Hospital Products Ltd v United States Surgical Corporation [1984] HCA 64; (1984) 156 CLR 41 (25 October 1984)

HIGH COURT OF AUSTRALIA

HOSPITAL PRODUCTS LTD. v. UNITED STATES SURGICAL CORPORATION, SURGEONS CHOICE
INC., BALLABIL HOLDINGS PTY. LTD., ALAN RICHARD BLACKMAN AND I.R.D. ENGINEERING
SERVICES PTY. LTD. [1984] HCA 64; (1984) 156 CLR 41

Contract - Trusts

High Court of Australia
Gibbs C.J.(1), Mason(2), Wilson(3), Deane(4) and Dawson(5) JJ.

CATCHWORDS

Contract - Exclusive distribution agreement - Statements preceding contract - Whether promissory - Statement that distributor would devote best efforts to distribute products - Whether warranty or mere representation - Implied terms - Term implied by statute that distributor would "use best efforts" to promote products - Whether further term implied that distributor not to do anything inimical to market for products - Distributor developing own capacity to manufacture principal's products - Orders for principal's products deferred to be met with distributor's products - Whether breach of best efforts term - Uniform Commercial Code (U.S.), s. 2-306(2).

Trusts - Constructive trust - Fiduciary duty - Breach - Distributorship agreement - Whether fiduciary relationship between parties - Importation of fiduciary duties into commercial transactions - Relevance of terms of contract to existence of fiduciary relationship.

HEARING

1984, March 13-16, 20-22; October 25. 25:10:1984
APPEAL from the Supreme Court of New South Wales.

DECISION

GIBBS C.J. This is an appeal from a decision of the Court of Appeal of New South Wales, which allowed an appeal from a judgment of McLelland J. given in proceedings brought by United States Surgical Corporation ("U.S.S.C."), one of the present respondents, against the present appellant, Hospital Products Limited ("H.P.L.") and the other respondents, Surgeons Choice Inc. ("S.C.I."), Hospital Products International Pty. Limited (whose name has been changed to Ballabil Holdings Pty. Limited), Alan Richard Blackman and I.R.D. Engineering Services Pty. Limited ("I.R.D."). All of the respondents have cross-appealed.

2. After hearing voluminous evidence, McLelland J. made findings of fact which have not been challenged, although the Court of Appeal has supplemented them with some further findings. For present purposes it is unnecessary to state the facts in the full detail in which they are recounted in the judgments below. The material facts were as follows. U.S.S.C., a corporation incorporated in the United States, carried on the business of manufacturing in the United States, and marketing in

the United States and elsewhere, implements for use in surgery, in particular surgical stapling instruments, disposable loading units for use with such instruments and disposable skin staplers. These implements were all made to U.S.S.C.'s own design, which was apparently novel. They were marketed under the name "Auto Suture".

3. The marketing of U.S.S.C.'s products in countries other than the United States was carried out through distributors - independent contractors who purchased the products from U.S.S.C. and resold them to customers. Early in November 1978 Mr Blackman arranged a meeting with the President of U.S.S.C., Mr Leon Hirsch, and the Vice-President in charge of marketing, Ms Turi Josefsen, at which he proposed to them that he should be appointed sole distributor of the company's products in Australia in place of Downs Surgical (Australia) Pty. Limited ("Downs") which had been the Australian distributor since December 1976. Mr Blackman was at the time on good terms with Mr Hirsch and Ms Josefsen, and was known to them as an efficient salesman. He had in 1973 been appointed a dealer for U.S.S.C. in the New York area, and in 1976 a corporation (The Hospital Products Corporation) which he owned and controlled had been appointed to replace him as dealer. It was part of his proposal that this dealership should be phased out. Mr Hirsch and Ms Josefsen indicated that they were favourably disposed to the proposal. After some later discussions and correspondence, U.S.S.C. on 27 December 1978 wrote to Downs, terminating its appointment as from 31 March 1979, and to Mr Blackman, advising him that he would be U.S.S.C.'s exclusive Australian distributor from 1 April 1979. It will be necessary to refer again to these discussions and correspondence for the purpose of determining more precisely the terms of the agreement between U.S.S.C. and Mr Blackman, but that task may for the moment be postponed.

4. In January 1979 Mr Blackman arrived in Australia, and in February of that year he acquired a shelf company whose name he changed to Hospital Products of Australia Pty. Limited. In the same month, by a novation, that company was substituted for Mr Blackman as the distributor under the agreement with U.S.S.C. In November 1979 the name of Hospital Products of Australia Pty. Limited was changed to Hospital Products International Pty. Limited and it will be convenient to refer to that company as "H.P.I.", in respect of the period before November 1979 as well as afterwards. H.P.I. purchased the stock of U.S.S.C.'s products held by Downs and on 1 April 1979 commenced to market U.S.S.C.'s products in Australia. It was successful in bringing about a substantial increase in the use of those products. From about May 1979 H.P.I. began purchasing further stocks direct from U.S.S.C. and until about October 1979 it satisfied the orders which it received from customers from those stocks.

5. During all this time Mr Blackman was putting into effect a dishonest plan which he had formulated before he had put his proposal to U.S.S.C. in November 1978, and for which he had made careful preparations before he had been appointed U.S.S.C.'s Australian distributor. The object of the plan was that ultimately H.P.I. would itself manufacture products which very closely resembled those made by U.S.S.C. and would pass them off as products made under licence from, or by arrangement with, U.S.S.C., and in that way would appropriate for Mr Blackman's own benefit the market in Australia that would otherwise have been available to U.S.S.C. The plan was to be put into effect in a number of stages. In the first stage, Mr Blackman intended to market products which contained some components of his own manufacture together with demonstration cartridges obtained from U.S.S.C. It was the practice for U.S.S.C., in order to assist in the marketing of its products, to supply its distributors and dealers, at comparatively low cost, with disposable loading units and disposable skin staplers for demonstration purposes. The demonstration units were identical with those for clinical use, except that they were not sterilized or packed in sterile containers and that they contained only a single anvil and (in certain cases) a single retaining pin or pusher-knife assembly for use with a number of separate cartridges. In clinical use each component, once used, had to be discarded, and a new anvil and (where applicable, retaining

pin or pusher-knife assembly) was needed for each cartridge. In the first stage Mr Blackman's intention was to manufacture anvils, retaining pins and pusher-knife assemblies, to add them to the demonstration cartridges and to sterilize and repack the resulting units and sell them in satisfaction of the orders which H.P.I. obtained for U.S.S.C. products. In the second stage, it was intended to manufacture all of the components of the disposable units, and to assemble, sterilize, pack, label and sell them in competition with or substitution for U.S.S.C.'s products.

6. From about 1977 Mr Blackman had been accumulating large stocks of demonstration products which he was able to obtain in the course of the New York dealership. As early as August 1978 he commenced to make inquiries from his solicitors in Australia about the possibility that he might compete with U.S.S.C., and might register the trade mark "Autosuture", and from experts with regard to the possible manufacture of the components and the sterilization of disposable loading units. In November 1978 Mr Blackman's solicitors lodged an application for registration of the trade mark "Autosuture" in respect of, inter alia, "instruments and apparatus for use in surgery". During the period from December 1978 to February 1979 he arranged for the demonstration products which he had accumulated to be shipped by The Hospital Products Corporation to H.P.I. via Hong Kong. The products were invoiced by The Hospital Products Corporation at a price of US$19,190, and were ultimately received by H.P.I. at invoiced prices of about $500,000. At the beginning of March 1979 Mr Blackman engaged an engineering consultant who set about arranging for the manufacture of the various components and the assembling, packaging and sterilizing of the disposable loading units. Much of the engineering work in both stages of the plan was performed under contract for H.P.I. by I.R.D., a company which on 30 June 1980 came under the control of Mr Blackman. A painstaking process of reverse engineering was carried out; i.e. U.S.S.C.'s components were disassembled, measured and analysed, and tools, moulds and dies were prepared to enable components to be made which were as far as possible identical with those made by U.S.S.C. In July 1979 Mr Blackman, who had known at least from August 1978 that U.S.S.C. had no patent rights in Australia, applied for an Australian patent for a "surgical skin and fascia stapler and disposable staple cartridge for use therewith" and lodged a provisional specification which was largely copied from the specifications of certain United States patents of U.S.S.C.; his purpose was to enable him to use the words "patent pending" on H.P.I.'s labels and thus discourage other potential manufacturers in Australia. By about August 1979, anvils, retaining pins and pusher-knife assemblies were being manufactured for, and supplied to, H.P.I. In about October 1979 H.P.I. began to defer fulfilment of orders being received for Auto Suture products, its intention being to fill those orders with the products assembled by H.P.I.; it then ceased placing its own orders with U.S.S.C. On 25 December 1979 H.P.I. wrote to U.S.S.C., saying that from that day on H.P.I. would no longer be the authorized agent of U.S.S.C.; the reasons given for bringing the distributorship to an end were spurious. On 10 January 1980 U.S.S.C. accepted H.P.I.'s decision to terminate the distributorship. From 25 December 1979 H.P.I. began supplying products, which it had itself assembled and repacked, in fulfilment of orders then outstanding and subsequently received for Auto Suture products. The products which it supplied had labels which included the words "For use with Auto Suture instrument", "Packaged and distributed by H.P.I." and "Patent pending", but which bore no reference to U.S.S.C. On 28 December 1979, and again on 18 February 1980, H.P.I. issued to its customers a circular stating that it was phasing out all goods manufactured in the United States and substituting a product manufactured in Australia. The learned trial judge made the following finding:

"I am satisfied that as from 25 December 1979
H.P.I. began to supply customers in Australia with
H.P.I.-labelled products, the H.P.I.-made
proportion of the contents of which was increasing
with the passage of time, in order that the

existing Australian market for U.S.S.C.-made
products might change into an equivalent market for
H.P.I.-made products, and that this was done in a
manner which was intended to, and did in fact,
mislead existing customers for U.S.S.C.-made
products into believing that the H.P.I.-labelled
products were being manufactured in Australia by
arrangement with, or under licence from, the
manufacturer of United States-made Auto Suture
products, namely U.S.S.C."
manufactured by itself, but it experienced some manufacturing difficulties, and found it necessary to obtain supplies of quite large quantities of U.S.S.C. products in order to enable it to satisfy its orders. These products were acquired by subterfuge, so that U.S.S.C. was not aware of the true identity of the purchaser, and were either repackaged under a label which showed that they were packed and distributed by H.P.I., or were used to supply components for the product which H.P.I. assembled.

7. H.P.I. continued to market its products in Australia, until November 1980, when it commenced to market them in the United States and to withdraw from the Australian market. The marketing in the United States was done through S.C.I., which was incorporated in the United States in October 1980 as a wholly owned subsidiary of H.P.I.

8. It is apparent that it was essential to the success of Mr Blackman's scheme that H.P.I. should be appointed exclusive distributor of U.S.S.C. products in Australia and that U.S.S.C. should not know that H.P.I. was using the distributorship for the purpose of obtaining a market for itself. The Court of Appeal concluded (although McLelland J. made no finding on the matter) that H.P.I. would not have been able to raise the finance necessary to enable it to develop its manufacturing capacity had it not been for financial assistance provided by U.S.S.C. itself, and for the fact that the Bank of New Zealand extended credit to it only because it was U.S.S.C.'s distributor. It is unnecessary to consider whether that conclusion is justified by the evidence, because quite apart from the difficulty of obtaining finance, it is most unlikely that H.P.I. could have developed its manufacturing capacity and entered the market as it did if it had not been able to persuade its customers to believe that it was in some way acting for, or with the concurrence of, U.S.S.C. Because it was the exclusive distributor of U.S.S.C.'s products, H.P.I. was able to sell its own goods as soon as they were ready for sale, without having to secure for itself orders in competition with U.S.S.C. It is reasonable to conclude on the balance of probabilities that H.P.I. would not have been able to develop its manufacturing and marketing business if it had not been U.S.S.C.'s exclusive distributor.

9. In February 1980 U.S.S.C. received information which caused it to suspect that Mr Blackman was "up to no good". It commenced investigations, and by April or May 1980 it was aware that H.P.I. was manufacturing or attempting to manufacture copies of its products. In August 1980 U.S.S.C. re-entered the Australian market.

10. In July 1980 U.S.S.C. commenced proceedings against H.P.I. and Mr Blackman in New York alleging, inter alia, conspiracy. Further proceedings, including proceedings for infringement of patent, have since been commenced by U.S.S.C. in Connecticut and Texas. In August 1980 U.S.S.C. commenced proceedings in the Federal Court of Australia against H.P.I. and Mr Blackman and others who are not parties to the present proceedings seeking relief for contraventions of the Trade Practices Act 1974 (Cth), as amended, and for passing off, infringement of copyright, breach of confidence, unfair competition and other alleged wrongs. The defendants brought a challenge in

this Court to the jurisdiction of the Federal Court, and it was held that the Federal Court lacked jurisdiction to entertain the whole of those proceedings (see [1981] HCA 7; 55 A.L.J.R. 120).

11. By an agreement made on 1 April 1981, H.P.I. and I.R.D. agreed to sell all their assets (including the shares in S.C.I.) to a listed public company, Aquila Investment Corporation Limited ("Aquila"), for a consideration which included an issue of shares representing 60 per cent of the capital in that company. Aquila agreed to change its name to Hospital Products Limited ("H.P.L.") and to indemnify H.P.I. and I.R.D. in respect of existing litigation, and H.P.I. and I.R.D. agreed to hold any amount awarded to them for the benefit of Aquila. Completion was conditional upon the approval of Aquila's shareholders, which was given at a meeting held on 11 May 1981. Completion took place on or about 30 June 1981; thereby H.P.L. acquired all the assets of H.P.I. and I.R.D., and Mr Blackman, through H.P.I., acquired a controlling interest in H.P.L.

12. The present proceedings were commenced on 6 May 1981. By its amended statement of claim, U.S.S.C. claimed a variety of relief, including declarations that the defendants held certain assets on constructive trusts in favour of U.S.S.C., an account of profits made by the defendants as a result of breaches of contract or fiduciary duty, or in the alternative damages for such breaches, damages for conspiracy and extensive ancillary relief. A claim was originally made for damages for fraudulent misrepresentation, but that was abandoned. No claim was made for passing off or infringement of patent. McLelland J. declared that H.P.I. had committed breaches of contract, that Mr Blackman had knowingly participated in the breaches by H.P.I. of its equitable obligations and that U.S.S.C. was entitled, at its election, either (1) as against H.P.I. and Mr Blackman,to an account of profits, secured in the case of H.P.I. by an equitable lien over certain of its assets; or (2) as against H.P.I. and Mr Blackman, to equitable compensation for breach of H.P.I.'s equitable obligations; or (3) as against H.P.I., to damages for breach of contract. U.S.S.C. elected for the first of these remedies and it was ordered accordingly. The proceedings were dismissed as against the other defendants, H.P.L., I.R.D. and S.C.I. An appeal by U.S.S.C. to the Court of Appeal was allowed, and in lieu of the orders made by McLelland J. it was declared that all assets owned by H.P.L. on 1 July 1981 and at any time thereafter, except such as were its assets prior to its acquisition of the assets, goodwill and undertaking of H.P.I. and I.R.D. on or about 29 and 30 June 1981 pursuant to the agreement made on 1 April 1981, are held in trust for U.S.S.C. Orders were made for extensive ancillary relief. Orders were also made against H.P.I., Mr Blackman and H.P.L. for costs.

The Terms of the Contract

13. To determine the rights of U.S.S.C., it is necessary first to consider what were the terms of the contract between that corporation and Mr Blackman, which became the terms of the contract between U.S.S.C. and H.P.I. when the novation took effect. It is therefore necessary to consider in further detail the circumstances in which the contract between U.S.S.C. and Mr Blackman was made. It was found by the learned trial judge that when, at the meeting early in November 1978, Mr Blackman put to Mr Hirsch and Ms Josefsen his proposal that U.S.S.C. appoint him its exclusive Australian distributor, he made statements to the following effect in support of that proposal:

"(a) that there was a great potential market for
USSC surgical stapling products in Australia
which was not being tapped by the existing
distributor,
(b) that with his long experience of, and
accumulated knowhow in, marketing such
products, and his long association with USSC,
he could do an outstanding job for USSC and

perform better than anyone else in building up
sales of USSC products,
(c) that this would be a great opportunity both
for himself and for USSC,
(d) that he would set up a marketing organisation
with sales representatives trained in the use
and demonstration of USSC products in a manner
similar to that used in USSC's training
program in the United States,
(e) that after he had got the Auto Suture business
built up, 'really rolling', he might take on
other non-competing product lines and build up
a broad-based surgical distributorship but not
so as to interfere with his giving proper
attention to USSC's products,
(f) that because establishment of the new business
would take some time and would be expensive he
would need some financial help in the form of
credit and would like to rent instruments from
USSC with the option of purchasing them in the
future."

14. The learned trial judge further found that at this discussion Mr Blackman laid considerable emphasis on the benefit to be derived by U.S.S.C. from his appointment as its Australian distributor. Mr Hirsch and Ms Josefsen indicated that they were favourably disposed to the proposal. Mr Hirsch said, "Alan we will work it out" and Mr Blackman replied, "You won't regret it". It was arranged that Mr Blackman should later discuss further details of the matter with Ms Josefsen.

15. A further discussion took place, probably in late November 1978, but the details are not important for present purposes. However Ms Josefsen then said that she thought that a written distributorship agreement was necessary; Mr Blackman disagreed but said that he would read anything that she sent him.

16. By arrangement with Ms Josefsen, Mr Blackman discussed with Mr Grimes, another officer of U.S.S.C., the details of the termination of the New York dealership. On 27 November 1978 he wrote to Ms Josefsen a letter in which he set out a "chronology of events", which suggested 1 December 1978 as the date on which Downs' distributorship should be terminated on ninety days notice, and 30 September 1979 as the date on which the dealership would be officially ended. Again, much of the detail in the letter does not matter, but it should be mentioned that Mr Blackman stated that he would purchase from Downs their "inventory", i.e. their stocks, and that the letter went on to state:

"(e) I will be using my inventory of $100-$125,000
wholesale value, to provide an inventory level
in Australia.
(f) All additional products ordered from U.S.S.C.
will be paid in 30 days.
(g) U.S.S.C. will make instruments available to me
on a rental basis.

A transition in this manner will benefit U.S.S.C.
by having improved coverage in the Australian
market, as well as an orderly change here."

Ms Josefsen replied by letter of 18 December 1978, agreeing in principle to these proposals. She said in the letter that she had asked Mr Fisher (U.S.S.C.'s in-house counsel) to write a distributorship agreement which would be ready when she returned from vacation on 2 January, and said, "At that time I will contact you so that we can review it, 'sign and seal'."

U.S.S.C. again wrote to Mr Blackman on 27 December 1978.

The letter, omitting formal parts, was as follows:

"We take pleasure in confirming the continuance of
our relationship. You will become our Australian
distributor while phasing out your dealership in
accordance with the following procedures.

1. We have this day given notice of termination
to our present Australian distributor, Downs
Surgical (Australia) Pty. Ltd. effective
March 31, 1979. A copy of the notice has been
furnished to you. Upon that termination
becoming effective and commencing April 1,
1979 you will be our exclusive Australian
distributor. Although you have indicated that
no formal agreement is necessary, we believe
it is desirable and will forward to you a
suggested agreement covering the
distributorship.

2. During the period through March 31, 1979 you
will undertake to purchase the Downs'
inventory at prices mutually agreeable to you
and them and in any event use your dealership
inventory which you estimate will be
approximately $100,000 - $125,000, wholesale
value, to provide an inventory level in
Australia. Additional products purchased by
you from us will be paid on a 30 day net
basis. In the meantime arrangements should be
made to examine your inventory books and
records as per your dealership agreement at
the earliest convenient date.

3. You expect to rent from us between 20-30 sets
of instruments which within 120 days you will
convert to purchase from us.

4. You will hire and train your nurse unless she
is agreeable to training by us at your
expense.

5. Your dealership will continue without change
through June 30, 1979. Effective July 1, 1979
your dealership shall be deemed terminated in
all respects and your PAR (Primary Area of
Responsibility) will be taken over by us for
servicing.

6. By July 1, 1979 all accounts owed to us will
be paid in full by you. This includes
outstanding A/R (Accounts Receivable),
inventory, demonstrations, interest, financing
charges and other obligations.
If the above is your understanding of our
discussions please sign and return the enclosed
copy of this letter. We look forward with great
pleasure to our new relationship and wish you
every success in your new undertaking."
On 28 December, Mr Fisher telephoned Mr Blackman and asked him to come to his office in New York to discuss the letter. Mr Blackman went to Mr Fisher's office on the following day, read over the letter and confirmed that he was satisfied with its contents and then signed it as follows:

"Accepted and Agreed
The Hospital Products Corporation
Alan R. Blackman
President"
Mr Fisher said that he might forward to Mr Blackman a formal contract. Mr Blackman replied that he did not think that one was necessary but said that he would read whatever Mr Fisher sent. Ms Josefsen and Mr Hirsch decided that they would take no further steps in relation to a formal agreement, having regard to Mr Blackman's disinclination to enter into one, and U.S.S.C. took no further action to send any contract document to Mr Blackman.

17. It was held both at first instance and in the Court of Appeal that the proper law of the contract between U.S.S.C. and H.P.I. was that of either New York or Connecticut, that there was no material difference between the laws of those two States, and that, so far as concerns the principles governing the implication of terms in a contract, there was no material difference between the laws of those States and the law of New South Wales. These conclusions are not challenged. There is however a statutory provision, s.2-306(2) of the Uniform Commercial Code, which is in force in both New York and Connecticut, and which provides:

"A lawful agreement by either the seller or the
buyer for exclusive dealing in the kind of goods
concerned imposes unless otherwise agreed an
obligation by the seller to use best efforts to
supply the goods and by the buyer to use best
efforts to promote their sale."
Neither McLelland J. nor the Court of Appeal thought this provision to be of importance, because they considered that the matter was covered by the express terms of the contract.

18. McLelland J. held, and the Court of Appeal agreed, that the letter of 27 December 1979 did not embody all of the terms of the contract, and that the statements made during the course of the meeting between Mr Blackman and Mr Hirsch and Ms Josefsen early in November 1978 were of a promissory nature and should be regarded as express terms of Mr Blackman's offer, and therefore of the contract which resulted from the acceptance of that offer, and that, as the result of the novation, H.P.I. became bound by the same terms, which were to the following effect:

"(1) That the distributor would establish a
marketing organisation for U.S.S.C. surgical
stapling products in Australia having one or
more sales representatives specifically

trained in the use and demonstration of those
products,
(2) That the distributor would devote its best
efforts to distributing U.S.S.C. surgical
stapling products, and building up the market
for those products, in Australia, to the
common benefit of U.S.S.C. and itself,
(3) That the distributor would not deal (scil. in
Australia) in any products competitive with
U.S.S.C. surgical stapling products,
(4) That the distributor would not deal (scil. in
Australia) in any other products in such a
manner as would diminish its efforts in
distributing U.S.S.C. surgical stapling
products and building up the market for those
products, in Australia."
It was held that by necessary implication these obligations were to endure for the duration of the distributorship. It was further held that a term should be implied in the contract that "the distributor would not during the distributorship do anything inimical to the market in Australia for U.S.S.C. surgical stapling products".

19. There can be no doubt that the parties reached a concluded agreement when the letter of 27 December 1978 was signed by Mr Blackman, or that they intended themselves to be bound to performance of that agreement, notwithstanding that they left open the possibility that the terms might be restated in an ampler form (cf. Masters v. Cameron [1954] HCA 72; (1954) 91 CLR 353, at p 360). The question however is whether the statements made by Mr Blackman to Mr Hirsch and Ms Josefsen, in the course of the negotiations in November 1978, became terms of the contract which is, in part at least, embodied in that letter. The letter purports to state the effect of the previous discussion between the parties, and the fact that Mr Blackman was asked to, and did, endorse it "Accepted and Agreed" provides an indication that the letter itself was intended to state all the terms of the agreement then made between the parties, although it was envisaged that further terms might be added if the agreement were put into more formal shape. In these circumstances, the rule that oral evidence is not allowed to be given to add to a written contract might have made it difficult to treat the statements made in the course of negotiations as part of the agreement, were it not for the fact that it was admitted on the pleadings that the distributorship agreement reached by the parties in November and December 1978 was partly in writing, partly oral and partly implied: see par.13 of the amended statement of claim and par.8 of the various amended defences. There was, however, no admission that all the representations made by Mr Blackman in November 1978 became part of the distributorship agreement.

20. A representation made in the course of negotiations which result in a binding agreement may be a warranty - i.e. it may have binding contractual force - in one of two ways: it may become a term of the agreement itself, or it may be a separate collateral contract, the consideration for which is the promise to enter into the main agreement. In either case the question whether the representation creates a binding contractual obligation depends on the intention of the parties. In J.J. Savage & Sons Pty. Ltd. v. Blakney [1970] HCA 6; (1970) 119 CLR 435, at p 442 and Ross v. Allis-Chalmers Australia Pty. Ltd. (1980) 55 ALJR 8, at pp 10 and 11, it was said that a statement will constitute a collateral warranty only if it was "promissory and not merely representational", and it is equally true that a statement which is "merely representational" - i.e. which is not intended to be a binding promise - will not form part of the main contract. If the parties did not intend that there should be contractual liability in respect of the accuracy of the representation, it will not create contractual

obligations. In the present case Mr Blackman, who made his statements fraudulently, had of course no intention that they should amount to contractual undertakings, but he could not rely on his secret thoughts to escape liability, if his representations were reasonably considered by the persons to whom they were made as intended to be contractual promises, and if those persons intended to accept them as such. The intention of the parties is to be ascertained objectively; it "can only be deduced from the totality of the evidence": Heilbut, Symons & Co. v. Buckleton [1912] UKHL 2; (1913) AC 30, at p 51. In other words, as Lord Denning said in Oscar Chess Ltd. v. Williams (1957) 1 WLR 370, at p 375:

"The question whether a warranty was intended
depends on the conduct of the parties, on their
words and behaviour, rather than on their thoughts.
If an intelligent bystander would reasonably infer
that a warranty was intended, that will suffice."
The intelligent bystander must however be in the situation of the parties, for "what must be ascertained is what is to be taken as the intention which reasonable persons would have had if placed in the situation of the parties": Reardon Smith Line v. Hansen-Tangen (1976) 1 WLR 989, at p 996.

21. In the present case I am unable to agree with the conclusion reached by the learned judges in the Supreme Court that the statements made by Mr Blackman in November 1978 were intended by the parties to be warranties. The fact that Mr Blackman intended Mr Hirsch and Ms Josefsen to act on the representations by entering into an agreement, and that they did so, does not mean that the parties intended the representations to be terms of the agreement. The representations were not made at the time when the parties concluded an agreement, but about a month before that time. They were followed up by further discussions and correspondence in which no reference was made to them. The explanation suggested for the fact that the representations were not incorporated into the letter of 27 December 1978 was that the letter dealt largely with the procedures for determining the dealership and commencing the distributorship, but the absence from the letter of any mention of the suggested terms is nevertheless an indication, although not a conclusive one, that the parties did not intend them to be warranties. With one exception, the representations were not promissory in form, but were statements of fact or of belief or of self-commendation. The possible exception was the statement (immaterial for present purposes) that Mr Blackman would set up a marketing organization with sales representatives trained in the use and demonstration of U.S.S.C.'s products in a manner similar to that used in U.S.S.C.'s training program in the United States. The critical terms found by McLelland J. to be warranties were, as was stated in the judgment of the Court of Appeal, "a distillation of the words which Blackman actually employed". Although it might well have been thought that Mr Blackman was making a proposal that would be for the benefit of both parties, he made no promise to act for the common benefit. The suggested term that he would not deal in competitive products is sought to be implied from the statement that after he had got the Auto Suture business "really rolling" he might take on non-competitive product lines - a statement which falls far short of a promise not to deal in competitive products. The form of the representations is not decisive, but is nevertheless relevant in determining the intention, actual or imputed, of the parties. Although the suggested terms now appear to have great significance, it is by no means clear that they were so regarded at the time. When agreements had been made by U.S.S.C. with other distributors, such as Downs, it was not a term of those agreements that the distributor should act for the common benefit of the parties and should not deal in products competitive with those of U.S.S.C. The Australian market seems to have been regarded as of so little significance to U.S.S.C. that that company did not at the time of the agreement bother to protect itself by applying for patents or seeking to register a trade mark, and in the same way it did not require Mr Blackman to enter into a formal agreement containing express warranties of the kind

now sought to be based on the representations made in the conversation of November 1978. The proper conclusion to be drawn from the evidence in my opinion is that neither Mr Blackman nor Mr Hirsch and Ms Josefsen intended the statements made in November to be anything more than mere representations.

Implied Terms

22. It then becomes necessary to consider whether any terms should be implied in the agreement. It is clear that, as a matter of law, there is implied a term imposing on the parties the obligations described in s.2-306(2) of the Uniform Commercial Code. The obligation thus imposed on H.P.I. was to "use best efforts" to promote the sale of the goods concerned, i.e. the relevant products of U.S.S.C.

23. In the Supreme Court, little attention seems to have been paid to the question whether the implication of this term, as a matter of law, might render it unnecessary to make any further implication as a matter of fact. McLelland J. thought that in order to effectuate the purpose of the agreement as mutually contemplated by the parties, and to enable U.S.S.C. to have the benefit thereof which was mutually contemplated, it was necessary to imply a term that H.P.I. would not during the distributorship do anything inimical to the market in Australia for U.S.S.C.'s surgical stapling products. The members of the Court of Appeal, who agreed with this conclusion, considered that the express warranties which they held had been given, that Mr Blackman would use his best efforts to build up the Australian market for U.S.S.C.'s products for the common benefit of the parties and would not deal in any products competitive with those of U.S.S.C., removed the agreement from the common run of contracts between supplier or manufacturer and distributor, and that in the circumstances it was necessary to imply a provision that Mr Blackman would do nothing to damage or destroy U.S.S.C.'s market in Australia.

24. The implied obligation to use best efforts to promote the sale of the goods necessarily imported the obligation not to take any deliberate steps to damage the market for those goods in Australia. The meaning of terms of this kind has been considered in a number of cases, but it is trite to say that the meaning of particular words in a contract must be determined in the light of the context provided by the contract as a whole and the circumstances in which it was made, and that decisions on the effect of the same words in a different context must be viewed with caution. On the one hand, an express promise by an agent to use his best endeavours to obtain orders for another and to influence business on his behalf "necessarily includes an obligation not to hinder or prevent the fulfilment of its purpose": Shepherd v. Felt and Textiles of Australia Ltd. [1931] HCA 21; (1931) 45 CLR 359, at p 378. On the other hand, an obligation to use "best endeavours" does not require the person who undertakes the obligation to go beyond the bounds of reason; he is required to do all he reasonably can in the circumstances to achieve the contractual object, but no more: Sheffield District Railway Co. v. Great Central Railway Co. (1911) 27 TLR 451, at p 452; Terrell v. Mabie Todd & Co. Ltd. (1952) 69 RPC 234, at p 237. In Transfield Pty. Ltd. v. Arlo International Ltd. (1980) [1980] HCA 15; 144 CLR 83 the licensee of a patented process for the manufacture and erection of a steel pole for the purpose of electricity transmission lines (the Arlo pole) covenanted "to use its best endeavours in and towards the ... selling" of the pole. The actual decision in the case was that this provision of the contract did not prohibit the licensee from using any pole other than the Arlo pole. Stephen J. said, at p.94:

"An obligation to use best endeavours to sell Arlo
poles implies a prohibition upon the offering for
sale and selling of competitive poles, at least to

the extent that to do so will prejudice the sale of
Arlo poles."

Mason J. took a somewhat narrower view of the effect of the words of the relevant clause of the contract. He said, at pp.101, that the licensee's obligation was "to use all its efforts and skills towards (inter alia) the selling of the ARLO pole to the extent that it was reasonable so to do in the circumstances and to energetically promote and develop a market for it" and that he could see "no adequate basis for importing into this positive obligation a negative implication that the appellant will not use or for that matter sell a pole which competes with the ARLO pole, whether that pole be manufactured by the appellant or by another". He added, at p.102, that the licensee might do all that was within its power to comply with the clause yet find that it had no practical alternative but to use or sell a competing pole and that the clause did not prohibit or prevent such use or sale. Wilson J. said, at p.107, that the licensee was obliged to do "all that could reasonably be expected of it having regard to the circumstances of its business operations". An undertaking to use best endeavours or best efforts to promote the sale of one product does not necessarily impose an obligation not to sell a competing product (see Van Valkenburgh, Nooger & Neville, Inc. v. Hayden Publishing Co. (1972) 330 NYS 2d 329, at p 333, and cases there cited) although it may do so in some circumstances, as was held to be the case in Randall v. Peerless Motor Car Co. (1912) 99 NE 221. However, a person who had given such an undertaking could not successfully assert that he had fulfilled it if he prepared a product of his own and promoted the sale of that product with the deliberate intention of appropriating for himself the market which he had in effect promised to do all he reasonably could to secure for the person to whom he had given the undertaking. Clearly it was a breach of the implied obligation for H.P.I. to prepare and sell, as it did, its own products instead of those of U.S.S.C.

25. There is in my opinion no room in the present case for the implication in the agreement of any further term such as that implied by McLelland J. and the Court of Appeal. The principles governing the implication of terms in contracts have recently been stated by the Judicial Committee in B.P. Refinery Pty. Ltd. v. Hastings Shire Council (1977) 52 ALJR 20, at pp 26-27, and by this Court in Secured Income Real Estate (Australia) Ltd. v. St. Martins Investments Pty. Ltd. [1979] HCA 51; (1979) 144 CLR 596, at pp 605-606, and Codelfa Constructions Pty. Ltd. v. State Rail Authority of N.S.W. (1982) [1982] HCA 24; 149 CLR 337, at pp 345-347 and 403-404. It was said by the majority of the Judicial Committee in the first of those cases, and accepted in this Court in the others, that for a term to be implied the following conditions (which may overlap) must be satisfied:

"(1) it must be reasonable and equitable; (2) it
must be necessary to give business efficacy to the
contract, so that no term will be implied if the
contract is effective without it; (3) it must be so
obvious that 'it goes without saying'; (4) it must
be capable of clear expression; (5) it must not
contradict any express term of the contract."

26. In the present case the agreement was efficacious without the implication of any further term. In other words, it does not here become necessary to imply any further term, "with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have" (to use the familiar words of The Moorcock (1889) 14 P.D. 64, at p.68) or to make the agreement work or to avoid an unworkable situation, to adopt the words of the dissenting judgment in B.P. Refinery Pty. Ltd. v. Hastings Shire Council, at p 30. The commercial objective that U.S.S.C. sought to achieve by means of the agreement was that as many of its products should be sold in

Australia as was reasonably possible and that as a result the market for those products should be expanded in Australia. This objective would be secured if H.P.I. did all that it reasonably could to sell as many of U.S.S.C.'s products as possible in Australia. In other words, the obligation imported by the Uniform Commercial Code was enough to give to the agreement the business efficacy that U.S.S.C. intended it to have. The circumstances that Mr Blackman had been fraudulent and (if it was the case) that U.S.S.C. had placed special trust in him did not justify the implication of any further term of this kind. Moreover a term that H.P.I. would not do anything inimical to U.S.S.C.'s market in the goods in question, or in other words that H.P.I. would do nothing to damage or destroy U.S.S.C.'s market in Australia, if it went beyond the term implied by the Uniform Commercial Code, was not a term which the parties must presumably have intended to be a part of the agreement - a term so obvious that there was no need to express it. On the contrary, if the parties had been asked on 27 December 1978 whether such a term was part of the agreement, instead of replying "of course; that is so clear that we did not bother to say it", they might well have answered that such a term would go too far, since it might require the distributor to refrain from action that was perfectly reasonable although it might in some way damage U.S.S.C.'s market in Australia. For example, a decision by H.P.I. to increase the price of the products, or to reduce the extent to which they were advertised, might have an adverse effect on the market, although it might be reasonable or even necessary from H.P.I.'s point of view. I conclude that the agreement contained no implied term imposing any duty on H.P.I. except that resulting from the operation of s.2-306(2) of the Uniform Commercial Code. The conclusions which I have reached on this aspect of the matter differ in their practical consequences from those reached in the Supreme Court in two main respects. First, although H.P.I. was bound to use its best efforts to promote the sale of U.S.S.C.'s products, and thus to build up the market for them, and it was necessarily contemplated that this would enure to the advantage of both parties, H.P.I. had no contractual obligation to act for the common benefit of U.S.S.C. and itself; it was entitled to put its own interests first, or to disregard its own interests entirely, provided that it did not fail to do all that it reasonably could to promote the sale of U.S.S.C.'s products. Secondly, the term which the Supreme Court held to be implied, against doing anything inimical to the market in Australia for U.S.S.C.'s products, would make it a breach for H.P.I. to do anything whose effect was to damage or destroy U.S.S.C.'s market, whereas in my opinion action by H.P.I. having a damaging effect would amount to a breach only if it amounted to a failure to do all that could reasonably be done to sell U.S.S.C.'s products.

Fiduciary Relationship

27. It is clear that H.P.I. committed serious breaches of its obligation to use its best efforts to promote the sale of U.S.S.C.'s products, and that U.S.S.C. is entitled to recover from H.P.I. damages for these breaches. However U.S.S.C. contends that it was also owed by H.P.I. a fiduciary obligation, the breach of which entitled U.S.S.C. not merely to compensation but to "restitution of property unconscientiously withheld" (Vyse v. Foster (1872) LR 8 Ch App 309, at p 333), and to the equitable remedies of equitable lien and constructive trust. A person who occupies a fiduciary position may not use that position to gain a profit or advantage for himself, nor may he obtain a benefit by entering into a transaction in conflict with his fiduciary duty, without the informed consent of the person to whom he owes the duty. This principle - some would prefer to say "these principles" - has been described as "inflexible" (Birtchnell v. Equity Trustees, Executors and Agency Co. Ltd. [1929] HCA 24; (1929) 42 CLR 384, at p 408) and "fundamental" (Phipps v. Boardman [1966] UKHL 2; (1967) 2 AC 46, at p 123) and its nature and application have been discussed in a number of comparatively recent cases: by this Court in Consul Development Pty. Ltd. v. D.P.C. Estates Pty. Ltd. (1975) [1975] HCA 8; 132 CLR 373 and Chan v. Zacharia [1984] HCA 36; (1984) 58 ALJR 353; by the Judicial Committee in N.Z. Netherlands Society "Oranje" Incorporated v. Kuys (1973) 1 WLR 1126 and Queensland Mines Ltd. v. Hudson (1978) 52 ALJR 399; by the Court of Appeal of New Zealand in Coleman v. Myers (1977) 2 NZLR 225; and by the

Supreme Court of Canada in Canadian Aero Service Ltd. v. O'Malley (1973) 40 DLR (3d) 371. Clearly if H.P.I. was under a fiduciary obligation to U.S.S.C. it failed to fulfil it. The question however is whether any fiduciary relationship did exist between the parties.

28. The authorities contain much guidance as to the duties of one who is in a fiduciary relationship with another, but provide no comprehensive statement of the criteria by reference to which the existence of a fiduciary relationship may be established. The archetype of a fiduciary is of course the trustee, but it is recognized by the decisions of the courts that there are other classes of persons who normally stand in a fiduciary relationship to one another - e.g., partners, principal and agent, director and company, master and servant, solicitor and client, tenant-for-life and remainderman. There is no reason to suppose that these categories are closed. However, the difficulty is to suggest a test by which it may be determined whether a relationship, not within one of the accepted categories, is a fiduciary one.

29. In the present case McLelland J. said that there were two matters of importance in deciding when the court will recognize the existence of the relevant fiduciary duty. First, if one person is obliged, or undertakes, to act in relation to a particular matter in the interests of another and is entrusted with the power to affect those interests in a legal or practical sense, the situation is, in his opinion, analogous to a trust. Secondly, he said that the reason for the principle lies in the special vulnerability of those whose interests are entrusted to the power of another to the abuse of that power. The learned members of the Court of Appeal considered that the first of these statements needed a qualification which McLelland J. had intended to suggest, namely that the undertaking to act in the interests of another meant that the fiduciary undertook not to act in his own interests; they said that the principle is that "a fiduciary relationship exists where the facts of the case in hand establish that in a particular matter a person has undertaken to act in the interests of another and not in his own". They added that it is not inconsistent with this principle that a fiduciary may retain that character although he is entitled to have regard to his own interest in particular matters. Their conclusion was that in matters concerning the development of U.S.S.C.'s market in Australia for its surgical stapling products, and its protection from competition, H.P.I. undertook to act in U.S.S.C.'s interest and not in its own.

30. I doubt if it is fruitful to attempt to make a general statement of the circumstances in which a fiduciary relationship will be found to exist. Fiduciary relations are of different types, carrying different obligations (see In re Coomber. Coomber v. Coomber (1911) 1 Ch 723, at pp 728-729, Jenyns v. Public Curator (Q.) [1953] HCA 2; (1953) 90 CLR 113, at pp 132-133 and Phipps v. Boardman, at pp 126-127) and a test which might seem appropriate to determine whether a fiduciary relationship existed for one purpose might be quite inappropriate for another purpose. For example, the relation of physician and patient, and priest and penitent, may be described as fiduciary when the question is whether there is a presumption of undue influence, but may be less likely to be relevant when an alleged conflict between duty and interest is in question. Moreover, different fiduciary relationships may entail different consequences, as is shown by the discussion of the respective positions of a trustee and a partner in relation to the renewal of a lease: see In re Biss. Biss v. Biss (1903) 2 Ch 40, at pp 56-57 and 61-62, Griffith v. Owen (1907) 1 Ch 195, at pp 203-204, and Chan v. Zacharia.

31. In the decided cases, various circumstances have been relied on as indicating the presence of a fiduciary relationship. One such circumstance is the existence of a relation of confidence, which may be abused: Tate v. Williamson (1866) LR 2 Ch App 55, at p 61, Coleman v. Myers, at p 325. However, an actual relation of confidence - the fact that one person subjectively trusted another - is neither necessary for nor conclusive of the existence of a fiduciary relationship; on the one hand a trustee will stand in a fiduciary relationship to a beneficiary notwithstanding that the latter at no

time reposed confidence in him, and on the other hand an ordinary transaction for sale and purchase does not give rise to a fiduciary relationship simply because the purchaser trusted the vendor and the latter defrauded him.

32. Another circumstance which it is sometimes suggested indicates the existence of a fiduciary relationship is inequality of bargaining power, but it is clear that such inequality alone is not enough to create a fiduciary relationship in every case and for all purposes. In any case, Mr Blackman was not in a position of dominance or advantage over U.S.S.C. at the time the contract was made. Indeed, if there was any inequality in the situation of the parties, it might well be thought that U.S.S.C. was in the stronger position.

33. On the other hand, the fact that the arrangement between the parties was of a purely commercial kind and that they had dealt at arm's length and on an equal footing has consistently been regarded by this Court as important, if not decisive, in indicating that no fiduciary duty arose: see Jones v. Bouffier [1911] HCA 7; (1911) 12 CLR 579, at pp 599-600, 605; Dowsett v. Reid [1912] HCA 75; (1912) 15 CLR 695, at p 705; Para Wirra Gold & Bismuth Mining Syndicate No Liability v. Mather (1934) 51 CLR 582, at p 592; Keith Henry & Co. Pty. Ltd. v. Stuart Walker & Co. Pty. Ltd. [1958] HCA 33; (1958) 100 CLR 342, at p 351. A similar view was taken in Canada in Jirna Ltd. v. Mister Donut of Canada Ltd. (1971) 22 DLR (3d) 639; affirmed (1973) 40 DLR (3d) 303.

34. In Reading v. The King (1949) 2 KB 232, a case in which a soldier had obtained bribes by abuse of his position, Asquith L.J. said, at p 236:

"A consideration of the authorities suggests that for the present purpose a 'fiduciary relation' exists (a) whenever the plaintiff entrusts to the defendant property, including intangible property as, for instance, confidential information, and relies on the defendant to deal with such property for the benefit of the plaintiff or for purposes authorized by him, and not otherwise ... and (b) whenever the plaintiff entrusts to the defendant a job to be performed, for instance, the negotiation of a contract on his behalf or for his benefit, and relies on the defendant to procure for the plaintiff the best terms available ..."

That decision was approved in the House of Lords [1951] UKHL 1; ((1951) A.C. 507) although Lord Porter said (at p.516) that the words "fiduciary relationship" in that setting were used in "a wide and loose sense". The first branch of Lord Asquith's statement has no application to the present case. It was submitted on behalf of U.S.S.C. that that company had entrusted to H.P.I. its actual and prospective business connexion and goodwill in Australia and had relied on H.P.I. to protect and increase that goodwill for the benefit of U.S.S.C. I do not need to discuss the question whether product goodwill can be regarded as property capable of assignment by itself, for I find it impossible to accept that H.P.I. became a fiduciary in respect of U.S.S.C.'s goodwill. The contract did not oblige H.P.I. to protect U.S.S.C.'s goodwill nor were representations made that it would be protected. H.P.I.'s relevant obligation was to use its best efforts to promote the sale of U.S.S.C.'s goods. However, apart from the agreement, in cl.2 of the letter of 27 December 1978, to purchase Downs' inventory and use the dealership inventory of approximately $100,000 to $125,000 wholesale value, H.P.I. was not obliged to purchase from U.S.S.C. any particular quantity or value of products for distribution. Failure to make further purchases would only be a breach if it amounted to a failure to do all that could reasonably be expected to promote the sale of the

products, and H.P.I.'s business circumstances and financial situation could be considered in deciding what was reasonable. There was no express provision as to the duration of the agreement; it was therefore terminable either at will or on reasonable notice. Although what H.P.I. did would be likely to affect the market for U.S.S.C.'s goods in Australia, it is apparent that H.P.I. had not given an undertaking to develop or protect the market since its obligation to buy the products for distribution was qualified by what was reasonable having regard to its own circumstances, and it was free to terminate the agreement at any time. Nor was U.S.S.C. powerless in this situation; it also was free to terminate the agreement and make other arrangements for the distribution of its goods. The argument that a fiduciary relation was created with regard to the goodwill of the products in my opinion quite deserts the reality of the situation.

35. The second branch of Lord Asquith's statement, if regarded as enunciating a general rule divorced from its context, seems to me, with all respect, to be far too wide; the fact that there is a duty to be performed - a job to do - cannot in every case create a fiduciary obligation. I agree with the statement of Megarry V.-C. in Tito v. Waddell (No. 2) (1977) Ch 106, at pp 229-230, that the imposition of a statutory duty to perform certain functions cannot be said as a general rule to impose fiduciary obligations, and the same is true of contractual duties arising under ordinary commercial contracts.

36. Finally, I would refer to the opinion expressed by Dr Finn in his comprehensive work on Fiduciary Obligations (1977), at p.201, that, for the purposes of the conflict rule, a fiduciary is "simply, someone who undertakes to act for or on behalf of another in some particular matter or matters." Even if it were meant that every agent is a fiduciary, the statement would be open to doubt: see McKenzie v. McDonald (1927) VLR 134, at p 144, Phipps v. Boardman, at p 127, and cases cited in 17 MLR, at pp 31-32. And if the statement is to be understood more widely it cannot be accepted without some qualification. Indeed Dr Finn appeared himself to qualify it when he went on to say, at p.201:

"The finding of such an undertaking is simply a question of fact in each case. So if, for example, all that can be shown is that two people have dealt with each other only as principals neither will be the other's fiduciary."

37. The test suggested by the Court of Appeal in the present case seems to me not inappropriate in the circumstances, although it must be remembered that any test can only be stated in the most general terms and that all the facts and circumstances must be carefully examined to see whether a fiduciary relationship exists (cf. Phipps v. Boardman, at pp 123, 127). However, if the Court of Appeal's test is applied, it is not satisfied, for in my opinion H.P.I. did not undertake, whether by representation or contractual provision, to act solely in the interests of U.S.S.C. and not in its own interests.

38. An examination of all the circumstances confirms in my opinion that the relationship between the parties was not a fudiciary one. It is true that U.S.S.C. relied on H.P.I. to promote the sale of its products and left it to H.P.I. to determine how it should go about doing so, and that H.P.I. had it in its power to affect U.S.S.C.'s interests beneficially or adversely. However, there are two features of the case, in particular, which together constitute an insuperable obstacle to the acceptance of U.S.S.C.'s contention that a fiduciary relationship existed between itself and H.P.I. In the first place, as I have said, the arrangement was a commercial one entered into by parties at arm's length and on an equal footing. It was open to U.S.S.C. to include in its contract whatever terms it thought

necessary to protect its position, for U.S.S.C. acted in response to Mr Blackman's request and was under no pressure either to make him a distributor in place of Downs or to accept an agreement on his terms; indeed U.S.S.C. itself prepared the letter of agreement which its in-house counsel asked Mr Blackman to sign. An ordinary commercial contract made in those circumstances, even as a result of fraud, is unlikely to give rise to fiduciary obligations. Secondly, it was of course clear that the whole purpose of the transaction from Mr Blackman's point of view, as U.S.S.C. knew, was that he, and later H.P.I., should make a profit. Further, as I have already explained, in the performance of the contract a conflict between the interests of H.P.I. and U.S.S.C. was likely to arise, and any such conflict was not necessarily to be resolved in favour of U.S.S.C. How, in those circumstances, is it possible to say that H.P.I. was under an obligation not to profit from its position, and not to place itself in a situation in which its duty and its interest might conflict? It is true, as Lord Wilberforce said in New Zealand Netherlands Society "Oranje" Incorporated v. Kuys, at p 1130, that a person "may be in a fiduciary position quoad a part of his activities and not quoad other parts: each transaction, or group of transactions must be looked at." His Lordship referred to Birtchnell v. Equity Trustees, Executors and Agency Co. Ltd. where Dixon J. said, at p 408:

"The subject matter over which the fiduciary obligations extend is determined by the character of the venture or undertaking for which the partnership exists, and this is to be ascertained, not merely from the express agreement of the parties ... but also from the course of dealing actually pursued by the firm."

Lord Wilberforce said that although these remarks were made in the context of a partnership the principle must be of general application, and it is clear that in the case of every fiduciary relationship it is critical to determine what is the subject of the fiduciary obligation. However, in the present case, there was, in my opinion, no part of the transaction to which a fiduciary obligation might sensibly be limited. H.P.I. was entitled to make a profit from the entire conduct of the distributorship, and possible and actual conflicts between its interest and its duty might arise at any stage in the conduct of that business. It would commit a breach of its contractual obligations only if it acted unreasonably and thereby failed to use its best endeavours to promote the sale of the products. An obligation to act reasonably falls far short of that imposed by the rules of equity on a fiduciary, who can defeat a claim to account for profits acquired by reason of his fiduciary position and by reason of the opportunity resulting from it only on the ground that the profits were made with the knowledge and assent of the person to whom the fiduciary obligation was owed (see Phipps v. Boardman, at p 105); the equitable rules are exceedingly strict, as the decisions in Regal (Hastings) Ltd. v. Gulliver [1942] UKHL 1; (1942) 1 All ER 378, noted [1942] UKHL 1; (1967) 2 AC 134, and Phipps v. Boardman plainly illustrate. What is attempted in this case is to visit a fraudulent course of conduct and a gross breach of contract with equitable sanctions. It is not necessary to do so in order to vindicate commercial morality, for the ordinary remedies for damages for fraud and breach of contract were available to U.S.S.C. although it did not choose to pursue the former, but in any case the equitable doctrines sought to be invoked have no application to the present circumstances.

39. For these reasons I conclude that H.P.I. did not stand in a fiduciary relation to U.S.S.C. and that the only relief to which U.S.S.C. was entitled in the circumstances of the case was an award of damages for breach of contract.

40. I have not failed to consider the decisions of the United States courts upon which counsel for U.S.S.C. relied in support of the view that a manufacturer's distributing agent stands in a fiduciary relationship to the manufacturer. Of those cases that which is most in point is Flexitized, Inc. v.

National Flexitized Corporation (1964) 335 F 2d 774. In that case the plaintiffs, which manufactured flexible collar stays under the name "Flexitized", appointed the defendants to be their exclusive distributors under an agreement by which the defendants promised to use their best efforts to sell the plaintiffs' product and also promised not to sell a competing product during the life of the contract. The defendants, in breach of their agreement, sold competing collar stays and the plaintiffs recovered damages for that breach. That aspect of the case does not concern us. After the plaintiffs had terminated the agreement, the defendants continued to use the name "Flexitized" while marketing collar stays not made or sold by the plaintiffs. It was held that although the plaintiffs had no valid trade mark, they were entitled to an account of the defendants' profits by reason of their unfair competition. The court said, at p.782:

"Also, the defendants' conduct in continuing to use, without plaintiffs' permission, the name 'Flexitized' after its contract breach was expressly found to have been the result of a deliberate attempt to exploit purchaser familiarity with the name, and, as is clear from our prior discussion of the breach of contract claim in this case, such conduct by defendants was also directly connected with a breach on their part of a fiduciary relationship which had arisen upon their becoming exclusive sales agents for plaintiffs. Under these circumstances we think that defendants were properly chargeable with having misappropriated a valuable property right or commercial benefit under circumstances meriting a finding of unfair competition according to the law of New York ..."

In another case of passing off by a former distributor, Distillerie Fili Ramazzotti, S.P.A. v. Banfi Products Corporation (1966) 276 NYS 2d 413, it was said, at p 422, that "the goods being sold by defendant are the same goods which it sold during the time when it stood in what amounts to a fiduciary relationship to plaintiff, both as distributor and licensee." In Sapery v. Atlantic Plastics, Inc. (1958) 258 F 2d 793, where it was held that a manufacturer was entitled to terminate an agreement with its sales representative when he had set up a competing business, the view also seems to have been taken that the parties stood in a fiduciary relationship: see at p.796. It was not necessary to decide in any of these cases whether the relation between the parties was a fiduciary one in the sense that the distributor or representative owed a duty not to make a profit from his relationship and not to allow his interest to conflict with his duty. In none of the cases was there any discussion of the question why or how the alleged fiduciary relationship arose. In another case to which we were referred, Arnott v. American Oil Co. [1979] USCA8 562; (1979) 609 F 2d 873, it was held that a fiduciary relationship existed between an oil company and a dealer who had leased a service station from that company and that in consequence the oil company was in breach of its "fiduciary" duty of good faith and fair dealing by terminating the dealer's lease without good cause. Again the court was considering whether there existed what it called a "fiduciary relationship" but which was quite different in kind from that suggested to exist in the present case. In truth those decisions provide no assistance in deciding the questions that now arise. The fact that they are relied on illustrates "the danger of trusting to verbal formulae" of which Fletcher Moulton L.J. spoke in In re Coomber. Coomber v. Coomber, at p 728. If the distributors were properly described as "fiduciaries" for the purposes of the American cases to which I have referred, it does not follow that they were fiduciaries who owed duties of the kind sought to be enforced against H.P.I. The judgments in those cases throw no light on the questions that now fall for decision.

41. The conclusion which I have reached, that there was no breach of fiduciary duty, makes it unnecessary to consider other questions so fully debated at the bar. It means that U.S.S.C.'s claim to have it declared that the assets of H.P.I., I.R.D. and S.C.I., and certain of the assets of H.P.L., are held subject to a constructive trust for U.S.S.C. fails at the outset. A case might have been made out against Mr Blackman for inducing a breach of contract, but the proceedings in the Supreme Court do not appear to have been conducted on that basis. McLelland J. held that Mr Blackman had knowingly participated in the breaches by H.P.I. of its equitable obligations, but made no finding that he had induced a breach of H.P.I.'s contractual obligations. The matter was not pursued on appeal to this Court.

42. I accordingly hold that the only relief to which U.S.S.C. is entitled is to recover from H.P.I. damages for breach of contract.

Damages

43. Clearly, it was a breach by H.P.I. of its contractual obligations to defer fulfilment of orders for U.S.S.C.'s products in anticipation of filling those orders with products which it prepared or manufactured and to fill orders for the products of U.S.S.C. with its own competing products. The question remains whether it was a breach of the contract for H.P.I. secretly to develop a capacity to manufacture copies of U.S.S.C.'s products or components thereof with a view to appropriating for itself at the expense of U.S.S.C. the whole or a part of the Australian market for U.S.S.C.'s products. In my opinion that did amount to a breach of H.P.I.'s duty to use its best endeavours to promote the sale of U.S.S.C.'s products. It was quite incompatible with that obligation to make preparations to sell its own products as those of U.S.S.C. to persons who would otherwise have bought the products of U.S.S.C.: cf. Blyth Chemicals Ltd. v. Bushnell [1933] HCA 8; (1933) 49 CLR 66, especially at p 82. It will of course be a question of fact whether any damage flowed from that breach additional to that which flowed from the other breaches mentioned.

Conclusion

44. In my opinion the appeal of the appellant and the cross appeals of the second, third, fourth and fifth respondents should be allowed and the cross appeal of the first respondent should be dismissed. Judgment should be entered for the first respondent against the third respondent for damages and the matter should be remitted to the Supreme Court to assess the damages. Judgment should be entered for the appellant and the second, fourth and fifth respondents.

MASON J.

INTRODUCTION

2. This appeal, which has attracted cross appeals, is from a decision of the New South Wales Court of Appeal allowing an appeal by the first respondent ("USSC"), the plaintiff in an action in the Supreme Court of New South Wales, which, though it succeeded in the action, failed to obtain relief by way of constructive trust at first instance. The case raises interesting questions as between an overseas manufacturer and its exclusive distributor in Australia. These questions concern the existence of a fiduciary relationship, the scope of the distributor's fiduciary duty and the extent of relief for breach of that duty, in particular the availability of relief by way of a constructive trust over the assets of a business commenced by the distributor in competition with that of the overseas manufacturer at a time when the distributorship was still on foot.

3. USSC is a manufacturer in the United States of surgical stapling devices and disposable loading units. In November-December 1978 USSC agreed with the fourth respondent, Alan Richard Blackman, to appoint him as USSC's exclusive Australian distributor as from 1 April 1979. In or about February 1979, by agreement between USSC, Blackman and Hospital Products International Pty. Ltd. ("HPI") (then known as Hospital Products of Australia Pty. Ltd.), HPI was substituted for Blackman as the proposed distributor. HPI acted as the exclusive distributor in Australia of USSC's products from 1 April 1979 until 25 December 1979 when HPI terminated the distributorship. That termination was accepted by USSC by telex on 10 January 1980.

4. On 25 December 1979 HPI began to supply to its existing customers for USSC's products and to market generally products which were for all relevant purposes identical to those of USSC but which were contained in packages identifying them with HPI, not with USSC. Initially the products were of USSC manufacture and were sterilized and repackaged by HPI, in some cases with components manufactured by HPI. Gradually the components manufactured by HPI increased so that ultimately it marketed products entirely of its own manufacture.

5. The development by HPI of its own manufacturing capacity had been proceeding, unknown to USSC, from a time before the commencement of the distributorship, by a process known as "reverse engineering", involving the measurement and analysis of USSC components and the construction of tools, moulds and dies for the production of copies. In connexion with the "reverse engineering", HPI engaged the fifth respondent, I.R.D. Engineering Services Pty. Ltd. ("IRD"), a company which eventually came under the control of Blackman. Later, towards the end of 1980, HPI began to market its products in the United States through the second respondent, Surgeons Choice Inc. ("SCI"), a wholly-owned subsidiary of HPI.

6. In June 1981 the business and assets of HPI and of IRD, including the issued capital of SCI, were acquired by the appellant. Blackman and HPI acquired control of the appellant.

7. I have taken this narration of the basic facts from the judgment of the primary judge, McLelland J. They reflect what was common ground between the parties in the Supreme Court. Before I examine the facts more closely I should refer to the principal conclusions reached and the relief granted by the primary judge and later by the Court of Appeal.

8. McLelland J. made the following declarations:

(1) that HPI by secretly developing a capacity to manufacture copies of products manufactured by USSC or components thereof, by deferring fulfilment of orders for products manufactured by USSC in anticipation of filling those orders with products packaged or manufactured by HPI and by filling those orders with its competing products, with a view to appropriating for itself at the expense of USSC the whole or a substantial part of the Australian market for products manufactured by USSC, committed breaches of equitable and contractual obligations owed by HPI to USSC;
(2) that Blackman knowingly participated in the breaches by HPI of its equitable obligations; and

(3) that by reason of the breaches and the knowing participation by Blackman, USSC was entitled at its election -
(a) as against HPI and Blackman to payment of an amount equal to the profits made by HPI by selling surgical stapling products, other than products manufactured by USSC and sold in USSC's packages, on the Australian market between 1 December 1979 and 30 November 1980 and such payment to be secured by an equitable lien over the assets held by HPI representing the proceeds of the sale by HPI of its manufacturing business to the appellant or so much of those assets as the court may think sufficient to secure the payment;
(b) as against HPI and Blackman, to payment of equitable compensation in respect of the breaches of equitable obligations; or
(c) as against HPI to damages for breaches of its contractual obligations.
Orders were made in accordance with these declarations, USSC having elected to pursue the first of the alternative remedies.

9. By way of security for the payment of the amount of profits, McLelland J. further declared that USSC was entitled to an equitable lien over all the shares in the capital of the appellant held by HPI and all moneys owing by the appellant to HPI, representing or derived from any part of the consideration on the sale of its manufacturing business to the appellant. His Honour restrained the appellant until payment from (a) disposing of, charging or otherwise dealing with any such shares held by HPI in the capital of the appellant; and (b) demanding, directing or receiving payment of, or assigning, charging or otherwise dealing with any such moneys owing to HPI by the appellant.

10. The Court of Appeal, unlike the primary judge, concluded that USSC was entitled to relief by way of constructive trust over the assets of HPI and that the appellant acquired HPI's assets with notice of USSC's claim to those assets. The Court set aside the declarations and orders of McLelland J. and declared that all assets including the business and goodwill owned by the appellant on 1 July 1981 and at any time thereafter were and had been at all material times since 1 July 1981 held on trust for USSC with the exception of those assets which were assets of the appellant prior to its acquisition of the business and assets of HPI and IRD. The Court ordered the appellant to transfer those assets to USSC. Other orders consequential upon the making of those orders were also made.

11. The arguments presented to this Court by the appellant, HPI, Blackman and IRD challenge the findings that there was a fiduciary duty owed by HPI to USSC, that there was a breach of that duty and that relief by constructive trust was appropriate relief for breach of fiduciary duty. These arguments call for a detailed examination of the facts and of the findings made by the primary judge and by the Court of Appeal.

THE FACTS

(a) Background

12. Since 1967 USSC has manufactured in the United States and marketed there and in other countries, under the name "Auto Suture", surgical stapling devices of its own design, and disposable loading units, also of its own design, for use with those devices. They enable surgeons to carry out surgical procedures, in particular suturing, using stainless steel staples applied mechanically instead of surgical needles and thread. By the end of 1978 USSC had developed and was manufacturing and marketing a range of these devices and disposable loading units for use in various types of surgical procedure. USSC had also developed and was manufacturing and marketing integrated devices and staple cartridges known as disposable skin staplers suitable for use on a single occasion, being made predominantly in plastic.

13. In the years 1972 and 1973 USSC began to appoint "authorized dealers" to market its products and provide instruction to users. Each dealer was allocated a defined geographical area. The relationship between USSC and each dealer was governed by a standard form "Dealership Agreement", supplemented where necessary by a "Dealer Security Agreement" regulating the financial arrangements between USSC and the dealer.

14. The authorized dealer was neither an employee nor an agent of USSC. The dealer was in business on his own account and purchased USSC's products for resale to customers. By 1975 USSC had approximately eighty dealers serving areas within the United States. In that year USSC began to establish its own sales staff to market its products within the United States. Thereafter the sales representatives employed by USSC replaced authorized dealers. By late 1978 there were no more than thirty three dealers and by 1980 or 1981 they had been entirely eliminated.

15. In foreign countries USSC appointed distributors. By the end of 1978 they numbered twenty seven. Generally speaking a foreign distributor was an established business house already engaged in the distribution of other products. The arrangements between USSC and its distributors were more informal than those regulating USSC's relationships with its dealers. There was no standard form distribution agreement, the contractual arrangements consisting of an appointment of the distributor by letter following preliminary discussions or correspondence. Foreign distributors were not agents of USSC; like dealers, they purchased USSC's products for resale to customers.

16. USSC supplied to its dealers and distributors disposable loading units and disposable skin staplers for demonstration purposes at a fraction of the cost charged for the clinical products. They were in general identical to those supplied for clinical use except in two respects, viz., (1) unlike the clinical product, the demonstration product was not sterilized; and (2) unlike the clinical product the demonstration product was supplied in unsterile packs.

(b) Blackman's Association with USSC

17. Blackman first became associated with USSC early in 1973 when he was employed as product manager in relation to the marketing of an intravenous infusion set then manufactured by USSC. In August 1973 he commenced business on his own account as an authorized USSC dealer for a substantial part of the city of New York. In 1976 the dealership was taken over by The Hospital Products Corporation ("HPC"), a corporation formed in New York and owned and controlled by Blackman.

18. Blackman was a competent salesman with a high degree of expertise in USSC's products. He was highly regarded by Mr Leon Hirsch, the President of USSC, and Miss Turi Josefsen, Mr Hirsch's wife and Vice-President of USSC in charge of marketing, with each of whom he maintained a close relationship.

19. Despite this close relationship there had been some friction, arising principally from the substantial reduction in September 1975 of Blackman's New York distributorship area and a complaint made in December 1975 by Blackman about USSC's quality control which Hirsch believed to have been fabricated. The primary judge found that its existence did not cause "any permanent impairment of the cordial relationship" between Blackman and Hirsch and Josefsen.

(c) The Australian Distributorship

20. At or about the beginning of November 1978 at a meeting in a restaurant in Stamford, Connecticut, or in New York, Blackman, after informing Hirsch and Josefsen that he wished to emigrate to Australia, proposed that he be appointed USSC's exclusive Australian distributor in place of Downs Surgical (Australia) Pty. Ltd., ("Downs Surgical"), the then Australian distributor of USSC products, and that his existing New York dealership be phased out. Hirsch and Josefsen indicated that they were favourably disposed to Blackman's proposal. It was arranged that Blackman should later discuss further details of the matter with Josefsen. There was a conflict of evidence between Blackman on the one hand and Hirsch and Josefsen on the other, as to the discussions which they had. The primary judge resolved this conflict in favour of Hirsch and Josefsen, concluding that Blackman was not a credible witness.

21. A later discussion did take place, apparently in the latter half of November 1978 in USSC's office in Stamford. There was discussion about the training of a nurse whom Blackman proposed to employ in Australia and about the size of Downs Surgical's stock inventory and the possibility of its purchase by Blackman. It was arranged that he would consult with Mr Grimes, USSC's regional manager, in order to work out details of the termination of the New York distributorship. Although Josefsen stated that she thought a written distributorship agreement should be prepared, Blackman said that he did not think it was necessary.

22. Subsequently, Blackman discussed with Grimes the phasing out of the New York dealership. There followed an exchange of letters between Blackman and Josefsen beginning with a letter dated 27 November 1978 from Blackman and a reply dated 18 December 1978 from Josefsen in which she agreed in principle to proposals outlined by Blackman in his letter of 27 November for (a) the termination of his dealership; (b) the termination of the Downs Surgical distributorship on 1 December 1978 with 90 days' notice on the footing that Blackman would purchase its inventory and USSC would refrain from shipping to Downs Surgical further supplies; and (c) the terms of supply by USSC to Blackman in Australia. Josefsen stated that she had requested Mr Fisher (USSC's in-house counsel) to prepare a distributorship agreement for execution by USSC and Blackman.

23. On 27 December 1978 USSC wrote to Downs Surgical terminating its distributorship as from 31 March 1979. On the same day USSC sent to Blackman in duplicate a letter under the hand of Mr Whittingham, Senior Vice-President, Administration, which read as follows:

"We take pleasure in confirming the continuance of
our relationship. You will become our Australian
distributor while phasing out your dealership in
accordance with the following procedures.
1. We have this day given notice of termination to
our present Australian distributor, Downs
Surgical (Australia) Pty. Ltd. effective March
31, 1979. A copy of the notice has been
furnished to you. Upon that termination
becoming effective and commencing April 1, 1979

you will be our exclusive Australian
distributor. Although you have indicated that
no formal agreement is necessary, we believe it
is desirable and will forward to you a suggested
agreement covering the distributorship.
2. During the period through March 31, 1979 you
will undertake to purchase the Downs' inventory
at prices mutually agreeable to you and them and
in any event use your dealership inventory which
you estimate will be approximately
$100,000 - $125,000, wholesale value, to provide
an inventory level in Australia. Additional
products purchased by you from us will be paid
on a 30 day net basis. In the meantime
arrangements should be made to examine your
inventory books and records as per your
dealership agreement at the earliest convenient
date.
3. You expect to rent from us between 20-30 sets of
instruments which within 120 days you will
convert to purchase from us.
4. You will hire and train your nurse unless she is
agreeable to training by us at your expense.
5. Your dealership will continue without change
through June 30, 1979. Effective July 1, 1979
your dealership shall be deemed terminated in
all respects and your PAR (primary area of
responsibility) will be taken over by us for
servicing.
6. By July 1, 1979 all accounts owed to us will be
paid in full by you. This includes outstanding
A/R (accounts receivable), inventory,
demonstrations, interest, financing charges and
other obligations.
If the above is your understanding of our
discussions please sign and return the enclosed
copy of this letter. We look forward with great
pleasure to our new relationship and wish you every
success in your new undertaking."

24. On 29 December 1978 in a discussion in Fisher's office in New York Blackman confirmed that he was satisfied with the contents of the letter. Blackman signed the letter under the words:

"Accepted and agreed
The Hospital Products Corporation".
USSC took no further steps in relation to a formal
distributorship agreement on the decision of Josefsen, concurred in by Hirsch, as a result of Blackman's expressed disinclination to have one.

25. On 6 January 1979 Blackman arrived in Australia. At or about the beginning of February he acquired HPI, then a shelf company bearing a different corporate name. It was admitted on the pleadings that at about the same time, by novation, HPI was substituted for Blackman in the distributorship agreement entered into in November and December 1978.

26. Having made arrangements to purchase the excess stock of Downs Surgical, HPI replaced that company as USSC's sole distributor in Australia as from 1 April 1979 and began to market Auto Suture products to Australian hospitals and surgeons. Blackman devoted himself energetically to the promotion of Auto Suture products with the result that between April and December 1979 there was a substantial increase in the use of those products in Australian hospitals.

27. The cost price to Downs Surgical of the stock purchased from it by HPI was $50,000 approximately, some five times more than Blackman had anticipated as a result of his discussions with Josefsen. The price at which HPI was to purchase the stock was 10 per cent over cost. HPI paid Downs Surgical $5,000 approximately and it was arranged that USSC would give that company credit for the balance of $50,000 approximately and debit that amount to HPI.

28. In or about May 1979 HPI began to purchase further stock direct from USSC. As at 30 June 1979 HPI was indebted to USSC in the sum of US$65,000 approximately for stock purchased from USSC as well as US$54,000 approximately for stock purchased from Downs Surgical. In addition HPC was indebted to USSC in respect of the New York dealership in an amount of US$70,000 as at 30 July 1979. These debts gave rise to a further agreement between the parties which resulted later in the execution of mutual releases.

(d) Blackman's Plans To Compete With USSC

29. Blackman had first come to Australia in August 1978 for twelve days. He ascertained then, if not earlier, that USSC's surgical stapling devices and disposable loading units, which were the subject of patents in the United States, were not the subject of patents registered in Australia and he consulted solicitors in Sydney in relation to his competing with USSC by marketing USSC-made demonstration products repackaged and sterilized in Australia and the possibility of his obtaining registration in Australia of the trademark "AUTOSUTURE". On 11 August 1978 he set in train investigations by Professor Wallwork, a metallurgist in the University of New South Wales, into

(a) the composition and physical properties of the wire
staples in USSC disposable loading units; and
(b) the suitability of radiation sterilization of
disposable loading units after packaging.
Later in 1978 he asked Professor Wallwork to investigate and report on the composition and physical properties of other metal components in the disposable loading units and to investigate the possibility of the production of dies for the manufacture of those components.

30. Blackman had for some years known that USSC's demonstration product did not differ in quality from its clinical product. He had been accumulating since 1977 abnormally large stocks of demonstration product in the course of HPC's New York dealership. No doubt this was the stock to which he referred when on 2 February 1979 he told HPI's prospective banker that he had purchased stock in America at very advantageous prices in readiness for him to start on his own.

31. The primary judge found that by the time of the restaurant meeting at the beginning of November 1978 Blackman had, subject to his being appointed USSC's Australian distributor, formed the intention of setting up an organization in Australia:

(a) to manufacture components similar to USSC-made
components of the types required to be used with
USSC-made demonstration cartridges;
(b) to repackage and sterilize USSC-made demonstration
cartridges accompanied where necessary by
components made by himself; and
(c) to market the resulting products in competition
with USSC-made clinical products.
His Honour also found that Blackman was at that stage exploring the feasibility of recovering, refurbishing, repackaging and marketing used cartridges as well as manufacturing and marketing complete copies of USSC-made disposable loading units.

32. On a subsequent visit to Australia in the first half of November 1978 Blackman retained Graham Engel and Associates Pty. Ltd., consultants in pharmaceutical sciences and in the regulation of pharmaceutical goods, to act for him in his dealings with the Federal and State Governments in Australia and to advise in relation to the sterilization and quality control of surgical stapling cartridges and the packing of such cartridges. After Blackman's return to the United States Mr Engel, the principal of the company, entered into discussions with Blackman's Sydney solicitors with a view to taking steps "to get the stapling business underway". In December 1978 approaches were made to Smith & Nephew Associated Companies of Australia Pty. Ltd. with a view to carrying out the packaging and sterilization of certain USSC-made demonstration disposable loading units. This company was later retained to undertake this work, but the engagement did not proceed. On 15 November 1978 Blackman's solicitors lodged an application for the registration of the trademark "AUTOSUTURE" in the name of HPI in respect of, inter alia, "instruments and apparatus for use in surgery".

33. Between December 1978 and February 1979 arrangements were made by Blackman for the shipping of large quantities of USSC-made demonstration product by HPC to HPI via Hong Kong. For taxation reasons each transaction was structured as a sale by HPC to Pilotte Nominees Ltd., a New Hebrides company, as a trustee for a trust called the Bellevue Trust at a price equivalent to the cost of the product to HPC, a second sale by Pilotte Nominees Ltd. to Morust Ltd., a Hong Kong company, the shares in which were to be held by the Bellevue Trust, whilst Morust Ltd. was intended to hold all the shares in HPI, at a price many times that under the first sale, and a third sale by Morust Ltd. to HPI at a price slightly in excess of the price under the second sale. Shipments of these demonstration products were made by HPC by air on 16 February 1979 and on 29 March 1979 at invoiced prices to Pilotte Nominees Ltd. of US$4,490 and US$14,700 respectively. They were received by HPI at invoiced prices of the order of $500,000.

34. At the beginning of March 1979 HPI, through Blackman, engaged Mr L. Crispe, a product engineering consultant, as project manager for HPI's proposed manufacturing activities. Under Blackman's direction Crispe immediately set about establishing a production capability for HPI involving, inter alia, as a first stage:

(a) the manufacture of components for disposable
loading units identical to USSC-made components;
and
(b) the cleaning, assembly, packaging, labelling and
sterilization of certain disposable loading units
manufactured by USSC, comprising USSC-made
demonstration product, combined where necessary
with locally-made components;

and as a second stage:

(c) the manufacture of all components identical with
USSC-made components of certain types of disposable
loading units manufactured by USSC; and
(d) the assembly, packaging, labelling and
sterilization of those types using locally-made
components.
All this was with a view to marketing the disposable loading units so produced, under the name of HPI in competition with, or in substitution for, USSC-made clinical product.

35. Substantially all the engineering work involved in the first stage of these activities was performed for HPI under contract by a firm called IRD Engineering Services and in the second stage by that firm and its successor in business, the respondent IRD. By August 1979 a number of components for disposable loading units were being manufactured for, and supplied to HPI. And by October 1979 HPI had begun to defer fulfilment of orders received for Auto Suture products in anticipation of filling those orders with HPI packaged products. At or about the same time HPI ceased to place further orders with USSC. In or about November 1979 HPI commenced to assemble disposable loading units comprising USSC-made demonstration product with HPI-made components added where necessary, repackaging them under HPI's label and sterilizing them.

36. On 25 December 1979 Blackman wrote to Josefsen as follows:

"Dear Turi,
I am sorry to inform you that Hospital Products of
Australia Pty. Ltd. shall this day on, no longer be
the authorized distributor for United States
Surgical Corporation's product line. This decision
has been made for numerous reasons, not the least
of which involves:
1/ U.S.S.C.'s growing problem with quality control.
2/ U.S.S.C.'s constant back-order position.
3/ U.S.S.C.'s inability to process orders
efficiently.
4/ Resulting damage to Hospital Products of
Australia Pty. Ltd.'s reputation in the
marketplace.
I will be in New York City from January
25 - February 15 finalizing all my affairs. I
suggest we get together during this period to
settle all accounts due."

37. The letter was received by Josefsen on 7 January 1980. On 10 January 1980 Josefsen telexed Blackman on behalf of USSC accepting HPI's decision to terminate the distributorship and suggesting that a time and place be appointed in New York for settling accounts and the outstanding debt owing to USSC.

38. From 25 December 1979 HPI began to supply HPI repackaged product to fill orders then outstanding and subsequently received for Auto Suture products. Blackman anticipated that HPI would be able to supply products wholly manufactured by itself within a few months and in the

meantime considered that HPI would be able to supply its labelled and repackaged USSC-made demonstration products with the addition of HPI-made components where necessary.

39. On 28 December 1979 HPI communicated with all hospital purchasing agents, stating that it was phasing out all the United States' manufactured goods and substituting an Australian manufactured product. Thereafter products supplied by HPI made no reference to USSC or to Auto Suture except in the words "For use with Auto Suture instrument". Each label included the words:

"Packaged and distributed by
Hospital Products International Pty.
Ltd.
10-12 Clarke Street, Crows Nest.
Sydney, NSW 2065.
Patent pending".

40. The primary judge found that as from 25 December 1979 HPI began to supply customers in Australia with HPI-labelled products, the HPI-made proportion of the content of which was increasing with the passage of time, in order that the existing Australian market for USSC-made products might be converted into an equivalent market for HPI-made products. He found also that this was done in a manner which was intended to, and did in fact, mislead existing customers for USSC-made products into believing that the HPI labelled products were being manufactured in Australia by arrangement with, or under license from, USSC.

41. During 1980 HPI began to supply various types of disposable loading units of its own manufacture. However, in order to maintain its ability to satisfy orders in that year, HPI obtained supplies of USSC-made clinical products which HPI repackaged under its label. HPI obtained large quantities of these products by procuring their purchase from USSC, or its distributors, by agents either using a false name or otherwise adopting methods to conceal from USSC the identity of HPI as purchaser. HPI also acquired USSC-made devices by similar means for use in the promotion of HPI-packaged products.

42. After the termination of HPI's distributorship, USSC did not re-enter the Australian market until August 1980 when it formed a subsidiary which resumed the marketing of USSC-made disposable loading units in Australia. HPI continued marketing its products in Australia until November 1980. Thereafter, while continuing to manufacture its product in Australia, it marketed them in the United States and elsewhere through SCI which it formed in the United States for that purpose in or about October 1980.

43. McLelland J. found that the obtaining by Blackman of the distributorship was a condition of the implementation by him of his scheme to take over the whole or a substantial part of the market in Australia for USSC's products. The Court of Appeal concluded that his appointment as distributor conferred on him a number of opportunities without which his scheme may not have succeeded. The opportunities which the Court of Appeal identified were as follows:

(1) the distributorship would enable him to know or become

known to purchasers of USSC's products in Australia,
without labouring under the handicap of being a
competitor;
(2) the distributorship would enable him to establish

surreptitiously a manufacturing capacity;
(3) he would be able to obtain finance from USSC and other
sources;
(4) he would be able to reduce the promotion and sale of
USSC's products before terminating the distributorship
and satisfy outstanding orders with products containing
Australian made components; and
(5) he could supply his own products to existing customers
who might readily believe that he was acting with the
authority of USSC.
As the Court pointed out, Blackman and HPI took advantage of each of these opportunities.

44. The Court of Appeal then drew the inference:

"... that in all Blackman did, and through him all
that HPI did, he and with him HPI, were actuated by
one design, namely to put himself, and hence HPI,
in a position in which he, and it, could
appropriate for himself and it at the expense of
USSC, the whole or a substantial part of the
Australian market for USSC products. ... Without
limiting what we have said, this applied throughout
the period of the actual operation of the
distributorship. Even his activity, during the
distributorship, of building up the market in
Australia for USSC products by the use of USSC
marketing techniques was done by him in order that
the enhanced market could be taken over by HPI as
it was by vacating it for USSC products during the
distributorship and thereupon occupying it with HPI
products."
CHOICE OF LAW

45. USSC based its claim for relief in the proceedings in the Supreme Court on the law of New South Wales. The primary judge and the Court of Appeal proceeded on the footing that choice of law was not a material issue in the case because there was a substantial identity between the law of New South Wales and the laws of New York and Connecticut, the two competing jurisdictions. Consequently choice of law is not a matter which this Court need consider and I shall therefore proceed on the assumption that the relevant law is that of New South Wales.

TERMS OF THE DISTRIBUTORSHIP AGREEMENT

46. McLelland J.'s finding that the countersigned letter of 27 December 1978 from USSC to Blackman was not intended to record the whole of the transaction between them, was confirmed by the Court of Appeal. The appellant challenges the finding on the ground that Blackman was asked to sign beneath the words "Accepted and agreed" and that the letter purported to be a statement of USSC's understanding of the discussions between the parties. It seems that the letter did more than confirm the earlier discussions. The letter specified a different termination date for the New York dealership and a different commencement date for the Australian distributorship from those proposed in the earlier letter of 27 November and the new dates do not appear to have been mentioned in the oral discussions. The letter of 27 December actually records an appointment of

Blackman as Australian distributor from 1 April 1979 and a termination of his New York dealership on 1 July 1979. Apart from these matters the letter deals with procedural matters, as McLelland J. found. It indicates that USSC then contemplated the execution of a formal agreement regulating Blackman's appointment as Australian distributor.

47. The ultimate decision of the parties to dispense with the execution of a formal agreement does not necessarily compel the conclusion that the letter of 27 December was a complete statement of the contract between the parties. Although Hirsch and Josefsen participated in the earlier discussions with Blackman believing that a formal contract governing the Australian distributorship should be executed, it does not follow that the discussions had no contractual significance. It sometimes happens that parties arrive at an oral agreement without knowing whether the oral agreement will constitute a contract in its own right or whether it will lead to the execution of a formal written contract. If the parties then proceed on the footing that they have entered into a contract without executing a formal contract, the terms of their contract are to be found in their oral discussions. Here the problem has an extra dimension in that the oral discussions were followed by the countersigned letter which evidenced an agreement on a number of topics and contemplated the possibility of the execution of a formal contract governing the appointment of Blackman as Australian distributor.

48. That USSC did not insist on a formal distributorship contract was due to Blackman's insistence that it was unnecessary and possibly to the confidence which Hirsch and Josefsen, particularly Josefsen, had in Blackman, though this is not supported by any finding on the part of the primary judge. Although USSC's decision not to insist on a formal contract might suggest that it was content to rely on the contract as set out in the countersigned letter, it is equally consistent with USSC's reliance on a contract consisting of that letter and the earlier discussions between Blackman, Hirsch and Josefsen. The importance of the discussions is acknowledged in the penultimate sentence of that letter which indicates that the discussions constituted the contract. The letter itself does not purport to be a contract between the parties; it begins by confirming "the continuance of our relationship" and ends by making it clear that the object of the letter is to record USSC's "understanding" of the antecedent discussions. In those discussions USSC had agreed to appoint Blackman as its exclusive distributor in Australia and to provide financial assistance, factors which support the view that the discussions were contractual in some aspects at least.

49. In addition to these matters there is the conclusion reached by the primary judge, a conclusion with which I agree, that some of the matters conveyed by Blackman to Hirsch and Josefsen at the restaurant meeting were "of a promissory nature and not merely representational", amounting in substance to an offer by Blackman to USSC which was accepted by USSC by its agreement to appoint him as Australian distributor. This acceptance had the effect of incorporating these promises, subject to later modifications of them in discussion and correspondence, as express terms of the contract.

50. The express terms of the contract as found by McLelland J. and accepted by the Court of Appeal, were:

(1) that the distributor would establish a marketing
oganisation for USSC surgical stapling products in
Australia having one or more sales representatives
specifically trained in the use and demonstration
of those products;
(2) that the distributor would devote its best efforts
to distributing USSC surgical stapling products,

and building up the market for those products, in
Australia, to the common benefit of USSC and
itself;
(3) that the distributor would not deal (scil. in
Australia) in any products competitive with USSC
surgical stapling products; and
(4) that the distributor would not deal (scil. in
Australia) in any other products in such a manner
as would diminish its efforts in distributing USSC
surgical stapling products and building up the
market for those products in Australia.
Each was to endure for the term of the distributorship.

51. The implied terms of the contract as found by McLelland J. were:

(1) that the distributorship was not terminable
unilaterally except upon reasonable notice to the
other party; and
(2) that the distributor would not during the
distributorship do anything inimical to the market
in Australia for USSC surgical stapling products.
The Court of Appeal was in agreement with the primary judge, observing that he was using the word "inimical" in its most stringent sense. It is apparent that his Honour was using the word in a sense of "adverse or injurious in tendency or influence; harmful, hurtful", the meaning usually assigned to the word in its application to acts.

52. The appellant submits that the third and fourth express terms and the second implied term were not part of the contract. The appellant also submits that the obligation of the distributor to use his best efforts do not go beyond the obligation to use such efforts to promote the sale of the goods with a corresponding obligation on the part of USSC to use its best efforts to supply the goods.

53. To take the last point first, by including in the second express term the concluding words "to the common benefit of USSC and itself" his Honour was reflecting the emphasis which Blackman in the restaurant meeting had given to the advantages which would flow to USSC and to himself from his energetic development of the Australian market for USSC surgical stapling products, an emphasis which any person seeking appointment as a distributor would give to his proposed activities. This emphasis merely underlined the respective advantages which ordinarily flow to manufacturer and distributor from active promotion by the latter of the market for the former's products.

54. Although McLelland J. confined his use of the phrase "common benefit" to the obligation to use best efforts and to the development (and servicing) of the market for USSC's surgical stapling products in Australia - a limitation which is repeated in his treatment of the fiduciary duty owed by HPI - the Court of Appeal seems to have gone somewhat further. The Court of Appeal concluded that McLelland J. was not referring to a shared benefit. The Court regarded the phrase "common benefit" as indicating a promise to carry on the distributorship for the benefit of both parties. The Court did not suggest that Blackman made an explicit promise in terms that he would work, or carry on the distributorship, for the benefit of both parties; instead the Court acknowledged that the express terms found by the primary judge were no more than a distillation of what was actually said in the oral discussions. The problem, as it seems to me in this respect, is that the Court of Appeal has treated as contractual statements made by Blackman which stressed the advantages his

appointment as distributor would bring to both parties - statements not usually promissory in nature though made with the object of inducing USSC to make the appointment - and has given them a wider significance than that attributed to them by McLelland J.

55. A best efforts clause is not an uncommon feature of a distributorship agreement. However, it is unusual to include in the clause a provision that the promissor will use his best efforts for the common benefit of both parties. It is a clause ordinarily inserted in a contract between parties at arm's length, designed to give protection to one party by imposing an obligation on the other to promote the sales of the first party's products. The extent of the obligation thereby imposed is governed by what is reasonable in the circumstances (Transfield Pty. Ltd. v. Arlo International Ltd. [1980] HCA 15; ; (1980) 144 CLR 83, at pp 100-101, 107). In Transfield a tender by a licensee based on its use of its own product instead of the product of its licensor was held not to be a breach of a best efforts clause. However, in other cases sale of competing products has been regarded as a breach (see, for example, Randall v. Peerless Motor Car Co. (1912) 99 NE 221; Paige v. Faure (1920) 127 NE 898). To say that the promise was to be performed to or for the common benefit of both parties is to overlook the qualification of reasonableness usually associated with a best efforts promise. The qualification itself is aimed at situations in which there would be a conflict between the obligation to use best efforts and the independent business interests of the distributor and has the object of resolving those conflicts by the standard of reasonableness. Its effect here is to modify the obligation to distribute (and service) USSC's surgical stapling products and to build up the market for them by reference to what is reasonable in the circumstances, in particular the situation of the distributor. It therefore involves a recognition that the interests of USSC could not be paramount in every case and that in some cases the interests of the distributor would prevail. This qualification of the promise, unlike the common benefit qualification, does not attribute to the distributorship the characteristics of a joint venture.

56. Yet, the Court of Appeal seems to have treated the promise as investing the entire distributorship with joint venture characteristics, if not the character of a joint venture agreement. The Court regarded the promise as "restricting Blackman to business decisions calculated to advance the interests of both parties." It is necessary then to examine the elements of a distributorship arrangement, for that is the basic relationship which Blackman proposed, and to ascertain whether such an arrangement lends itself to a restriction of the kind suggested by the Court of Appeal.

57. A distributorship agreement generally, as here, contemplates that the manufacturer will sell and the distributor will purchase the manufacturer's products for resale to customers. Subject to the impact of the provisions of the contract, the distributor is entitled to set the prices payable on resale because its profit depends largely on the difference between these prices and those payable to the manufacturer. And unless the contract provides that the distributor is to make the resale as agent for the manufacturer then in making the resale the distributor resells as principal without bringing the customer into contractual relations with the manufacturer. It is scarcely necessary to add that the distributor in carrying on its business is entitled to make decisions in its own interests, subject to such restrictions on its power so to do as may be imposed by the contract.

58. Indeed, it is because the distributor is free to act independently in its own interests that from time to time the parties include in the contract stipulations, like the best efforts clause, the performance of which will serve to protect and benefit the manufacturer. All this is to say that a distributorship agreement is not in general a joint venture in which the parties pool their resources in an undertaking carried on for their mutual or common benefit, though it is possible that some aspects of a distributorship agreement may have joint venture characteristics. Of course, the agreement may be so structured as to impose on the distributor the responsibility of acting, in some

matters at least, as agent for the manufacturer. In this event the distributor is bound in those matters to act in the interests of the manufacturer, rather than in his own interest, or for that matter in their joint interests.

59. The characteristics of a distributorship arrangement are all present in this case. The relationship between the parties was that of buyer and seller; HPI was entitled to set the prices to be paid by Australian customers, subject to the best efforts promise and to its promise not to injure USSC's market; and there is no suggestion that HPI was to resell as agent for USSC so as to bring it into contractual relations with the Australian customers. See Michelin Tyre Co. Ltd. v. Macfarlane (Glasgow) Ltd. (in Liq.) [(1916) 2 SLT 221.]

60. HPI was an exclusive distributor which, in the early stages at any rate, was to devote its entire efforts to the building up of the market for USSC's products. But this factor does not affect or detract from the elements of the relationship between USSC and HPI which I have mentioned. Nor does it provide a basis for finding that HPI promised to carry on its business for and on behalf of the parties jointly or for their common benefit.

61. The problems presented by the "common benefit" qualification are pointed up when we consider the Court of Appeal's view that the promise restricted HPI to "business decisions calculated to advance the interests of both parties" and how this restriction would operate in practice. Take, for example, the consequences to HPI of an increase in the price of USSC-made products brought about by an increase by USSC in its prices to HPI, by an increase in duties or by a change in the exchange rate. A decision by HPI to increase its prices to Australian customers might well have a tendency to affect adversely the market in Australia for USSC's products and in that sense be calculated not to advance the interests of USSC. Likewise, a decision by HPI to reduce its purchases of USSC's products by reason of USSC's increased prices or HPI's financial circumstances or a decision to restrict credit to purchasers of USSC's products due to HPI's financial circumstances might well prejudice the market for these products notwithstanding that the decisions might be essential to HPI's financial viability and to its continuing existence as a commercial entity.

62. True it is that a decision which has a tendency to prejudice the interests of one of two parties may in particular circumstances be calculated to advance the common interests of both parties. However, in all the situations which I have mentioned there arises a situation of conflict or potential conflict between the interests of USSC and those of HPI. It is unrealistic to suggest that Blackman was promising that HPI would in these situations confine itself to decisions calculated to advance the interests of both parties. No party would be likely to sacrifice or surrender its capacity to make vital business decisions of this kind by reference to what it considers to be its own interests on matters essential to its financial viability and continuing existence as a commercial entity. The more sensible approach is to recognize that a distributor in the position of HPI would make ordinary business decisions by reference to its own interests but that in making those decisions it would need to take account of (a) the obligation imposed by the best efforts promise with the qualification of reasonableness which it imports; and (b) any implied obligation prohibiting injury to the market for USSC's products in Australia.

63. The appellant's challenge to the third and fourth express terms as found by the primary judge is based very largely on the effect which the appellant seeks to attach to a best efforts clause. According to the argument, such a clause ordinarily permits the promissor to compete; it is therefore inconsistent with the third and fourth express terms. No doubt the appellant goes too far in suggesting that a best efforts clause ordinarily permits the promissor to compete, as so much in each case depends on the context in which the clause is to be found and on the terms of the particular contract that it is impossible to formulate a rule of universal or general application. Here the nature

and details of the conversation are such that the judge was quite entitled to conclude that Blackman was promising not to deal in competing products or in other products which would diminish his efforts in distributing USSC products and in building up the market for those products in Australia. Blackman's appointment as exclusive distributor in Australia and USSC's provision of substantial financial assistance to him are other factors which tend to support the primary judge's conclusion.

64. The second implied term found by McLelland J. presents in a more acute form difficulties of the kind considered in connexion with the qualification attached to the best efforts promise by the Court of Appeal. An undertaking to do nothing inimical to the market in Australia for USSC's surgical stapling products would be broken by any act or business decision whose tendency was to damage or injure that market, even if the act was done or the decision taken in the honest belief based on reasonable grounds that it would not damage or injure that market or that it would enhance or protect that market. The examples already given in relation to the best efforts promise have additional force here. A decision by HPI to increase prices, to reduce purchases or restrict credit in the situations already discussed would involve a breach of the second implied term if the action taken had a tendency to injure the market for USSC's surgical stapling products in Australia, notwithstanding the existence of an honest and reasonable belief that it would not have such a tendency.

65. The severity of the operation of the second implied term suggests that it goes beyond what was necessary to give the contract business efficacy and what was within the reasonable contemplation of the parties - see Secured Income Real Estate (Australia) Ltd. v. St. Martins Investments Pty. Ltd. [1979] HCA 51; (1979) 144 CLR 596; Codelfa Construction Pty. Ltd. v. State Rail Authority of New South Wales [1982] HCA 24; (1982) 56 ALJR 459, at pp 463-465; B.P. Refinery (Westernport) Pty. Ltd. v. Hastings Shire Council (1977) 52 ALJR 20; Prenn v. Simmons (1971) 1 WLR 1381, at pp 1383-1385. It is unnecessary and inappropriate to impose upon the distributor an obligation more onerous than the negative aspect of the positive best efforts promise, namely that the distributor would not during the distributorship do anything for the purpose of injuring or destroying the market in this country for USSC's surgical stapling products. Such an obligation to restrain deliberate acts undertaken by the distributor for that purpose sufficiently protected USSC and at the same time preserved HPI's freedom of decision in relation to its business operations. The Court of Appeal's view to the contrary is based on the proposition, which I cannot accept, that HPI was not entitled to take action by reference to its own interests in any matter pertaining to the distributorship and that in all matters it was bound to act in the interests of USSC as well as in its own interests.

66. Neither the express terms nor the implied terms of the contract prohibited fair competition by HPI with USSC after termination of the distributorship. Nor in my view did they prohibit preparations on the part of HPI during the course of the distributorship for fair competition after termination of the distributorship, so long as the preparatory acts (a) were not undertaken for the purpose of developing a market for the competing products before termination took place, or (b) did not otherwise amount to a breach of contract (see Robb v. Green (1895) 2 QB 1, at pp 14-18; Wessex Dairies Ld. v. Smith (1935) 2 KB 80, at pp 84-85, 87-88; Feiger v. Iral Jewelry Ltd. (1975) 382 NYS(2d) 216; (1976) 382 NYS(2d) 221; (1977) 363 NE(2d) 350). However, HPI, by secretly developing a capacity to manufacture copies of USSC's products or components, by deferring fulfilment of orders for USSC's products in anticipation of satisfying those orders with HPI's product and by satisfying those orders with HPI's products with a view to appropriating for itself at the expense of USSC the market or a substantial part of the market for USSC's products, committed breaches of contract, as McLelland J. declared in the first declaration which he made.

WAS HPI A FIDUCIARY?

67. Because distributor-manufacturer is not an established fiduciary relationship it is important in the first instance to ascertain the characteristics which, according to tradition, identify a fiduciary relationship. As the courts have declined to define the concept, preferring instead to develop the law in a case by case approach, we have to distill the essence or the characteristics of the relationship from the illustrations which the judicial decisions provide. In so doing we must recognize that the categories of fiduciary relationships are not closed (Tufton v. Sperni (1952) 2 TLR 516, at p 522; English v. Dedham Vale Properties Ltd. (1978) 1 WLR 93, at p 110).

68. The accepted fiduciary relationships are sometimes referred to as relationships of trust and confidence or confidential relations (cf. Phipps v. Boardman [1966] UKHL 2; (1967) 2 AC 46, at p 127), viz., trustee and beneficiary, agent and principal, solicitor and client, employee and employer, director and company, and partners. The critical feature of these relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position. The expressions "for", "on behalf of" and "in the interests of" signify that the fiduciary acts in a "representative" character in the exercise of his responsibility, to adopt an expression used by the Court of Appeal.

69. It is partly because the fiduciary's exercise of the power or discretion can adversely affect the interests of the person to whom the duty is owed and because the latter is at the mercy of the former that the fiduciary comes under a duty to exercise his power or discretion in the interests of the person to whom it is owed. See generally: Weinrib, "The Fiduciary Obligation" (1975) 25 University of Toronto Law Journal 1, at pp.4-8. Thus a mere sub-contractor is not a fiduciary. Although his work may be described loosely as work which is to be carried out in the interests of the head contractor, the sub-contractor cannot in any meaningful sense be said to exercise a power or discretion which places the head contractor in a position of vulnerability.

70. That contractual and fiduciary relationships may co-exist between the same parties has never been doubted. Indeed, the existence of a basic contractual relationship has in many situations provided a foundation for the erection of a fiduciary relationship. In these situations it is the contractual foundation which is all important because it is the contract that regulates the basic rights and liabilities of the parties. The fiduciary relationship, if it is to exist at all, must accommodate itself to the terms of the contract so that it is consistent with, and conforms to, them. The fiduciary relationship cannot be superimposed upon the contract in such a way as to alter the operation which the contract was intended to have according to its true construction.

71. Because I take a different view about the terms of the contract I do not share the Court of Appeal's conclusion that HPI was under a fiduciary duty to carry on the entire distributorship business in the joint interests of USSC and HPI. That view, it seems to me, rested very heavily on the suggested promise to carry on the business for the common benefit of the parties and on the implied term that HPI would do nothing inimical to USSC's interests.

72. My conclusion that HPI was at liberty to make some business decisions by reference to its own interests, subject to the obligations arising under the best efforts promise and the other terms of the contract express and implied, presents an overwhelming obstacle to the existence of the comprehensive fiduciary relationship found by the Court of Appeal. This is because HPI's capacity to make decisions and take action in some matters by reference to its own interests is inconsistent with the existence of a general fiduciary relationship. However, it does not exclude the existence of a more limited fiduciary relationship for it is well settled that a person may be a fiduciary in some

activities but not in others (Kuys, at p 1130; Birtchnell v. Equity Trustees, Executors and Agency Co. Ltd. (1929) 42 CLR 384, at p 408; Phipps, at p 127).

73. The appellant submits, mistakenly in my view, that the very existence of the best efforts promise is inconsistent with the co-existence of a fiduciary duty. True it is that a promise or a contractual term may be so precise in its regulation of what a party can do that there is no relevant area of discretion remaining and therefore no scope for the creation of a fiduciary duty (R.H. Deacon & Co. Ltd. v. Varga (1972) 30 DLR(3d) 653; affirmed (1973) 41 DLR (3d) 767). Here, however, HPI enjoyed a substantial area of discretion in the exercise of its responsibility to promote the market in Australia for USSC surgical stapling products. The giving of a best efforts promise to promote that market did not relevantly limit the ambit of HPI's discretion in discharging that responsibility.

74. In considering whether a fiduciary duty, and if so, what fiduciary duty, was generated by that responsibility we have to take account of the following factors:

(1) there was a valuable market for USSC's products in

Australia;
(2) USSC, by appointing HPI, entrusted HPI with the
exclusive responsibility of promoting that market during
the term of the distributorship which was determinable
by either party on reasonable notice;
(3) the manner in which the market was to be promoted was
left to HPI's general discretion, subject to the express
and implied terms of the contract;
(4) the exercise of that discretion provided HPI with a
special opportunity of acting to the detriment of the
market for USSC's products, rendering USSC vulnerable to
abuse by HPI of its position, USSC having no
representation at all in Australia;
(5) in selling USSC's products to Australian customers HPI
was not acting as agent for USSC;
(6) although HPI's actions would not alter or affect USSC's
legal rights vis-a-vis others, its actions could and
did affect adversely in a practical sense the market
in Australia for USSC's products and consequently its
product goodwill in this country;
(7) in the circumstances mentioned in (1)-(6) above USSC
relied on HPI to protect and promote USSC's product
goodwill in Australia; and
(8) HPI's responsibility to protect and promote USSC's
product goodwill was necessarily subject to the
qualification of reasonableness attached to the best
efforts promise.

75. Paragraph (8) above presents an unusual problem. The classical illustrations of the fiduciary relationship are those in which the fiduciary is under a duty to act not in his own interests or solely in his own interests but in the interests of another or jointly in the interests of another and himself, e.g., a trustee and a partner. In the present case the nature of the distributorship relationship and the

best efforts promise with its attendant standard of reasonableness necessarily entailed that HPI could make some business decisions by reference to its financial interests, without subordinating them to the promotion of the market for USSC's products, so long at any rate as HPI did not deliberately do something, or omit to do something, for the purpose of destroying or injuring that market. And, as we know, HPI when it entered into a contract to sell USSC's products to an Australian customer was not acting as trustee or agent for USSC. The contractual rights which arose against the customer were held by HPI in its own right and were not the subject of any trust in favour of USSC. HPI was entitled to recover and retain the purchase price for its own benefit, being under no duty to account to USSC.

76. But entitlement to act in one's own interests is not an answer to the existence of a fiduciary relationship, if there be an obligation to act in the interests of another. It is that obligation which is the foundation of the fiduciary relationship, even if it be subject to qualifications including the qualification that in some respects the fiduciary is entitled to act by reference to his own interests. The fiduciary duty must then accommodate itself to the relationship between the parties created by their contractual arrangements. And entitlement under the contract to act in a relevant matter solely by reference to one's own interests will constitute an answer to an alleged breach of the fiduciary duty. The difficulty of deciding under the contract when the fiduciary is entitled to act in his own interests is not in itself a reason for rejecting the existence of a fiduciary relationship, though it may be an element in arriving at the conclusion that the person asserting the relationship has not established that there is any obligation to act in the interests of another.

77. There has been an understandable reluctance to subject commercial transactions to the equitable doctrine of constructive trust and constructive notice. But it is altogether too simplistic, if not superficial, to suggest that commercial transactions stand outside the fiduciary regime as though in some way commercial transactions do not lend themselves to the creation of a relationship in which one person comes under an obligation to act in the interests of another. The fact that in the great majority of commercial transactions the parties stand at arms' length does not enable us to make a generalization that is universally true in relation to every commercial transaction. In truth, every such transaction must be examined on its merits with a view to ascertaining whether it manifests the characteristics of a fiduciary relationship.

78. The disadvantages of introducing equitable doctrine into the field of commerce, which may be less formidable than they were, now that the techniques of commerce are far more sophisticated, must be balanced against the need in appropriate cases to do justice by making available relief in specie through the constructive trust, the fiduciary relationship being a means to that end. If, in order to make relief in specie available in appropriate cases it is necessary to allow equitable doctrine to penetrate commercial transactions, then so be it. See, for example, Barclays Bank Ltd. v. Quistclose Investments Ltd. [1968] UKHL 4; (1970) AC 567 and Swiss Bank Corporation v. Lloyds Bank Ltd. (1982) AC 584. A preferable approach to an artificial narrowing of the fiduciary relationship - the gateway to relief in specie - is to define and delimit more precisely the circumstances in which the remedy by way of constructive trust will be granted.

79. There is a strong case for saying that because USSC entrusted HPI with the responsibility of protecting and promoting the market for USSC's products in Australia HPI was a fiduciary in protecting and promoting USSC's Australian product goodwill. In procuring orders for, making sales of and supplying USSC's products to Australian consumers HPI was acting in USSC's interests as well as its own. And by engaging in these activities HPI enhanced both USSC's local product goodwill and the goodwill of its own distributing business. By the sale of its products to its distributor here and by its sale of those products to Australian consumers under the name of "Auto Suture" in circumstances in which the products were associated by consumers with USSC as

manufacturer, USSC created a local product goodwill (Estex Clothing Manufacturers Pty. Ltd. v. Ellis and Goldstein Ltd. [1966] HCA 81; (1967) 116 CLR 254, at pp 267-268, 270-271; Imperial Tobacco Company of India Ltd. v. Bonnan (1924) 41 RPC 441). The remarks of Latham C.J. and Rich J. in Commissioner of Taxes (Q.) v. Ford Motor Co. of Australia Pty. Ltd. [1942] HCA 16; (1942) 66 CLR 261, at p 272, indicate that goodwill cannot be assigned independently of the business with which it is associated, but they do not deny the existence of local product goodwill in a case such as the present. The difficulty of determining how much of the goodwill in Australia was local product goodwill of USSC and how much was goodwill of HPI's distributing business does not deny the separate existence in USSC of local product goodwill.

80. USSC, by entrusting HPI with a responsibility for protecting and promoting the market for USSC's products in Australia, effectively constituted HPI the custodian of its product goodwill in this country. Its responsibility in procuring orders, making sales and effecting deliveries of USSC's products in Australia armed HPI with a power and discretion to affect USSC's product goodwill. And in exercising this responsibility HPI had a special opportunity of acting to the detriment of USSC which was, accordingly, vulnerable to the abuse by HPI of its position.

81. HPI's position as custodian of USSC's product goodwill in Australia may be likened in a general way to that of a bailee whose duty it is to protect and preserve a chattel bailed to him. It has been well recognized, at least since the judgment of Jessel, M.R., in In re Hallett's Estate (1880) 13 ChD 696, at pp 708-709, that a bailee stands in a fiduciary relationship with his bailor when the bailor entrusts to the bailee goods to be held or dealt with by him for the benefit of the bailor or for certain limited purposes stipulated by the bailor.

82. In engaging in the activities which I have mentioned, activities related to the production and promotion of USSC's product goodwill, HPI was acting in its own interests as well as in the separate interests of USSC. Although, as we have seen, it was entitled to prefer its own interests to the interests of USSC in some situations where those interests might come into conflict, this entitlement was necessarily subject to the requirement that HPI act bona fide and reasonably with due regard to the interests of USSC. In no circumstance could it act solely in its own interests without reference to the interests of USSC. This, as it seems to me, fixed HPI with the character of a fiduciary in relation to those activities mentioned, notwithstanding that in pursuing them HPI was also acting in its own interests and that it was carrying on the distributorship business generally for its own benefit and in no sense as a trustee for USSC.

83. This conclusion is largely founded on the general nature of the responsibility which, according to the contract, HPI undertook to discharge in pursuing the relevant activities, though the obligation not to compete and the obligation not to deliberately injure USSC's market were significant elements in that responsibility. And it is the general nature of that responsibility which distinguishes HPI from the mortgagee who is bound to exercise his power of sale in good faith. In exercising that power the mortgagee is acting in his own interests, subject to the requirement of good faith (see Kennedy v. De Trafford (1897) AC 180, at p 185) and possibly that of reasonable care (see Australia and New Zealand Banking Group Ltd. v. Bangadilly Pastoral Co. Pty. Ltd. (1978) 139 CLR 195, at pp 222-225). Even so, the mortgagee's duty in exercising the power is sometimes described as analogous to a fiduciary duty (Sir Frederick Jordan, Chapters on Equity (6th ed. 1947) p.113).

THE SCOPE OF THE FIDUCIARY DUTY

84. The categories of fiduciary relationships are infinitely varied and the duties of the fiduciary vary with the circumstances which generate the relationship. Fiduciary relationships range from the

trustee to the errand boy, the celebrated example given by Fletcher Moulton L.J. in his judgment in In re Coomber (1911) 1 Ch 723, in which, after referring to the danger of trusting to verbal formulae, he pointed out (at pp 728-729) that the nature of the curial intervention which is justifiable will vary from case to case. In accordance with these comments it is now acknowledged generally that the scope of the fiduciary duty must be moulded according to the nature of the relationship and the facts of the case (Phipps v. Boardman, at pp 123-125; Kuys, at p 1129-1130; Canadian Aero Service Ltd. v. O'Malley (1973) 40 DLR(3d) 371, at pp 383, 390). The often repeated statement that the rule in Keech v. Sandford (1726) Sel Cas T King 61 (25 ER 223) applies to fiduciaries generally tends to obscure the variable nature of the duties which they owe. The rigorous standards appropriate to a trustee will not apply to a fiduciary who is permitted by contract to pursue his own interests in some respects. Thus, in the present case the so-called rule that the fiduciary cannot allow a conflict to arise between duty and interest (Kuys, at p.1130) cannot be usefully applied in the absolute terms in which it has been stated.

85. McLelland J. found - a finding with which I agree - that, as a fiduciary having responsibility for protecting and promoting the market for USSC's products in Australia, HPI was under a duty not to make a profit or to take a benefit by virtue of its position as a fiduciary without the informed consent of USSC and that within the ambit of its fiduciary responsibility it should not act in a way in which there was a possibility of conflict between its own interests and those of USSC (Queensland Mines Ltd. v. Hudson (1978) 52 ALJR 399, at p 401). It was accepted in that case (at p 401) that "possibility of conflict" needs to be understood in the sense of "real sensible possibility of conflict" as was pointed out by Lord Upjohn in Phipps v. Boardman, at p 124. The rule that a fiduciary is not entitled to make a profit without the informed consent of the person to whom the fiduciary duty is owed is not limited to profits which arise from the use of the fiduciary position or of the opportunity or knowledge gained from it for it is said that the basis of this rule is that the fiduciary may not place himself in a situation where his duty and his interest conflict (Consul Development Pty. Ltd. v. D.P.C. Estates Pty. Ltd. [1975] HCA 8; (1975) 132 CLR 373, at p 393).

86. The traditional view that the profit rule is merely a corollary of the conflict rule may be traced back to the speech of Lord Herschell in Bray v. Ford (1896) AC 44, at p 51. The view has been severely criticised, with some justification - see Shepherd, The Law of Fiduciaries (1981) pp.147-151. And a recognition of its shortcomings induced Sir Frederick Jordan in his Chapters on Equity, op. cit., at p.115 to describe the conflict rule as a "counsel of prudence" rather than a rule of equity. Accordingly, the fiduciary's duty may be more accurately expressed by saying that he is under an obligation not to promote his personal interest by making or pursuing a gain in circumstances in which there is a conflict or a real or substantial possibility of a conflict between his personal interests and those of the persons whom he is bound to protect (Aberdeen Railway Co. v. Blaikie Brothers (1854) 1 Macq 461, at p 471). By linking the obligation not to make a profit or take a benefit to a situation of conflict or possible conflict of interest the proposition, in accordance with the authorities, (a) excludes the relevance of an inquiry into the actual motives of the fiduciary; and (b) excludes restitutionary relief when the interest of the fiduciary is remote or insubstantial - see Boulting v. Association of Cinematograph, Television and Allied Technicians (1963) 2 QB 606, at pp 637-638; Phelan v. Middle States Oil Corporation (1955) 220 F 2d 593, at pp 602-603.

87. In Phelan Learned Hand J., in discussing the nature of the conflict that gives rise to the fiduciary's liability to account, said (at pp.602-603):

"Was that such a conflict as invokes the doctrine?
It enables the beneficiary to hold the fiduciary
liable for any profits he may make, or losses he
may cause, in order to deprive him of any

inducement that will affect his absolute and
disinterested loyalty; and there is no doubt that
an expectation or hope of future advantage may do
so, even though it is not secured to him as an
existing legally protected interest. Therefore, if
the doctrine be inexorably applied and without
regard to the particular circumstances of the
situation, every transaction will be condemned once
it be shown that the fiduciary had such a hope or
expectation, however unlikely to be realized it may
be, and however trifling an inducement it will be,
if it is realized. We do not understand that it is
to be applied so rigidly, or to so literal an
extreme. ... we have to determine the scope of the
implementary rule that dispenses with the need of
proving that his personal interest had any part in
determining the fiduciary's conduct; indeed, with
a rule that altogether forbids any inquiry whether
it had any such part. We have found no decisions
that have applied this rule inflexibly to every
occasion in which the fiduciary has been shown to
have had a personal interest that might in fact
have conflicted with his loyalty. On the contrary
in a number of situations courts have held that the
rule does not apply, not only when the putative
interest, though in itself strong enough to be an
inducement, was too remote, but also when, though
not too remote, it was too feeble an inducement to
be a determining motive."

BREACH OF FIDUCIARY DUTY

88. In Blyth Chemicals Ltd. v. Bushnell [1933] HCA 8; (1933) 49 CLR 66, at p 82, Dixon and McTiernan JJ. observed that it would be misconduct amounting to a ground justifying dismissal for a manager to take steps during his employment to prepare a position to which he could retreat with a large part of his employer's business in the event that it should become necessary or desirable to vacate the managership. And in Maryland Metals Inc. v. Metzner (1978) 382 A(2d) 564, the Court of Appeals of Maryland, referring to competition by an employee after termination of his employment, observed (at p.569):

"The right to make arrangements to compete is by no
means absolute and the exercise of the privilege
may, in appropriate circumstances, rise to the
level of a breach of an employee's fiduciary duty
of loyalty. Thus, the privilege has not been
applied to immunize employees from liability where
the employee has committed some fraudulent, unfair
or wrongful act in the course of preparing to
compete in the future...".

89. Of course the fiduciary duty of a distributor is not necessarily to be equated with that of an

employee. The employee's duty of loyalty may involve him in a breach of duty if he secretly makes arrangements during his employment to compete with his employer after termination of the employment. And the secret development by the employee of a manufacturing capacity by surreptitiously copying the manufacturer's product will certainly constitute a breach of duty. Whether either of these activities constitutes a breach of fiduciary duty on the part of a distributor is another question the answer to which depends on the terms of the contract and the ambit of the fiduciary relationship which it creates. It is possible that it would not have been a breach of duty for HPI to make secret arrangements during the distributorship for the establishment of a manufacturing capacity in order to compete with USSC after termination of the distributorship, so long as HPI did not compete and did not deliberately damage USSC's product goodwill before that time.

90. HPI's copying of USSC's products raises a more complex question. As we have seen, a bailee may stand in a fiduciary relationship with his bailor. A buyer who has possession of goods the subject of a contract of sale on terms that property does not pass until payment of the purchase price is a bailee of the goods until the property passes (see City Motors (1933) Pty. Ltd. v. Southern Aerial Super Service Pty. Ltd. [1961] HCA 53; (1961) 106 CLR 477, at p 490; see also Aluminium Industrie Vaassen B.V. v. Romalpa Aluminium Ltd. (1976) 1 WLR 676; In re Bond Worth (1980) Ch 228, at pp 246-247; Borden (U.K.) Ltd. v. Scottish Timber Products Ltd. (1981) Ch 25). Where the buyer is an exclusive distributor and his purchase is for the purpose of supplying the local market with the manufacturer's product, it being the duty of the distributor to promote and protect the market, it may well be a breach of the fiduciary duty of the distributor as bailee to copy the manufacturer's product - the distributor thereby putting the product to a use lying outside the scope of the bailment. But there is here nothing to indicate that HPI copied USSC's products whilst it was still a bailee, i.e., before property in the products passed to HPI when the bailment came to an end. Once the bailment came to an end HPI's fiduciary duty as bailee terminated and it was thereupon at liberty to deal with or use the product as it thought fit, subject to such other rights as USSC may have had, e.g., passing off and breach of contract.

91. However, HPI did more than copy USSC's products. McLelland J. found that during the distributorship HPI failed to fulfil its fiduciary duty and its contractual obligations in the two ways set out in his first declaration:

"(i) by secretly developing a capacity to
manufacture copies of USSC's products or components
thereof with a view to appropriating for itself at
the expense of USSC the whole or a substantial part
of the Australian market for USSC products and (ii)
by deferring fulfilment of orders for USSC clinical
products in anticipation of filling those orders
with HPI repackaged or manufactured competing
products and by filling orders for USSC clinical
products with such competing products, again with a
view to appropriating for itself at the expense of
USSC the whole or a substantial part of the
Australian market for USSC products."

The two breaches described by his Honour need to be understood as involving actions taken by HPI during the term of the distributorship with a view to appropriating USSC's market for itself during that term and thereafter. Once the breaches are understood in this light, it is incontestable, as it seems to me, that his Honour was correct in finding that the relevant acts constituted breaches of

fiduciary duty. HPI, though custodian of USSC's product goodwill, sought to appropriate that goodwill for itself by the means described in the declaration.

92. In expressing the breaches in the same terms for contractual and fiduciary purposes his Honour was not asserting that, once a fiduciary relationship is found to exist, that relationship endows breaches of contract with a fiduciary character as well. He was saying no more than that the acts described constituted breaches of each obligation. Neither breach constituted the making of a gain but rather the pursuit of a gain, the intended gain being the appropriation of USSC's local product goodwill. Each breach as described in the declaration is a description of the means by which HPI pursued the gain. Each breach, had it been discovered in time, might have been restrained by injunction (In re Thomson (1930) 1 Ch 203).

93. The Court of Appeal, giving the ambit of the fiduciary relationship much wider scope than I am disposed to do, went further than the primary judge in holding that all the steps taken by HPI in relation to the development of the manufacturing capacity, the reverse engineering, the production of moulds (and dies), the entry into the relevant contracts, the raising of the necessary finance and the employment of workers, were breaches of HPI's fiduciary duty. The Court also held that HPI's manufacturing activities (including the incorporation of HPI-manufactured components with those manufactured by USSC) and the promotion and sale of HPI packaged and labelled goods, constituted breaches of HPI's fiduciary duty. The Court commented:

"By actually manufacturing before 25th December,
and by manufacturing, promoting and selling between
that date and 10th January, HPI put to practical
use the capacity it had developed."

94. I agree that HPI's manufacturing activities and the promotion and sale of HPI packaged and labelled goods constituted breaches of its fiduciary duty. I agree also with the comment in the final sentence of the preceding paragraph. But I do not find it necessary to isolate and identify every step taken by HPI in developing a manufacturing capacity so as to assign to each such step the character of a breach of HPI's fiduciary duty. This is because it is possible to ascertain the profit which HPI made in breach of its fiduciary duty by accepting the breaches of duty as McLelland J. generally described them without seeking to describe them in greater detail.

RELIEF FOR BREACH OF FIDUCIARY DUTY

(a) General Principle Governing Liability to Account

95. The principle, accepted by the courts below, is that the fiduciary cannot be permitted to retain a profit or benefit which he has obtained by reason of his breach of fiduciary duty (Consul Development, at p.393; Queensland Mines, at p.401). A fiduciary is liable to account for a profit or benefit if it was obtained (1) in circumstances where there was a conflict, or possible conflict of interest and duty or (2) by reason of the fiduciary position or by reason of the fiduciary taking advantage of opportunity or knowledge which he derived in consequence of his occupation of the fiduciary position.

(b) Constructive Trust

96. Any profit or benefit obtained by a fiduciary in either of the two situations already described is held by him as a constructive trustee (Keith Henry & Co. Pty. Ltd. v. Stuart Walker & Co. Pty. Ltd.

[1958] HCA 33; (1958) 100 CLR 342, at p 350). Neither principle nor authority provide any support for the proposition that relief by way of constructive trust is available only in the case where a profit or benefit obtained by the fiduciary was one which it was an incident of his duty to obtain for the person to whom he owed the fiduciary duty. Once it is established that the fiduciary is liable to account for a profit or benefit which he has obtained there can be no objection to his being held to account as a constructive trustee of that profit or benefit. It can make no difference that it was not his duty to obtain the profit or benefit for the person to whom the duty was owed. What is important is that the advantage has accrued to him in breach of his fiduciary duty or by his misuse of his fiduciary position. The consequence is that he must account for it and in equity the appropriate remedy is by means of a constructive trust.

97. In Beatty v. Guggenheim Exploration Co. (1919) 225 NY 380, Cardozo J. observed (at p 386) that an agent or a partner who promised or covenanted not to engage in some other business does not, as a matter of course, become chargeable as a trustee for the profits of the forbidden venture. For this proposition he cited well-known authorities which included Dean v. MacDowell (1878) 8 ChD 345, and Aas v. Benham (1891) 2 Ch 244. He went on to say (at p 386):

"A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee."
Later he said (at p.389):

"A court of equity in decreeing a constructive trust is bound by no unyielding formula. The equity of the transaction must shape the measure of relief."

98. The decided cases provide many illustrations of the fiduciary who has been held to be accountable as a constructive trustee of a profit or benefit which he has obtained for himself, notwithstanding that it was not his duty to acquire that profit or benefit as an incident of his fiduciary duty. See, for example, Regal (Hastings) Ltd. v. Gulliver [1942] UKHL 1; (1967) 2 AC 134; Phipps v. Boardman; Prebble v. Reeves (1910) VLR 88; Industrial Development Consultants Ltd. v. Cooley (1972) 1 WLR 443, at p 453; and Pre-Cam Exploration & Development Ltd. v. McTavish (1966) 57 DLR(2d) 557. The principle and the policy which underlie the cases was comprehensively expressed by Rich, Dixon and Evatt JJ. in Furs Ltd. v. Tomkies [1936] HCA 3; (1936) 54 CLR 583. Their Honours, after pointing out the rule that an undisclosed profit derived by a director from the execution of his fiduciary duties belongs in equity to the company, observed (at p.592):

"It is no answer to the application of the rule that the profit is of a kind which the company could not itself have obtained, or that no loss is caused to the company by the gain of the director. It is a principle resting upon the impossibility of allowing the conflict of duty and interest which is involved in the pursuit of private advantage in the course of dealing in a fiduciary capacity with the affairs of the company. If, when it is his duty to

safeguard and further the interests of the company,
he uses the occasion as a means of profit to
himself, he raises an opposition between the duty
he has undertaken and his own self interest, beyond
which it is neither wise nor practicable for the
law to look for a criterion of liability. The
consequences of such a conflict are not
discoverable. Both justice and policy are against
their investigation."

99. However, there is authority for the proposition that equity does not assume jurisdiction to punish a fiduciary for misconduct by making him account for more than he actually received as a result of his breach of fiduciary duty. In Vyse v. Foster (1872) LR 8 Ch App 309, James L.J. said (at p 333):

"This Court is not a Court of penal jurisdiction.
It compels restitution of property
unconscientiously withheld; it gives full
compensation for any loss or damage through failure
of some equitable duty; but it has no power of
punishing any one. In fact, it is not by way of
punishment that the Court ever charges a trustee
with more than he actually received, or ought to
have received, and the appropriate interest
thereon. It is simply on the ground that the Court
finds that he actually made more, constituting
moneys in his hands 'had and received to the use'
of the cestui que trust."
The decision of the Court of Appeal was affirmed by the House of Lords ((1874) L.R. 7 H.L. 318) without their Lordships reflecting on the passage which I have quoted.

100. The proposition which I have stated based on the observations of James L.J. needs to be modified in order to take account of the situation where the fiduciary has so mixed an indeterminate profit with his own property as to render the identification of the gain impossible. There "... the whole will be treated as trust property, except so far as he may be able to distinguish what is his own." (Brady v. Stapleton [1952] HCA 62; (1952) 88 CLR 322, at p 336, quoting Page Wood V-C. in Frith v. Cartland (1865) 2 H & M 417, at p 418 (71 ER 525, at p 526)). The proposition may also need to be modified to take account of a profit acquired by a fraudulent fiduciary through a combination of trust property and his own property or efforts. It may well be that equity in such circumstances will not seek to apportion the gain.

101. The propriety of granting relief by way of constructive trust is therefore closely associated with the answers to two questions: (1) What is the breach of fiduciary duty? and (2) What is the profit or benefit which the fiduciary has made in consequence of that breach? Before proceeding to answer the second question, which is the outstanding question, I should mention that a particular problem has arisen with respect to the declaration of a constructive trust of a competing business established and carried on by a fiduciary in breach of his duty. One approach, more favourable to the fiduciary, is that he should be held liable to account as constructive trustee not of the entire business but of the particular benefits which flowed to him in breach of his duty. Another approach, less favourable to the fiduciary, is that he should be held accountable for the entire business and its profits, due

allowance being made for the time, energy, skill and financial contribution that he has expended or made. In In re Jarvis (1958) 1 WLR 815, Upjohn J. observed (at p 820), correctly in my opinion, that it is not possible to say that one approach is universally to be preferred to the other, for each case depends on its own facts and the form of inquiry which ought to be directed must vary according to the circumstances. In each case the form of inquiry to be directed is that which will reflect as accurately as possible the true measure of the profit or benefit obtained by the fiduciary in breach of his duty.

(c) What was the Profit or Benefit obtained by HPI in

Breach of its Fiduciary Duty?

102. McLelland J. confined the profit or benefit obtained by HPI to the profits which it made during the "headstart" period which ceased in November 1980 when HPI stopped selling on the Australian market. McLelland J. found:

"The development of its manufacturing capacity in
breach of its (HPI's) equitable obligation to USSC
prior to the termination of the distributorship
gave HPI a very considerable lead-time advantage in
getting its own products on the market ... . The
advantage represented by this headstart, which it
would not have received had it not breached its
fiduciary duty, provided HPI with a springboard
which, together with its fraudulent conduct prior
to the termination of the distributorship in
filling orders for USSC clinical products with its
repackaged product and creating a situation where
HPI repackaged or manufactured products would be
supplied in lieu of USSC clinical products in
circumstances calculated to mislead consumers,
enabled it to have the benefit of a market in
Australia which otherwise would have been a market
for USSC products."

103. The Court of Appeal found that the true measure of the profit or benefit was represented by all the assets of HPI as at 10 January 1980. In rejecting the view that the "headstart" was the correct yardstick, the Court considered that as at 10 January 1980, the date of termination of the distributorship, HPI would not have been able to develop a manufacturing capacity had it attempted to do so on that date, and not before. This was because the raising of very substantial finance was an essential preliminary to the establishment of manufacturing capacity and HPI's status as exclusive Australian distributor of USSC's products was a sine qua non to its ability to raise that finance. The Court of Appeal's assessment of HPI's gain was expressed as follows:

"What it had on 10th January, 1980, on the
termination of the distributorship, was a
manufacturing capacity, the benefit of the
knowledge of and by the market it had obtained or
generated as a distributor of USSC goods, the
benefit of deferred orders for USSC goods, and the

benefit of the financial resources which it had obtained on the assumption that it was acting with USSC's approval in developing its manufacturing capacity. It was no longer USSC's distributor and it was not in the business of executing with USSC goods the orders which it had deferred or which it obtained unless its own manufacturing limitations made that necessary.
The selling activities which it then had were substantially the selling, under its own name, of products containing components manufactured by itself, leading in due course to the selling of products wholly manufactured by itself."

104. By way of reinforcing this conclusion the Court of Appeal stated that the assets held by HPI on 10 January 1980 had been acquired, created or developed by the misuse of USSC's distributorship, for the purpose of or in the course of the commission of breaches of its fiduciary duties. The assets were not assets acquired, created or developed for use only in the event that USSC's distributorship should be terminated but were the means by which HPI intended to appropriate to itself the market for USSC's products in Australia.

105. This approach opened up the way to relief by way of constructive trust over the assets of HPI, an approach which McLelland J. rejected. Unlike the Court of Appeal he thought that the "headstart" was an accurate measure of the profit or benefit gained by HPI. The ultimate profit or gain which HPI sought to obtain - USSC's local product goodwill - formed no part of the relief which he or the Court of Appeal awarded. The reason for this is that HPI did not succeed in appropriating for itself that goodwill on a permanent basis. It ceased to compete with USSC in the Australian market. Any loss of local product goodwill by USSC to HPI was on a temporary footing only. Whether it was recovered by USSC or lost to other competitors we do not know.

106. The Court of Appeal's reason for rejecting the "headstart" approach centred on its view that, but for its status and standing as exclusive distributor of USSC's products in Australia, HPI would not have succeeded in securing the substantial finance essential for the establishment of a manufacturing capacity on or after 10 January 1980. There is some evidence that the Bank of New Zealand, HPI's principal financier, would not have advanced finance to HPI to undertake manufacturing activities if HPI had not been USSC's distributor and if the Bank had been aware that USSC had not approved the copying of its products. This direct evidence and other evidence capable of supporting an inference that HPI would have found it necessary to borrow substantially from other sources may well have justified the Court of Appeal's finding that HPI would not have been able to develop a manufacturing capacity had it attempted to do so on 10 January 1980 and not before.

107. However, this finding does not demonstrate that the headstart was not a correct measure of HPI's profit. First, the establishment by HPI of a manufacturing capacity or the taking of preparatory steps to that end after the termination of the distributorship would not have amounted to a breach of fiduciary duty or of contract. Secondly, it was not established that finance would not have been available to HPI from other sources to enable it to develop a manufacturing capacity. The headstart period fixed by the primary judge - 1 December 1979 to 30 November 1980 - covers the entire period in which HPI was selling its products to the Australian market. It therefore covers all

the profits made by HPI in Australia in the course of its appropriation of USSC's product goodwill in Australia.

108. Whether HPI is accountable for (1) profits made from sales of its surgical stapling devices in the United States market and (2) its assets generally raises two separate questions. The first point to be made about sales in the United States - one which McLelland J. considered decisive - is that the ambit of the fiduciary relationship and the contractual obligations with which it was associated, i.e., the promise not to compete and the promise not to damage USSC's market, was restricted to the market in Australia. However, it does not follow as a matter of principle or logic that the profits for which HPI is liable are necessarily restricted to profits made within the ambit, geographical or otherwise, of the fiduciary relationship. As a fiduciary HPI is liable for any profits made in breach of its fiduciary duty, even if they happen to be made outside the area of the fiduciary relationship. If, for example, the responsibilities of the Victorian manager of a company with a nation-wide business are limited to Victoria, this geographical limitation on his responsibility gives him no immunity from liability to account for profits which he makes in Western Australia in competition with his employer by making use in breach of his fiduciary duty of knowledge or an opportunity gained in his fiduciary position. See Green and Clara Pty. Ltd. v. Bestobell Industries Pty. Ltd. (1982) WALR 1; McLeod and More v. Sweezey (1944) 2 DLR 145 and Pre-Cam. Although these are cases in which the defendant turned to his own advantage confidential information or knowledge acquired in his capacity as a fiduciary, they clearly illustrate that limitations on the ambit of the fiduciary relationship cannot be invoked as limitations on the fiduciary's liability to account for profits resulting from his breach of duty.

109. However, the second and decisive point to be made in connexion with possible profits arising from United States sales is that what gave the secret development of manufacturing capacity during the term of the distributorship the character of a breach of fiduciary duty was HPI's intention that the capacity should be exploited for the purpose of appropriating to HPI USSC's Australian product goodwill. The development of manufacturing capacity with a view to competing with USSC in the United States market only during the distributorship would not have amounted to a breach of duty, though it would unquestionably have triggered a termination by USSC of the distributorship, had USSC been aware of the development. And it is clear from the findings of fact made in the courts below that at all material times HPI intended to use its manufacturing capacity to compete in the United States market as well as in the Australian market.

110. In some circumstances it may be proper to hold a fiduciary liable to account for a profit or benefit arising from the pursuit of an activity which did not amount to a breach of fiduciary duty but for the circumstance that the activity was also undertaken for the purpose of obtaining another profit or benefit which was a breach of fiduciary duty. If the breach of fiduciary duty is a sine qua non in the sense that the pursuit of the activity for the purpose of obtaining the legitimate profit or benefit could not have been undertaken as a practical business operation on its own without seeking also to obtain the forbidden profit or benefit, then there is much to be said for the view that the fiduciary's liability to account should extend to all profits and benefits. The problem seems not to have been explored in the courts below. There was no occasion to do so in the Court of Appeal because USSC obtained more extensive relief. And, although at first instance USSC sought in its statement of claim an account of profits generally, it seems not to have sought an account of profits arising from the United States sales on the footing now under discussion, preferring instead to claim, as it does in this Court, a comprehensive remedy by way of constructive trust over HPI's assets. In these circumstances it is not appropriate to make any order requiring HPI to account for profits arising from sales made in the United States.

111. The claim for a constructive trust of all the assets of HPI as at 1 July 1981 ranges far beyond the profits and benefits obtained by HPI in breach of its fiduciary duty. In granting that relief the Court of Appeal based its finding not only on a wider view of the fiduciary relationship, but more importantly on the view that the business of the Australian distributor had been fraudulently established with the very object of operating as a vehicle for the appropriation of USSC's Australian product goodwill. Whether fraud provides an adequate additional foundation for the constructive trust is a question still to be considered. At the moment it is sufficient to mention two matters. The first is that the constructive trust sought by USSC not only extends far beyond the profits and benefits obtained by HPI in breach of its duty but fails to make any allowance for the contribution in time, effort and finance made by HPI to the acquisition and creation of the assets which it held on 1 July 1981. The second is that the consequence of upholding the claim for the constructive trust would be to debar HPI from competing with USSC in the United States market, notwithstanding that the contract between the parties contained no such embargo during the currency of the contract or after its termination.

112. Nevertheless there is one aspect of HPI's manufacturing capacity which merits specific mention. This capacity was developed on the basis of reverse engineering - the copying of USSC's products. The evidence does not establish that the copying of these products constituted a breach of HPI's fiduciary duty, considered apart from the intention with which it was undertaken. As we have seen, the evidence seems to indicate that HPI acquired title to the products which it bought from USSC, including the demonstration product and that the copying or reverse engineering was carried out in relation to products of which HPI was the owner. There is no separate claim for relief by USSC based on confidential information alleging that the copying of the products amounted to an exploitation by HPI of confidential information to its own advantage to the detriment of USSC. Consequently, there is no foundation for imposing a constructive trust over the dies and moulds produced by the reverse engineering which are used in the course of HPI's manufacturing operations.

THE CLAIM TO A CONSTRUCTIVE TRUST BASED ON FRAUD

113. USSC submits that the constructive trust declared by the Court of Appeal can be sustained on the footing of the findings of fraud made by that Court. These findings are incontestably correct. USSC seizes on the finding that Blackman's fraudulent conduct - conduct which HPI adopted - in procuring the distributorship and in committing breaches of contractural and fiduciary obligations was undertaken in the execution of a dishonest scheme the object of which was to appropriate the whole or a substantial part of USSC's market.

114. The reasons which I have already given for rejecting the claim to a constructive trust for breach of fiduciary duty apply with equal force to the ground now under consideration. This is because common to both claims is the notion that the assets of HPI represent the material profit made or benefit taken, in one case in breach of fiduciary duty, in the other case by means of fraud. The answer in each case is that the assets of HPI do not represent, and substantially exceed, any profit or benefit obtained by HPI in breach of its duty or by means of fraud. It is not, and could not be suggested, that in equity restitutionary relief for fraud involving actual dishonesty differs in material respects from restitutionary relief in other species of equitable fraud not involving actual dishonesty. In every case the wrongdoer's underlying liability is to account for the gain that he has made.

115. There are cases, Timber Engineering Co. Pty. Ltd. v. Anderson (1980) 2 NSWLR 488, being a striking example, where an employee has fraudulently and in breach of his fiduciary duty diverted business from his employer to a company owned and operated by the employee and others who

participated in the fraudulent breach of fiduciary duty and the court has declared that the business of the company was held on a constructive trust to the employer. The decision in Timber Engineering, rests on the proposition that the business of the company represented the measure of the profit or benefit which was obtained in breach of fiduciary duty, for relief by way of constructive trust is merely a means of giving effect to the fiduciary's basic liability to account. This is how Kearney J. dealt with the matter. He was at pains (at p.496) to demonstrate that (a) every opportunity which the company received was directly attributable to resources and benefits provided by the employer, even to the extent of time and effort expended by the employees for which the employer paid and (b) every advance made by the company was due to resources and facilities provided by the employer, leading to the conclusion that the business of the company was "carved out of the business" of the employer.

116. The final matter to be mentioned on this aspect of the case is that in an interlocutory judgment delivered on 11 June 1982 McLelland J. ruled that in the light of the pleadings and the manner in which USSC's case had been conducted the claim in fraud could only be pursued in association with the case for relief for breach of fiduciary duty and not as an independent case for relief.

ORDERS

117. In the result I would allow the appeal and the cross appeals of the second, third, fourth and fifth respondents, dismiss the cross appeal of the first respondent, set aside the orders made by the Court of Appeal and restore the orders made by McLelland J.

WILSON J. My consideration of the issues in this case has led me to a view substantially in accord with that expressed both by the Chief Justice and by Dawson J. in their respective reasons for judgment. In the circumstances, I refrain from embarking on a lengthy judgment of my own. I content myself with a few observations.

2. I accept the finding of the learned trial judge, with which the Court of Appeal agreed, that the statements made by Blackman at the restaurant meeting in November 1978 were "promissory and not merely representational" (J.J. Savage & Sons Pty. Ltd. v. Blakney [1970] HCA 6; (1970) 119 CLR 435, at p 442) and that consequently it was an express term of the contract that

"the distributor would devote its best efforts to
distributing U.S.S.C. surgical stapling products,
and building up the market for those products, in
Australia, to the common benefit of U.S.S.C. and
itself".

Although the use of the words "common benefit" may leave room for differences of opinion as to the precise operation of such a term, I would not give it an effect which is different in any significant respect from that which is achieved by the implication of the statutory term prescribed by s.2-306(2) of the Uniform Commercial Code which is in force in both New York and Connecticut. That clause provides:

"A lawful agreement by either the seller or the
buyer for exclusive dealing in the kind of goods
concerned imposes unless otherwise agreed an
obligation by the seller to use best efforts to
supply the goods and by the buyer to use best
efforts to promote their sale".

I would have thought that every sole distributor contract would induce in both parties a reasonable expectation of mutual benefit accruing from the "best efforts" of the distributor.

3. However, I agree that the trial judge erred when, having identified the express terms of the contract he went on to imply a term that the distributor would not, during the distributorship, do anything inimical to the market in Australia for USSC surgical stapling products (the "nothing inimical" clause). McLelland J. was of the view that the fact that the distributor was bound by a promise to devote its best efforts to distributing USSC surgical stapling products in Australia to the common benefit of USSC and itself necessarily imported, in all the circumstances, an obligation not to do anything inconsistent with building up the market for USSC products in Australia to the common benefit of USSC and the distributor. On a number of recent occasions this Court has considered and reviewed the principles which govern the implication of contractual terms. In Secured Income Real Estate (Australia) Ltd. v. St. Martins Investments Pty. Ltd. [1979] HCA 51; (1979) 144 CLR 596 Mason J., in a judgment concurred with by other members of the Court, declined to imply a term in the contract of sale confining the leases to long-term leases, saying "(t)he fact that such a provision would provide a greater protection for the respondent is not a sufficient reason for implying it." (at p. 605). He then referred to and expressly adopted the majority judgment of the Judicial Committee in B.P. Refinery (Westernport) Pty. Ltd. v. Hastings Shire Council (1977) 52 ALJR 20, at p 26 wherein their Lordships said:

"... for a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract."

4. The implication of a term was again considered at length by this Court in Codelfa Construction Pty. Ltd. v. State Rail Authority of N.S.W. [1982] HCA 24; (1982) 149 CLR 337 (per Mason J. at pp. 345-356, per Aickin J. at pp. 371-375 and per Brennan J. at pp 400-407) and, to a lesser extent, in Meehan v. Jones [1982] HCA 52; (1982) 149 CLR 571 and Booker Industries Pty. Ltd. v. Wilson Parking (Qld) Pty. Ltd. [1982] HCA 53; (1982) 149 CLR 600. In those cases the Court reiterated that "it is not enough that it is reasonable to imply a term; it must be necessary to do so to give business efficacy to the contract." (Codelfa per Mason J. at p. 346). In my view there is no necessity to imply the nothing inimical clause in order to accord business efficacy to the distributorship agreement.

5. The relationship which existed between the parties in this case, namely that of manufacturer and sole distributor, is not one which would ordinarily be productive of a fiduciary duty. Notwithstanding the fact that Blackman had embarked on a fraudulent scheme, the circumstances of this case do not persuade me that any such duty came into existence. What was required of the distributor was that it devote its best efforts to distributing USSC surgical stapling products and building up the market for those products in Australia to the common benefit of USSC and itself. The extent of that obligation falls to be determined by what is reasonable in the circumstances: see Transfield Pty. Ltd. v. Arlo International Limited (1980) 144 CLR 83. In Van Valkenburgh v. Haydon Publishing Co. (1972) 30 N.Y. 2d 34 the New York Court of Appeals was clearly of the view that the obligation to use one's "best efforts" to promote the object of the agreement between

the parties does not foreclose the obligee's right to pursue his own economic interests in matters to which the agreement relates: see Bergan J. (with whom Burke, Scileppi, Breitel and Gibson JJ. concurred) at p. 45.

6. In a commercial transaction of the kind here under consideration, where the parties are dealing at arm's length and there is no credible suggestion of undue influence, I am reluctant to import a fiduciary obligation. The Courts have often expressed a cautionary note against the extension of equitable principles into the domain of commercial relationships, so as "not to strain (them) beyond (their) due and proper limits", to use the words of Lord Selborne L.C. in Barnes v. Addy (1874) 9 ChApp 244, at p 251. In New Zealand and Australian Land Co. v. Watson (1881) 7 QBD 374 the Court of Appeal held that the defendants, who had effected sales of wheat consigned by the plaintiffs for sale, did not stand in any fiduciary character towards the plaintiffs so as to entitle the latter to follow the proceeds of their property in the defendant's hands. Bramwell L.J. said, at p. 382:

"Now I do not desire to find fault with the various
intricacies and doctrines connected with trusts,
but I should be very sorry to see them introduced
into commercial transactions and an agent in a
commercial sense turned into a trustee with all the
troubles that attend that relation. I think there
is no good ground for holding that these defendants
have any fiduciary character towards the
plaintiffs."
These observations remain as pertinent today as they were one hundred years ago: Scandinavian Trading Tanker Co. A.B. v. Flota Petrolera Ecuatoriana (1983) 2 AC 694, per Lord Diplock at pp 703-704; cf. Law Quarterly Rev., vol. 100 (1984), at pp 369-375. As the cases referred to by the Chief Justice in his judgment show, this Court has refused, on several occasions, to find a fiduciary relationship in circumstances where the parties contract with each other freely and more or less on an equal footing in a commercial dealing: see Jones v. Bouffier [1911] HCA 7; (1911) 12 CLR 579; Dowsett v. Reid [1912] HCA 75; (1912) 15 CLR 695; Para Wirra Gold & Bismuth Mining Syndicate N.L. v. Mather (1934) [1934] HCA 46; 51 CLR 582. In my view the passage of the judgment of this Court in Keith Henry & Co. Pty. Ltd. v. Stuart Walker & Co. Pty. Ltd. [1958] HCA 33; (1958) 100 CLR 342 wherein they said:

"It cannot be suggested that the plaintiff and the
defendant at any stage stood in any fiduciary
relationship one to the other. The position is
simply that business men - or business firms - were
engaged in ordinary commercial transactions with
each other, dealing with each other, as the saying
goes, at arm's length." (per Dixon C.J., McTiernan
and Fullagar JJ. at p. 351)
aptly describes the relationship which existed between the parties in the present case.

7. I would make orders in similar terms to those proposed by the Chief Justice.

DEANE J. Due largely to the accuracy and precision of the findings of the learned trial judge, the basic facts of this complicated case are no longer in dispute. They are set out in other judgments in this Court and I refrain from repeating them. As I see the matter, the issues on this appeal involve three broad questions: (i) which, if any, of Mr. Blackman's oral statements to the representatives of

United States Surgical Corporation ("USSC") constituted express terms of the contract between Blackman and USSC and, by substitution or novation, between Hospital Products International Pty. Limited ("HPI") and USSC; (ii) whether any, and if so what, terms should be implied in that contract, and (iii) whether USSC is entitled to any, and if so what, relief by way of constructive trust. The discussion of those questions in the judgments of other members of the Court makes it possible for me to indicate, in comparatively summary fashion, the conclusions to which I have come and my reasons for them. I shall refer indifferently to the contract between Blackman and USSC and the substituted contract between HPI and USSC as "the contract".

(i) Express terms of the Contract

2. In the course of the critical restaurant conversation in November 1978 between himself and the two representatives of USSC, Blackman made a number of statements or representations which arguably constituted express terms of the contract which is agreed to have been partly oral. The test for determining whether any, and if so which, of those statements in fact constituted an express term of the contract is whether the proper inference is that the relevant statement or representation was, when viewed objectively and in context, offered and accepted as, or as part of, a contractual promise. At first instance, McLelland J. identified four such statements or representations which he concluded had been incorporated as express terms of the contract. That conclusion was upheld by the Court of Appeal. For the reasons given by Mason J. and Dawson J. in their judgments in this Court, I am of the view that his Honour's finding of those four express terms of the contract should be accepted as correct.

3. That being so, the express terms of the contract included a promise by the distributor (i.e. Blackman and, subsequently, HPI) to the effect that, during the term of the distributorship under the contract, the distributor "would devote its best efforts to distributing USSC's surgical stapling products, and building up the market for those products, in Australia, to the common benefit of USSC and itself" and that, during that term, the distributor would not deal in Australia "in any products competitive with USSC's surgical stapling products". I agree with Mason J's comments about the limited effect of the words "to the common benefit of USSC and itself" in that "best efforts" clause.

(ii) Implied terms of the Contract

4. In a number of recent cases, this Court has accepted the summary of the majority of the Privy Council in B.P. Refinery Pty. Ltd v. Hastings Shire Council (1977) 52 ALJR 20, at p 26 of the criteria which must be satisfied before a term will be implied in a contract. Those cases in this Court, like the B.P. Refinery Case itself, were concerned with the question whether a term should be implied in a formal contract which was complete upon its face and care should be taken to avoid an over-rigid application of the cumulative criteria which they specify to a case such as the present where the contract is oral or partly oral and where the parties have never attempted to reduce it to complete written form. In particular, I do not think that a rigid approach to the requirement "that it must be necessary to give business efficacy to the contract" should be adopted in the case of an informal and obviously not detailed oral contract where the term which it is sought to imply is one which satisfies the requirement of being "so obvious that it goes without saying" in that if it had been raised both parties would "testily" have replied "of course" (cf. the B.P. Refinery Case, at p.27). As a general rule however, the "so obvious that it goes without saying" requirement must be satisfied even in the case of an informal oral contract before the courts will imply a term which cannot be implied from some actual statement, from previous dealings between the parties or from established mercantile practice.

5. Both at first instance and in the Court of Appeal, it was held that it was an implied term of the contract that the distributor would not, during the distributorship, "do anything inimical to the market in Australia for USSC surgical stapling products". I respectfully disagree with that finding. Such a term, particularly if the word "inimical" is given the "most rigorous sense" attributed to it by the Court of Appeal, would be commercially unusual and unexpected in a distributorship arrangement. Indeed, the express "best efforts" clause of the contract appears to me to remove any basis which might otherwise be thought to exist for implying a broad unqualified term under which the distributor was contractually bound during the distributorship not to do "anything" inimical to the Australian market for the relevant product or for implying some other term having a similar but more limited operation. I would add that, subject to the foregoing and one additional qualification, I am in general agreement with what is said on this aspect of the case by the Chief Justice and by Dawson J. The additional qualification is that my acceptance of the "best efforts" clause as an express term of the contract makes it unnecessary to place reliance upon the similar provision prescribed by s.2-306(2) of the Uniform Commercial Code which is set out in the judgment of the Chief Justice.

(iii) Constructive Trust

6. The conclusions of the Court of Appeal on the questions of fiduciary relationship, fiduciary duty and constructive trust were, to no small extent, based on the view that it was an implied term of the contract that the distributor would not do anything inimical to the market in Australia for USSC surgical stapling products. The rejection of that implied term removes an important part of the basis of the Court of Appeal's conclusion that USSC was entitled to the benefit of the comprehensive constructive trust which it declared. While a careful reading of McLelland J's judgment leaves me in little doubt that his finding that the distributor owed a limited fiduciary duty to the manufacturer would have been the same if he had relied merely on the express "best efforts" and "no competing products" terms of the contract, he would seem partly to have based that finding of a limited fiduciary duty on the existence of the relevant implied term ("HPI's position of power and its contractual obligations": (1982) 2 N.S.W.L.R. 766, at p.811). In all the circumstances, the preferable course is to approach the question of constructive trust afresh on the basis of McLelland J's findings of fact.

7. The relationship between a manufacturer and a distributor is not, in itself, ordinarily a fiduciary one even in a case where the distributor enjoys sole rights of distribution in a particular area. Such a relationship is ordinarily that of seller and buyer. It is true that the manufacturer and distributor have a common interest in ensuring that the distributor should sell as much of the relevant product as possible. That however is a truism of the market place and not a legal principle. In seeking such sales, the distributor is ordinarily acting in pursuit of his own interests. It is in the pursuit of his own interests that he acts to the advantage of the manufacturer by generating more sales of the product (cf. Federal Commissioner of Taxation v. Cooke (1980) 42 FLR 403, at p 419).

8. The express term of the contract in the present case requiring the distributor to use its "best efforts" to build up the market for, and distribute, the products in Australia "to the common benefit" of both manufacturer and distributor did not, of itself, impose a general fiduciary duty on the distributor to seek no profit or benefit for itself or to disregard its own interests where they conflicted with the manufacturer's. In the context of the term precluding the distributor from dealing in any competing product, the reference to "the common benefit" was no more than a reflection of the commercial fact that, while the distributorship subsisted, it was in the interests of both manufacturer and distributor that, consistently with ordinary economic restraints on pricing, the market for the manufacturer's product in the relevant area be maximized. Neither that nor any other provision of the contract transformed the relationship into a partnership or joint venture. Nor was

there anything in the contract which either authorized the distributor to act on behalf of the manufacturer in the sense of acting as agent for a principal or which required the distributor generally to subordinate its own interests to those of the manufacturer. The arrangement under the contract was the ordinary arrangement that a distributor would buy product from a manufacturer and sell it on its own behalf. Subject to one possible qualification, the manufacturer - distributor arrangement between USSC and HPI was not a fiduciary relationship and did not involve general fiduciary duties.

9. The conclusion that the overall relationship between USSC and the distributor was not fiduciary does not preclude the possibility that, within or arising from that relationship, a more restricted fiduciary relationship might exist. Indeed, the continuing relationship of manufacturer and distributor might well provide a context in which it would be easier to imply an undertaking by one party to act as a fiduciary in relation to a particular matter than would be the case if that relationship did not exist. The possible qualification to the denial of a general fiduciary relationship is that which was accepted by McLelland J., namely, that HPI was a fiduciary in respect of "such of USSC's interests as were represented by the market for its products in Australia" or, to adopt the phraseology used in argument in this Court, in respect of USSC's local products goodwill.

10. Under the contract, the distributor was given the exclusive opportunity of exploiting and developing the local goodwill of USSC's products. There was an established local goodwill in respect of USSC's products before HPI was appointed as the exclusive Australian distributor. Upon its appointment, HPI circularized "numerous" hospitals advising that "we currently distribute the product for the manufacturer in the United States" and "will be the exclusive Distributors nationwide in Australia". The contractual right to distribute and exploit that local goodwill was not, however, uncontrolled. It was subject to the terms of the contract including the express terms that the distributor would devote its best efforts to distributing USSC's products and to building up the market for those products in Australia to the common benefit of USSC and itself and that the distributor would not deal in Australia in any other products competing with those products. Plainly, the distributor was acting in breach of those express terms of the contract when, during the currency of the distributorship, it deferred fulfilment of orders for USSC's clinical products in anticipation of filling those orders with HPI's re-packaged or manufactured competing products and filled orders for USSC's clinical products with such competing products. It is clear from the evidence that, as McLelland J. found, the distributor committed those breaches of the contract "with a view to appropriating for itself at the expense of USSC the whole or a substantial part of the Australian market for USSC products".

11. In these circumstances, I agree with the conclusion reached by McLelland J. at first instance and Mason J. in this Court that USSC was entitled to an order that HPI account, as constructive trustee, for any profits it derived from the business of distributing within Australia its own re-packaged or manufactured products up until November 1980 when it ceased to distribute in this country. The reasoning which leads me to that conclusion diverges however from that accepted by McLelland J. at first instance and by Mason J. in this Court in that I am not persuaded that a "fiduciary relationship" existed between USSC and HPI in respect of the local products goodwill. Provided that it did not act in breach of the terms of the contract, HPI was, as I see the matter, entitled to exploit that local goodwill for its own benefit not only as regards its profit from sales of USSC's products but also, for example, by taking advantage of the "flow on" advantage which it might derive in marketing any non-competing products to the existing customers for USSC's products. If it had not acted in breach of its contractual obligations, it would have subsequently been free to exploit the advantage of its previous association with USSC's products to build up the goodwill of its own. In my view, the constructive trust pursuant to which HPI is liable to account for the profits arising from the sale in Australia of its own re-packaged or manufactured competing products

should properly be seen as imposed as equitable relief appropriate to the particular circumstances of the case rather than as arising from a breach of some fiduciary duty flowing from an identified fiduciary relationship. HPI's business of distributing those competing products in Australia was founded upon and incorporated the appropriation to itself, by a course of conduct which involved calculated breach of its contractual obligations to USSC, of the local goodwill for USSC's products. In all the circumstances, USSC was entitled to a declaration that HPI was liable to account as a constructive trustee for the profits of that Australian business in accordance with the principles under which a constructive trust may be imposed as the appropriate form of equitable relief in circumstances where a person could not in good conscience retain for himself a benefit, or the proceeds of a benefit, which he has appropriated to himself in breach of his contractual or other legal or equitable obligations to another. Since this particular aspect of the matter was not explored in argument and a majority of the Court is of the view that there is no basis for any finding of constructive trust however, it is preferable that I defer until some subsequent occasion a more precise identification of the principles governing the imposition of a constructive trust in such circumstances.

12. Subject to what has been said above and to my rejection of any relevant implied term in the contract, I am in general agreement with Mason J's reasoning (and the reasoning of McLelland J. at first instance) leading to the conclusion that the only relief by way of constructive trust to which USSC was entitled was in respect of HPI's liability to account for the profits which it made from distributing its competing products in Australia for the limited period up until November 1980. The consequence of that conclusion is that I agree with the orders proposed by Mason J. which would effectively restore the orders made at first instance.

13. The relief to which USSC is entitled may well appear inadequate in the light of the calculated and fraudulent conduct of which it was the victim. That is, however, at least in part, the result of the manner in which USSC has, no doubt for good commercial or other reasons, framed its claims for relief in the present proceedings rather than any inability of the law to provide adequate remedies. In that regard, it is possibly relevant to note that the evidence indicates that the present proceedings should properly be seen as but one battle in wider hostilities being waged on a multi-national scale.

DAWSON J. In 1973 the fourth respondent, Alan Richard Blackman ("Blackman"), was employed by the first respondent, United States Surgical Corporation ("USSC") as a product manager. USSC is a company, incorporated in the United States of America, which has since 1967 marketed in that country and elsewhere surgical stapling implements of its own design together with disposable loading units containing staples, also of its own design, for use with such instruments. Surgical stapling is a form of suturing during surgical operations by means of stainless steel staples rather than needle and thread. Some of the instruments also enable a cutting operation to be performed simultaneously with the application of the staples. The instruments save time, avoid trauma and minimize blood loss during operations. In some instances they enable surgical procedures to be carried out which were not possible using traditional suturing methods.

2. After some months Blackman ceased to be an employee of USSC and was appointed an authorized dealer of that company for a territory covering a substantial part of the City of New York. The terms of the dealership were contained in an agreement in standard form.

3. In 1976 Blackman formed a company in New York called The Hospital Products Corporation ("HPC") which, under a new dealership agreement, replaced him as the dealer in the dealership which he held with USSC. Blackman, however, continued to carry on the actual work of the dealership.

4. Authorized dealers were appointed by USSC only in respect of areas within the United States. Elsewhere distributors were appointed by it to market its products. In general, these distributors carried on an established business marketing, as well as USSC products, the products of other manufacturers. There was no standard form of distributorship agreement and the arrangement between USSC and its distributors tended to be informal and loose, unlike the arrangement between USSC and its dealers. It is clear, however, that distributors, like dealers, did not sell USSC products as agents of the company; they purchased the products from USSC and resold them to customers. In 1976 a company called Downs Surgical (Australia) Pty. Ltd. ("Downs Surgical") became USSC's distributor in Australia.

5. Blackman was an effective salesman who became expert in the use and sale of USSC products. Authorized dealers took part in a programme designed to make USSC products familiar to surgeons and hospital staffs in the United States. They were required to develop skills which involved a considerable degree of medical and technical knowledge. USSC established a training school where its dealers were given instruction in basic anatomy and physiology, medical and surgical terminology, operating theatre protocol, the nature of the surgical procedures in which USSC products could be used and the appropriate product for the purpose and the techniques of using USSC products. Dealers were required to provide guidance to surgeons in hospital operating theatres during actual operations. For this purpose there was a training course established by USSC which extended over some five or six weeks of study and, in addition, USSC supplied its dealers with a training manual setting out in detail the matters which they were required to know.

6. The founders and principal executives of USSC were a Mr Hirsch and a Miss Turi Josefsen. They were in fact husband and wife. As an employee of USSC and as a dealer Blackman developed a direct, personal relationship with Hirsch and Josefsen and they held him in high regard, recognizing his skills in demonstrating and promoting USSC products. On occasions Hirsch and Josefsen asked Blackman to monitor the performance of other dealers and to give them advice. There were occasional disagreements between Hirsch and Josefsen on the one hand and Blackman on the other but these do not appear to have resulted in any permanent impairment of the cordial relationship between them.

7. In August 1978, Blackman visited Australia for twelve days. At about this time he ascertained that USSC surgical stapling instruments and disposable loading units were not the subject of registered patents in Australia as they were in the United States. On 11 August 1978, he consulted an Australian expert in metallurgy, Professor Wallwork, and provided him with samples of USSC disposable loading units for the purpose of investigating the composition and physical properties of the staples in those samples and the suitability for radiation sterilization after packaging of loading units of the same kind as the samples. Later in 1978 Blackman also asked Professor Wallwork to investigate and report on the composition and physical properties of other metal components in the various sample disposable loading units and to investigate the sources of possible tool and die makers in Sydney capable of producing dies for the manufacture of such components. At Blackman's request, Professor Wallwork also referred him to a colleague for information concerning plastic components in the disposable loading units. Reports on some of these matters were made to Blackman during 1978 and the remainder in January 1979.

8. Also during his visit to Australia during August 1978, Blackman consulted solicitors in Sydney about his competing with USSC by marketing USSC demonstration products repackaged and sterilized in Australia and about the registration in Australia by him of USSC's trade mark "Auto Suture".

9. Demonstration products consisting of disposable loading units were supplied by USSC to dealers and distributors for demonstration purposes at a fraction of the cost of clinical products. They were identical with those supplied for sale for clinical use but were neither sterilized nor supplied, individually packed, in sterile packs like the clinical products. Moreover, in a number of instances each pack of the clinical products held separate components comprising a cartridge containing the staples and a pusher mechanism, an anvil to form the staples to the required shape and, in most cases, a retaining pin to secure and align the cartridge and anvil on the instrument. Each pack of the demonstration products, containing six or twelve separate cartridges, held only one anvil and, where applicable, only one retaining pin. The single anvil and pin could be used a number of times with the demonstration products but would have to have been discarded after a single use with the clinical products because of the possibility of contamination. Blackman had been aware for some years that USSC demonstration products did not differ in quality from its clinical products. Since about 1977 he had been accumulating abnormally large stocks of demonstration products in the course of HPC's New York dealership.

10. In November 1978, Blackman again visited Australia for twelve days. This time he consulted Mr Engel of Graham Engel and Associates Pty. Ltd., consultants in pharmaceutical sciences and the regulation of pharmaceutical goods. He engaged Engel's company to advise him about the repackaging and sterilizing of USSC disposable loading units and provided it with samples. He also asked for advice about Australian requirements relating to the information required for, and the labelling of, such products.

11. During November 1978, Blackman telephoned Josefsen and arranged a meeting to discuss an unspecified proposal. On some date between 17 and 27 November 1978 the meeting took place between Blackman, Hirsch and Josefsen over a meal at a restaurant, either in Stamford, Connecticut, or in New York City. Blackman told Hirsch and Josefsen that he would like to emigrate to Australia and proposed that USSC appoint him as its exclusive Australian distributor in place of Downs Surgical. He said that there was a great potential market for USSC surgical stapling products in Australia which was not being tapped by the existing distributor. He pointed out that with his long experience of, and accumulated know-how in, marketing these products and with his long association with USSC he could do an outstanding job for USSC and perform better than anyone else in building up sales of USSC products. He expressed the view that this would be a great opportunity both for himself and for USSC. He said that he would set up a marketing organization with sales representatives trained in the use and demonstration of USSC products in a manner similar to that used in USSC's training programme in the United States. Blackman indicated that after he had built up the Auto Suture business - had "got it really rolling" - he might take on other non-competing lines and build up a broad-based surgical distributorship but not so as to interfere with his giving proper attention to USSC products. He pointed out that the establishment of the new business would take some time and would be expensive so that he would need some financial help in the form of credit and would like to rent instruments from USSC with the option of purchasing them in the future.

12. Hirsch and Josefsen indicated at the meeting that they were favourably disposed to Blackman's proposal. Hirsch said "Alan we will work it out" and Blackman said "You won't regret it." It was arranged that Blackman should discuss further details of the arrangement later with Josefsen.

13. In the meantime, after Blackman's return from Australia to the United States, Engel was in touch with Blackman's Sydney solicitor and they "discussed the various steps needed to get the stapling business under way". On 15 November 1978, on Blackman's instructions, his solicitors lodged an application in Australia for the registration of the trademark "Auto Suture" under the Trade Marks Act 1955 (Cth), in the name of HPC in respect of, amongst other things, "instruments

and apparatus for use in surgery". In December 1958, Engel made approaches to Smith and Nephew Associated Companies of Australia Pty. Ltd. ("Smith and Nephew") in Melbourne for them to carry out for Blackman the repackaging and sterilization of certain USSC demonstration disposable loading units.

14. Probably in the latter half of November 1978 a further meeting took place between Blackman and Josefsen. There was a discussion about a number of matters relating to Blackman's proposal, including the training of a nurse to be employed by Blackman in Australia, the size of Downs Surgical's stock inventory and the possibility of Blackman's purchasing it and the transfer to Australia of some of the inventory of HPC's New York dealership. At that meeting the question was raised whether USSC should have a written distributorship agreement with Blackman. It had not been the usual practice of USSC to require its overseas distributors to enter into formal, written agreements. Josefsen indicated that she would prefer a written agreement with Blackman but he rejected the suggestion on the ground that it was not necessary. He said, however, that he was willing to read a draft agreement.

15. On 27 November 1978 Blackman wrote to Josefsen outlining a timetable of events intended to facilitate his American company's withdrawal from the market in the United States and his entry into the Australian market. He ended the letter by saying:

"A transition in this manner will benefit USSC by
having improved coverage in the Australian market,
as well as an orderly change here. We will provide
all necessary introductions to assure the success
of the salespeople who will be representing USSC,
and inventories of hospitals will not be
overloaded.
Turi, it has been a pleasure being associated with
you for the past 7 years, I look forward to many
more."

16. On 18 December 1978, Josefsen replied to Blackman's letter. She indicated her agreement in principle with Blackman's proposals. However, she affirmed USSC's desire to have Blackman enter into a written agreement by advising him that one would be drawn up by Mr Fisher, who acted as in-house counsel for USSC and was also a director of that company. Josefsen concluded her letter by saying:

"We look forward to working with you and although
personal contacts will be few and far between, we
shall do our best to keep you informed and abreast
of trends and new events as they happen. Alan,
this is an exciting step you are taking and I wish
you every success in your endeavours and happiness
in your new country. May it all work out exactly
the way you hope."

17. On 27 December 1978, USSC wrote to Downs Surgical terminating its distributorship from 31 March 1979. Also on 27 December 1978, USSC wrote to Blackman. The letter was signed by Mr

Whittingham, a senior Vice-President of USSC, because Josefsen was then on vacation and it was ultimately countersigned by Blackman. It was as follows:

"We take pleasure in confirming the continuance of our relationship. You will become our Australian distributor while phasing out your dealership in accordance with the following procedures.
1. We have this day given notice of termination to our present Australian distributor, Downs Surgical (Australia) Pty. Ltd. effective March 31, 1979. A copy of the notice has been furnished to you. Upon that termination becoming effective and commencing April 1, 1979 you will be our exclusive Australian distributor. Although you have indicated that no formal agreement is necessary, we believe it is desirable and will forward to you a suggested agreement covering the distributorship.
2. During the period through March 31, 1979 you will undertake to purchase the Downs' inventory at prices mutually agreeable to you and them and in any event use your dealership inventory which you estimate will be approximately $100,000 - $125,000, wholesale value, to provide an inventory level in Australia. Additional products purchased by you from us will be paid on a 30 day net basis. In the meantime arrangements should be made to examine your inventory books and records as per your dealership agreement at the earliest convenient date.
3. You expect to rent from us between 20-30 sets of instruments which within 120 days you will convert to purchase from us.
4. You will hire and train your nurse unless she is agreeable to training by us at your expense.
5. Your dealership will continue without change through June 30, 1979. Effective July 1, 1979 your dealership shall be deemed terminated in all respects and your PAR will be taken over by us for servicing.
6. By July 1, 1979 all accounts owed to us will be paid in full by you. This includes outstanding A/R, inventory, demonstrations, interest, financing charges and other obligations.
If the above is your understanding of our discussions please sign and return the enclosed copy of this letter. We look forward with great

pleasure to our new relationship and wish you every
success in your new undertaking."

18. Blackman placed his signature on this letter on 28 December 1978. He did so having read it in Fisher's office and in Fisher's presence. Fisher said that he might forward to Blackman a formal contract for the Australian distributorship to which Blackman replied that he did not think that one was necessary. Fisher said that nevertheless he might forward a formal agreement and Blackman said that he would read whatever Fisher sent.

19. In the event there was no formal written agreement. Josefsen, and apparently Hirsch, eventually accepted Blackman's view that, as Josefsen put it, " ... we just do not need to have a written agreement we are old friends, we have done business together for years, what do we need to put it in writing for?" Josefsen gave evidence that Blackman appeared to be offended by the suggestion that there ought to be a formal distributorship agreement.

20. Blackman arrived in Australia on 6 January 1979 and immediately set about developing his distributorship. He acquired a shelf company and changed its name to Hospital Products of Australia Pty. Ltd. ("HPA"). By novation, HPA became the distributor under the distributorship agreement in place of Blackman.

21. Between December 1978 and March 1979, HPC sent to Australia, at Blackman's direction, a large quantity of demonstration products. These were sent in two consignments through the New Hebrides and Hong Kong in a purported series of sales which involved companies and a trust controlled by Blackman. It is unnecessary to go into these transactions in detail. For taxation reasons and in order to provide increased security for subsequent bank advances it was advantageous that the value of the demonstration products be inflated and this result was achieved. The invoiced price of the demonstration products when first sold totalled US$19,190. The same products were eventually invoiced to HPA at prices of about $500,000.

22. On 14 February 1979, Blackman wrote to Smith and Nephew on behalf of HPA about quality control and packaging of "my staple cartridges". This was a reference to demonstration cartridges made by USSC. The letter also made reference to the sterilizing of the cartridges and sample checking to verify sterility. It went on to say "my current schedule indicates a shipment of 5000 cartridges to be sent to your firm April 16, 1979. I will be in need of the finished product by May 4, 1979." As it turned out, the work was not done by Smith and Nephew.

23. Using the services of a product engineering consultant, HPA caused retaining pins, anvils and pusher-knife assemblies identical with the USSC products to be manufactured in Australia and to be combined with USSC demonstration products which were cleaned, assembled, packaged and sterilized here in order that the combined products could be sold under an Australian label in competition with or in substitution for USSC-made clinical products. Subsequently, disposable loading units identical with the USSC products were entirely manufactured locally for the same purpose. The work was performed under contract by a firm called IRD Engineering Services and later by its successor, IRD Engineering Services Pty. Ltd. ("IRD"), which was incorporated on 1 December 1979, using in turn the services of subcontractors and of another engineering company which was expert in the field of plastics, together with the assistance and guidance of the product engineering consultant. Eventually IRD came under the control of Blackman. From about June 1979 an effort was also made to develop a plastic skin stapler similar to USSC skin staplers, which could be used and resterilized repeatedly and be fitted with detachable cartridges.

24. In February 1979, HPA sent a circular to numerous hospitals in Australia announcing the end of Downs Surgical's distributorship and the beginning of the new one after 31 March 1979. HPA purchased Downs Surgical's stock for more than $50,000 which was more than Blackman had anticipated. HPA paid Downs Surgical approximately $5000 and arranged for USSC to give Downs Surgical credit for the balance of about $50,000, debiting that amount to HPA. There were other sums for stock arising out of the New York dealership which Blackman or his companies owed to USSC and in the end this led to mutual releases being executed. Nothing, however, turns on that in this appeal.

25. After HPA replaced Downs Surgical as USSC's sole distributor in Australia, Blackman set about promoting Auto Suture products energetically. Between April and December 1979 there was a substantial increase in the usage of those products in hospitals in Australia.

26. By about October 1979, HPA began to defer the filling of orders which it had received for Auto Suture products in anticipation of meeting those orders with products packaged by HPA and it ceased placing any further orders with USSC. In about November 1979, HPA began to assemble the disposable loading units comprising the USSC-made demonstration products with HPA-made components added where necessary, repackaging them under HPA's label and sterilizing them. By this time Blackman had decided that the cleaning and recycling of used components of disposable loading units was not feasible.

27. On 13 November 1979, HPA changed its name to Hospital Products International Pty. Ltd. ("HPI"). On 25 December 1979, HPI wrote to USSC terminating its distributorship giving as its reasons USSC's growing problem with quality control, its constant back-order position and its inability to process orders efficiently. USSC replied by telex dated 10 January 1980 accepting the decision to terminate the distributorship but rejecting the reasons given for it.

28. After 25 December 1979, HPI began to fill the outstanding orders and those which were subsequently received, with products repackaged by it. Blackman anticipated that HPI would within a few months be able to supply products wholly manufactured by itself and until then could carry on with USSC products, repackaged and relabelled by HPI, with HPI-made components where necessary.

29. On 28 December 1979, HPI advised hospitals by circular that it was "currently phasing out all U.S. manufactured goods and substituting Australian manufactured product." The trial judge, from whose findings the foregoing statement of facts is largely taken, found that from 25 December 1979, HPI began to supply customers in Australia with HPI-labelled products, the HPI proportion of the contents of which was increasing with the passage of time, in order that the existing Australian market for USSC-made products might change into an equivalent market for HPI-made products and that this was done in a manner which was intended to, and did in fact, mislead existing customers for USSC-made products into believing that HPI-labelled products were being manufactured by arrangement with, or under licence from, the manufacturer of United States-made Auto Suture products, namely, USSC.

30. During 1980, HPI experienced some difficulty with its manufacturing capacity and was forced to obtain supplies of USSC clinical products which it combined with its own components or repackaged under its own label. It obtained the USSC products by means of agents using false names or otherwise in a manner designed to conceal from USSC the identity of HPI as the purchaser. It also obtained USSC instruments by similar means for use in the promotion of products packaged by HPI.

31. HPI continued marketing in Australia until November 1980. Thereafter, while continuing to manufacture its products in Australia, it marketed them in the United States through Surgeons Choice Incorporated ("SCI"), a company which it formed there for that purpose in about October 1980. It would appear that it also marketed its products elsewhere in the world.

32. After the termination of HPI's distributorship, USSC did not re-enter the Australian market until August 1980 when it formed a subsidiary in Australia to resume marketing its disposable loading units here.

33. In about June 1981, Blackman and HPI acquired control of a listed public company which was called Aquila Investment Corporation Ltd. but which changed its name to Hospital Products Limited ("HPL"). HPL acquired the business and assets of HPI. These transactions were described as a reverse takeover.

34. USSC commenced this action in the Supreme Court of New South Wales seeking the enforcement of a constructive trust which was alleged to extend to assets held by all defendants which were the companies controlled by Blackman and to Blackman himself. The constructive trust was alleged to arise from breaches of fiduciary duty by HPI as USSC's distributor, in which the other defendants participated and from which they received benefits. Alternatively, USSC sought against all defendants an account of profits or equitable compensation arising out of the alleged breaches of fiduciary duty. There were, in addition, claims against HPI and HPL for damages for breach of contract and for injunctions to restrain any continuing breach. Claims against all defendants for damages for conspiracy and for injunctions to restrain the continuation of the conspiracy were included but were rejected by the trial judge and it is unnecessary to have further regard to them in this appeal. Also, at one stage USSC claimed damages against Blackman and HPI for fraudulent misrepresentations which were alleged to have induced the appointment of HPI as USSC's distributor in Australia but these claims were abandoned. Blackman's alleged fraud was, however, relied upon by USSC to the extent that it was relevant to the claim for relief based upon the breach of fiduciary duty.

35. There is, or has been, other litigation both in Australia and the United States between USSC and one or more of the defendants in this action and there is a claim in the United States by USSC against HPI, Blackman and SCI for relief under patents and trademarks legislation and for relief against unfair competition, including passing off. There was no claim in these proceedings based upon passing off as such although what may have amounted to passing off was relied upon as going to the breaches of fiduciary duty.

36. Putting on one side the claims based upon conspiracy, these proceedings have a limited scope. It has been the choice of USSC to limit its claims to relief for breach of fiduciary duty and for breach of contract.

37. The trial judge found that HPI was under a fiduciary duty towards USSC because the former had been entrusted by USSC with the development and servicing of the market for USSC surgical stapling products in Australia. However, HPI's fiduciary position ended, he held, upon the termination of the distributorship on 10 January 1980. The fiduciary duty found by the trial judge was that HPI should not make a profit or take a benefit through its position as a distributor without the informed consent of USSC and that it should not act in a way in which there was a possible conflict between its own interests and those of USSC.

38. The breaches of that duty were, in the opinion of the trial judge, twofold. First, HPI secretly developed a capacity to manufacture copies of USSC products or components with a view to

appropriating for itself at the expense of USSC the whole or a substantial part of the Australian market for USSC products. Secondly, it deferred the fulfilment of orders for USSC clinical products in anticipation of filling those orders with HPI repackaged or manufactured competing products and by filling orders for USSC clinical products with such competing products, again with a view to appropriating for itself at the expense of USSC the whole or a substantial part of the Australian market for those products.

39. Taking the view, which he did, that HPI was not a fiduciary in respect of any of the assets of its distributing business or in respect of any of the profits from that business, the trial judge declined to grant relief upon the basis of a constructive trust over the assets of the manufacturing business developed by HPI and later carried on by HPL. He did, however, order an account of profits upon the basis that the breaches of fiduciary duty which he found to have been committed by HPI gave HPI a head start, or acted as a springboard for HPI, in getting its own product on the market. He concluded that all profits up to the time HPI abandoned the Australian market in November 1980 should be treated as flowing from HPI's breaches of fiduciary duty and as properly the subject of account. He held that HPI's fiduciary obligation was limited to the Australian market and that it was not accountable for profits made outside Australia. In the alternative, the trial judge found that USSC was entitled to equitable monetary compensation to be assessed if it elected to accept that remedy.

40. The trial judge also found a number of breaches of contract and put USSC to its election as to the acceptance of damages, to be ascertained, against HPI, in place of the equitable relief.

41. So far as Blackman was concerned, the trial judge found that he was liable in equity to account to USSC for any benefit which he received as a result of his participation in HPI's breaches of fiduciary duty and was jointly liable with HPI in respect of any equitable monetary compensation due to USSC as a result of those breaches.

42. On appeal by HPL to the Court of Appeal, that Court also found that HPI was in breach of a fiduciary duty which it owed to USSC. It, however, concluded that the breaches of duty were such that it was appropriate to declare a constructive trust in favour of USSC over all the assets including the goodwill and business of HPI as at 10 January 1980 and until 30 June 1981 and to declare a constructive trust in favour of USSC over all the assets of HPL acquired by it in the reverse take-over. The consequence of these declarations was that on 1 July 1981 and thereafter HPL held in trust for USSC all its assets including its goodwill and business with the exception of those assets which were the assets of HPL before 1 July 1981. It is from the judgment of the Court of Appeal that HPL now appeals to this Court. There are cross appeals by the respondents other than USSC, namely, Ballabil Holdings Pty. Ltd. (which is now the name of HPI), SCI, Blackman and IRD.

43. The real basis of the appellant's case is that neither Blackman nor HPI was under a fiduciary duty to USSC and, of course, if that is so, then USSC would not be entitled to relief by the declaration of a constructive trust or an account of profits or equitable compensation. It was not contested, indeed it was conceded, that HPI was in breach of its distributorship agreement with USSC in deferring the filling of orders for USSC products and, to the extent that it was done during the currency of the distributorship agreement, in the sale of products under the HPI label. That would entitle USSC to damages but that is a remedy which it clearly finds less attractive than equitable relief. Indeed, it appears that USSC has chosen to place heavy reliance upon the remedy of the constructive trust rather than other remedies which may have been open to it. It is appropriate, therefore, to turn to the question of the existence of a fiduciary relationship between USSC and Blackman in the first place and then HPI which is the basis of any entitlement to that relief.

44. In examining that question it is, I think, necessary to have regard first to the definition of the relationship between Blackman and USSC which is provided by the terms of the distributorship agreement. It is convenient to continue to speak of the relationship between Blackman and USSC because that is the origin of any fiduciary obligations, although, of course, after the novation which substituted HPI for Blackman as a party to the distributorship agreement those obligations were imposed upon HPI. The fact of that agreement is no necessary bar to the existence of a fiduciary relationship between the parties to it whether or not the agreement imposed obligations of a fiduciary nature but its terms are obviously of significance in determining what their relationship was. The trial judge found that proper law of the distributorship agreement was either that of New York or Connecticut both before and after the novation. He found it unnecessary to distinguish between the law of New York and Connecticut which was, for the purposes of this case, the same and was, indeed, not significantly different from the law of New South Wales. These findings were not questioned upon this appeal. In order to put the choice of law to one side it is convenient to say at this point that the trial judge found it unnecessary to determine which law should govern the question of the existence of fiduciary obligations and entitlement to equitable relief because he found, upon the evidence, that there is no material difference upon the subject between the law of New York, the law of Connecticut and the law of New South Wales. He found that in this area of jurisprudence decisions of the courts of the United States, as well as those of other jurisdictions, are of assistance in ascertaining the law of New South Wales. This finding was also not questioned upon this appeal.

45. Perhaps, however, express mention should be made of the trial judge's finding that under the law of New York and of Connecticut "every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement": Restatement of the Law: Contracts (2d) s.205. This, he found, meant no more than that neither party to an agreement may do anything to impede performance of the agreement or to injure the right of the other party to receive the proposed benefit and was, in substance, an expression of the same principle enunciated by this Court in Secured Income Real Estate (Australia) Ltd. v. St. Martins Investments Pty.Ltd. [1979] HCA 51; (1979) 53 ALJR 745, at p 749, quoting the words of Griffith C.J. in Butt v. M'Donald (1896) 7 QLJ 68, at pp 70-71:

"It is a general rule applicable to every
contract that each party agrees, by implication, to
do all such things as are necessary on his part to
enable the other party to have the benefit of the
contract."

46. The trial judge rejected the contention that the letter dated 27 December 1978 was intended by the parties to constitute the whole agreement between them and found that the conversation in the restaurant early in November 1978 gave rise to express terms of that agreement which were to the following effect:

1. That the distributor would establish a
marketing organization for USSC surgical
stapling products in Australia having one or
more sales representatives specifically
trained in the use and demonstration of those
products.
2. That the distributor would devote its best
efforts to distributing USSC surgical stapling
products and building up the market for those

products in Australia to the common benefit of USSC and itself.
3. That the distributor would not deal (scil. in Australia) in any products competitive with USSC surgical stapling products.
4. That the distributor would not deal (scil. in Australia) in any other products in such a manner as would diminish its efforts in distributing USSC surgical stapling products and building up the market for those products in Australia.

47. I can see no reason to disagree with the finding that these terms formed part of the distributorship and am content to proceed upon the basis that they did. I should, perhaps, just add that even if there were no express term, as the trial judge found, that the distributor would devote its best efforts to distributing USSC products, s.2-306(2) of the Uniform Commercial Code, which forms part of the law of both New York and Connecticut, would have imposed a term with similar effect. The trial judge went further, however, and, in addition to the express terms which he found, implied a term that the distributor would not during the distributorship do anything inimical to the market in Australia for USSC surgical stapling products. He further held that an act done during the distributorship could for this purpose be considered inimical to that market notwithstanding that it was calculated to lead to actual damage to the market only after termination of the distributorship. The development of a capacity to manufacture copies of USSC products or components of such products, and the manufacture of them, with a view to appropriating the whole or a part of the market for USSC products would, in either case, constitute an act inimical to the market.

48. I must confess that I am unable to see how the application of any of the recognized principles gives rise to the implication of any term such as that implied by the trial judge. Those principles were recently examined by this Court in Codelfa Construction Pty. Ltd. v. State Rail Authority of New South Wales [1982] HCA 24; (1982) 56 ALJR 459 and for present purposes it is sufficient to say that it is not enough that it is reasonable to imply a term; it must be necessary to do so to give business efficacy to the contract. In my view it is plain that a distributorship agreement containing the express terms found by the judge was capable of an effective operation in a business sense without the implication of a further term, save for a term (which the trial judge found) that the agreement could be brought to an end by reasonable notice on either side. The observance of the best efforts clause may or may not have impeded Blackman during the distributorship from developing a capacity to manufacture and from manufacturing copies of USSC products, but I am unable to see that there was any necessary implication that he should not do so, having regard to his right to market copies at the conclusion of the distributorship. It is certainly not something which went without saying in the agreement. Indeed, USSC's position during the distributorship was protected by the express term found by the trial judge which precluded Blackman from dealing in products competitive with USSC products, a term which obviously included copies of USSC products sold under another name. It also needs to be remarked that USSC had not previously shown itself to be concerned to protect its Australian market and had taken no steps to take out any patents or to register its trade mark. It does not appear that its distributorship agreement with Downs Surgical contained any protection against the use of copies of its products and it is far from a necessary conclusion that USSC regarded the situation differently when it concluded its distributorship agreement with Blackman.

49. Indeed, the implied term as it is expressed by the trial judge has a curious effect. It is limited in its operation to the duration of the distributorship agreement. That, as the trial judge found, could be terminated upon reasonable notice. Such an implied term would do nothing to prevent Blackman from terminating the distributorship and competing upon the Australian market by manufacturing and selling copies of USSC products. Such an implied term would afford no real protection of USSC's Australian market. As the trial judge himself saw it, its effect would be limited to prohibiting activities on the part of Blackman during the currency of the distributorship which were calculated to enable him to capture the market or part of it after the determination of the distributorship. However, the agreement, as it was found, was explicit about what it required from Blackman during the distributorship agreement: it required him to devote his best efforts to distributing USSC surgical stapling products and building up the market for those products in Australia to the common benefit of USSC and himself. The agreement was silent about what was to happen at its conclusion and in those circumstances it seems to me impossible to decide that the distributorship could only have business efficacy if, in addition to the requirement that Blackman use his best efforts on behalf of USSC during the currency of the agreement, there was a requirement that he not do anything which would enable him to damage USSC's market after the distributorship had ended. However much the latter requirement may eventually have appeared to USSC to be desirable for its protection, the distributorship was clearly able to operate effectively without it.

50. No assistance is to be derived from the authorities dealing with contracts which establish what is clearly a confidential (in the sense of fiduciary) relationship - contracts such as contracts of employment or partnership agreements. There the confidential nature of the relationship may require the implication of a term or terms in the absence of express provisions in order to protect the confidence. A distributorship agreement of the kind here does not ordinarily, and certainly does not necessarily, give rise to a confidential relationship and it would be wrong to assume such a relationship in order to read into the agreement a term protecting it. Moreover, the development by Blackman during the currency of the distributorship agreement of a capacity to manufacture copies of USSC products did not involve the use of confidential information and, except to the extent that it resulted in his failure to devote his best efforts to distributing USSC products or building up its market in Australia, involved no breach of any express term of the agreement. Nor did the possibility of such an occurrence call for the implication of a term in addition to the best efforts clause. Cf. Robb v. Green (1895) 2 QB 1; Wessex Dairies Ltd. v. Smith (1935) 2 KB 80; Furs Ltd. v. Tomkies [1936] HCA 3; (1936) 54 CLR 583; Hivac Ltd. v. Park Royal Scientific Instruments Ltd. (1946) 1 Ch 169; Feiger v. Iral Jewellery Ltd. (1975) 382 NYS (2d) 216, 221; (1977) 363 NE (2d) 350.

51. Clearly, if it had wished to do so, there were various ways in which USSC could have protected the market which it had in Australia or which it anticipated it would have as a result of Blackman's distributorship. As I have said, it could have patented its products and registered its trade mark or at least have taken some steps to do so. It could have required Blackman to enter into a covenant in restraint of trade to the extent permitted by the law so as to restrict his activities during and after the termination of the distributorship. But to imply a term such as that implied by the learned trial judge would, in my view, be to impute to USSC a concern which had in no way been manifested by it and which, if it had existed, could have been met by appropriate contractual terms. In those circumstances, not only was the term implied by the trial judge unnecessary to give the distributorship agreement business efficacy but its implication would effectively recast that agreement in a form which the parties had chosen not to adopt.

52. It is clear that the term implied by the trial judge and accepted by the Court of Appeal was of fundamental importance in their arrival at the conclusion that Blackman occupied a fiduciary

position. There is nothing else in the contract itself which would assist in that regard. It is possible that a fiduciary relationship might arise from the circumstances surrounding the agreement but before embarking upon an examination of those circumstances it is desirable to make some attempt to identify the characteristics of such a relationship, even if that attempt is unlikely to meet with complete success. It has been said more than once that it is not possible to define completely and with precision those matters which give rise to fiduciary obligations notwithstanding that it is possible to discern a fiduciary relationship when it exists. See Lloyds Bank v. Bundy (1975) 1 QB 326, at p 341.

53. To be sure there are relationships which are ordinarily recognized as fiduciary, at least in some of their aspects, and little trouble is experienced with them. They are all relationships which are analogous to that which exists between a trustee and his beneficiary - the clearest of all fiduciary relationships. Without any attempt at classification, obvious examples spring to mind such as the relationship between partners, between employee and employer, between agents and their principals, between solicitors and their clients, between directors and their companies and between wards and their guardians.

54. Notwithstanding the existence of clear examples, no satisfactory, single test has emerged which will serve to identify a relationship which is fiduciary. It is usual - perhaps necessary - that in such a relationship one party should repose substantial confidence in another in acting on his behalf or in his interest in some respect. But it is not in every case where that happens that there is a fiduciary relationship. If it were, whenever there is "a job to be performed" (Tito v. Waddell (No.2) (1977) 1 Ch 106, at p 229) and entrusting the job to someone involves reposing substantial trust and confidence in him, equity would impose fiduciary obligations. Clearly that is not the case. Nor does a fiduciary duty arise because the person to whom a job is entrusted acts in his own interest and thereby fails to perform the job properly, however useful it may appear with hindsight that such protection should have been available. As Megarry V.-C. put it in Tito v. Waddell, at p 230:

"If there is a fiduciary duty, the equitable rules about self-dealing apply: but self-dealing does not impose the duty. Equity bases its rules about self-dealing upon some pre-existing fiduciary duty: it is a disregard of this pre-existing duty that subjects the self-dealer to the consequences of the self-dealing rules. I do not think that one can take a person who is subject to no pre-existing fiduciary duty and then say that because he self-deals he is thereupon subjected to a fiduciary duty."

55. The difficulty in identifying and classifying those qualities in individual relationships which give rise to fiduciary obligations is well recognized. See, e.g., Phipps v. Boardman [1966] UKHL 2; (1967) 2 AC 46, at p 125 per Lord Upjohn. There is, however, the notion underlying all the cases of fiduciary obligation that inherent in the nature of the relationship itself is a position of disadvantage or vulnerability on the part of one of the parties which causes him to place reliance upon the other and requires the protection of equity acting upon the conscience of that other. See Tate v. Williamson (1866) 2 ChApp 55, at pp 60-61. From that springs the requirement that a person under a fiduciary obligation shall not put himself in a position where his interest and duty conflict or, if conflict is unavoidable, shall resolve it in favour of duty and shall not, except by special arrangement, make a profit out of his position. In terms of general principle I do not think that it is

necessary to go further than that in the present case. It is sufficient, in my view, to lead to the conclusion that no fiduciary relationship arose between USSC on the one hand and Blackman or, subsequently, HPI, on the other, having regard to all the circumstances.

56. No doubt it was necessary to look to the contract as part of an inquiry whether the relationship between the parties was of such a kind that equity would impose fiduciary obligations in addition to those imposed by the contract. However, as I have said, I can discern no basis for the implication of a term such as was found to exist and it follows that in my view there is absent from the relationship between the parties any fiduciary character which may have been derived from such a term. Of course, the relationship between the parties to a contract may be defined not only by the contract itself but may also arise from the circumstances in which the contract is made. But, just as the common law does not allow the implication of a term merely to remedy the inadequacy of the parties' contractual arrangements, so too does equity decline to re-adjust the balance of a relationship which does not of its very nature place the parties in an unequal position.

57. I have already explained why in my view there was no implied term such as that found by the trial judge. That goes some distance in explaining why I am unable to accept the further conclusion that the relationship between the parties was sufficiently analogous to that of a trust to classify it as fiduciary. The circumstances which make it inappropriate to imply the term in question form part of those circumstances which, in my view, preclude the formation of any fiduciary relationship. But there is more to it than that.

58. By its very nature a distributorship agreement does not ordinarily give rise to a relationship in which any conflict between duty and interest must be eliminated. It is, if anything, an exception to the adage that a man cannot serve two masters. Whilst the parties have the common aim of exploiting a market and, no doubt, rely upon that coincidence of aim as much as any contractual provision to ensure the success of their arrangement, nevertheless their interests do not always and entirely coincide. Where there is no agreement to the contrary (and there was none here) and the distributor re-sells his supplier's products, he must determine the price at which he will market them. Whilst it may be in the supplier's interest that the products should be sold at a price which is as close as possible to the wholesale price, the distributor's interest may dictate a higher price. Whilst it is in the supplier's interest that the distributor should purchase and sell as many of the supplier's products as the market will absorb, there may be considerations which the distributor must take into account in his own interest which involve a lesser achievement. I have in mind such matters as the distributor's capacity to finance his operations, to give credit and to promote the product. All of these matters and others may require the distributor to make decisions in a situation which of its very nature makes it impossible to eliminate conflict between his interests and those of the supplier.

59. Nor does the existence of a best efforts or best endeavours clause, such as was found to be a term of the contract between USSC and Blackman, impose a duty upon the distributor to disregard his own interests. In speaking of a "best endeavours" clause in a licence agreement, in Transfield Pty. Ltd. v. Arlo International Ltd. [1980] HCA 15; (1980) 54 ALJR 323, at p 329, Mason J. said that it went no further than to prescribe "a standard of endeavour which is measured by what is reasonable in the circumstances, having regard to the nature, capacity, qualifications and responsibilities of the licensee viewed in the light of the particular contract." See also Terrell v. Mabie Todd & Coy Ltd. (1952) RPC 234, at p 237; B. Davis, Ltd. v. Tooth & Co., Ltd. (1937) 4 All ER 118, at p 127; Van Valkenburgh, N.& N., Inc. v. Hayden P Co. (1972) 30 N.Y.2d 34, at p 45. Clearly that leaves room for a balancing of interests and does not require the elimination of any conflict.

60. What is important is that in a distributorship agreement such as that in the present case it is assumed that the distributor will pursue his own economic interests and reliance is placed upon the fact that in doing so he will sufficiently serve the supplier's interests as well as his own, notwithstanding that he may on occasions follow his interests to the exclusion of those of his supplier. Apart from the considerations to which I have already referred, this of itself makes it inappropriate to imply a contractual term purporting to impose absolute obligations upon the distributor. It makes it even less appropriate to impose an equitable obligation upon the distributor in the performance of the contract to have regard to the interests of the supplier in disregard of his own.

61. Moreover, in considering whether any of Blackman's obligations towards USSC were of a fiduciary nature, I find no assistance in the notion that he may have occupied a fiduciary position of a limited kind in relation to the goodwill attaching to USSC products. Product goodwill as a legal concept is virtually unexplored. How and when it may exist, if at all, as something distinct from the goodwill of the business which is the origin of the product is something which has received little attention. See Pinto v. Badman (1891) 8 RPC 181, at pp 194-195; Heublein Inc. v. Continental Liqueurs Pty. Ltd. [1960] HCA 97; (1960) 103 CLR 435; Estex Clothing Manufacturers Pty. Ltd. v. Ellis and Goldstein Ltd. [1966] HCA 81; (1967) 116 CLR 254; Commissioner of Taxes (Q.) v. Ford Motor Co. of Australia Pty. Ltd. [1942] HCA 16; (1942) 66 CLR 261. Perhaps some explanation of this fact is to be found in the position at common law where a trade mark is assignable only in conjunction with the goodwill of the business in which the mark is used. That was also the position for some time with registered trade marks. It is, however, unnecessary to examine in detail in this case any meaning which the term product goodwill may have, because whatever it may be in another context, it can in the context of this case mean no more than the reputation in the market place which USSC products had in this country.

62. It is not possible, to my mind, to say that Blackman had a fiduciary relationship with USSC limited to its product goodwill or the reputation in the market place of USSC products. It is, I think, artificial in the extreme to regard USSC as having entrusted Blackman with the reputation of its products in Australia in the same way as one person might entrust another with property of a tangible kind to deal with it on his behalf. There were no special features of Blackman's distributorship relating to product goodwill. The only sense in which it could be said that USSC entrusted Blackman with the reputation of its products in Australia is in the sense that the reputation of those products might grow or diminish as a consequence of the manner in which he performed his function as a distributor of those products. But the same might be said of any distributor of any supplier's products. Moreover, the nature of the agreement between Blackman and USSC precluded any special obligations relating to product goodwill.

63. The extent of the exertions required of Blackman under the agreement is to be found in the obligation imposed upon him to devote his best efforts to distributing USSC products and building up the market for them. Any effect upon the reputation of USSC products in Australia was necessarily a consequence of Blackman's performance of or failure to perform these functions. However, in observing the requirements of the best efforts clause, Blackman was, as I have noted, not required to have regard to USSC's interests to the exclusion of his own. He was not required to resolve any conflict entirely in favour of USSC and he was, therefore, not placed by the best efforts clause in a fiduciary position. No more was or could be required of Blackman under the agreement in relation to the reputation of USSC products than was required of him by the best efforts clause.

64. If that clause imposed no fiduciary obligation upon Blackman, and I have already indicated that it did not, it follows ineluctably, in my view, that there was no fiduciary obligation in relation to the reputation of USSC products even if some such obligation could in other circumstances arise. It is

to my mind quite impossible to say that the efforts which Blackman was required to make under the agreement were not in discharge of any fiduciary duty but that the reputation of USSC products, which could only be affected under the agreement by the way in which he discharged the duties which the agreement imposed, was somehow entrusted to Blackman in a fiduciary way.

65. Nor is the problem to be solved by saying that there was a limited fiduciary relationship with respect to the reputation of USSC products which was of a different kind from that normally encountered in that it recognized the possibility of conflict between the interests of Blackman and those of USSC which was not to be resolved in favour of USSC. That is the antithesis of a fiduciary relationship which demands that in any situation of conflict between duty and interest, duty must come first. See Furs Ltd. v. Tomkies, at pp 590, 592, 600. As Lord Hodson said in Phipps v. Boardman, at p 111:

"Nevertheless, even if the possibility of conflict
is present between personal interest and the
fiduciary position the rule of equity must be
applied."
See also Gillett v. Peppercorne [1840] EngR 828; (1840) 3 Beav 78, at pp 83-84 [1840] EngR 828; (49 ER 31, at p 33); Bray v. Ford (1896) AC 44, at pp 51-52; Regal (Hastings) Ltd. v. Gulliver [1942] UKHL 1; (1967) 2 AC 134, at pp 137, 144-145. The whole purpose served by the recognition of a fiduciary relationship would otherwise be thwarted for the court would be required to examine individual transactions in order to determine whether the interests of the person to whom the fiduciary duty was owed had been sacrificed in some impermissible manner as, for example, where the person owing the duty had not acted reasonably in the circumstances. That may well be a task which "no court is equal to" and certainly is a task which has never been undertaken. See Ex parte James [1803] EngR 536; (1803) 8 Ves Jun 337, at p 345 [1803] EngR 536; (32 ER 385, at p 388).

66. The circumstances in which the contract between USSC and Blackman was made do not suggest any disadvantage or vulnerability on the part of USSC requiring the intervention of equity to protect its interests. Those negotiations were of a commercial nature and were at arm's length. They were conducted by persons on both sides who were experienced in the market place. The recognition by those who represented USSC that a formal, written agreement was desirable was a recognition of the possibility, at least, of a contract providing greater protection of USSC's interest than was in fact provided. Not only does the conscious choice to proceed in the absence of a formal agreement fail to provide any basis for the implication of a term affording the type of protection which the agreement might have provided, but it is also inconsistent with any need for the intervention of equity.

67. It may be conceded that USSC eventually accepted that there was no need for a formal agreement because of the misplaced trust which Hirsch and Josefsen had in Blackman's integrity and ability. But that is not the sort of trust or confidence which equity will protect by the imposition of fiduciary obligations. A fiduciary relationship does not arise where, because one of the parties to a relationship has wrongly assessed the trustworthiness of another, he has reposed confidence in him which he would not have done had he known the true intentions of that other. In ordinary business affairs persons who have dealings with one another frequently have confidence in each other and sometimes that confidence is misplaced. That does not make the relationship a fiduciary one. See Lloyds Bank v. Bundy at p 341. A fiduciary relationship exists where one party is in a position of reliance upon the other because of the nature of the relationship and not because of a wrong assessment of character or reliability. That is to say, the relationship must be of a kind which of its nature requires one party to place reliance upon the other; it is not sufficient that he in fact

does so in the particular circumstances. Of course, where a relationship is fiduciary in character it will be so whether or not the party in whose favour the fiduciary obligations are imposed actually trusts the party upon whom the obligations are imposed.

68. Moreover, a fiduciary relationship does not arise where one of the parties to a contract has failed to protect himself adequately by accepting terms which are insufficient to safeguard his interests. Where a relationship is such that by appropriate contractual provisions or other legal means the parties could adequately have protected themselves but have failed to do so, there is no basis without more for the imposition of fiduciary obligations in order to overcome the shortcomings in the arrangement between them.

69. In my view, there was no special feature of the distributorship agreement between USSC and Blackman which distinguished it from an ordinary commercial arrangement of its type. Apart from the actual terms of the contract, I do not think that the nature of the relationship which it created or the circumstances in which it was made, required USSC to put its trust and confidence in Blackman in a way which called for the imposition of fiduciary obligations to protect it from a position of vulnerability or disadvantage. That it did put its trust and confidence in Blackman is clear, but it did so of its own choice. If that placed it in an unequal position in relation to Blackman it was not due to anything inherent in the relationship but to the way in which the parties chose to establish and define it.

70. Too much should not, however, be made of any inequality in the position of USSC. The distributorship was, even in the absence of breach, determinable upon reasonable notice and although Blackman's activities took place unnoticed for some time in what USSC appears to have regarded as a remote corner of the globe, that company had at least the means of remedying the situation by ending its relationship with Blackman as soon as those activities could be seen to be harmful to it.

71. It should also be borne in mind that at the time Blackman concluded a distributorship agreement with USSC, the dealership agreement which he had previously made with USSC was in existence and continued in operation for some time thereafter. It is clear, indeed it was conceded, that the position of dealer under the latter agreement carried with it no fiduciary obligations. That agreement, which was contained in a formal document, expressly provided that it should not constitute the dealer the agent of USSC and that the relationship between USSC and Blackman should at all times be that of independent contractors. See Jirna Ltd. v. Mister Donut of Canada Ltd. (1973) 40 DLR (3d) 303. It would have been anomalous that any fundamental change in the relationship between USSC and Blackman should have taken place during the subsistence of the dealership agreement without either party adverting to it merely because Blackman had become a distributor of USSC products in Australia in addition to his, or his company's, being a dealer for USSC in the United States. From a commercial point of view, the distributorship was, and was intended to be, a much looser arrangement than a dealership.

72. In the Court of Appeal considerable emphasis was placed upon Blackman's fraudulent conduct and the importance to him of obtaining the distributorship in order to effectuate his plan of capturing USSC's market for himself with copies of USSC products. For my part, I am unable to see how either of these circumstances, which are clearly established, assists in answering the question whether a fiduciary relationship existed. The law, of course, offers remedies for fraudulent misrepresentation and the fact that USSC has chosen not to pursue them is not to the point in the case which it has eventually made out. The fact that USSC was the victim of Blackman's fraud is no indication that the agreement which it induced gave rise to a relationship which called for the special protection of equity. And if such a relationship had existed, the fact that the conduct of

which USSC complains was fraudulent would in the circumstances have been of limited relevance to the availability of the equitable remedies which it seeks; it would have been sufficient that Blackman allowed his duty to conflict with his interest so as to profit from his position of trust.

73. Even less relevant, in my view, is the importance of the distributorship to Blackman. It explains, of course, his motivation in obtaining a distributorship; his whole plan to capture the Australian market was dependent upon it. It emphasizes, perhaps, the lack of judgment and the misplaced confidence on the part of those who were acting for USSC in failing to see and guard against what Blackman was doing or was about to do. But the fact that it was important to Blackman to achieve the relationship which he did with USSC did not determine the nature of that relationship any more than the failure of USSC to recognize that fact.

74. The undesirability of extending fiduciary duties to commercial relationships and the anomaly of imposing those duties where the parties are at arm's length from one another was referred to in Weinberger v. Kendrick (1892) 34 Fed. Rules Serv. 2d 450. And in Barnes v. Addy (1874) 9 Ch App 244, at p 251, Lord Selborne L.C. said:

"It is equally important to maintain the doctrine of trusts which is established in this court, and not to strain it by unreasonable construction beyond its due and proper limits. There would be no better mode of undermining the sound doctrines of equity than to make unreasonable and inequitable applications of them."

75. There can be no question that the behaviour of Blackman was calculated and fraudulent. But the law provides remedies for such behaviour which are capable of a precise application. To invoke the equitable remedies sought in this case would, in my view, be to distort the doctrine and weaken the principle upon which those remedies are based. It would be to introduce confusion and uncertainty into the commercial dealings of those who occupy an equal bargaining position in place of the clear obligations which the law now imposes upon them. The remarks of Bramwell L.J. in New Zealand and Australian Land Co. v. Watson (1881) 7 QBD 374, at p 382, have, I think, special application:

"Now I do not desire to find fault with the various intricacies and doctrines connected with trusts, but I should be very sorry to see them introduced into commercial transactions, and an agent in a commercial case turned into a trustee with all the troubles that attend that relation."

76. For these reasons, I would allow the appeal and dismiss the cross appeal of the first respondent. I would also allow the cross appeals of the second, third, fourth and fifth respondents. I would order that the proceedings be remitted to the Supreme Court of New South Wales for an inquiry as to the damages suffered by the first respondent as the result of the breach by the third respondent of its contractual obligations and for entry of judgment in favour of the first respondent against the third respondent in the amount of the damages ascertained by that inquiry.

ORDER

Appeal of the appellant allowed, and cross appeal of the first respondent dismissed, with costs against the first respondent.

Cross appeals of the second and fifth respondents allowed, with costs against the first respondent.

Cross appeals of the third and fourth respondents allowed. No order as to costs.

Order of the Court of Appeal of the Supreme Court of New South Wales set aside, and in lieu thereof order as follows:

(1) Appeal by the appellant to that Court dismissed with costs.
(2) Cross appeal by the first respondent in that Court allowed in part. No order as to costs.
(3) Cross appeal by the second respondent in that Court allowed. No order as to costs.
(4) Cross appeals by the third, fourth and fifth respondents in that Court dismissed with costs.
(5) Order of McLelland J. set aside, and in lieu thereof order:
(a) Judgment for the second defendant in the action. No order as to costs.
(b) Judgment for the third, fourth and fifth defendants in the action with costs.
(c) Judgment for the plaintiff in the action against the first defendant for damages for breach of contract and for costs.

Remit the matter to the Supreme Court of New South Wales to assess damages and to enter judgment in favour of the plaintiff against the first defendant in the amount assessed.

Liberty to apply.