the concluding remarks of the Honourable Sir Robert Megarry in his paper entitled: "*Investing Pension Funds: The Mineworkers Case*" (T G Youdan (ed), Equity, Fiduciaries and Trusts, Carswell, 1989), a paper presented at: "*The International Symposium on Trusts, Equity and Fiduciary Relationships*" in Canada in 1988 (held at the Faculty of Law of the University of Victoria).

{2} The following analysis of the recent decision of *Maguire and Tansey v Makaronis and Makaronis (Maguire and Tansey's case)*, a judgment of the Full Court of the Supreme Court of Victoria (delivered on 17 August 1995), exemplifies another factual scenario where it is important to bear in mind that equity is neither an inflexible nor an amorphous institution. While one could hardly quarrel with the proposition that equity is not concerned with "palm-tree" justice, one would surely hesitate to say that equity is "absolute" about any equitable principle. The nature of equity is such that it would always bear in mind the facts and circumstances of each case before it will grant what it considers to be an "equitable" remedy in the circumstances of the case.

{3} In *Maguire and Tansey's case*, the Full Court of the Victorian Supreme Court was asked to grant an order for rescission of a mortgage, granted in favour of the applicant solicitors, on the ground of breach of fiduciary duty. The difficulty with such an order was that, unless it was ordered on terms of repayment of the loan, the respondents would gain a windfall. On the other hand, if rescission was ordered on terms, it would have the effect of indirectly enforcing the very transaction that was sought to be set aside. Here lies the dilemma.

{4} What then, is the extent of the court's discretion in granting the remedy of rescission? It is said that equity would not insist upon a complete restitution of the parties to the *status quo ante* before rescission is ordered, it is sufficient if equity could do what was "practically just" between the parties and, in so doing, restore them substantially to their original position (*Alati v Kruger* (1955) 94 CLR 216 at pp223-4). What is meant by "practically just"?

{5} In addition, the writer will discuss briefly another important issue raised by the facts of *Maguire and Tansey's case* - where does the concept of causation fit in when there is a breach of an equitable principle? In discussing this issue, it will be necessary to consider the status, in Australia, of the test expounded by the Privy Council in *Brickenden v London Loan and Savings Co* [1934] 3 DLR 465.

2. The Facts

{6} The unusual facts of *Maguire and Tansey's case* can be summarised briefly. John Maguire and David Tansey, the appellants, were solicitors practising in partnership. They acted for the respondents, Mr and Mrs Makaronis, in the purchase of a business and freehold of a poultry farm. These two separate contracts were initially subject to finance. Furthermore, each contract was subject to the completion of the other. The contract for the purchase of the freehold of the farm was also conditional upon the respondents entering into an unconditional contract of sale of their two properties. The contract for the purchase of the business was conditional upon the respondents obtaining a licence from the Licensing Committee of the Victorian Egg Marketing Board, pursuant to s.17 of the *Egg Industry Stabilisation Act* 1983, for the issue of a licence to keep hens on the land. (The appellants' firm also acted for the vendor. This fact was not disclosed to the respondents but it does not seem that the case turned on this point.)

{7} The contracts were subsequently varied to remove the condition for finance and to fix a completion date. As the completion date drew near, the respondents had difficulties in obtaining finance but, after some vicissitudes, they finally settled the purchases with the aid of a bridging finance of $250,000. This bridging finance was arranged by the appellants who

had a continuing arrangement with the Commonwealth Bank for the loan of short-term finance to certain recommended clients. The precise character of this loan transaction is unclear (neither the trial judge nor the Full Court of the Supreme Court gave it a definite characterisation - perhaps because not all the documentation was before the court) but the following facts were found by the trial judge, Ashley J, and accepted by the Full Court:

1. the loan was from the bank to the respondents.
2. the appellants acted as agents for the bank in arranging the loan but they did not act for the bank in a legal capacity in arranging these loans.
3. the loan was secured with an "interest only" first mortgage of the respondents' home and certain other entitlements. The appellants' name appears on the mortgage documents as mortgagees. They were, in fact, "nominee" mortgagees for the bank. The appellants were in a position of mortgagee and mortgagor with the respondents.
4. the interests payable on the loan were paid to the bank, not to the appellants.
5. the appellants guaranteed the repayment of the loan to the bank who looked to the appellants for its repayment.
6. the respondents paid a procuration fee to the appellants of 1% which is a charge authorised under the Fourth Schedule of the Solicitors' Remuneration Order.

{8} The appellants explained the above facts to the respondents except for the fact relating to their acting as the bank's "nominee" mortgagee. The trial judge found that the appellants would enforce the mortgage against the respondents in the event that the bank enforced the guarantee against the appellants.

{9} The trial judge found that, although the respondents were Greek immigrants and thus could not speak fluent English, they had sufficient understanding of the English language. Mrs Makaronis "could understand legal documents relating to property transactions, when their contents were explained in English, so long as the explanation was given in relatively uncomplicated language." (AB24). Indeed, his Honour was "convinced that Mrs Makaronis, particularly, considered herself to be shrewd in business" (AB53) and that she would not have been dissuaded from proceeding with the bridging finance even had she been advised of the fact that the appellants were to be their mortgagee and that they should seek independent legal advice.

{10} The respondents mismanaged the business and quickly lost money. They did not meet the first interest repayment. Upon default, the appellants sought possession of the secured property. The respondents counterclaimed against the appellants for breach of fiduciary duty and sought rescission of the mortgage and all other supporting documentation.

3. The Proceedings to Date

{11} In spite of the fact that the evidence of Mr and Mrs Makaronis was, respectively, "rambling" and "unreliable" (AB27), the trial judge found in favour of the respondents. His Honour was satisfied that the appellants did not inform the respondents of the fact that they, the appellants, were to be the Commonwealth Bank's "nominee" mortgagee and thus, by entering into the bridging finance transaction, they would be in a mortgagee/mortgagor relationship. He was also satisfied that the appellants did not counsel the respondents to seek independent legal advice.

{12} His Honour dismissed the application for possession of the property the subject of the mortgage. He set aside the mortgage and all supporting documentation on the ground that Maguire and Tansey had breached their fiduciary duties as solicitors. Their failure to disclose the potential conflict to their clients was a breach of their fiduciary duty. There was a conflict, or at least a potential conflict, of personal interest and their fiduciary duty.

{13} On appeal to the Full Court of the Supreme Court of Victoria, the court was unanimous that the conduct of the appellants constituted a breach of fiduciary duty. Opinions differed, however, on the appropriate remedy to be ordered in the circumstances. Brooking JA (dissenting) held that the order of rescission should be on terms that the respondents repaid the loan to the bank. To order otherwise would be to allow the respondents a windfall of $250,000. Nathan and Smith JJ were of the view that an order of rescission on terms of repayment would be tantamount to an enforcement of the mortgage.

{14} The appeal was therefore dismissed.

{15} Special leave to appeal from the decision of the Full Court has been granted to the appellants. The case is to be heard before the High Court on 23 April 1996.

4. The Fiduciary Principle

{16} As solicitors to the respondents, the appellants clearly owed a fiduciary duty to the respondents to ensure that they act in the best interests of their clients and they do not allow their personal interest to conflict with that of their clients (*Law Society of NSW v Harvey* [1976] 2 NSWLR 154). The question is whether there was a breach of fiduciary duty on the facts.

{17} Both the trial judge and the Full Court of the Supreme Court found that the solicitors were in breach of their fiduciary duty because they had failed to disclose to the respondents the fact that they would be the respondents' mortgagee by virtue of the loan transaction. Furthermore, the appellants failed to advise their clients that they ought to seek independent legal advice in the circumstances. This finding of breach of fiduciary duty is despite the fact that:

1. the appellants were trying to help the respondents in obtaining the finance which they needed in order to fulfil their obligations under the contracts for the purchase of the business and the poultry farm. The respondents were also anxious to buy the business and the farm.
2. the terms of the mortgage were on commercial terms and the respondents were not disadvantaged by the transaction.
3. the respondents would have entered into the transaction even had the appellants disclosed the fact that they would be the bank's "nominee" mortgagee.
4. the interests repayable on the loan were paid to the Commonwealth Bank, and not to the appellants. Apart from the procuration fee and the benefit of legal fees for advising on the purchase transaction, the appellants did not gain any other benefit from the respondents.

{18} The finding that there had been a breach of fiduciary duty must be, with respect, correct. The fiduciary principle is a draconian principle. Good faith, or lack of bad faith, on the part of the fiduciaries is irrelevant to their liability (*Phipps v Boardman* [1967] 2 AC 46). The appellants could avoid liability only if they had fully disclosed the relevant facts giving rise to the conflict or potential conflict of interest and duty to their clients and had duly obtained their informed consent (*DPC Estates Pty Ltd v Grey and Consul Development Pty Ltd* [1974] 1 NSWLR 443; *Chan v Zacharia* (1984) 154 CLR 178).

5. The Court's Discretion in Ordering Rescission

{19} In view of the fact that the appellants were in breach of their fiduciary duty, the respondents had a right to seek an order for the rescission of the mortgage and other supporting documentation.

{20} Rescission has the effect of annulling the contract which is vitiated by, for instance, misrepresentation or, in this case, breach of fiduciary duty. The aggrieved party is basically seeking to be restored to the pre-contract position on the basis that he or she would not have agreed to enter into the contract but for the misrepresentation, undue influence or other vitiating factors that had allegedly occurred.

(i) Executed Contracts and Complete Restitution

{21} Where the contract is executory, an order of rescission of the contract would not create much difficulty in terms of restoring the parties to their pre-contract position since neither party has yet performed their respective obligations under the contract. After rescission, it would be as if the contract had never been made.

{22} The position is, however, different where the contract is wholly or partly executed. Since one or both (assuming the contract is a bi-partite contract) parties have already performed or partly performed their contractual obligations, the common law has required that, before it orders rescission and thus treats the contract as never made between the parties, the aggrieved party must show that he or she is willing and able to satisfy the *restitutio in integrum* principle (*A H McDonald & Co Pty Ltd v Wells* (1931) 45 CLR 506) - that is, to revest in the pre-contract owner property passed or vested by reason of the contract so that the parties are brought back to their pre-contractual position. Where money has been paid pursuant to the contract, the party who has received payment will be liable, after rescission, to make pecuniary restitution. This *restitutio in integrum* requirement, according to Crompton J in *Clarke v Dickson* ((1858) E B & E 148, at pp 154-5; 120 ER 463 at p 466) is "founded on the plainest principles of justice ... a party can never repudiate a contract after, by his own act, it has become out of his power to restore the parties to their original condition".

{23} The point to remember is that, until the contract is rescinded, the contract is valid. It is a voidable contract and, until rescission, the obligations under the contract must be performed. It is therefore "plainest" equity that the party who is seeking to avoid the contract must be prepared to restore the parties to their pre-contract position. If this is not the case, the party seeking rescission would be in a position to wait until the other side has wholly or partly performed the contract before seeking rescission so as "to have his cake and eat it, too".

(ii) Substantial Restitution and "Practical Justice"

{24} Equity has, however, accepted that the notion of complete restitution required by the common law may create harsh results in that it may be impossible, in some circumstances, to bring the parties to the exact position they were in prior to the contract. Adopting a more flexible approach, equity has allowed rescission in circumstances where the parties can be restored *substantially* to their pre-contractual position (*Alati v Kruger* (1955) 94 CLR 216, at pp223-4.). Equity does not require that the *status quo ante* be restored in all respects, but rather that "practical justice" be done between the parties and, in so doing, restore the parties substantially to their original position. It is in this context that the equitable maxim: "He who seeks equity must do equity" is emphatically applied (see: Story, *Commentaries on Equity Jurisprudence, as Administered in England and America* (12th ed, 1877), vol 1 at para 693).

{25} In the recent High Court decision of *Vadasz v Pioneer Concrete (SA) Pty Ltd* ((1995) 69 ALJR 678), the court was asked to assess what is meant by “practical justice” between the parties. In a joint judgment, the High Court said that:

“If [a] complete and unconditional relief is to be granted, it must be on some basis other than mere entitlement to practical restoration of the status quo upon rescission or “disaffirmance” of a contract induced by fraud. The only basis that comes to mind is that equity’s general jurisdiction, in setting aside contracts and other dealings on equitable grounds, to ensure the observance of the requirements of good conscience and practical justice (ibid at 683).”

{26} It is unclear, with respect, what is meant by "the observance of good conscience". The writer submits that the High Court was not referring to an amorphous notion of "palm-tree" justice. While an element of value judgment in borderline cases is unlikely to be excluded, what is "good conscience" will involve "the ordinary process of legal reasoning by induction and deduction from settled rules and decided cases" (*The Commonwealth v Verwayen* (1990) 170 CLR 394 at p 441). It is submitted that the court would look at all the circumstances of the case to ascertain if there is a good reason which would justify not requiring even a substantial restitution.

{27} The facts of *Commercial Bank of Australia Ltd v Amadio* ((1983) 151 CLR 447) provides such an example. In that case, the unconscionability of the bank was such that it "tainted" the whole of the transaction. The court upheld an order to set aside a mortgage in its entirety in circumstances where the mortgagors believed that they were providing a limited guarantee (to the limit of $50,000 and for a period of six months) to secure their son's overdraft. The guarantee was in fact unlimited in amount and in time. It was argued that the court should set aside the mortgage only to the extent that it involved a liability in excess of $50,000 - on the basis that the mortgagors in that case had agreed to guarantee the overdraft to that amount. Their Honours did not, however, accept this argument. They said that the Amadios would not have entered into the contract at all, had they known of the true financial position of their son.

{28} On the facts of *Maguire and Tansey's case*, the trial judge found that the respondents would have entered into the loan transaction even if they had been duly informed the facts which gave rise to the breach of fiduciary duties by the appellants. They were, in fact, anxious to proceed with the contracts to purchase the poultry farm and believed that they would have the funds and the potential income stream to permit them to proceed with the purchase (AB 81).

{29} In the Full Court, Smith and Nathan JJ took the view that, if the respondents were required to repay the money received by virtue of the loan transaction, the court would be indirectly enforcing the mortgage transaction which was the very transaction sought to be set aside. Nathan J thought that the case before him involved a collision of two equitable principles (AB 128). His Honour said:

"...on the one hand a fiduciary in breach should not prosper from that breach, and on the other a person is not entitled to become gratuitously or unjustly enriched because of the default of another."

{30} His Honour said that the court's "guiding light", in deciding who should bear the burden of the $250,000 loan, "is to do that which good conscience or equity requires" (AB 129). His conclusion was that "the law relating to sustaining the integrity of fiduciary relationships enunciates the [sic] higher principle than that of restitutio in integrum" (AB 131). Consequently, the burden of the breach should be borne by the solicitors and not "the hapless clients".

{31} With respect, there are authorities which would support a different view. The classic case of *Phipps v Boardman* (supra) is an example where the fiduciaries who had breached their fiduciary duties had been given the benefit of restitution while being deprived of the benefit of the transaction.

{32} In seeking equity's intervention, the party rescinding the contract must be prepared to do equity. Thus, in *Brown v Smitt* ((1924) 24 CLR 160), the purchaser of a farm and improvement was entitled to recover, after rescission, as compensation in equity, the cost of repairs to the farm and the value of improvements added to the land. In *Alati v Kruger* (supra), the purchaser of a fruit shop was required, amongst other things, to return such chattels as could be returned to the vendor who was also allowed a sum for chattels not returned, for stock in trade received under the contract, and reasonable compensation for the use of the premises and other property during the period of occupation.

{33} To require the party seeking rescission "to do equity" simply reflects the rationale that this party must not be allowed to gain a windfall as a result of the rescission (*Spence v Crawford* (1939) ALL ER 271 at pp 288-9). It is submitted that an order of rescission on terms of repayment of the loan does not amount to an indirect enforcement of the mortgage. If the mortgage was enforced, the appellants would have the power to possess the subject property and have the power of sale. The court is not enforcing that contract. It is rescinding the contract so that the appellants do not have the right of enforcing the mortgage. The respondents, in return for the rescission of the mortgage, must do equity by returning the benefit which they had obtained in return for the mortgage - the $250,000.

{34} While it is axiomatic that the fiduciary principle is draconian and imposes a strict standard of integrity on the fiduciary, the writer submits that this strict approach ought to be applied only when determining whether there is a breach of fiduciary duty. Once liability is determined, the court must be able to take into account all the relevant circumstances in determining what the appropriate remedy ought to be in the circumstances. At this stage, the court should consider, for instance, whether the breach of the fiduciary duty was a cynical breach - that is, whether there was a lack of good faith on the part of the fiduciary. To put it in more familiar terms, the question is: was there some unconscionable conduct on the part of the fiduciary? Did the appellants, for instance, exploit the vulnerability, if any, of the

respondents? As the trial judge said, if the appellants had been at fault, it was the fact that they had assisted the respondents in obtaining bridging finance.

{35} The following facts ought to be taken into account: (i) apart from the procuration fees, the appellants did not gain any substantial direct benefit from the respondents; (ii) the respondents were anxious to have the poultry farm and would have entered into the loan transaction even if they had been fully informed ; (iii) the respondents had "an unjustified confidence in their ability to run the poultry farm" which resulted in their refusal to act upon the advice and assistance offered to them by the officers of the Egg Marketing Board; (iv) if the poultry farm had not been so poorly managed, the business would not have withered.

{36} To allow rescission of the mortgage without requiring the repayment of the loan would, in the writer's view, be to allow the respondents to use the breach of fiduciary duty as a tool to avoid all their liability. In the absence of an appropriate justification, this surely cannot be correct. As the High Court said in *Vadasz v Pioneer Concrete* (supra), the concern of equity, in moulding relief between the parties, is to prevent or nullify, or provide compensation for, a wrongful injury (ibid at p 685). The Full Court in *Maguire and Tansey's case* nullified a wrong by ordering rescission but, in not requiring repayment, the respondents made an unjustified gain. The point is, they would have entered into the transaction even had there been no breach. Indeed, not only had the respondents not lost anything as a result of the breach of fiduciary duty, they had in fact gained the opportunity of running the poultry farm - they were perilously close to not being able to complete the purchase transactions because of lack of finance.

{37} What of the fact that the respondents are impecunious and cannot repay the loan? In such circumstances, it would be tempting to suggest that "it is unfair" to require the respondents to repay the loan because they are, practically speaking, unable to meet such an obligation. To follow this analysis would be, it is submitted, unsound because the court must look at what is practically just for both the appellants and the respondents, not just the respondents. If the respondents were not required to repay the loan, the appellants would be left with a guarantee made in favour of the Commonwealth Bank for the benefit of the respondents. This is not, in the writer's view, a practically just result for both parties. What would be practically just is to allow rescission of the mortgage on terms that the respondents repay the loan. Whether or not the respondents would be able to meet this obligation is an entirely separate issue from the obligation to repay.

{38} (If the court is concerned that rescission on terms in the circumstances would not amount to a sufficient deterrence against breaches of fiduciary duty, there are other equitable remedies which the respondents may seek - for instance, equitable compensation. See generally: Gummow, "*Compensation for Breach of Fiduciary Duty*" in T G Youdan (ed), Equity, Fiduciaries and Trusts, Carswell, 1989. Equitable compensation was not sought in *Maguire and Tansey's case* - perhaps because the respondents had not, in fact, suffered any loss which could be attributed to the breach of fiduciary duty. It may be that, when an appropriate occasion arises, the High Court may consider the question of whether exemplary damages should be awarded against fiduciaries who have breached their duties. Extreme caution, however, would need to be taken here in developing this remedy, if it is to be developed at all, against fiduciaries lest it be said that fiduciaries are treated unreasonably harshly.)

6. Status of the Brickenden Test - the Issue of Causation

{39} It was argued by the appellants that their breach of fiduciary duty did not cause the respondents to enter into the mortgage. Consequently, the breach of fiduciary duty did not cause the respondents any loss. This argument raises two issues: (i) the relevance of causation in determining liability; and (ii) the relevance of causation in determining the appropriate remedy.

{40} The Full Court of the Supreme Court held in *Maguire and Tansey's case* that the appropriate test to be applied is that propounded by the Privy Council in *Brickenden v London Loan and Savings Co* ([1934] 3 DLR 465 at 469) where the court said:

"When a party, holding a fiduciary relationship, commits a breach of his duty by non-disclosure of material facts, which his constituent is entitled to know in connection with the transaction, he cannot be heard to maintain that disclosure would not have altered the decision to proceed with the transaction, because the constituent's action would be solely determined by some other factor. Once the Court has determined that the non-disclosed facts were material, speculation as to what course the constituent, on disclosure, would have taken is not relevant."

{41} It is not surprising that the Brickenden test has been adopted in Australia by subsequent cases (see, for instance: *Commonwealth Bank of Australia v Smith* (1991) 102 ALR 453; *Wan v McDonald* (1992) 33 FCR 491) because this approach is correct for two reasons. First, it is consistent with the draconian nature of the fiduciary duty. In determining the issue of liability, it is irrelevant to consider the issue of causation between the breach of duty and the alleged loss. Liability will be imposed where the fiduciary has placed himself or herself in a position of conflict or potential conflict. It is immaterial that the breach did not cause any loss.

{42} Secondly, the issue of causation of loss is often not in issue because there are many cases where the fiduciary duty's breach has caused no loss at all to the aggrieved party. For instance, in *Regal (Hastings) Ltd v Gulliver* ([1967] 2 AC 134), the company was unable to take up an opportunity which was later taken up by the defendant directors. In *Industrial Development Consultants Ltd v Cooley* ([1972] 1 WLR 443) the opportunity was not even available to the company and the defendant director was invited to tender for the work personally. In both cases, the breach of fiduciary duty did not cause any loss to the company. Yet, the court found liability and ordered an account of profits in both cases.

{43} It is submitted that the Brickenden test is not applicable to the issue of an appropriate remedy. Having determined the issue of liability, the issue of causation is relevant in determining the issue of what the appropriate relief ought to be. The writer agrees with the views expressed by Heydon QC in a Case Note (110 LQR 332) where the author commented that:

"...it is one thing to strip a fiduciary of profit without much enquiry; it is another to hold him accountable for all loss without enquiring into relative causes."

{44} In *Re Dawson* ([1966] 2 NSWLR 211), Street J said that equity is not concerned with the common law principles of remoteness and foreseeability of loss when calculating the amount of compensation that the aggrieved party has suffered as a result of the breach of fiduciary duty. This is premised upon, however, a loss suffered as a result of the breach. If no loss is suffered as a result of the breach of fiduciary duty, then a remedy couched in terms of compensation for loss suffered is clearly inappropriate.

7. Unjust Enrichment and Restitution

{45} Smith J in the Full Court of the Supreme Court in *Maguire and Tansey's case* said that the respondents would not be left with a windfall even if rescission was not conditional upon repayment of the loan because the bank would have recourse against the respondents on the ground of unjust enrichment. His Honour said that the Commonwealth Bank could sue for money had and received because "the consideration provided had wholly failed or simply on the basis that otherwise there would be an unjust enrichment - applying that 'unifying legal concept'" (AB 198).

{46} With respect, his Honour's use of the principle of unjust enrichment is incorrect. This principle is not an amorphous concept which allows the court to indulge in an idiosyncratic notion of what amounts to "unjust enrichment" (*Pavey and Matthews v Paul* (1987) 160 CLR 583). There are definite requirements that must be met before a plaintiff can establish unjust enrichment. The plaintiff must show that the defendant has obtained an unjust benefit, at the plaintiff's expense which, in the absence of any recognised defences, justifies a remedy of restitution (see for instance, *Baltic Shipping Co v Dillon (The Mikhail Lermontov)* (1993) 176 CLR 344).

{47} The problem with the Commonwealth Bank raising an "unjust enrichment" argument against the respondents (assuming, of course, that it should decide to do so. Practically speaking, the bank would only do so in the case where it does not succeed in obtaining repayment of the loan from the appellants pursuant to the guarantee.) is that the enrichment is *not* at the bank's expense. If there is, in fact, an unjust enrichment, it is at the expense of the appellants, not the bank. The bank is not in a vulnerable position at all because of the guarantee which was granted to it by the appellants.

{48} Furthermore, it is doubtful that "total failure of consideration" is an appropriate unjust factor. In this tri-partite situation, the bank's "bargained-for" performance (see *Rover International Ltd v Cannon Film Sales Ltd* [1989] 1 WLR 912, approved by the High Court in *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353) was for the appellants to be its "nominee" mortgagee and for the appellants to guarantee the repayment of the loan. Even if the mortgage was rescinded, the bank still has the guarantee which it can enforce against the appellants. There is, therefore, no total failure of consideration.

8. Conclusion

{49} *Maguire and Tansey's case* raises some difficult issues - difficult because they involve a balance between the competing interests of the parties. The appellants were in breach of fiduciary duty and rescission as a remedy was justifiably ordered in the circumstances. Yet, if rescission was ordered without a requirement that the respondents repay the loan, the respondents would gain a windfall out of the very same transaction which they were seeking to set aside.

{50} The writer takes the view that it is necessary to distinguish between liability for breach of fiduciary duty and the appropriate equitable remedy that should be ordered in the circumstances. While the spirit of the fiduciary principle must be respected, the court must be

careful not to impose a draconian remedy in all cases simply on the basis that the party in breach is a fiduciary. The nature of the breach (whether it was a cynical breach or an innocent breach) as well as the effect of the breach must be considered before an appropriate equitable remedy is ordered.

{51} As Sir Robert Megarry said, equity is not concerned with absolutes. A "softly, softly" approach is, in the writer's view, one which respects the spirit of an equitable principle, such as the fiduciary principle but, at the same time, looks at the nature and effect of the breach before ordering an appropriate remedy. After all, the court's goal is to achieve "practical justice" for both parties.