Equity Division
Supreme Court
New South Wales

Case Name:	The Property Investors Alliance Pty Ltd t/as PIA v Qi
Medium Neutral Citation:	[2018] NSWSC 977
Hearing Date(s):	28 & 29 May 2018; supplementary written submissions 11 and 18 June 2018
Date of Decision:	27 June 2018
Jurisdiction:	Equity - Commercial List
Before:	Stevenson J
Decision:	Plaintiff to elect whether to seek equitable compensation or an account of profits
Catchwords:	EQUITY — fiduciary duties — fiduciary relationships — employee and employer — where employees established company in competition to compete with employer during their employment — where employees diverted employer's clients to that company — whether employees bound to direct opportunities to employer EQUITY — fiduciary duties — scope — proscriptive duties — disclosure — whether employees obliged to direct opportunities to employer— where disclosure of opportunity was the only means by which fiduciary could obtain fully informed consent EQUITY — equitable remedies — calculation of loss suffered by employer and profit gained by fiduciary — election between equitable compensation and account of profits
Legislation Cited:	Corporations Act 2001 (Cth) Restraints of Trade Act 1976 (NSW)
Cases Cited:	AMP Services Ltd v Manning (No 2) [2007] FCA 82 Apand Pty Ltd v Kettle Chip Co Pty Ltd (1999) 88 FCR 568 Armory v Delamirie (1722) 1 Stra 505; 93 ER 664 Attorney-General (NSW); Ex rel Corporate Affairs v

Australian Softwood Forest Pty Ltd [1979] 2 NSWLR 73
Breen v Williams [1996] HCA 57; (1996) 186 CLR 71
Canson Enterprises Ltd v Boughton and Co [1991] 3 SCR 534
Colbeam Palmer Ltd v Stock Affiliates Pty Ltd (1968) 122 CLR 25
Commercial Plastics Ltd v Vincent [1965] 1 QB 623
Coope v LCM Litigation Fund Pty Ltd [2016] NSWCA 37
Curro v Beyond Productions Pty Ltd (1993) 30 NSWLR 337
Dart Industries Inc v Decor Corporation Pty Ltd (1993) 179 CLR 101
Digital Pulse Pty Ltd v Harris [2002] NSWSC 33
Fitzwood Pty Ltd v Unique Goal Pty Ltd (in liq) [2001] FCA 1628
General Tire & Rubber Co v Firestone Tire & Rubber Co Ltd [1975] 1 WLR 819
Grimaldi v Chameleon Mining (No 2) 200 FCR 296
HML v The Queen [2008] HCA 16; (2008) 235 CLR 334
Harris v Digital Pulse Pty Ltd [2003] NSWCA 10
Herbert Morris Ltd v Saxelby [1916] 1 AC 688
Hill v Rose [1990] VR 129
Hospital Products Ltd v United States Surgical Corporation [1984] HCA 64; (1984) 156 CLR 41
Houghton v Immer (No. 155) Pty Limited (1997) 44 NSWLR 46
Jones v Dunkel (1959) 101 CLR 298
Kone Elevators Pty Ltd v McNay (1997) ATPR 41-564
Koops Martin Financial Services Pty Ltd v Reeves [2006] NSWSC 449
Lindner v Murdock's Garage (1950) 83 CLR 628
My Kinda Town Ltd v Soll (1982) FSR 147
Nocton v Lord Ashburton [1914] AC 932
Nordenfelt v Maxim Nordenfelt Guns & Ammunition Co Ltd [1894] AC 535
Orton v Melman (1981) 1 NSWLR 583
OXS Pty Ltd v Sydney Harbour Foreshore Authority and Minister for Planning and Environment [2014] NSWSC 1284
Pilmer v Duke Group Ltd (in liq) [2001] HCA 31; (2001) 207 CLR 165
Re Dawson (1966) 84 WN (Pt 1) (NSW) 399
Smith v Smith [2017] NSWSC 408
Stacks Taree v Marshall (No. 2) [2010] NSWSC 77
Tank Lining Corp v Dunlop Industries Ltd (1982) 140 DLR (3d) 659
Tullett Prebon (Australia) Pty Ltd v Purcell [2008]

	NSWSC 852 Vandervell Products v McLeod [1957] RPC 185 V-Flow Pty Ltd v Holyoake Industries (Vic) Pty Ltd [2013] FCAFC 16 Warman International Ltd v Dwyer [1995] HCA 18; (1995) 182 CLR 544 Woolworths Ltd v Olson [2004] NSWCA 372 Wright v Gasweld Pty Ltd (1991) 22 NSWLR 317
Texts Cited:	Dal Pont, Equity and Trusts in Australia (5th ed, 2011) Meagher, Gummow and Lehane, Equity: Doctrines & Remedies (4th ed) W M C Gummow, "Compensation for Breach of Fiduciary Duty" in T G Youdan, Equity, Fiduciaries and Trusts (1989, Carswell, The Law Book Company)
Category:	Principal judgment
Parties:	The Property Investors Alliance Pty Ltd trading as PIA (Plaintiff) Yang Qi (First Defendant) Zhengyu Tong (Second Defendant) Rental Master Pty Ltd trading as Rental Master (Third Defendant)
Representation:	Counsel: T J Dixon (Plaintiff) H Grace (Defendants) Solicitors: Rutland's Law Firm (Plaintiff) Austin Haworth Lexon Legal (Defendants)
File Number(s):	SC 2017/338354

JUDGMENT

1 The Property Investors Alliance Pty Ltd, trading as PIA, is a real estate agent and property developer.

2 The business of PIA includes leasing and managing residential investment properties.

3 Since 2013 PIA has managed a portfolio of some 4,000 properties. One of its assets is a "rent roll" in respect of the properties currently under management.

4 Between 2 December 2013 and 30 August 2017 the first and second defendants, Mr Yang Qi and Mr Zhengyu Tong, were employed in PIA's property management department.

5 These proceedings concern the undisputed facts that Mr Qi and Mr Tong, while employed by PIA:

(1) established the third defendant, Rental Master Pty Ltd to compete with PIA;

(2) in breach of their contractual, fiduciary and statutory obligations caused clients of PIA to become clients of Rental Master and Rental Master to manage 44 properties owned by those clients; and

(3) caused Rental Master to manage 60 further properties.

The contracts of employment

6 Mr Tong was employed by PIA between 2 December 2013 and 30 August 2017, and Mr Qi between 21 May 2014 and 10 February 2017. Although Mr Qi left PIA's employment some six months before Mr Tong, both sides conducted the proceedings on the basis that no distinction should be drawn between the two resignation dates.

7 Mr Qi and Mr Tong were employed pursuant to written contracts entitled "Letter of Appointment Terms". Each had the job title "Property Manager's Assistant (Property Officer)" and later "Junior Portfolio Manager". Each had management responsibilities for approximately 400 investment properties managed by PIA on behalf of its clients.

8 In their initial roles as property manager assistants, Mr Tong and Mr Qi were to support "the Property Manager in the day to day management of their portfolio of investment properties" including:

(a) dealing with enquiries;

(b) biannual property inspections;

(c) showing properties to prospective tenants; and

(d) monitoring and managing the payment of rent by tenants.

9 There is no evidence of Mr Qi and Mr Tong's responsibilities as Portfolio Managers.

10 Mr Tong's initial salary was $38,000 per annum plus superannuation. When he commenced work as Portfolio Manager on 1 April 2015 Mr Tong's remuneration increased to $40,000 plus superannuation and a "performance based commission" of $200 per annum for each property managed. On 19 September 2016 his remuneration increased to $50,000 per annum plus superannuation, and the performance based commission became payable after "deduction of annual upfront payment of A$7,000". As Mr Tong was managing some 400 properties, his total remuneration was then in the order of $142,500 per annum.

11 Mr Qi's initial salary was also $38,000 per annum plus superannuation. In April 2015 Mr Qi commenced work as a Junior Portfolio Manager and his salary increased to $40,000 per annum plus superannuation. Mr Qi was then also entitled to a "performance based commission of $200 for property each managed". As Mr Qi was also managing some 400 properties, his total remuneration was in the order of $120,000 per annum.

12 There were express terms of Mr Qi's and Mr Tong's employment by PIA that:

(a) during their employment, they would not enter into any contract which was contrary to the interests of PIA or in which they had interests which conflicted with their duties to PIA (cl 15.1);

(b) during working hours they would give their full attention to the performance of their duties for PIA (cl 15.2);

(c) while working for PIA they would not engage in any other employment without the consent of PIA or be involved in any capacity, directly or indirectly, in any other business in competition with PIA (cl 15.3);

(d) on termination of their employment they would promptly account to and return to PIA all records of PIA and property or things of PIA that were made available for their use in the course of their employment (cl 20.1);

(e) they were to maintain the confidentiality of all "confidential information" (defined to include all information contained in all databases owned or used by PIA) and to use such information solely for the benefit of PIA during and after the termination of their employment (cl 21.1);

(f) they would not, for 24 months after termination of their employment, for any reason, in any capacity directly or indirectly, canvass, solicit or otherwise seek the custom of persons who have been customers of PIA in the 12 months prior to the termination of such employment (cl 22.2); and

(g) they would, on termination of their employment with PIA return to PIA all files, records, documents, discs, equipment and similar items relating to PIA's business (cll 20.1 and 21.5).

13 In their Commercial List Response Mr Qi and Mr Tong admit that the terms of their employment by PIA included fiduciary duties:

(a) to act with good faith and fidelity to PIA;

(b) of loyalty to PIA such that neither of them would:

(i) put themselves in a position of conflict with their obligation to act solely in PIA's interests in relation to any of PIA's businesses they were involved in; and

(ii) take for themselves an opportunity within the sphere of PIA's business operations without PIA's fully informed consent.

14 Fiduciary duties are proscriptive. A fiduciary must not promote his or her personal interest by making or pursuing a gain in circumstances where there is a conflict, or real or substantial possibility of conflict, between the personal interest of the fiduciary and those to whom the duty is owed: *Pilmer v Duke Group Ltd (in liq)* [2001] HCA 31; (2001) 207 CLR 165 at 199; see also *Coope v LCM Litigation Fund Pty Ltd* [2016] NSWCA 37 at [105].

15 As Gaudron and McHugh JJ put it in *Breen v Williams* [1996] HCA 57; (1996) 186 CLR 71 at 113:

> "In this country, fiduciary obligations arise because a person has come under an obligation to act in another's interests. As a result, equity imposes on the fiduciary proscriptive obligations — not to obtain any unauthorised benefit from the relationship and not to be in a position of conflict. If these obligations are breached, the fiduciary must account for any profits and make good any losses arising from the breach. But the law of this country does not otherwise impose positive legal duties on the fiduciary to act in the interests of the person to whom the duty is owed." [Citation omitted]

16 It is common ground that by reason of their employment with PIA, Mr Qi and Mr Tong were also under duties not improperly to use their position with PIA to gain an advantage for themselves or someone else, or to cause detriment to PIA: s 182 of the *Corporations Act 2001* (Cth).

Mr Qi and Mr Tong decide to compete with PIA

17 Mr Qi and Mr Tong established Rental Master on 7 March 2016; whilst employed by PIA. Mr Qi, Mr Tong and Ms Selina Zhang were then appointed directors of Rental Master. Mr Qi and Mr Tong remained directors until immediately after Mr Tong ceased to be an employee of PIA; whereupon their

spouses took their place as directors. Each was, and remains, a 30 per cent shareholder in Rental Master.

18 In April 2016 Mr Qi and Mr Tong leased office space in the name of Rental Master and in July 2016 obtained a corporate real estate agents licence for it.

19 From about April 2016 Rental Master, without the knowledge or consent of PIA, competed with PIA.

20 The relief sought by PIA relates to the loss it suffered, or alternatively the profit gained by Rental Master, by reason of the conduct of Mr Qi and Mr Tong that occurred while one or both of them was employed by PIA; that is, up to 31 August 2017, the date Mr Tong resigned.

The issues

21 Mr Grace, who appeared for Mr Qi, Mr Tong and for Rental Master, accepted that:

(a) between 24 September 2014 and 24 August 2017, Mr Qi and Mr Tong sent some 55 emails relating to PIA's clients from their PIA email accounts to their personal accounts and that those emails contained "confidential information" within the meaning of their employment contracts;

(b) since June 2016, Mr Qi and Mr Tong procured PIA's former clients to transfer the management of 44 properties from PIA to Rental Master and to enter exclusive management agreements with Rental Master in respect of the 44 properties owned by those parties;

(c) by engaging in that conduct Mr Qi and Mr Tong had acted in breach of their contractual, equitable and statutory obligations to PIA;

(d) so far as concerned their breaches of their fiduciary duties, Rental Master was a knowing beneficiary of those breaches; and

(e) there should be judgment for PIA and, subject to PIA's election, either an order that Mr Qi, Mr Tong and Rental Master pay PIA damages, equitable compensation and/or statutory compensation or account for all profits received by Rental Master from those 44 former clients of PIA.

22 The issues that divide the parties are:

(1) whether Mr Qi and Mr Tong also acted in breach of their fiduciary duty to PIA by causing, during the time that one or both of them was employed by PIA, Rental Master to be retained to manage a further 60 properties. The owners of these properties were not clients of PIA. PIA contends that the opportunity to acquire the business of the owners of these properties was one Mr Qi and Mr Tong were bound to make available to PIA, rather than Rental Master; and one they could not in any event take for themselves;

(2) the validity of the restraint referred to at [12(f)] above. This has implications concerning the relief sought by PIA;

(3) the relief to which PIA is entitled, including whether PIA is entitled to relief in respect of unexplained credit entries styled "rent payment" in Rental Master's banking records.

Some preliminary matters

23 There are a number of matters that arose during argument which can be dealt with at the outset.

24 First, PIA alleged that Rental Master earned commissions on sales of some properties improperly diverted to it by Mr Qi and Mr Tong. However, the evidence necessary to establish those matters did not survive objection.

25 Second, PIA contended that Mr Qi and Mr Tong had, in breach of their obligations under cl 21 of their employment contracts (see [12(e)] above), used confidential information of PIA otherwise than for the benefit of PIA. This allegedly confidential information concerned 9 of the 44 properties admittedly diverted by Mr Qi and Mr Tong to Rental Master. Mr Grace disputed whether this material was confidential for the purposes of s 183 of the *Corporations Act* (although in his written opening submissions he said that Mr Qi and Mr Tong did not contest that they had contravened that section). I do not consider I need to deal with this aspect of the matter. That is because Mr Dixon, who appeared for PIA, did not suggest that PIA had suffered any damage by reason only of the alleged misuse by Mr Qi and Mr Tong of the allegedly confidential information. PIA's case is that the loss it had suffered is because it lost the clients whose properties were the subject of the allegedly confidential information and thus lost the income stream that would thereby have accrued to its benefit.

26 Third, PIA claimed, and Mr Qi and Mr Tong accepted, that in breach of their obligations under cll 20.1 and 21.5 (see [12(g)] above) they had failed to return PIA's records to it. In their List Response, Mr Qi and Mr Tong said they were willing to provide undertakings to return, delete or otherwise dispose of any confidential information of PIA in their possession and not to misuse or disclose PIA's confidential information to solicit, canvass or to take on any new work for clients of PIA. In his opening submissions, Mr Grace set out the terms of the undertaking that Mr Qi and Mr Tong were prepared to give. In light of the preparedness of Mr Qi and Mr Tong to give such an undertaking I do not propose to consider the matter further in these reasons. I will hear submissions as to the adequacy of the undertakings offered once these reasons are published.

27 Fourth, despite his acceptance of Mr Qi's and Mr Tong's position as stated at [21] above, in closing submissions Mr Grace submitted that PIA should be denied equitable relief because, once it commenced these proceedings, it failed to seek interlocutory relief restraining Mr Qi and Mr Tong from continuing to deal with the clients they had caused to be diverted from PIA to Rental Master. Mr Grace accepts the plaintiff would still be entitled to damages but contends that it would be inequitable to require Rental Master to account for profit made in circumstances where the plaintiff "allowed Rental Master" to "keep generating income". I do not accept this submission. PIA makes clear in its Summons and Commercial List Statement that it contends Mr Qi and Mr Tong had improperly diverted its clients to Rental Master. It has prosecuted its case diligently. It obtained interlocutory injunctive relief restraining Mr Qi and Mr Tong from acting inconsistently with the restriction in cl 22.2 of the employment contracts. I do not see how the fact that it did not also seek further interlocutory relief can affect its entitlement to an account of profits now.

Ambit of the restraint

28 Clause 22.2 of Mr Qi's and Mr Tong's contracts of employment were in the following terms:

> "You must not, at any time during the period [of 24 months], after termination of your employment for any reason, in any capacity directly or indirectly, canvass, solicit or otherwise seek the custom of, or undertake any work for, any person who is at the date of your employment ceases, or who was at anytime during the period of 12 months preceding that date, a customer of the Company."

29 Mr Grace submitted that cl 22.2 is "an invalid restraint of trade" and is "altogether invalid".

30 I do not accept that submission.

31 The relevant principles were succinctly summarised in the following passage from the judgment of Brereton J in *Tullett Prebon (Australia) Pty Ltd v Purcell* [2008] NSWSC 852 at [47]:

> "In New South Wales, a restraint of trade is valid to the extent that it is not against public policy [*Restraints of Trade Act 1976* (NSW), s 4(1); *Koops Martin Financial Services Pty Ltd v Reeves* [2006] NSWSC 449 at [26]-[27]]. A restraint of trade is not contrary to public policy if it is reasonable as between the parties, and not unreasonable in the public interest, so that while affording adequate protection to the party in whose favour it is imposed, it is not injurious to the public [*Nordenfelt v Maxim Nordenfelt Guns & Ammunition Co Ltd* [1894] AC 535 at 565; *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688 at 706-707; *Lindner v Murdock's Garage* (1950) 83 CLR 628 at 653]. Whether a restraint is reasonable having regard to the interests of the parties depends on two, albeit related, considerations: first, whether the covenantee has a legitimate protectable interest, and secondly, whether the restraint is no more than reasonable for the legitimate protection of that interest. A covenantee is not entitled to be protected against mere competition; the legitimate interests which may be the subject of protection by covenant are in the nature of proprietary subject matter [*Vandervell Products v McLeod* [1957] RPC 185; *Tank Lining Corp v Dunlop Industries Ltd* (1982) 140 DLR (3d) 659 at 664], including trade secrets and confidential information, and goodwill including customer connection. The validity of a restraint is to be judged at the time at which the contract is made, by reference to what the restraint entitles or requires the party to do, rather than what they intend to do or have actually done [*Nordenfelt* at 573-574; *Commercial Plastics Ltd v Vincent* [1965] 1 QB 623 at 644; *Curro v Beyond Productions* Pty Ltd (1993) 30 NSWLR 337 at 344; *Woolworths Ltd v Olson* [2004] NSWCA 372 at [40]]."

32 PIA has a "legitimate protectable interest" for the purpose of the authorities discussed by Brereton J, namely its customer connection.

33 Further, as McDougall J said in *Stacks Taree v Marshall (No. 2)* [2010] NSWSC 77 at [44(l)]:

> "The effect of the *Restraints of Trade Act 1976* (NSW) is to allow the restraint to be read down so as to be valid to the extent necessary only to capture the conduct of the defendant, if that extent would have been valid. However, the Act does not allow the Court to remake the contract or a covenant in the contract: *Orton v Melman* (1981) 1 NSWLR 583; *Wright v Gasweld Pty Ltd* (1991) 22 NSWLR 317 at 329; *Kone Elevators Pty Ltd v McNay* (1997) ATPR 41-564 (NSW Court of Appeal) at 43,833. Whilst the Court is permitted to read down the clause if the clause is so capable, it cannot be re-drafted: *Kone Elevators Pty Ltd v McNay*...at 43,833; *Woolworths v Olson* [2004] NSWCA 372."

34 Clause 22.2 does not restrain Mr Qi or Mr Tong from competing with PIA.

35 Rather, it provides that, for 24 months after the termination of their employment, Mr Qi and Mr Tong may not solicit the custom of or work for

PIA's current clients or any party that was a client of PIA during the preceding 12 months.

36 Nonetheless, the prohibition on Mr Qi and Mr Tong soliciting former clients of PIA in my opinion goes beyond that which is reasonably necessary to protect PIA's legitimate protectable interests. After all, such parties are no longer clients of PIA.

37 Further, bearing in mind the relatively junior status of Mr Qi and Mr Tong as employees of PIA, I conclude that PIA's legitimate protectable interest does not require a restraint for 24 months following cessation of their employment. In my opinion, a restrain of 12 months is sufficient to protect those interests.

38 Accordingly I read down cl 22.2 pursuant to s 4(3) of the *Restraints of Trade Act* so as to confine its scope to 12 (rather than 24) months and to parties who were clients of PIA at 30 August 2017; being the date of cessation of Mr Tong's employment.

The 44 clients

39 Mr Qi and Mr Tong accept that since June 2016 they caused 44 of PIA's former clients to transfer their business to Rental Master.

40 That conduct was in breach of Mr Qi's and Mr Tong's contractual and fiduciary obligations to PIA. The conduct was deliberate, calculated and surreptitious. They did not seek to justify it. It is hard to see how they could. Although both swore and served affidavits, they were not called to give evidence.

41 One example of their conduct relates to an apartment in Cowper Street, Parramatta.

42 PIA introduced its client to that property in 2013. Once the client purchased the property, PIA managed the property from 2013 without complaint.

43 On 20 February 2017 Ms Selina Zhang (the third director of Rental Master) wrote to PIA claiming to be from "VIP Real Estate", stating that "this firm has been appointed managing agent" of the property and giving PIA 30 days' notice to hand over the management records to VIP Real Estate.

44 The evidence does not reveal whether "VIP Real Estate" had in fact been appointed by the owner of the property as managing agent. If it had, it must follow from Mr Qi's and Mr Tong's admission that they diverted this client to Rental Master and that this occurred at their instigation, or at least with their knowledge.

45 On 10 April 2017 Ms Zhang attended PIA and uplifted relevant management records and keys.

46 On 11 April 2017 a tenant at the Cowper Street property received an email from "Tony" from "VIP Investment Groups" stating:

> "This is a welcome email from your new rental agent. My name is Tony, I am your new property manager from VIP Investment Groups
>
> Please refer below Trust Bank Account for your further rental payment".

47 There followed details of Rental Master's bank account.

48 Evidently the tenant at Cowper Street was sceptical about this communication and sent an email to Mr Tong:

> "Please check the below email. Looks like it is spam! Please confirm urgently."

49 Within minutes Mr Tong replied:

> "Yes,
>
> Please pay rent to your new agent".

50 Mr Tong must have known that his fellow director, Ms Zhang, had by then collected the management records and keys to the Cowper Street property.

Mr Tong knew that "your new agent" was Rental Master, the company he (with Mr Qi and Ms Zhang) had set up to compete with his employer, PIA.

51 Another example relates to two properties in Brown Street, Chatswood.

52 PIA commenced managing those properties on behalf of its clients in September 2014.

53 In May 2016 the clients terminated PIA's retainer stating that they had a "closer relationship with other [sic] agent".

54 The Managing Director of PIA Mr Yue Wang has since discovered emails sent by Mr Tong to the tenants of those apartments stating:

> "We're no longer your managing agent for XXX Brown St Chatswood,
>
> For further communication, please contact Rocky from Rental master, his contact detail is: info@rentalmaster.com.au, they should send you an email regarding rent payment details, please DO NOT pay rent to PIA anymore,
>
> Should you have any further queries, please do not hesitate to contact me."

55 Mr Tong did not merely notify the tenant that PIA was no longer the managing agent of the property. He directed the tenant to pay rent to Rental Master and, in imperative terms, no longer to pay rent to PIA.

56 In relation to 4 of the 44 diverted properties, Rental Master did not receive income until shortly after Mr Tong ceased employment with PIA on 30 August 2017. However, as it is admitted that Mr Qi and Mr Tong diverted these properties from PIA to Rental Master, it is probable that the diversion of these properties occurred whilst one them was employed at PIA. I do not see how their liability to pay compensation or account is altered by the fact that Rental Master did not actually receive income from these properties while Mr Qi or Mr Tong were employed by PIA.

The 60 clients

57 These are clients retained by Rental Master while one or both of Mr Qi and Mr Tong were employed by PIA. Unlike the 44 clients, these parties were never clients of PIA.

58 PIA contends that by causing these clients to be retained by Rental Master, rather than their employer, PIA, Mr Qi and Mr Tong took "advantage of [an] opportunity or knowledge derived from [their] fiduciary position" (*Warman International Ltd v Dwyer* [1995] HCA 18; (1995) 182 CLR 544 at [23]) and are therefore either liable themselves to compensate PIA for the loss it has suffered or to procure that Rental Master account to PIA for the profit it has made for the retainer of those clients.

59 Mr Wang gave unchallenged evidence that PIA would have "taken on those opportunities if they had been presented to it" by Mr Qi and Mr Tong. As far as an account of profits is concerned, it is not necessary for PIA to show willingness or even an ability "to the make the profits of which an account is taken": *Warman* at [24]. On the other hand. Mr Wang's willingness to take on this business on behalf of PIA does not, itself, compel the conclusion that the business would have become available to PIA.

60 Palmer J summarised the position in *Digital Pulse Pty Ltd v Harris* [2002] NSWSC 33 (at [21] and [22]):

> "The obligations imposed by the duty are not coterminous with the employee's normal working hours: they govern all the activities of the employee, whenever undertaken, which are within the sphere of the employer's business operations and which could materially affect the employer's business interests. Whether a particular activity could materially affect the employer's business interests is a question of fact and degree.
>
> The duty of loyalty requires that an employee not place himself or herself in a position in which the employee's own interest in a transaction within the sphere of the employer's business operations conflicts with the employee's duty to act solely in the employer's interest in relation to that transaction. A fortiori, an employee may not take for himself or herself an opportunity within the sphere of the employee's business operations without the employer's fully informed consent."

61 His Honour's decision was overturned in part on appeal; but no criticism was made of this statement of the law: *Harris v Digital Pulse Pty Ltd* [2003] NSWCA 10.

62 With one exception, there is no evidence as to the circumstances in which the 60 parties came to be clients of Rental Master.

63 The one exception relates to an apartment in Chisholm Street, Wolli Creek (described by Mr Wang, without objection, as being "a potential PIA client").

64 In relation to that property, during business hours on 8 August 2016, Mr Qi sent from his PIA email address to his private Gmail email address a copy of an "Exclusive Management" agreement between Rental Master and the owner of the property. The agreement appears to have been signed by Mr Qi on behalf of Rental Master. It appoints Rental Master to manage the premises in return for a letting fee, a tenancy preparation fee, a 4.4 per cent management fee, and a monthly administration fee.

65 The document reveals Mr Qi's efforts to secure to Rental Master the exclusive management of the Wolli Creek property at a time when he was bound by contract and in equity to manage properties for PIA. His pursuit of this opportunity was clearly in service of Rental Master's and his own interests and in conflict with his contractual and fiduciary duty to PIA

66 There is no evidence of the circumstances in which the remaining 59 properties came to be retained by Rental Master, save that the retainer occurred while one or both of Mr Qi and Mr Tong were employed by PIA and bound not to compete with it. That fact alone reveals the existence of a real or substantial possibility for conflict between the defendants' interests and those of PIA. The management of properties by Mr Qi and Mr Tong was a matter squarely within the sphere of PIA's business operations and Mr Qi's and Mr Tong's roles as portfolio managers.

67 Mr Qi and Mr Tong must know the true position. As I have said, they both served affidavits. They were not called to give evidence.

68 In those circumstances there was debate before me as to whether a *Jones v Dunkel* (1959) 101 CLR 298 inference arises.

69 Mr Grace submitted that no *Jones v Dunkel* inference should be drawn as, in the circumstances, there could be no expectation that they be called to meet PIA's case concerning the 60 properties.

70 That was because, Mr Grace submitted, there was no reference in PIA's Summons or Commercial List Statement to the 60 properties, and that the issue in relation to those properties was only raised by PIA in Mr Dixon's outline submissions, which were served on 23 May 2018, two working days before the hearing.

71 However during the hearing, Mr Grace made no complaint about this matter. He did not contend that PIA's claim in relation to the 60 properties was outside the pleadings, or otherwise unavailable to it, that he could not meet it or that I should not determine the issue. Indeed it was common ground before me that the issue of whether PIA was entitled to compensation or an account of profits in respect of the 60 properties, in addition to the 44 admittedly diverted properties, was the principal matter for determination.

72 In my opinion, Mr Qi and Mr Tong had ample opportunity to adduce further evidence in relation to the 60 properties if they wished. Their submissions and objections to PIA's evidence were prepared and circulated over the weekend before the hearing. I see no reason why any evidence that Mr Qi and Mr Tong wish to adduce in relation to the 60 properties could not have been prepared and circulated at the same time, if not earlier.

73 The unexplained failure of a party to give evidence "is not treated as evidence of fear that it would expose as unfavourable fact, nor an assertion of the non-existence of the fact not proved: the only consequence is that the failure can

cause an inference arising from the evidence of the opposing party to be more confidently drawn" *HML v The Queen* [2008] HCA 16; (2008) 235 CLR 334 at [303] (Heydon J).

74 The only evidence Mr Qi and Mr Tong could have given to justify their conduct was that they sought and obtained PIA's fully informed consent to appropriate for themselves an opportunity within the scope of their employment at PIA.

75 As I have mentioned, Mr Wang gave evidence that PIA would have sought to manage the 60 properties had it been given the opportunity to do so. It is implicit in that evidence that neither Mr Qi nor Mr Tong sought PIA's consent to Rental Master assuming management of the properties. The failure of Mr Qi and Mr Tong to give evidence persuades me that I should, with confidence, infer that they did not.

76 Mr Grace submitted that Mr Qi and Mr Tong were not under a positive duty to refer clients to PIA. So much may be accepted. But Mr Qi and Mr Tong could not be absolved from their position of conflict without seeking PIA's informed consent to their company, Rental Master, taking the opportunity to manage the 60 properties.

77 As Finkelstein J said in *Fitzwood Pty Ltd v Unique Goal Pty Ltd (in liq)* [2001] FCA 1628 at [32]:

> "...that which is often regarded as a fiduciary obligation of disclosure should not be seen as a positive duty resting on a fiduciary, but a means by which the fiduciary obtains the release or forgiveness of a negative duty; such as the duty to avoid a conflict of interest, or the duty not to make a secret profit".

78 Mr Qi and Mr Tong were not entitled to appropriate for themselves (through Rental Master) the management of the 60 properties without seeking PIA's informed consent. As a practical matter, that meant that Mr Qi and Mr Tong were obliged to inform Mr Wang of the opportunity.

79 It seems likely that Mr Wang would not have given PIA's consent to Mr Qi and Mr Tong acquiring this business. It does not follow that the owners of the 60

properties would have chosen to engage PIA to manage them. The evidence does not enable me to come to any conclusion about this. I am therefore not able to conclude that PIA has suffered a loss by reason of these matters.

80 But that does not affect PIA's entitlement to an account of profits.

81 As Prof Gummow has said, extra judicially:

> "...equity acts not to restore what the plaintiff has lost, for nothing has been lost, but to deprive the fiduciary of a gain made in breach of an obligation to eschew undisclosed conflicts between his duty to his principal and self-interest". [W M C Gummow, "Compensation for Breach of Fiduciary Duty" in T G Youdan, *Equity, Fiduciaries and Trusts* (1989, Carswell, The Law Book Company) at 62.]

The unexplained "rent payments" received by Rental Master

82 Rental Master's bank accounts show regular monthly rental payments with the descriptors such as "RENT PAMNT AAGST", "RENT PAMNT AALETT".

83 PIA's solicitors asked the defendants' solicitors to explain what these entries represented. No response was received. Mr Dixon has calculated that the total of these amounts was $210,309.13 and that the commission earned by Rental Master (at its usual rate of 4 per cent) from this income was $8,412.37.

84 These amounts were deposited to Rental Master's account between August 2016 and December 2017.

85 The deposits obviously represent rental income from some source. The defendants did not explain what that source was. Mr Grace did not respond to Mr Dixon's written submission about them.

86 The High Court said, in *Warman* at [34]:

> "It is for the defendant to establish that it is inequitable to order an account of the entire profits. If the defendant does not establish that that would be so, then the defendant must bear the consequences of mingling the profits attributable to the defendant's breach of fiduciary duty and the profits attributable to those earned by the defendant's efforts and investment, in the

same way that a trustee of a mixed fund bears the onus of distinguishing what is his own." [Citations omitted]

87 As Lindsay J put it in *Smith v Smith* [2017] NSWSC 408 at [448]:

> "Where an accounting party fails to keep proper accounts, and thereby renders problematic any exercise of accounting by the Court, the Court generally proceeds on a presumption against that party, resolving doubtful questions against the party whose actions have made an accurate determination problematic: *Houghton v Immer (No. 155) Pty Limited* (1997) 44 NSWLR 46 at 59D, applying *Armory v Delamirie* (1722) 1 Stra 505; 93 ER 664. This principle may require moderation in its application to the facts of the particular case in order to serve the interests of justice; but, in a case in which an accounting party has deliberately put it out of the power of an adversary to obtain an accounting to which there is an entitlement, the accounting party cannot complain if the Court presumes the worst against him, her or it."

88 The defendants have not explained this income. It is clearly rental income. It is likely to have come from one or more of the properties the subject of these proceedings. It should be taken into account in assessing the relief to which PIA is entitled.

Compensation and account of profits

89 PIA is a victim of the breach of fiduciary duty by Mr Qi and Mr Tong. PIA is entitled to elect between the remedy of equitable compensation or damages and the remedy of an account of profits.

90 PIA is also entitled to compensation under s 1317H of the *Corporations Act* by reason of Mr Qi's and Mr Tong's admitted breach of their obligations under s 182 of that Act. In the circumstances of this case, I do not see that PIA's entitlements under s 1317H would differ from its entitlements in equity. Neither counsel suggested they would. Accordingly, I will confine findings to PIA's entitlements to equitable relief.

The principles

91 The relevant principles were summarised by the Full Court of the Federal Court of Australia in *V-Flow Pty Ltd v Holyoake Industries (Vic) Pty Ltd* [2013] FCAFC 16.

92 So far as concerns equitable compensation or damages the Court (Emmett, Edmonds and Rares JJ) said at [55] to [56]:

> "The object of the equitable remedy of compensation or damages is restitution of what the victim has lost. The question is whether the loss would have occurred but for the breach. While the monetary sum awarded to the victim is normally computed by reference to the detriment actually suffered by the victim, it may occasionally be computed by reference to the profit that has been made by the errant fiduciary. Nevertheless, the primary purpose of equitable compensation or damages is compensatory (*Nocton v Lord Ashburton* [1914] AC 932; *Re Dawson* (1966) 84 WN (Pt 1) (NSW) 399). No element of penalty is involved. (Meagher, Gummow and Lehane, *Equity: Doctrines & Remedies* (4th ed) at [23–02]).
>
> The obligation imposed by equity to pay damages or compensation is not fettered by the usual notions that serve to diminish the quantum of an award of damages at common law. The obligation imposed by equity upon an errant fiduciary is of a more absolute nature than the common law obligation to pay damages for tort or breach of contract. Thus, the obligation is not limited or influenced by common law principles governing remoteness of damage, foreseeability or causation (*Hill v Rose* [1990] VR 129 at 144). However, while foreseeability is not a concern in assessing equitable compensation or damages, the only losses that are made good are those that, on a common sense view of causation, are caused by the breach of duty (*Canson Enterprises Ltd v Boughton and Co* [1991] 3 SCR 534 at 556)."

93 So far as concerns an account of profits, their Honours said:

> "On the other hand, the purpose of an account of profit is to prevent the unjust enrichment of the fiduciary by compelling the fiduciary to surrender any profits actually made by the fiduciary that were made improperly, and nothing beyond that. It is not to punish the errant fiduciary (*Dart Industries Inc v Decor Corporation Pty Ltd* (1993) 179 CLR 101 at 111) (*Dart*). The errant fiduciary is made to account for, and is then stripped of, profits made that it would be unconscientious for that person to retain, because they are profits made by the fiduciary dishonestly. For example, in the case of infringement of intellectual property rights, the account is limited to the profits of the wrongdoer during the period when the victim's rights were being infringed (*Colbeam Palmer Ltd v Stock Affiliates Pty Ltd* (1968) 122 CLR 25 at 34).
>
> There is no reason why an errant fiduciary should not be required to disgorge a capital profit, as well as a trading profit (*Apand Pty Ltd v Kettle Chip Co Pty Ltd* (1999) 88 FCR 568 at 584) (*Apand*). However, the profit must be shown to be one resulting from the breach of fiduciary duty. It is only profits properly attributable to the breach of fiduciary duty that should be the subject of the account (Dal Pont, *Equity and Trusts in Australia* (5th ed, 2011) at [34.155]). In calculating the quantum of the relevant profit, the court adopts the nearest approximation to justice that it can make (*Dart* at 119). In principle, there is nothing wrong with the court estimating the profit by drawing inferences, provided that there is some evidence of actual profit (*Apand* at 571)."

94 As their Honours also pointed out, s 1317H appears to amalgamate notions inherent in both of these remedies. Their Honours said at [54]:

> "The language of s 1317H is singularly inelegant. Section 1317H(1) provides that the court may order a person to compensate a corporation for damage suffered by the corporation, if the damage resulted from a contravention of relevant provisions of the *Corporations Act* by that person. Section 1317H(2) then appears to direct the court determining the damage suffered by the corporation to include, as damage, profits made by any person resulting from the contravention. That appears to refer to profits made, irrespective of whether there was countervailing damage suffered by the corporation. That is to say, the effect of s 1317H(2) is definitional, in the sense that it brings into the compensatory scheme of s 1317H the capacity for the court to order that the compensation include profits, even though there was no corresponding loss on the part of the corporation (*Grimaldi v Chameleon Mining (No 2)* 200 FCR 296 at [630]–[631]). That scheme involves a conflation of the concepts of equitable compensation or damages, on the one hand, and account of profits, on the other."

95 It is necessary to determine, as accurately as possible, the true measure of the loss suffered by the victim of an errant fiduciary or the true measure of profit or benefit obtained by the fiduciary in breach of duty (for example see *Hospital Products Ltd v United States Surgical Corporation* [1984] HCA 64; (1984) 156 CLR 41 at 112). The assessment of these matters is often extremely difficult in practice. It has been said that "[what] will be required on the inquiry...will not be mathematical exactness but only a reasonable approximation" (*My Kinda Town Ltd v Soll* (1982) FSR 147 at 159 (Slade J) cited with approval in *Warman* at [25]).

96 What is required is a "judicial estimation of the available indications" (*General Tire & Rubber Co v Firestone Tire & Rubber Co Ltd* [1975] 1 WLR 819 at 826 (Lord Wilberforce) cited with approval in *Warman* at [46]).

Application of the principles

97 The profit earned by Rental Master and the loss suffered by PIA by reason of the diversion to it of the 104 properties will be determined by reference to the income generated by the properties and any cost that PIA would have incurred, and any cost Rental Master did incur, to generate that income.

The profit made by Rental Master

98 The profit made by Rental Master by reason of the breach of fiduciary duty by Mr Qi and Mr Tong may be ascertained by reference to the income received by Rental Master from the 44 properties diverted to Rental Master, the 60 properties that Rental Master acquired whilst Mr Qi and Mr Tong were employees of PIA and the income derived by Rental Master from the unexplained properties referred to at [82] above.

99 In relation to the 44 properties, the capital value to Rental Master of the income stream deriving from those properties is the subject of an expert report prepared by Mr Andrew Firth, a chartered accountant specialising in business valuation. That report was served by the defendants in the proceedings but ultimately relied upon by PIA. Mr Firth determined the capital value of the rent roll referable to the 44 properties by calculating the annualised revenue from the 44 properties ($47,463) and applying a "recurring multiple" to that figure. That multiple represents the number of years during which, in Mr Firth's opinion, Rental Master could reasonably expect to continue to enjoy receiving that income. The multiple adopted by Mr Firth was 3.3, reflecting his opinion that Rental Master could reasonably expect to enjoy the annualised rental for 3.3 years. Mr Grace did not challenge that evidence (unsurprisingly as Mr Firth's report was served on behalf of the defendants). Adopting that methodology Mr Firth opined that the value of the rent roll represented by the income stream generated by the 44 properties as at 31 May 2018 was $156,628.

100 Mr Firth said that he would adopt the same methodology were he to determine the value of Rental Master's rent roll by reference also to the 60 properties.

101 This would involve calculation of the annualised revenue received by Rental Master from the 60 properties and application to it of the "recurring multiple" of 3.3.

102 The resultant figure, when added to the $156,628 the subject of Mr Firth's calculations concerning the 44 properties will, subject to what follows, represent a fair assessment of the profit that Rental Master has made from the 104 properties in question.

103 To that figure should be added a corresponding figure in relation to the "unexplained" properties; that is $27,760.82 (= $8,412.37 x 3.3).

104 From the resultant figure there must be deducted an amount to reflect the expenses that Rental Master incurred to generate income from the properties.

105 Mr Grace has calculated that, at 30 August 2017, Rental Master incurred total expenses in the order of $180,000. It is unlikely that all those expenses were incurred to generate the income earned by Rental Master from the properties in question. On the other hand it is likely that Rental Master incurred some operating expenses in that regard. The expenses to which Mr Grace refers are for the period to 31 August 2017. However Rental Master also received income after that period. Mr Grace submits that I should be satisfied that "on a conservative estimate that at least 30 per cent of Rental Master's expenses should be allowed as deduction from the defendants' income when determining what profits were made". Mr Grace thereby invites me to engage in what really amounts to little better than "judicial guesswork" to adopt Finkelstein J's expression in *AMP Services Ltd v Manning (No 2)* [2007] FCA 82 at [21]. But I accept that some allowance must be made for expenses Rental Master must have incurred to generate the income in question. I propose to make that allowance by reducing the figure achieved by carrying out the above calculations by 20 per cent.

106 Mr Grace submits that the resultant figure should be further discounted because "a proportion of profits made by the defendants was not simply a product or consequence of [PIA's] property but the product of the defendants' skill, efforts, property and resources".

107 In *Warman*, the High Court said at [33] that:

> "...it may be appropriate to allow the fiduciary a proportion of the profits, particularly so when it appears that a significant proportion of an increase in profits has been generated by the skill, efforts, property and resources of the fiduciary, the capital which he has introduced and the risks he has taken, so long as they are not risks to which the principal's property has been exposed."

108 But there is no evidence Mr Qi and Mr Tong brought any special skill to bear in relation to the management of investment properties or that they have been able to provide those services in a manner superior to the manner in which PIA was able to do so. In any event they were required to apply those skills in observance of their employment at PIA. Nor is there any evidence of any personal or special connection between Mr Qi and Mr Tong and the owners of the properties in question. I see no basis to make any allowance in this regard, let alone one in the order the subject of Mr Grace's submissions.

109 Mr Grace also points out that, once Mr Qi and Mr Tong are free from the contractual restraint in cl 22.2 of their employment contracts, they would be free to solicit work from PIA's customers. I have determined that cl 22.2 should be read down to confine the period during which Mr Qi and Mr Tong are constrained from soliciting PIA's clients to 12 months from the cessation of Mr Tong's employment; that is 30 August 2017.

110 But there is no evidence as to what opportunity Mr Qi and Mr Tong would have after that date to canvass work from PIA's clients without using PIA's confidential information (for example a client list). I see no basis for Mr Grace's submission "PIA's clients would have followed [Mr Qi] and [Mr Tong] once they were free to compete with PIA". I do not propose to make any allowance in the defendants' favour on this account.

111 I also see no justification for Mr Dixon's submission that an additional account should be taken of the income received by Rental Master in respect of the properties. The capital value of the rent roll of Rental Master, by its nature, takes into account that income. Mr Firth's expert assessment of the stability of the rent roll (reflected by the multiple of 3.3) already takes account of the rent actually received by Rental Master.

112 If PIA elects for an account of profits, I will invite the parties to confer and endeavour to agree on the figure that reflects these reasons. If agreement cannot be reached, I will invite submissions as to the way forward. My present inclination is to refer out to Mr Firth the determination of any remaining accounting issues.

Equitable compensation

113 Mr Dixon submits that I should find that the loss suffered by PIA in relation to the 104 properties is the sum of:

(a) lost management fees ($167,720.43);

(b) lost letting fees ($117,494.19); and

(c) the capital lost based upon the sum of those figures subject to Mr Firth's multiplier of 3.3 ($513,386.32).

114 I see a number of difficulties with this submission.

115 The first is that the figure of $167,720.43 claimed as lost management fees is the result of a calculation performed by Mr Wang summarised in annexure C to his second affidavit. That calculation is based on the rent received by Rental Master for the 104 properties during various periods between March 2017 and March 2018.

116 Mr Wang's calculations assume that the rent paid by the tenants of the 44 properties when under PIA's management was the same as the rent paid under Rental Master's management. The difficulty is that PIA has only adduced evidence of the Management Agency agreements it entered in to in relation to 15 of those 44 properties. Only 10 of those 15 Management Agency agreements record the rent payable during the life of the agreement. In 9 out of those 10 cases, the rent received by PIA was less than that payable when Rental Master assumed management of the properties. There

is no other evidence of the rent that was in fact payable during PIA's management.

117 Presumably, PIA has management agreements for all the 44 properties and could have proved the rent payable and, thereby, the commission lost as a result of the diversion of the properties to Rental Master.

118 The second difficulty is that PIA's claim for lost letting fees is calculated upon the assumption that such fees were payable annually.

119 However, the Management Agency agreements do not provide for an annual letting fee. The agreements provide that PIA was entitled to a letting fee "upon any letting of the premises". The letting fee is a one-off fee payable when the tenant first enters the lease.

120 Thus, at least in relation to the 44 properties, PIA has suffered no loss in relation to letting fees as it has been paid the one-off fee at the outset of the lease.

121 The third difficulty is that an award of compensation based upon the total commission lost, in addition to the "capital lost", would involve double counting (see [111]).

122 PIA's loss is either actual lost income, or the capital value of the asset thereby lost (which would be calculated by reference to that lost income). It cannot be both.

123 The final difficulty is that, although I am satisfied that Rental Master must account to PIA for the profit it has made from the 60 properties, I am not satisfied that PIA has suffered any loss by reason of Mr Qi's and Mr Tong's breach of fiduciary duty concerning those properties.

124 In light of these difficulties, I am not in a position to quantify the equitable compensation available to PIA.

Declaratory relief

125 PIA also seeks a series of declarations as to the breaches by Mr Qi and Mr Tong of their fiduciary, contractual and statutory obligations.

126 I see no utility in making any of those declarations. It is generally inappropriate for a court to make a declaration where, as here, it would be merely prefatory to an order for substantive relief (here, compensation or an account of profits): *Attorney-General (NSW); Ex rel Corporate Affairs v Australian Softwood Forest Pty Ltd* [1979] 2 NSWLR 73 at 76 (Hutley JA with whom Reynolds and Samuels JJA agreed); and see *OXS Pty Ltd v Sydney Harbour Foreshore Authority and Minister for Planning and Environment* [2014] NSWSC 1284 at [6] (Black J).

127 Further as Mr Grace submitted, the declarations sought are neither constitutive nor investigative and would therefore have no practical effect.

Injunctive relief

128 PIA also seeks an injunction restraining Mr Qi and Mr Tong from acting contrary to the restrictions in cl 22.2 of their employment contracts.

129 Mr Qi and Mr Tong are prepared to offer appropriate undertakings. In those circumstances, I will defer further consideration of any injunctive relief until after the publication of these reasons. If necessary I will hear submissions as to the adequacy of the undertakings proposed to be offered.

Conclusion

130 I will stand this matter over to a date convenient to the parties to give PIA an opportunity to consider the election it must now make concerning remedy, and to hear any further submissions arising from these reasons.

131 If PIA elects to receive equitable compensation, I will hear submissions as to whether it should be given an opportunity to adduce further evidence about the loss it contends it has suffered.

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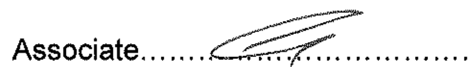
I certify that this and the ...29..... preceding pages are a true copy of the reasons for judgment herein of the Honourable Justice Stevenson

Dated....27 June 2018........



Associate.......[signature]..................