

## PRESENTERS



### **Dr Gerard Curry, Barrister, Auckland**

Gerard has practised since 1974, taught in NZ and Washington DC, appeared in profile cases, successfully led in the Privy Council, Supreme Court, Court of Appeal and the High, Environment, Employment, District Courts and in arbitrations and mediations. A partner and chairman of Russell McVeagh, he went to the Bar in 2008. Gerard's practice includes administrative, commercial, contract, governance, directors and trustees' duties, professional discipline, property and fraud. An AMINZ arbitrator, he chairs a foundation, a business trust and a business association.



### **Peter Whiteside QC, Barrister, Christchurch**

After 40 years' civil litigation experience, Peter went to the Bar in 2013 and was appointed a silk the following year. He has appeared as senior counsel in two of New Zealand's seminal cases in the field of fiduciary obligations: *Clark Boyce v Mouat* [1993] 3 NZLR 641 (solicitor's fiduciary obligations) and *Chirnside v Fay* [2007] 1 NZLR 433 (fiduciary obligations in an evolving joint venture).

Cover and text stocks used in this publication are from Forestry Stewardship Council certified mills, manufactured under the environmentally responsible paper manufactured environmental management system ISO 14001, using pulp from well managed forests and other controlled sources.

# CONTENTS

<b>1. INTRODUCTION</b>	<b>3</b>
TERMINOLOGY	4
<b>2. WHAT CONSTITUTES A FIDUCIARY RELATIONSHIP?</b>	<b>5</b>
UNDERLYING CHARACTERISTICS OF FIDUCIARY LAW	5
RELATIONSHIP WITH OTHER AREAS OF LAW	6
RELATIONSHIP WITH PROFESSIONAL ETHICS	6
WHO ARE FIDUCIARIES?	7
<i>Inherent fiduciary relationships</i>	7
<i>Particular relationships that may give rise to fiduciary obligations in the circumstances</i>	8
WHAT OBLIGATIONS DO FIDUCIARIES OWE AND TO WHOM?	11
<i>Two major objects of loyalty</i>	12
<i>Right use of position</i>	13
<i>Duty of disclosure</i>	14
<i>Fiduciary's breach of duty of care</i>	14
<i>Scope of the duties</i>	15
WHEN WILL FIDUCIARIES BE IN BREACH OF THEIR OBLIGATIONS?	16
WHAT ARE THE CONSEQUENCES FOR BREACH?	18
<i>The primary remedy - account of profits</i>	18
WHAT CAN FIDUCIARIES DO TO PROTECT THEMSELVES FROM LIABILITY FOR BREACH OF FIDUCIARY DUTY?	21
<i>Contract</i>	21
<i>Disclosure and informed consent</i>	21
<b>3. FIDUCIARY OBLIGATIONS OF LAWYERS</b>	<b>23</b>
INTRODUCTION	23
OBLIGATION TO AVOID CONFLICT	26
<i>Extent of obligation</i>	28
<i>Can informed client consent to the conflict?</i>	29
<i>Dealings with clients</i>	29
<i>Borrowing from clients</i>	31
<i>Lending to clients</i>	32
<i>Investing in a client's business</i>	33
<i>Lawyer buying from or selling to a client</i>	33
CONFLICTS BETWEEN CLIENTS	33
<i>Consent</i>	37
<i>Concurrent conflicts in transactional work</i>	39
<i>Concurrent conflicts in litigation</i>	40
LAWYER ACTING AGAINST FORMER CLIENTS	41
THE DUTY OF CONFIDENCE	43
FIDUCIARY OBLIGATION TO ACCOUNT	45
REMEDIES FOR BREACH OF THE DUTY OF LOYALTY BY A LAWYER	46
REMEDIES FOR BREACH OF CONFIDENCE	47
<b>4. PARTNERSHIP – SOME ASPECTS</b>	<b>48</b>
INTRODUCTION	48
WHAT IS A PARTNERSHIP?	48
WHAT FIDUCIARY DUTIES DO PARTNERS OWE?	49
<i>Duty to render accounts – s 31</i>	50
<i>Accountability of partners – s 32</i>	51
<i>Duty not to compete with the firm – s 33</i>	52
<i>Conflict of interest</i>	52
APPRAISALS	53
FIDUCIARY DUTIES AFTER DISSOLUTION	53
SCOPE OF DUTIES	54
<b>5. FIDUCIARY OBLIGATIONS OWED BY A PARTY IN BUSINESS</b>	<b>56</b>
FACTS OF THE CASE ( <i>CHIRNSIDE V FAY</i> )	56

	<i>Decision of the High Court of New Zealand</i> .....	57
	<i>Decision of the Court of Appeal</i> .....	58
	<i>Decision of the Supreme Court</i> .....	58
	DEVELOPMENTS IN THE CASES SINCE <i>CHIRNSIDE V FAY</i> .....	60
	CONSEQUENCES OF THE JUDGMENT IN <i>CHIRNSIDE V FAY</i> FOR PARTIES CONSIDERING BUSINESS VENTURE WITH OTHERS .....	62
	QUANTUM ASSESSMENT BY THE SUPREME COURT.....	63
<b>6.</b>	<b>APPENDIX 1</b> .....	<b>64</b>
	SCHEDULE.....	64
	<i>Lawyers and Conveyancers Act 2006</i> .....	64
<b>7.</b>	<b>APPENDIX 2</b> .....	<b>66</b>
	SCHEDULE.....	66
	<i>Lawyers and Conveyancers Act 2006</i> .....	66
<b>8.</b>	<b>APPENDIX 3</b> .....	<b>68</b>
	FACT SCENARIO: FIDUCIARY OBLIGATIONS OF LAWYERS.....	68
	<i>Questions</i> .....	69
<b>9.</b>	<b>APPENDIX 4</b> .....	<b>70</b>
	FACT SCENARIO: PARTNERSHIP .....	70