Judgment 2 of 1978

IN THE PRIVY COUNCIL

No. 28 of 1977

ON APPEAL
FROM THE SUPREME COURT OF
NEW SOUTH WALES
EQUITY DIVISION

IN PROCEEDINGS 292 OF 1973

2/78

QUEENSLAND MINES LIMITED

Appellant (Plaintiff)

ERNEST ROY HUDSON,

SAVAGE IRON INVESTMENTS PTY. LIMITED

and

INDUSTRIAL AND MINING INVESTIGATIONS PTY. LIMITED

Respondents (Defendants)

CASE FOR THE APPELLANT

SOLICITORS FOR THE APPELLANT

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Sydney. N.S.W.

By their Agents:

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C A S E F O R T H E A P P E L L A N T

PART I - THE FACTS AND THE NATURE OF THE CASE, TOGETHER WITH CERTAIN BRIEF SUBMISSIONS NOT DIRECTLY RELEVANT TO THE APPEAL BUT RATHER TO SO MUCH OF THE RESPONDENTS CASE AS MAY RAISE CONTENTIONS AGAINST THE JUDGMENT.

Record

1. This is an appeal by Queensland Mines Limited ("Queensland Mines") as the unsuccessful plaintiff from a reserved judgment of Wootten J. sitting in the Equity Division of the Supreme Court of N.S.W. Judgment was delivered on 6th October, 1976, dismissing the plaintiff's case against the three defendants for equitable relief, claimed on the footing that the 1st defendant ("Hudson") and two companies at all material times controlled by him (the 2nd and 3rd defendants) were liable to account as fiduciaries for very large profits derived from the exploitation of business opportunities that came Hudson's way by reason of activities

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carried out by him as managing director of the plaintiff. The question of costs was reserved for further argument.

2. The hearing before the primary judge occupied 17 days and during its course many issues of fact and law were canvassed. His Honour considered his decision for nearly two years; in the end, he found for the plaintiff on all issues but one. The sole point upon which the plaintiff failed was that its claim was held to be statute-barred because, as his Honour found, the only relevant breach of fiduciary duty committed by the 1st defendant occurred in 1961, i.e. more than six years before the commencement of the proceedings by Statement of Claim dated 22nd February, 1973. The correctness of that decision is the only point involved in the appeal. Basically, the appellant contends that any actionable breach of fiduciary duty committed by Hudson in 1961 was not relevant to the operation of any statute of limitations on that or any later breach of such duty. The true complexion of the facts is rather that the material breaches, consisting of the appropriation of profits derived from the use of his fiduciary position for his own purposes, extended from 1964 and were continuing from time to time thereafter as separate breaches not barred by statute.

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Pages 738-751

3. It is understood that many arguments will be raised by the respondents on the footing that if the defence of statutory limitation is not to prevail, the dismissal of the plaintiff's claim ought to stand for reasons that did not find favour with the trial judge. The appellant will not in this case endeavour to canvass in detail such matters of argument as the respondents may so raise before Your Lordships' Board. Broadly speaking, the appellant will endeavour to support his Honour's reasons and findings on those issues in the case which his Honour decided in favour of the appellant.

Record

4. One matter is unlikely to be within the realm of controversy: Hudson was, and was found by the trial judge to be, a witness unworthy of credit. On points relevant to the issues in the litigation his Honour variously stigmatised his testimony as "unsatisfactory", "unconvincing" and "implausible"; he was found to have engaged in deception. The high point of his mendacity related to a letter, admittedly drafted by him, the contents of which were not only crucial to one of the central issues in the litigation but quite contrary to the case he sought to make from the witness-box. This letter will be referred to later in this case (see paragraph 31 (infra)). Volume III Pages 593-594 Volume III Pages 598-603

5. Queensland Mines Limited was incorporated in New South Wales on 19th January, 1959. It had a nominal capital of £3,000,000 divided into 12 million ordinary shares of 5s. each. Volume III Page 587

6. On incorporation, the shareholders of Queensland Mines were Australasian Oil Exploration Limited ("A.O.E.") which had a 49% interest, and a company called Factors Limited ("Factors") which had a 51% interest. Volume III Pages 585, 659

7. A.O.E. was a company almost wholly owned by Kathleen Investments Limited ("Kathleen Investments"). Factors Limited was a company in which the "Stanhill" group of companies ("the Stanhill group") had a controlling interest. Mr. Stanley Korman controlled this group. At the height of his commercial success, Korman cut a great dash in Australian business circles: for a long time his power and influence were considerable. But unhappy events were to overtake him and his many ventures. Volume III Pages 585, 659 Volume III Pages 585-586 Volume III Pages 590-591

8. Neither A.O.E. nor Kathleen Investments formed part of the Stanhill group.

9. The first meeting of directors of Queensland Mines was held on 24th January, 1959. Hudson was then appointed managing director for a Volume III Page 587

		Record
	period of six months. His remuneration for that period was fixed at £2,500 together with hotel and travelling expenses.	
10.	At the conclusion of Hudson's six-month appointment, he was re-appointed managing director at an annual salary of £7,500, commencing from the 1st July 1959 with a right to reimbursement of out-of-pocket expenses for entertaining and accommodation up to £2,500 per annum. His Honour rejected in quite scathing terms a story told by Hudson in the witness box of an alleged agreement, said to have been made when the initial six-month appointment was about to expire, between himself and Stanley Korman, that Hudson would in a personal capacity act as adviser to the Stanhill group and Korman at an annual salary of £7,500, of which admittedly not a penny piece was paid. His Honour was firm in his conclusion that all the activities of Hudson that led ultimately to the accrual of the enormous pecuniary profits appropriated by himself and his co-defendants were activities undertaken by him as managing director of Queensland Mines and covered by his agreed annual salary and out-of-pocket expenses paid by that company.	Volume III Pages 587-588 Volume III Pages 593-596, 663 Volume II Page 437 Exhibit 102 Volume VIII Page 2151 Volume III Pages 442-443
11.	Queensland Mines was originally formed for the purpose of carrying out investigations of an area (Anderson's Lode) near Mt. Isa known to contain deposits of uranium oxide. A.O.E. had an option over this area but did not have the financial resources to investigate and develop it.	Volume III Pages 586, 587 Volume III Page 585
12.	Under its Memorandum of Association it was open to Queensland Mines to take an interest in mining activities other than the investigation of Anderson's Lode.	Volume III Pages 701-702, 705
13.	Subsequent to its incorporation, Queensland Mines carried out geological surveys to ascertain the extent of uranium deposits at	Volume III Pages 588, 608

		Record
	Anderson's Lode and in another area known as the Skal lease; also economic surveys to ascertain the feasibility of mining and selling that uranium. Those surveys, completed towards the latter of 1960, led to a conclusion that the deposits could not be mined economically at that time.	
14.	Whilst carrying out those surveys, Queensland Mines acquired a good reputation in Australian mining circles. This led to various mining propositions being submitted to it. Hudson persuaded his co-directors to allow these propositions to be examined and to agree to the use for that purpose of the paid time of geologists employed by the company.	Volume III Pages 589-590
15.	Hudson continued as managing director of Queensland Mines until 15th March, 1961. Thereafter, he remained a director. He was also appointed a consultant to the company at a salary of £500 per annum from 1st April, 1961.	Volume III Page 609
16.	Hudson remained Chairman of Directors of Queensland Mines until he was removed from that office by a resolution of the Board of Directors on 24th August, 1971. He subsequently brought court proceedings to challenge the validity of that resolution, and failed in his challenge.	Volume II Page 443 Volume III Pages 650-651
17.	Prior to February 1959, Stanley Korman had formed the ambition of establishing a steel manufacturing industry as part of the Stanhill group and asked Mr. Hudson if he knew of any deposits of iron-ore.	Volume III Page 592
18.	In February 1959, Hudson asked a geologist friend, Mr. Palmer, whether he knew of any substantial deposits of iron-ore. Mr. Palmer expressed the view that the best opportunities would be found in the iron sands of New Zealand.	Volume III Pages 592, 603
19.	Hudson relayed that advice to Stanley Korman, who requested Hudson to	Volume III Pages 592, 603

Record

arrange for Palmer to travel to New Zealand and investigate the iron sands there.

20. In about July 1959, Hudson and Palmer travelled to New Zealand, together with a Mr. Redpath and a Mr. Taft. Discussions took place with representatives of the New Zealand Government concerning the possibility of establishing a steel industry. Volume III Pages 603-604

A significant amount of the disbursements incurred by Palmer and Hudson in connexion with this visit to New Zealand were paid by Queensland Mines. Volume III Page 605

21. Subsequently Hudson arranged for Palmer to investigate deposits of iron-ore in Western Australia. Queensland Mines paid for these investigations without reimbursement or any agreement therefor. Hudson also investigated a considerable number of other mining and industrial proposals as to which no particular expense was involved apart from the normal incidence of Hudson carrying on his office as managing director of Queensland Mines and travelling within Australia at the expense of Queensland Mines. Hudson did not give any information to the Board of Queensland Mines about these investigations; nor did he seek any authorisation from that Board to carry them out. In one of them (Nowa Nowa) Palmer participated at the expense of Queensland Mines. Volume III Pages 606-607

22. In August 1960, Stanley Korman asked Hudson to investigate deposits of iron-ore in the Savage River area of Tasmania. Hudson sent Palmer to that State to carry out investigations, authorising him to use the name of Queensland Mines should he consider that it would help his inquiries. Volume III Page 608

Volume III Page 609

23. On 16th August, 1960, Hudson wrote to Mr. Symons, the Tasmanian Director of Mines, on the letterhead of Queensland Mines, a letter in the following terms signed by himself as its managing director:- Volume III Pages 610-611

"Hon. J. Symons,
Director of Mines
HOBART.

Dear Sir,

This company, at the request of interested organisations, recently carried out a survey of Australian iron-ore deposits which could support a new Australian Steel Industry.

A recommendation has been made that, provided suitable arrangements can be made with your Government, investigation should be made as to the economics of the use of Tasmanian iron ore possibly in conjunction with Victorian brown coal at an estimated cost of approximately £500,000.

Technical advice and assistance would be given by a major U.S. Steel organisation, but overseas financial interest would be limited to 25% of the required capital.

It is appreciated the Capitalisation may be in the vicinity of £80/100 million.

Mr. S. Korman of Stanhill Consolidated Ltd. Melbourne and the writer would like to interview you relative to the above at your convenience after the 26th of this month and would appreciate your granting an interview.

It is requested that this letter and any subsequent negotiations with your Government remain confidential for the time being.

Yours faithfully,
QUEENSLAND MINES LIMITED

Managing Director
E.R. Hudson."

24. On 30th August, 1960, Mr. Symons wrote to Queensland Mines, indicating his willingness to enter into discussions.

Volume III, Page 611

Exhibit "A2" Volume V Page 1284

		Record
25.	By letter dated 5th September, 1960, a reply was forwarded by Queensland Mines on its letterhead signed on its behalf by a member of Hudson's staff, stating that Hudson would communicate with the Director of Mines on his return from an interstate visit.	Volume III Page 611 Exhibit "A3" Volume V Page 1285
26.	Shortly afterwards, Hudson visited Tasmania and had a discussion with Mr. Symons about the Savage River iron-ore deposits.	Volume III Page 611
27.	On 23rd September 1960, Mr. Hudson wrote to Mr. Symons on plain paper stating that he had had a conference with Mr. Stanley Korman of Stanhill Consolidated Limited and that Mr. Korman would write to Mr. Symons direct.	Volume III Page 611 Exhibit "A8", Volume V Page 1288
28.	On 26th September, 1960, Mr. Stanley Korman wrote to Mr. Symons on the letterhead of Stanhill a letter which stated, (inter alia):-	Volume III Pages 611-614

"I refer to Mr. E.R. Hudson's recent interview relative to the establishment of a Steel Industry in Tasmania, based on the Savage River iron-ore deposits.

Queensland Mines Limited, under instructions from this company has, during the last 18 months, at a cost approximating £100,000, made an economic study of known iron and coal deposits throughout the Commonwealth of Australia and New Zealand, as a basis for the establishment of a Steel Industry and has recommended that such an industry could best be established in Tasmania using iron-ore from the Savage River deposits, but that a detailed investigation of the various problems including methods of treatment associated with the establishment of such an industry should be first undertaken over a period of eighteen months to two years at an estimated cost of £750,000.

Queensland Mines Limited has arranged for the technical advice and assistance of a large overseas steel organisation during the initial stage of investigation and subsequently for management and control during the early years of production.

I am anxious to take immediate steps to implement such recommendation and would appreciate your assistance in arranging a conference with your Premier and Minister for Mines, the Hon. E.E. Reece, to be attended by Mr. Hudson and myself.

My company will accept responsibility for the formation of a Public Company with a nominal capital of up to £100,000,000, if desirable, but with an initial issued capital of £750,000 with further issues of capital according to the requirements of the industry from time to time and will underwrite all capital requirements of the company, both initially and subsequent.

Although technical and managerial assistance will be supplied by an overseas organisation, the Company will remain essentially an Australian entity with overseas capital contribution limited to 25% only of issued capital from time to time.

We would commence our investigation within fourteen days of receiving your Government's approval and I will make £100,000 available on loan, prior to the formation of the Public Company to establish base camps, lines of communication, transportation and roads and co-operate with your Department in additional drilling, in order to shorten the investigation period.

..."

29. His Honour found that it was highly probable that Hudson at least assisted Mr. Korman in drafting that letter, despite Hudson's denial that he was aware of its terms before it was sent.

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Volume II
Pages 307-308

Record

30. Subsequently, a meeting took place between the Premier and certain officials on the one hand and Korman, Hudson and Sir John McAuley on the other. In the course of this meeting it was made plain that pending the submission of detailed proposals for the development of an integrated steel industry based on Savage River iron-ore deposits, no larger rights than an exploration licence would be granted to the interests represented by Korman and Hudson. Volume III Page 616

31. On 1st December, 1960, Hudson wrote a letter to Sir John Northcott, then Chairman of Directors of Kathleen Investments Australia Limited. A copy of a draft of that letter was produced at the hearing and Hudson was cross-examined upon it. In it he expressly recognised that Queensland Mines had an interest in the project relating to the establishment of a steel industry in Australia. In the context of that document and of the circumstances that when it was drafted negotiations with the Tasmanian Mines Department were current, this reference to "the project ..." could only have been intended as one to the Savage River project. Volume III Pages 598-603

Exhibit "AV", Volume VI Page 1333

32. It will be convenient at this stage to interpose, out of chronological order, a reference to another factual feature of the case. Exhibit 103, tendered by the defendant, consists of the minutes of a meeting of directors of Factors Limited held on 4th October, 1961. (It will be remembered that Factors Limited owned 51% of the issued capital of Queensland Mines). The following 3 paragraphs in these minutes are relevant:- Volume III Page 644

"Mr. Korman informed the meeting that some time ago Mr. Hudson obtained licences from the Tasmanian Government relative to Iron Ore Deposits in Tasmania.

These licences were obtained for and on behalf of Queensland Mines Limited.

It now appeared that Mr. Hudson was endeavouring to promote a company to develop the deposits.

Mr. Korman was authorised to proceed to Tasmania to interview the Premier in an endeavour to clarify the position."

33. Now it is clearly to be inferred, having regard to the relationship between Stanley Korman and Hudson, that the statement that the relevant licences "were obtained for and on behalf of Queensland Mines Limited" must have been based on information imparted to Korman by Hudson and upon an understanding common to the two of them. This is proof of yet another express recognition by the latter of the subsistence of an express fiduciary duty to Queensland Mines in relation to the exploration licences when initially granted. Thus it is demonstrated in the clearest possible way that when Hudson obtained the relevant exploration licences he did so intending that they be impressed, while in his name, with a fiduciary obligation in favour of the company, Queensland Mines, whose reputation, funds and credit had been utilised for the purpose of obtaining them. The materiality of this aspect of the evidence to the question whether the defence of statutory limitation should prevail will be dealt with later in this case.

34. There were further discussions between Hudson and Symons early in December 1960 concerning the conditions to be attached to any exploration licence. It was agreed during those discussions that no final decision would be made until 23rd January 1961, when Hudson would again meet Symons. Volume III Page 617

35. In late January 1961, a further meeting took place between Hudson and Symons, at which Symons stated the conditions upon which a permit would be granted. Volume III Page 617

36. Hudson returned to Melbourne and reported to Korman on that meeting. An application for an exploration permit was drafted on the basis that a public company would be formed for the purpose of carrying out all investigations to enable a decision to be made as to the economics of establishing an integrated steel industry. A letter was in fact drafted on plain paper, and Korman asked Hudson to sign it. It was intended to attach a formal application to that letter; yet it seems that this was not done and that the letter itself was treated as the application. That letter was in the following terms:- Volume III Pages 618-620

"16 O'Connell St.
Sydney, N.S.W.

31st January, 1961.

The Director of Mines,
Mines Department,
HOBART.

Dear Sir,

In making the attached Application for an Exploration Licence, I confirm the purpose is to carry out, over a period of 2 years, developmental and technical investigation at an estimated cost of £1 million to ascertain if an integrated steel industry, at an approximate cost of £100/£500 million can be economically established in Tasmania.

Briefly, the manner in which investigations will be proceeded with are:-

a) Immediate steps will be taken to establish means of access and to commence a geological survey.

b) A Public Company to be known as Tasmania Steel Investigations Ltd., shall be incorporated in Victoria with a paid up capital of £1,000,000 being the estimated expense of carrying out all necessary geological, geophysical, aerial surveys and all other

developmental work and technical investigations, as will enable a decision to be made as to the economics of the establishment of such a steel industry. Stanhill Consolidated Ltd., will contribute £500,000 to such Capital and will undertake the formation of the Company in Tasmania.

c) Drilling of the ore body will commence within a period of three months and will continue throughout the two year period at an estimated cost of £250,000 to £300,000.

d) Anticipated expenditure during the first three months is £50,000 and for the next three months £100,000. As the company builds up a technical staff, both local and overseas expenditure, during the following three six-monthly periods will be approximately £250,000 each.

e) The Company will form an association with Overseas steel organisations whose technical staff will undertake investigations of the most economic method of treatment and provision has been made in the estimate for the erection of a Pilot Plant.

f) Overseas capital investment will be limited to 25% of capital and the project, if successful, will be predominantly Australian.

g) As the question of site is one of great importance, the Company will, with your consent, drill all known iron-ore deposits in Tasmania.

Yours faithfully,
E.R. HUDSON."

37. Early in February 1961, Hudson took that letter to Tasmania. Volume III Page 620

Record

38. On 9th February, 1961, Hudson signed, on the letterhead of Queensland Mines and as its managing director, a letter to the Tasmanian Department of Mines in the following terms:- Volume III Page 621

> "I would like to confirm that this company will accept full responsibility for all costs and expenses in connection with the new drill hole at the Savage River iron-ore deposits.
>
> I would also like to extend my appreciation to your Geological staff assisting in arrangements whereby the drill, at present in the area, can be immediately utilised.
>
> I also appreciate your Department's offer to enable piping and other equipment belonging to your Department on the site to be purchased and would appreciate receiving an account at your convenience.
>
> Yours faithfully,
> QUEENSLAND MINES LIMITED
>
> E.R. Hudson
> Managing Director."

39. After commenting critically upon the deception involved in Hudson's false representation that he had the authority of Queensland Mines to give the undertaking contained in the first paragraph of that letter, his Honour observed that one thing was clear about the letter: "Hudson was making use of his position as managing director of Queensland Mines and of the reputation of that company to assist in the obtaining of an exploration licence in his own name." Volume III Pages 621-623

40. On 23rd February, 1961, Hudson went to Hobart; exploration licences EL/4/61 and EL/5/61 were issued to him in his own name. His Honour found that it must then have been obvious to Hudson that it was highly unlikely that either Korman or the Volume III Pages 625-627

Exhibits "F" & "G" Volume V Pages 1269, 1277

Stanhill group would be able or willing to undertake any part in the venture.

41. The statutory authority for the issue of the licences is to be found in s. 15B of the Mining Act, 1929 of the State of Tasmania. Volume III Page 626

42. On 6th March, 1961, Mr. Hudson, again as managing director of Queensland Mines, wrote to Associated Diamond Drillers Pty. Limited a letter on the letterhead of Queensland Mines in the following terms:- Volume III Page 624

> "I acknowledge receipt of your letter of the 3rd instant and confirm arrangements whereby this company will be responsible for the company's present drill at Savage River under the same terms and conditions as applied to the Mines Department of South Australia who took over responsibility from Rio Tinto.
>
> Mr. Ridgway our Geologist will supervise the present drill in place on Rio Tinto.
>
> I discussed with Rio Tinto the question of their equipment and agreed to purchase same, other than the Land Rover which they indicated they desired to trade in, but stated they would allow a reasonable time for other arrangements to be made.
>
> I will communicate with you in the course of the next few weeks and make an appointment for yourself and Mr. Skavaas to visit the site in company with Mr. Ridgway and myself to discuss future drilling.
>
> Yours faithfully,
> QUEENSLAND MINES LIMITED.
>
> Managing Director."

43. His Honour found that when that letter was written Hudson could not Volume III Page 624

have had any confident belief that either Korman or Stanhill were willing or in a position to pay any costs that might be incurred, or to indemnify Queensland Mines for any costs it may incur in developing the Savage River iron-ore venture.

44. His Honour found that Hudson did not reveal to Symons until some time after the issue of the licences that it was highly unlikely that Korman and Stanhill would be able or willing to undertake any part in the venture. Volume III Pages 628-629

45. Hudson asserted that on 8th March 1961 he was told by Korman that there was no possibility that he (Korman) would proceed with the setting up of the proposed company or that he would contribute the capital that he had undertaken to contribute. According to Hudson, Korman said that he and the Stanhill group would have to drop out of the project and agreed that Hudson should endeavour to find another company to take their place. Volume III Page 629

46. Hudson said that on 21st March, 1961, he told Symons that Korman was unable to proceed with the project and that he (Hudson) was willing to look for someone else to take Korman's place and was personally prepared while so looking to pay the initial costs incurred in relation to drilling. Hudson sought and obtained unofficial acquiescence to carrying out a rate of work and expenditure less than that stipulated by the licence. Volume III Page 630-631

47. The meeting held on 21st March, 1961 between Symons and Hudson was arranged as a result of a letter written on the letterhead of Queensland Mines by Hudson. Volume III Page 631

Exhibit "A12" Volume VI Page 1379

48. Until 30th May, 1961, weekly drilling reports were submitted to the Tasmanian Department of Mines with a covering slip stating: "With the compliments of Queensland Mines Limited." Volume III Page 631

		Record
49.	After 30th May, 1961, Hudson ceased using the letterhead of Queensland Mines Limited and commenced to use the letterhead of "Industrial and Mining Investigation Pty. Limited", a company at all relevant times controlled by Hudson and in fact the 2nd defendant in these proceedings. It changed its name to Tasmanian Investments Pty. Limited on 7th February, 1968 and then to Savage Iron Investments Pty. Limited on 13th April, 1968.	Volume III Pages 631-632
50.	At least until 1st May, 1961, Hudson was conducting correspondence with overseas interests concerning the Savage River iron-ore deposits using the letterhead of Queensland Mines.	Volume III Page 631
51.	Thereafter, Hudson sought finance to continue exploration under the exploration licence, and in late April, 1961 enlisted some support from Dubar Trading Pty. Limited ("Dubar"). In this connexion, a deed was made between Hudson and Dubar on 12th May, 1961.	Volume III Pages 632-633 Exhibit "Y" Volume VI Page 1416
52.	This deed, provided, inter alia, that Hudson should continue to hold exploration licences EL/4/61 and EL/5/61 in his own right but should hold all further exploration licences, leases or other mining rights granted under the Mining Act of Tasmania to him or any other person during the course of the investigation in relation to the Savage River iron-ore deposit and/or the export of iron-ore from Tasmania in trust for himself and Dubar in equal shares and that he should at all times use his best endeavours to obtain licences, leases or other mineral rights in the areas covered by the exploration licences or elsewhere in Tasmania as he and/or Dubar should consider desirable. In return Dubar agreed to be responsible for the payment of all present and future expenses in connection with the exploration, development and technical investigations necessitated under the agreement up to a total of £30,000.	Volume III Pages 634-635

Record

53. The deed further provided that any benefit flowing from the venture envisaged under the deed would firstly be charged with repayment to Dubar of its expenditure, and then charged with repayment of expenses previously incurred by Queensland Mines Limited and/or Hudson and Stanhill Consolidated Limited. After payment of those amounts, all property acquired as a consequence of the venture and existing exploration licences referred to in the Deed, including licences EL/4/61 and EL/5/61, was to be held by the person in whose name they should then stand for Hudson and Dubar in equal shares. Volume III Pages 635-636

54. Mr. Hudson asserted in evidence that at the date of entering into that Deed, he believed that the payments that had been made by Queensland Mines in connexion with the Savage River project amounted to £2,500 and that the only expense incurred by Stanhill was the cost of Stanley Korman's visit to Tasmania. Volume III Pages 636-637

55. By October 1961, differences had arisen between Mr. Hudson and Dubar concerning the construction of the Deed. Negotiations to settle those differences ensued. Volume III Page 637

56. Between October 1961 and December 1961, Mr. Barrell, a director of Dubar came into possession of information which suggested the possibility of rights existing in some other companies, in the two exploration licences. Volume III Page 640

57. Accordingly, Mr. Barrell arranged to meet Stanley Korman, Sir William Bridgeford and Mr. Feitz (none of those persons were directors or officers of Queensland Mines) and inquired of them whether companies with which they were associated claimed to have any right in the Savage River project. Mr. Barrell recalled that extravagant claims were made by Korman, the companies mentioned by Korman being Stanhill, Factors, Queensland Volume III Pages 640-641

Mines and other companies, but he was unable to recall any specific claim for any individual company.

58. Late in 1961 or early in 1962 Mr. Barrell approached Mr. Gladstones who had been appointed to the Board of Factors as Chairman of that company in July 1961. He was later appointed to the Board of Queensland Mines on 13th February 1962 as Chairman. Volume III Pages 641, 643, 645

59. Mr. Barrell informed Mr. Gladstones of the purpose of his inquiry and of the Deed between Mr. Hudson and Dubar. Mr. Gladstones told him that he was not au fait with the position but would investigate it. Volume III Page 641

60. Again in early 1962, Mr. Barrell had a further meeting with Mr. Gladstones in Melbourne and specifically asked what documents or claims if any the Stanhill group and associated companies had in relation to the Savage River project. He was not given any positive information then, or at any subsequent time. Barrell and Gladstones agreed upon a price of £2,500 for whatever the rights were. It is uncertain from the evidence whether this agreement took place before or after Mr. Gladstones was appointed to the Board of Queensland Mines. Volume III Pages 641-642

61. His Honour dealt with the evidence concerning a Board meeting of Queensland Mines held on 13th February 1962. He said that it was not possible to determine how much was revealed to the directors of that company by Hudson's lengthy report referred to in the minutes of that meeting. The only directors present at the relevant time were Hudson, Gladstones and David Korman. Hudson in his evidence gave an account of what took place; but his Honour expressed himself as having no confidence in his story "as he may well have tailored it to what he now believes will suit his case". However, his Honour observed that Hudson did not "claim to have told Volume III Pages 647-650

Gladstones, or the Board of Queensland Mines, that the exploration licences were obtained in part by the use of his office as managing director of Queensland Mines and by the use of the name, reputation and resources of the company. There is therefore no evidence that these facts, or the more detailed facts from which I have inferred them, were disclosed to Mr. Gladstones or the Board". At a later point in his reasons for judgment the learned judge said (dealing with and rejecting the defences of laches and acquiescence):-

> "I have earlier dealt with the defendants' allegations of the plaintiff's knowledge of Mr. Hudson's activities, and have given my reasons for refusing to attribute to the plaintiff knowledge critical to its claim, viz. knowledge that Mr. Hudson had acted in breach of fiduciary duty. Evidence as to how the plaintiff finally discovered these facts was not elicited, and all I know is that this action was instituted within a reasonable time after Mr. Hudson ceased to hold a position of authority in the plaintiff company. It cannot be said that it has not been prosecuted with normal diligence (Lamshed v. Lamshed (1963) 109 C.L.R. 440). In these circumstances I cannot infer acquiescence on the part of the plaintiff in Mr. Hudson's breach of duty. Nor can I infer that it was reasonable for Mr. Hudson, who had the duty to disclose the facts to the plaintiff and had failed to do so, to act in reliance on a belief that the plaintiff had accepted his ownership of the Savage River venture."

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Pages 755-756

62. Later, Mr. Barrell and other representatives of Dubar met Mr. Phillips, the secretary of Factors and Queensland Mines for the purpose of paying the sum of £2,500 and Mr. Phillips signed a document in the following terms:-

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Page 642

Exhibit 27
Volume VI
Page 1552

"20th March, 1962

The Secretary,
Dubar Trading Pty. Limited
66 Clarence Street, Sydney.

Dear Sir,

This is to acknowledge receipt of the sum of £2,500 in full settlement of all interest of this group and of Factors Limited and the Stanhill group, in iron-ore deposits in Tasmania known as Savage River and Bligh River.

Yours faithfully,
QUEENSLAND MINES LIMITED

(Sgd) W.D. Phillips
W.D. PHILLIPS
Secretary."

63. That transaction was never reported either to the Board of Queensland Mines or to A.O.E., but it was reported to the Board of Factors which purported to confirm the action of Mr. Gladstones in accepting the sum of £2,500. Volume III Page 646

64. It will be submitted that his Honour's reasons as to why the transaction referred to in paragraph 62 was not binding on Queensland Mines are correct. But it will also be submitted that his Honour erroneously rejected arguments, presented by the appellant and dealt with in the judgment as to the non-availability to Hudson of any estoppel that might be relied upon by Dubar against Queensland Mines in relation to the transaction. Further, the appellant will rely, so far as may be necessary, upon the operation of s. 23C(1)(c) of the Conveyancing Act, 1919 (N.S.W.) to invalidate the transaction insofar as it purported to divest Queensland Mines of any rights in relation to the iron-ore deposits. Volume III Pages 718-730; Volume III Pages 730-735; Volume III Pages 736-738

65. Mr. Hudson first became aware of the transaction recorded in the letter of Volume III Pages 638-640

		Record
	20th March, 1962, when he received a letter from Dubar dated 22nd March 1962, concerning the dispute between himself and Dubar over their deed, and that letter enclosed a copy of the document dated 20th March 1962, signed by Mr. Phillips.	Exhibit 27 Volume VI Page 1553
66.	Some time in 1962 the dispute between Dubar and Mr. Hudson was resolved by Dubar acquiescing in the view that it had no interest in the Savage River project.	Volume III Pages 643, 638
67.	Thereafter, Mr. Hudson proceeded with the development of the Savage River in his own name and in the name of his company without any reference to or assistance in any form from Queensland Mines or any of the companies in the Stanhill group.	Volume III Page 651
68.	It will be convenient now to set out the history of exploration licence EL/4/61, of applications by the defendants for mining leases and of agreements between the defendants and various American companies (Pickands Mather) which led to the substantial royalty payments received by the defendants.	
69.	Exploration licence EL/4/61 was granted to Hudson on 23rd February, 1961, the term of the licence remaining in force until 23rd August, 1961.	Volume III Page 625 Exhibit "F" Volume V Page 1269
70.	On 24th August, 1961, the Minister for Mines of Tasmania purported to extend the term of that licence until 23rd February, 1962. It is submitted that extension was invalid, as the term of the licence had expired on 23rd August, 1961. Accordingly, on 24th August, 1961, there was no subsisting licence capable of extension.	Exhibit "F" Volume V Page 1272
71.	On 15th March, 1962, the Minister purported to extend the term of the licence until 23rd August, 1962; on 4th September, 1962, he purported to extend it until 23rd February, 1963 and on 8th March, 1963, he purported	Exhibit "F" Volume V Page 1272

to grant another extension until 23rd August, 1963. It is submitted that each of those extensions were invalid, as the licence had terminated on 23rd August, 1961, and there is no evidence of the grant of a further licence after that date, nor is there any provision in the Tasmanian Mining Act to validate a purported extension of an exploration licence after its term had expired: cf. Attorney-General (N.S.W.) v. N.S.W. Rutile Mining Company Limited (1961) 35 A.L.J.R. 206.

72. On 31st May, 1963, the Minister purported to approve the transfer of licence EL/4/61 to Industrial and Mining Investigations Pty. Limited, the second defendant. — Volume III Page 655 Exhibit "F" Volume V Page 1272

73. By two letters, each dated 20th June, 1963, from Pickands Mather to Hudson and Industrial and Mining Investigations Pty. Limited (I.M.I.), I.M.I. purported to give an option over the rights and interests given under the exploration licence, such option to remain in force until 31st December, 1964. In exchange for the granting of that option, Pickands Mather agreed to carry out and pay for exploratory work on the land covered by the licence, and agreed, in the event that the option was exercised, to form a company to exploit any rights that may flow from the licence, and that such new company would assign its rights given by or flowing from the exploration licence to an assignee of Pickands Mather, and that such assignee would pay to the "new company" an over-riding royalty of 5s. per ton of iron-ore or iron-ore products shipped by the assignee in addition to an over-riding royalty equal to 15% of the net profits derived by the assignee from the production of minerals other than iron-ore, and would guarantee a minimum royalty to the new company of £50,000 per year. Those letters further provided that I.M.I. would be issued with shares in the "new company" in the event of the option being exercised. — Volume III Page 655 Exhibit 60 Volume VII Page 1619

74. On 28th August, 1963, the Minister purported to extend the term of the licence until 23rd February, 1964. — Exhibit "F" Volume V Page 1273

		Record
	It is submitted that this purported extension was invalid.	
75.	By letter dated 29th January, 1964, from I.M.I. to Pickands Mather, the agreement set forth in the letters dated 20th June, 1963, was varied by providing that I.M.I. with the approval of Pickands Mather would apply for a mineral lease from the State of Tasmania in the event that Pickands Mather elected to exercise the option, and any rights given by that lease consequent upon such application would be transferred to Pickands Mather.	Exhibit 62 Volume VII Page 1677
76.	On 5th March, 1964 the Minister purported to extend the term of the exploration licence until 23rd August, 1964 and on 27th August, 1964, the Minister purported to extend the exploration licence until 23rd February, 1965. It is submitted that each of those purported extensions were invalid.	Exhibit "F" Volume V Page 1273
77.	On 28th January, 1964, I.M.I. made application for exploration leases 4M/64 - 9M/64.	Volume III Page 655 Exhibit "AR" Volume VII Pages 1645, 1651, 1655, 1659, 1663, 1667
78.	On 24th October, 1964, these applications for leases were transferred from I.M.I. to Pickands Mather.	Volume III Page 655 Exhibit "AR" Volume VII Pages 1646, 1652, 1656, 1660, 1664, 1668
79.	On 24th October, 1964, an agreement in writing was entered into between Pickands Mather and I.M.I. which recited the option agreement set forth in the earlier letters, and I.M.I. acknowledged the receipt from Pickands Mather of £25,000. The time for exercise of the option was extended to 31st December, 1965, and the option was extended to cover any rights given pursuant to the applications for mining leases Nos. 4M/64 - 9M/64 made by I.M.I. I.M.I. also transferred on the signing of that agreement all its right title and interest in the	Exhibit 63 Volume VII Page 1743

exploration licence and applications for mining leases to Pickands Mather to be held in trust by Pickands Mather for I.M.I. until such time as Pickands Mather exercised its option. That agreement also recited that if the option were exercised, Pickands Mather would on or before 30th January, 30th April, 30th July and 30th October of each year pay a royalty of 2/6d. per ton of iron-ore shipped from Tasmania, and would pay a further royalty of 7½% of the net profit derived from minerals other than iron-ore such royalty to be paid on or before 15th February each year, provided that a minimum royalty of £25,000 would be paid each year if the option were exercised irrespective of the amount of iron-ore and other minerals shipped, the first of such payments to be made on or before 30th January, 1966, and to continue until 31st December, 1986.

80. On 26th January, 1965 the Minister purported to extend the exploration licence until 23rd August, 1965, and on 30th July, 1965, purported to extend the exploration licence until 23rd February, 1966. It is submitted each of those extensions were invalid. — Exhibit "F" Volume V Page 1273

81. On 19th November, 1965, a further variation to the option agreement was made by I.M.I. and Pickands Mather. That had the effect of extending the period for exercise of the option to 31st December, 1966, in consideration of the sum of £25,000 being paid to I.M.I. in four equal instalments during 1966. It also altered the provisions relating to minimum royalties by providing that minimum royalties should commence on the date upon which the option was exercised or 30th January, 1966, whichever be the later, and that minimum royalties should continue until the 21st anniversary of the exercise of the option. — Exhibit "K" Volume VII Page 1787

82. On 25th January, 1966, the Minister purported to extend the term of the exploration licence until 23rd August, 1966. It is submitted that this purported extension was invalid. — Exhibit "F" Volume V Page 1273

83. The option hereinbefore referred to was exercised on 30th May, 1966. — Exhibit 66 Volume VII Page 1805

		Record
84.	On 3rd June, 1966, a mining lease was granted by the State of Tasmania to various American companies either controlled by Pickands Mather, or to whom Pickands Mather had assigned the rights given to it by exercising the option.	Exhibit "AS" Volume VII Page 1806
85.	On 13th July, 1966, the Minister purported to extend the term of the exploration licence until 23rd February, 1967, and thereafter further purported extensions were made extending beyond the date upon which the suit was heard. It is submitted that all those purported extensions were invalid.	Exhibit "F" Volume V Page 1274
86.	On 21st May, 1968, the Minister purported to transfer the exploration licence to Savage Iron Investments Pty. Limited (Industrial & Mining Investigations Pty. Limited having changed its name to Savage Iron Investments Pty. Limited). On that same day, the Minister purported to transfer the exploration licence to Industrial and Mining Investigations Pty. Limited, a new company incorporated in the Australian Capital Territory, such company being the third defendant.	Volume III Page 754 Exhibit "F" Volume V Page 1274
87.	Since 1967, the second defendant has received and continues to receive substantial royalties from the companies which took up the mining lease. The receipt of these royalties has of course flowed from the grant and the exploitation of the original exploration licence EL/4/61, the applications for mining leases and from the option agreements. It matters not, from the viewpoint of Hudson's accountability, that renewals of the licence may have been ineffectual in law.	Exhibit 102 Volume VIII Page 2151
88.	After a careful examination of many authorities, his Honour finally concluded that, subject to other defences, all of which but the defence based on statutory time-bar were rejected, Hudson and the other defendants were liable to account for those	

receipts. The appellant will submit that his Honour's reasoning towards this conclusion was, with respect, basically unexceptionable; although it will be submitted that the liability arises by virtue of an expressly incurred fiduciary obligation for the benefit of Queensland Mines, or in the alternative, an obligation arising by construction of law.

89. In particular, it will be submitted that his Honour was correct in his conclusion that Hudson did not disclose to Queensland Mines the circumstances that gave rise to his fiduciary duty, namely, that he had used the name, prestige, credit and funds of Queensland Mines to acquire the original rights that constituted the fountain-head of all profits that he and his companies appropriated.

Volume III Pages 650, 662-663

90. Further it will be submitted that his Honour was right in holding that Queensland Mines did not at any time give an informed, or any relevant consent to the defendants' breaches of fiduciary duty.

Volume III Pages 707, 713, 715

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PART II - LEGAL SUBMISSIONS IN SUPPORT OF THE APPEAL

Record

1. The trial judge gave detailed consideration to the issues of law arising from the defence that the appellants' claim was time-barred by Statute. These issues involved the interpretation of s. 69 of the Trustee Act, 1925 (N.S.W.). It will be convenient to set out its provisions in extenso:- Volume III, Pages 738-754

"69. (1) In any action suit or other proceeding against a trustee or any person claiming through him, the provisions of this section shall have effect:

Provided that this section shall not affect any action suit or other proceeding where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property, or the proceeds thereof still retained by the trustee, or previously received by the trustee and converted to his use.

(2) All rights and privileges conferred by any statute of limitations shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action suit or other proceeding, if the trustee or person claiming through him had not been a trustee or person claiming through him.

(3) If the action suit or other proceeding is brought to recover money or other property, and is one to which no existing statute of limitations applies, the trustee or person claiming through him shall be entitled to the benefit of and be at liberty to plead the lapse of time as a bar to the action, suit, or other proceeding in the like manner and to the like extent as if the claim had been against him (otherwise than as a

trustee or a person claiming through a trustee) in an action of debt for money had and received.

(4) The bar by lapse of time shall run against a married woman entitled in possession for her separate use, whether with or without a restraint upon anticipation.

(5) The bar by lapse of time shall not begin to run against any beneficiary unless and until the interest of the beneficiary becomes an interest in possession.

(6) No beneficiary, as against whom there would be a good defence by virtue of this section, shall derive any greater or other benefit from a judgment or decree obtained by another beneficiary than he could have obtained if he had brought the action suit or other proceeding and this section had been pleaded.

(7) This section shall not deprive any legal representative of any right or defence to which he is entitled under any existing statute of limitations.

(8) This section shall apply only to actions suits or other proceedings instituted after the commencement of this Act."

2. Section 5 of that Act provides (inter alia) that interpreting its provisions, unless the context or subject matter otherwise indicates or requires the words "Trust" and "Trustee" have the following meanings:-

"Trust does not include the duties incident to an estate conveyed by way of mortgage; but, with this exception, includes implied and constructive trusts, and cases where the trustee has a beneficial interest in the trust property, and the duties

incident to the office of legal representative of a deceased person."

"Trustee has a meaning corresponding with that of trust; and includes legal representative and the public trustee and a trustee company."

3. The appellant submits that for a number of reasons his Honour was wrong in holding that the plaintiff's claim was statute-barred. These reasons will now be developed in some detail.

4. His Honour's conclusion on this point was reached by taking three steps: first: the only cause of action that ever became available to the plaintiff was one arising from a breach of fiduciary duty supposedly committed by Hudson at some unspecified time in 1961. Second: the cause of action was time-barred because the proviso to sub-section (1) of s. 69 does not apply to the case of property retained or converted by a constructive trustee who has come into possession of it solely by reason of the transaction sought to be impugned: Taylor v. Davies (1920 A.C. 106). Third: the relevant time limit was held to be six years from a date in mid-1961; and this on the footing that except in cases to which the proviso to sub-section (1) applied, section 69 otherwise operated to impose such a limitation in favour of a constructive trustee. Accordingly the proceeding, commenced as it was on 22nd February, 1973, was altogether out of time.

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5. It is submitted that each of these steps was erroneous.

6. As to the first step: It is submitted that it is impossible to characterize as a breach of fiduciary duty any particular act done by Hudson in 1961. A cause of action is the entire set of facts that, if traversed, a plaintiff must prove in order to

obtain the relief that he seeks: Read v. Brown (22 Q.B.D. 128). If, unknown to Queensland Mines, Hudson formed at some point of time in 1961 the intention of exploiting for his own profit the knowledge and opportunity that had come his way by virtue of his position as managing director of that company, the mere forming of such an intention was not an actionable breach of trust or fiduciary duty. It was incorrect for his Honour (a) to concentrate upon a search for the commission in 1961 of such a breach; (b) to find one; and (c) to regard that finding as conclusively raising a statutory time bar against the plaintiff's claim.

7. It may be conceded that if (and his Honour has correctly found expressly to the contrary) Hudson had informed all the directors of Queensland Mines that the exploration licences had been obtained by the use of his position of managing director and by the use of the name, reputation and resources of the company, it would have been open to them to rely upon such information to commence proceedings for a declaration that Hudson was liable to account as a trustee for all moneys that he might thereafter receive from turning to his personal profit and in breach of fiduciary duty the opportunities that he had utilised. But the availability of such a cause of action was not shown to have been known to the directors of Queensland Mines at any time relevant to the operation of any legal time limit. His Honour made a clear finding to this effect at two points in his reasons for judgment (see paragraphs 89, 90, supra). Thus this is not a case in which it is appropriate to apply any Statute of Limitation by analogy, even if (which is disputed) any such statute can be so applied to a claim for declaratory relief in equity.

8. Upon the assumption (the validity of which the appellant disputes) that the rights given by the exploration

licences were capable of constituting trust property and therefore of being the subject of a trust, the main relevant event that occurred in 1961 was that on 23rd February Hudson obtained two exploration licences, each of six months duration, in circumstances giving rise to an express trust positively accepted and recognised by Hudson and Stanley Korman in favour of Queensland Mines and any one or more of a number of other possible beneficiaries, namely, one or more companies in the Stanhill group to be nominated by Stanley Korman.

9. Contrary to his Honour's view, there is no reason for excluding, and every reason for including, Queensland Mines as at least one of the beneficiaries of such a trust. It was, and was treated by all concerned, as a member of the Stanhill group by reason of the majority shareholding of Factors. According to the directors' minutes of that company (4th October, 1961), Stanley Korman, the presiding genius of the group, acquiesced in the proposition that the exploration licences had been obtained on behalf of Queensland Mines (see as to these minutes paragraph 32 supra). His Honour found, correctly it is submitted, that Hudson (scil. when he obtained the licences) "anticipated that because of the role which he was playing as managing director of Queensland Mines that company would have some beneficial interest in what ultimately emerged". This conclusion is strongly supported by Hudson's draft letter of 1st December 1960, in which he admitted the interest of Queensland Mines in the Savage River project (see paragraph 31 supra). His Honour had "no doubt that Mr. Hudson saw the possibility of benefit flowing to Queensland Mines because it was in his capacity as managing director of Queensland Mines that Mr. Korman was using his services in relation to the proposed ventures".

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Volume III Pages 602-603

Record

10. His Honour really concluded that, despite strenuous efforts to create a different impression, Hudson intended to obtain the benefit of the original licences for others and not for himself. The only point of substance on this part of the case which the appellant would ask the board to regard as wrongly decided is his Honour's exclusion of Queensland Mines as one of the beneficiaries on whose behalf Hudson took up the licences. Volume III Pages 700-701, 749

11. As to the second step: On the basis set out in paragraphs 8 to 10 (inclusive), it would follow, contrary to his Honour's conclusion, that Queensland Mines as plaintiff can rely on the proviso to s. 69(1) of the Trustee Act 1925 (N.S.W.), because the relevant fiduciary duty did not arise solely by reason of the transaction sought to be impeached; it arose because Hudson voluntarily assumed it at the time of obtaining the licences: cf. Taylor v. Davies (1920 A.C. 106). The only property that could have been the subject of the postulated trust consisted in the first instance of the licences, of which the only one relevant to be considered for present purposes is EL/4/61. Curiously enough, it may well be that this licence lapsed forever on 23rd August, 1961, because its purported "renewal" after the date of its expiry was ineffectual in law: cf. Attorney-General (N.S.W.) v. N.S.W. Rutile Mining Company ((1961) 35 A.L.J.R. 206). (See paras. 69, 70, supra).

However, there were from time to time, although not continuously, identifiable subject matters to which Hudson's voluntarily assumed fiduciary obligation attached. First, there were the two exploration licences. If and when EL/4/61 lapsed, there was no such subject matter until in June 1963 Hudson and I.M.I. became entitled, as between themselves and Pickands Mather, to the benefit of the first option agreement; see

paragraph 73 (supra). That agreement was varied in January 1964 (see paragraph 75). It was not until October 1964 that any monetary profit accrued as a result of Hudson's activities as a fiduciary (see paragraph 79). This profit was received by I.M.I., which, being at all relevant times privy either to the existence of Hudson's initial voluntary assumption of fiduciary obligation to Queensland Mines was bound by it accordingly, as if an express trustee: Soar v. Ashwell ((1893) 2 Q.B. 390), or to his substituted obligation to that company that arose when Stanhill and Stanley Korman dropped out.

12. His Honour, with respect, lapsed into imprecision when he defined as the only relevant breach of fiduciary duty Hudson's supposed action in taking to himself the benefit of the exploration licences when Stanley Korman and the Stanhill group dropped out. A breach of fiduciary duty does not consist in mere intention to commit a breach: the duty is severally and separately infringed only when and as often as the fiduciary derives a profit from the abuse of his office: cf. Reid-Newfoundland Railway Company v. Anglo-American Telegraph Company Limited (1912 A.C. 555 especially at p. 559). Volume III Page 751

Queensland Mines would have had no cause of action in 1961 or at any time if Hudson's intention of profiting personally from his fiduciary position had miscarried and losses had been sustained rather than profits made. To establish a cause of action against a fiduciary the essential matters to be proved are (a) duty; and (b) breach by appropriation of a profit or of property derived from the fiduciary position. A statutory time bar runs only after the happening of the latter event. If several breaches of the same obligation be committed, some within and some outside a period of statutory limitation, the actionability of the former is not affected by the availability as

to the latter of a defence founded upon the statute. Cf. Arnott v. Holden ((1852) 18 Q.B. 593; 118 E.R. 224).

13. It was in October 1964 that a fresh agreement was made between I.M.I. and Pickands Mather. This is summarised in paragraph 79 (supra). It followed that the fiduciary obligation, attached to the benefit of this agreement so far as it remained to be performed by Pickands Mather in the future. The same may be said of the variation agreement of 19th November 1965 (see para. 81, supra). The whole point is that these agreements, and the several payments made under them, gave rise to a number of fiduciary obligations binding Hudson and the two corporate defendants. The better view is that these obligations were in the nature of express trusts. Their principal relevant feature was that they founded equitable claims for money had and received, which claims crystallized as separate causes of action only when the particular payments were made. If the obligations were trusts by construction of law, they grounded the same sort of claims.

14. On this footing the defendants can be held liable to pay to the plaintiff all moneys whensoever derived by them from the exploitation of Hudson's fiduciary opportunities. This submission was made to his Honour but rejected. Alternatively, the plaintiff can recover all such moneys derived within six years from the date of the Statement of Claim (22/2/1973).

15. As to the third step: (see para. 4) If (which as to both points is contested) his Honour was correct in his conclusions (a) that the only cause of action ever available to Queensland Mines arose at some time in 1961; and (b) that the principle in Taylor v. Davies (supra) applies to the interpretation of the proviso to s. 69 (1) of the Trustee Act, 1925, it should follow that Hudson was not a trustee to whom any part of that

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section could have any direct application. If the proviso to s. 69 (1) does not apply to a constructive trustee whose title to the disputed property depends upon the transaction impugned as giving rise to a constructive trust, then on proper interpretation, no other part of s. 69 is directly applicable to such a person, for it would be erroneous to attribute to the word "trustee" other than a uniform meaning throughout s. 69. In other words, the section has nothing to say about constructive trustees whose trust arises by reason of the transaction sought to be impugned.

16. If the approach suggested in the last paragraph is correct it would follow that:-

(a) there is no statutory time bar operating of its own force against any cause of action, whenever pleaded, for a declaration of trust arising out of whatever Hudson did in 1961 or afterwards. This is so whether the relevant trust be classified as express or constructive;

(b) there is no statutory time bar that is operative by analogy to any cause of action, whenever pleaded, for such a declaration;

(c) in extension of (b), it is submitted that s. 69 of the Trustee Act cannot be applied by analogy to a cause of action simply for a declaration of trust. For that section says nothing about such a cause of action;

(d) alternatively to (b) and (c), if s. 69 does apply by analogy to a cause of action against a constructive trustee whose title to the relevant property arises out of the transaction said to create the constructive trust, the analogy would be incomplete unless the proviso be applied in favour of the cestui que trust in a case

that falls within its literal wording; this is such a case;

(e) the only statute imposing a time bar for common law remedies capable of application by analogy to equitable causes of action against such a defendant, (i) to recover moneys received by him that are impressed with the trust; or (ii) to obtain an account of such moneys, is 21 Jac. I. chapter 16, section 3. The time bar, applicable to a common law action on a non-specialty debt and in a common law action of account, namely, six years from the accrual of the cause of action, would apply analogously. This means that Queensland Mines is not precluded by any statutory time bar from maintaining equity proceedings for recovering, or obtaining an account with respect to, money received by Hudson or by the corporate defendants at any time within six years back from 22nd February, 1973, the date of the Statement of Claim.

17. Taylor v. Davies (supra) does not establish as a matter of ratio that a constructive trustee, liable to be held as such only by reason of the transaction impugned as giving rise to the trust, is entitled to protection by virtue of the direct application of the statutory provision (s. 47) corresponding with s. 69 of the Trustee Act, 1925 (N.S.W.). In this connection, the crucial passage in the opinion of the Judicial Committee in Taylor v. Davies (supra) is at p. 653, where it is stated in express terms that such a trustee "remains entitled to such protection as he had before the passing of" the Limitations Act of the Province of Ontario. Two points must be made about this statement: first, it implies that a trustee of that description is not within the direct operation of s. 47. This implication presents a particular difficulty if one has regard to the inflexible definition of "trustee" in s. 47 (1).

The corresponding definition in section 5 of the New South Wales Act is more flexible: it yields to context and subject matter. But the implication is nevertheless to be found in the Privy Council's decision. The second point is that the pre-existent protection of such a trustee was derived only by analogy from any relevant statute of limitations. And the application of any such statute in that sense was qualified or limited in two respects:-

(a) The statute would be so applied only to causes of action of similar character to common law causes of action therein dealt with.

(b) There was an important qualification upon any such application in cases in which the defendant had not disclosed to the plaintiff the facts giving rise to the cause of action. In such cases, the statute ran by analogy only from the time when the plaintiff discovered his rights: Hovenden v. Lord Annesley ((1806) 2 Sch. & Lef 607); Bulli Coal Mining Company v. Osborne (1899 A.C. 351).

18. The materiality of these two qualifications is evident: first: the limitation by analogy applies to any relevant receipt of money from, and only from, at earliest, the date of its receipt. The limitation period does not run from the date upon which the fiduciary duty was, in general terms, assumed; second: the commencement of the limitation period was postponed in this case by Hudson's nondisclosure, as found by the trial judge, of the facts that gave rise to his fiduciary duty to account for profits as and when received (see paras. 89, 90, supra).

The defendants having pleaded a statutory bar, must prove its applicability. In the face of this finding of non-disclosure, they have not proved when, if at all, the statute started to run. The non-disclosure found by the

trial judge amounted to fraud in the equitable sense and within the meaning of that word as used in section 69 (1) of the Trustee Act: Shepherd v. Cartwright (1953 Ch. 728 per Denning L.J. at p. 756); approved by Viscount Simonds on appeal: (1955 A.C. 431 at p. 450).

19. The conclusion that emerges from these considerations is that the defendants have not established the applicability of any relevant statute of limitations, either directly or by analogy, so as to bar the plaintiffs' claim for moneys received by the defendants within six years of the commencement of the proceedings.

20. Taylor v. Davies (supra) was, it is respectfully submitted, wrongly decided; or if not, is distinguishable on the facts and should not be followed.

21. (A) Wrongly decided.

(a) One of the bases for the decision in Taylor v. Davies was that despite the statutory definition of "trustee" in s. 47(1) of the Ontario Act, the legislative intention could not have been such as to remove the protection given by equitable principles to those persons liable to be declared constructive trustees of property acquired by them in circumstances in which the transaction of acquisition was open to impeachment as giving rise to the constructive trust. None of the decisions upon which the Board founded in Taylor v. Davies involved a statutory definition of "trustee" as including a constructive trustee. Indeed the previous cases upon which the decision was primarily based seem to have involved situations in which the defendant who was sought to be held liable as a constructive trustee was a bona fide purchaser for value without notice from the originally defaulting trustee or in which the

defendant had before action was brought disposed of the property to such a purchaser: see Beckford v. Wade (17 Ves. Jun. 87; 34 E.R.) and cases therein cited.

(b) The consideration that the Board in Taylor v. Davies regarded as being of paramount significance was that if the statutory equivalent of the proviso to section 69 (1) was applicable to a constructive Trustee who had acquired possession of the trust property by means of the very transaction sought to be impeached, then all the protection that such trustees had hitherto had against stale claims would be taken away. On analysis this is not so at all. Prior to the enactment of provisions such as section 69 and the Ontario section 47, such constructive trustees had the benefit of the statutes of limitation, but only by analogous application. This meant that the running of the time-bar would be prevented by the fiduciary's non-disclosure (short of actual fraud) of the facts giving rise to the cause of action. The application in full measure of section 69 to all constructive trustees would relieve them of this risk, while admittedly imposing upon them a burden, namely, the proviso to subsection (1), from which they were previously free. So it was, with respect, not correct for the Board in Taylor v. Davies (at p. 652) to say that the application of the analogue to the proviso in section 69 (1) of the N.S.W. Act "would seriously alter for the worse the position of constructive trustees", and that a doctrine would be "introduced which may be fatal to the security of property". In truth, what section 69 (1) did was to give some benefit to constructive trustees of the relevant class, even though it also took something away.

(c) The decision of the Court of Appeal in Re Lands Allotment Company ((1894) 1 Ch. 616) supports the propositions that Section 8 of the Trustee Act 1888 (U.K.) (similar to section 69 of the N.S.W. Act) operates to protect constructive trustees and that the exceptions expressed in section 69 (1) are applicable to such trustees. Reference is also made to what was said by Warrington J. in Re Robinson; McLaren v. Public Trustee ((1911) 1 Ch. 502 at p. 506). Further, in Wassall v. Leggatt ((1896) 1 Ch. 554) a husband who forcibly took from his wife moneys that had been given to her as a legacy and used them for his own purposes was held to be disentitled to the benefit of the Statute of Limitations. It seems that none of these cases was cited to the Board in Taylor v. Davies. Lastly, there is the subsequent case of Re Eyre Williams ((1923) 2 Ch. 533), in which Romer J. held, relying on Soar v. Ashwell (supra) that a constructive trustee who constitutes himself such by receiving trust property with the knowledge that it is trust property is not entitled to avail himself of the Statute of Limitations.

(B) Taylor v. Davies is distinguishable:

(a) First, on a comparison of the relevant statutory provisions, because the Ontario statute of limitations contained a section, namely, section 48 (referred to in the opinion of the Board as section 49) which has no counterpart in the Trustee Act, N.S.W. This section (see the Opinion at p. 653) was relied upon by Their Lordships as pointing to the conclusion that not all constructive trustees were within section 47.

(b) Second, on the facts: in Taylor v. Davies, the claim was to recover the land conveyed and retained by the constructive trustee. Here the claim, apart from a declaration of trust, is for the recovery of moneys received by the trustees and presumably in large measure disbursed, e.g. in payment of dividends. The trust in the present case arose not solely by reason of the transaction impeached. It arose by reason of the transactions of receipt and disbursement coupled with the antecedent creation of a general fiduciary obligation arising from the circumstances in which Hudson acquired the licences. In this connexion, it matters not if his Honour was correct (which is disputed) in holding that Queensland Mines was not within the range of persons for whom, beneficially, Hudson intended to acquire them. The fiduciary obligation to hold any of the ultimate fruits of the licences for other persons accrued before the transactions sought to be impeached occurred. When Korman and Stanhill dropped out, there was by construction of law a transmutation of this obligation so that Queensland Mines became the sole beneficiary.

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22. The last point to be raised on the question of statutory limitation is that when the Limitation Act 1969 (N.S.W.) (which repeals s. 69 of the Trustee Act) came into force on 1st January, 1971, it was the first enactment which imposed any time bar limiting the period in which actions could be brought against persons who were liable to be declared constructive trustees in circumstances in which the trust arose only by reason of the transaction impeached. This proposition assumes Taylor v. Davies was correctly decided.

23. The trial judge concluded that s. 69 of the Trustee Act applied to the

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defendants, and that section had the effect of imposing a six year limitation period. The appellant submits that this conclusion was wrong, because if the defendants were not trustees within the meaning of the proviso to s. 69 (1) (as the trial judge found by applying Taylor v. Davies), it would be wrong to treat them as trustees within the meaning of any other part of s. 69.

24. Accordingly, as there was no existing enactment limiting the period in which such actions could be commenced when the Limitation Act 1969 came into force, and because of the definitions of "trust" and "trustee" in that Act, Queensland Mines is entitled to the benefit of s. 47 (2) of that Act, or a limitation period of twelve years. (s. 47 (1))

25. The following definitions are included in s. 11 of that Act:-

> '"Trust" includes express implied and constructive trusts, whether or not the trustee has a beneficial interest in the trust property, and whether or not the trust arises only by reason of a transaction impeached, and includes the duties incident to the office of personal representative but does not include the duties incident to the estate or interest of a mortgagee in mortgaged property.'
>
> '"Trustee" has a meaning corresponding to the meaning of "trust".'

26. S.47 of that Act is in the following terms:-

"Fraud and conversion; trust property.

(1) An action on a cause of action -

(a) in respect of fraud or a fraudulent breach of trust, against a person who is, while a trustee, a party or privy to the fraud or the breach of trust or against his successor;

(b) for a remedy for the conversion to a person's own use of trust property received by him while a trustee, against that person or against his successor;

(c) to recover trust property, or property into which trust property can be traced, against a trustee or against any other person; or

(d) to recover money on account of a wrongful distribution of trust property, against the person to whom the property is distributed or against his successor,

is not maintainable by a trustee of the trust or by a beneficiary under the trust or by a person claiming through a beneficiary under the trust if brought after the expiration of the only or later to expire of such of the following limitation periods as are applicable -

(e) a limitation period of twelve years running from the date on which the plaintiff or a person through whom he claims first discovers or may with reasonable diligence discover the facts giving rise to the cause of action and that the cause of action has accrued; and

(f) the limitation period for the cause of action fixed by or under any provision of this Act other than this section.

(2) Except in the case of fraud or a fraudulent breach of trust, and except so far as concerns income converted by a trustee to his own use or income retained and still held by the trustee or his successor at the time when the action is brought, this section does not apply to an action on a cause of

action to recover arrears of income.

27. The main, but not necessarily the only points to be made by the appellant can be conveniently summarised.

Issue 1

Does a separate cause of action arise on each failure by the respondents to account for royalty payments received by them?

If the answer to this question is "yes", Queensland Mines is content to succeed with respect to all such royalty payments received within six years of 22nd February, 1973.

Issue 2

If the answer to Issue 1 above is "no" then the plaintiff must establish:-

(a) the existence of an express trust, in which case it is common ground, with the exception of the defence of laches, which the respondents failed to establish, that there is no applicable time limit which would bar the plaintiff's claim;

or,

(b) a constructive trust coming into existence at some time prior to February 1967 but which, because Taylor v. Davies is wrong or distinguishable, is not time-barred;

or,

(c) that on the authority of Bulli Coal (supra) it had six years from the date upon which it was shown to have had knowledge of the relevant breach within which to bring action. (Queensland Mines was not shown not to have brought action within that period).

or that,

(d) The applicable limitation period is found in s. 47(1) or 47(2) of the Limitation Act, 1969.

28. It is submitted that the appeal should be allowed.

T.E.F. Hughes

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T.E.F. HUGHES

B.C. Oslington

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B.C. OSLINGTON