The nature and function of fiduciary loyalty

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*L.Q.R. 452 I. INTRODUCTION

THE word "fiduciary" recurs in legal discussion without much understanding of its meaning. In particular, the fiduciary relationship has been described as "a concept in search of a principle", [1] due in large part to judicial refusal to define the fiduciary concept. [2] The judges have, however, indicated that the "distinguishing obligation of a fiduciary is the obligation of loyalty." [3] The question addressed in this article is, what does that mean? The article seeks to identify the function that fiduciary duties serve; that which marks them out from other categories of legal duty such that they attract a different name. Rather than offering a principle by which to identify fiduciary relationships, this article endeavours to present an understanding of the nature and function of fiduciary duties when they exist. In other words, the article seeks to identify within equity's case law a more precise view as to the nature and function of the concept of fiduciary loyalty.

This is important in a number of respects, both theoretical and practical. Several commentators, particularly law and economics scholars, have argued that fiduciary duties are, in essence, merely examples of implied or default contractual obligations. [4] Others have suggested that they are properly categorised as torts. [5] This type of categorisation seems relatively unimportant in purely practical terms: provided the duties, and the remedies available for their breach, are clear, their description is

unimportant in settling disputes. However, at a theoretical level, the proper **L.Q.R. 453* classification of doctrines is important in understanding their interrelationship and, consequently, legal doctrine in general. The difference between types of legal doctrine is much more than a matter of semantics, and fiduciary doctrine is no exception. [6] At a time when the historical origins of doctrines are becoming less important than the substance of obligations, [7] it becomes even more important to identify and analyse the theoretical similarities and differences between the substance of various doctrines. Furthermore, given the iterative nature of common law development, a theoretical understanding of fiduciary doctrine is also relevant at the more practical level, as it helps indicate how we should approach the resolution of disputes about currently unsettled aspects of fiduciary doctrine. [8] Finally, although it is not the focus of this article, a deeper understanding of *what* purpose fiduciary duties serve should assist in the future determination of *when* their recognition is appropriate. [9]

This article contends that fiduciary duties serve a function which differs from that served by other legal duties. The concept of fiduciary "loyalty" is an encapsulation of a subsidiary and prophylactic form of protection for non-fiduciary duties which enhances the chance that those non-fiduciary duties will be properly performed. The primary means by which this notion of loyalty is given effect is a range of fiduciary duties which seek to insulate fiduciaries from influences that are likely to distract from such proper performance. It is often observed that fiduciary doctrine is *applied* in a prophylactic manner, although frequently without much clarification of what that means. This article seeks to show that fiduciary doctrine's prophylactic aspect is more than merely the strictness of its application; the argument presented here is that fiduciary doctrine is prophylactic *in its very nature,* as it is designed to avert breaches of non-fiduciary duties by seeking to neutralise influences likely to sway the fiduciary away from properly performing those non-fiduciary duties. This understanding of fiduciary loyalty provides a theoretical underpinning for a number of tenets of fiduciary doctrine that are acknowledged in the case law but are otherwise unexplained.

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Fiduciary doctrine is frequently conceptualised as exhorting more moral behaviour from fiduciaries. Properly understood, the doctrine is far more **L.Q.R. 454* cynical, functional and instrumentalist in outlook, focusing on lessening the danger that a fiduciary's undertaking will not be properly performed.

II. REFERENCE POINTS

Before explaining more fully what is meant by the proposition that fiduciary doctrine provides subsidiary and prophylactic protection for non-fiduciary duties, it is important to be clear about the material from which this thesis is developed. Much writing on fiduciary doctrine is beset by a lack of clarity as to the reference points from which the arguments are developed. In many instances, commentators are talking past one another as their analyses arise out of different premises which are neither articulated nor defended.

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The analysis offered in this article focuses on situations where fiduciary duties indubitably are owed. This is possible because the case law clearly recognises several relationships where one party, the "fiduciary", ordinarily [10] owes fiduciary duties to the other party in the relationship, the "principal". The paradigm example is the relationship between trustee and beneficiary, but there are many other clear examples of established fiduciary relationships. [11] Adopting this course circumvents any need to develop a theory as to when fiduciary duties are owed. It is also sensible, when developing a theory as to the nature and function of fiduciary loyalty, to do so by reference to cases where fiduciary liability is clear, rather than by reference to those where its very existence is more contentious.

Secondly, concentrating on settled categories of fiduciary relationship allows attention to be focused upon the duties within that relationship that are peculiar to fiduciary doctrine. It is only by doing this that one can develop a theory as to the nature and function of fiduciary doctrine. The problem that arises at this stage of the analysis is that there is no clear view as to which doctrines are fiduciary and which are not. On one view, which holds considerable sway in North America, all duties owed by a fiduciary are appropriately treated as fiduciary duties. Thus, for example, a director's duty of care is often discussed as part of directors' fiduciary duties in the United States. [12] Even where duties of care are differentiated from duties of loyalty, the two heads of liability frequently remain subsumed under the **L.Q.R. 455* over-arching category of fiduciary duties. [13] This approach reflects the function that the fiduciary concept has served, particularly historically, in exporting the incidents of the trustee-beneficiary relationship to other relationships which differ from that paradigm fiduciary relationship but which are sufficiently similar to it to justify the imposition of similar duties. [14] However, if one seeks to find a connection between the duties which may be exported in this way, one is, in essence, really seeking to answer the "notoriously intractable" [15] question,

when does a fiduciary relationship arise? [16] As yet, there is no settled answer to that question. [17] Consequently, that approach does not much help when attempting to ascertain the nature and function of fiduciary doctrine.

Instead, in recent years, courts have begun to insist that a distinction be drawn between (i) the duties that fiduciaries owe but which are not owed by non-fiduciaries and (ii) duties that can be owed by fiduciaries and non-fiduciaries alike. It is only the former class of duties which differentiate fiduciaries from others and which ought to be referred to as fiduciary duties. In England, this approach was forcefully advocated by the Court of Appeal in *Bristol and West Building Society v Mothew,* [18] and it is recognised guidance elsewhere in the Commonwealth. [19] In *Mothew,* Millett L.J. observed that fiduciary doctrine "has been bedevilled by unthinking resort to verbal formulae" [20] and that this can only be avoided in the following way [21] :

"The expression "fiduciary duty' is properly confined to those duties which are peculiar to fiduciaries and the breach of which attracts legal **L.Q.R. 456* consequences differing from those consequent upon the breach of other duties. Unless the expression is so limited it is lacking in practical utility."

Thus, as the House of Lords have observed, "not every breach of duty by a fiduciary is a breach of fiduciary duty." [22] In other words, fiduciary duties can be owed concurrently with non-fiduciary duties, and the fiduciary duties are those which are peculiar to fiduciary relationships. For example, although there are subtle differences between equitable and common law duties of care, [23] those differences are not great, [24] and the fundamental substance of the obligation does not depend upon whether the duty-bound person is a fiduciary. Many fiduciaries owe duties of care--as in the case of most trustees, directors and solicitors--but many non-fiduciaries also owe fundamentally equivalent duties of care. The duty of care is not peculiar to fiduciaries and so "is not to be equated with or termed a "fiduciary' duty." [25]

For similar reasons, it is suggested that the duty of good faith ought not to be classed as a fiduciary duty. Fiduciaries undoubtedly must act in good faith, [26] and this is part of the "irreducible core of obligations owed by trustees". [27] But, just as a trustee's duty of care is not a fiduciary duty, the core obligations of trustees are not necessarily all fiduciary. The duty of good faith is frequently recognised in circumstances not traditionally considered to be fiduciary relationships, and where fiduciary analysis played no part in reaching the court's conclusion. In numerous cases, for example, courts have held that discretionary powers in contracts had to be exercised in good faith. [28] These decisions were based on the contractual terms and factual matrices of the particular cases, rather than special principles of law relating to particular classes of contracts, [29] and they did **L.Q.R. 457* not depend on fiduciary doctrine. Similarly, mortgagees, who are not fiduciaries with respect to the exercise of their power of sale, [30] are nonetheless required to exercise the power in good faith. [31] In the employment law context, also, duties of good faith have been recognised and treated as implied contractual obligations rather than fiduciary duties; [32] indeed, they have been recognised in circumstances where fiduciary duties were positively held to be inapplicable. [33] The duty of good faith is not, therefore, peculiar to fiduciaries and so ought not to be considered a fiduciary duty, at least when analysing the nature and function of duties that are peculiarly fiduciary. 特殊的受託人

In a similar vein, it is suggested that the duty to act for proper purposes is not a peculiarly fiduciary doctrine. This duty frequently comes hand-in-hand with a duty to act in good faith. Thus, when exercising his power of sale, a mortgagee cannot exercise it for improper purposes. [34] Similarly, in most of the cases referred to above where it was held that contractual powers had to be exercised in good faith, it was also held that the powers could not be exercised for an improper purpose. [35] This suggests that the duty to act for proper purposes ought also to be excluded from a consideration of peculiarly fiduciary duties.

In the company law context, a director's duty to act for proper purposes is often described as a fiduciary duty, or at least one which arises out of the director's fiduciary position. [36] However, it is suggested that this duty is **L.Q.R. 458* simply a manifestation of the broader concept of fraud on a power, [37] and is best treated as not peculiarly fiduciary in nature. The descriptions of it as fiduciary in the case law reflect the exporting function of the fiduciary concept referred to earlier: directors held positions sufficiently similar to trustees that the courts would similarly not allow them to use their powers for improper purposes. [38] In company law, this came to be known as the "proper purposes" doctrine, but it is suggested that its root is the concept of fraud on a power.

The connection between the proper purposes doctrine and fraud on a power was made explicit by Lord Cranworth in *Spackman v Evans,* where he referred to directors who had purported to exercise a power to forfeit shares as having applied the power "to a

purpose foreign to that to which alone they would be justified in acting on it … That which the directors did was, therefore, what is called a fraud on the power". [39] The relevance here is that fraud on a power is a general doctrine concerned with limitations impliedly imposed with the grant of a limited power, rather than a peculiarly fiduciary doctrine. Fraud on a power "merely means that the power has been exercised for a purpose, or with an intention, beyond the scope of or not justified by the instrument creating the power." [40] Thus, it is "trite law that a power can be exercised only for the purpose for which it is conferred, and not for any extraneous or ulterior purpose." [41] The doctrine of fraud on a power does apply to fiduciaries, but it applies more broadly than that, also controlling powers held by persons who are *not* fiduciaries. The cases involving the proper purposes limit on the exercise of mortgagees' powers of sale and those implied in other contractual settings have already been mentioned. [42] Similarly, despite the fact that shareholders do not normally occupy any fiduciary relationship *vis-à-vis* one another, [43] they are restricted in the exercise of some of their powers, ***L.Q.R. 459*** such as powers to alter the articles of association, in the sense that those powers cannot be used for an ulterior or improper purpose: "like other powers, [they] must be exercised bona fide, and having regard to the purposes for which they are created, and to the rights of persons affected by them." [44] The fraud on a power doctrine has also been applied to the exercise of powers of appointment held by beneficiaries of trusts. [45] It is not fiduciary in the sense that matters here, as Farwell observed [46]:

"the essential notion is disposition beyond the scope of the power, not breach of trust by the donee, though it is not unusual to speak of the donee of a limited power as being in a fiduciary position. His position is referable to the terms, express and implied, of the instrument creating the power and the implied obligation not to appoint for an ulterior purpose, and is not in truth founded, like the position of a trustee, upon a state of conscience imputed to him by Courts of Equity."

Excluding from analysis the duty of good faith and the proper purposes doctrine, as neither is peculiarly fiduciary in nature, does not leave the cupboard bare. Certain doctrines are widely acknowledged as peculiarly applicable to those in fiduciary positions. Seeking rules which apply universally, and peculiarly, to fiduciaries, one is likely "to halt at the bedrock of the two negative principles" [47] which prohibit fiduciaries (a) from acting with a conflict between duty and interest; and (b) from making a profit out of the fiduciary position. The conflict principle, which has been "established as the irreducible core of the fiduciary obligation", [48] has ***L.Q.R. 460*** further engendered a separate conflict doctrine that prohibits fiduciaries from acting where duties owed to one principal conflict with duties owed to another principal.

It is suggested that it is these doctrines which form the core of fiduciary doctrine and which constitute its conceptualisation of loyalty. It is these doctrines, therefore, which call for consideration if we are to understand more deeply the nature and function of fiduciary doctrine. Even if it is not accepted that the good faith and proper purposes doctrines are not peculiarly fiduciary in nature, it can be said with confidence that the conflict and profit principles undoubtedly are peculiarly fiduciary; the same cannot be asserted with such confidence in respect of the good faith and proper purposes doctrines. It is sensible, when trying to understand the nature and function of a particular kind of doctrine, to begin the analysis by reference to rules and principles which clearly are examples of that kind of doctrine.

III. SUBSIDIARY PROPHYLACTIC PROTECTION

The thesis proposed in this article is that the concept of "loyalty", as it exists in Anglo-Australian fiduciary doctrine, encapsulates the subsidiary and prophylactic protection for non-fiduciary duties that is provided by fiduciary duties. That protection enhances the likelihood that a fiduciary will properly perform his non-fiduciary duties. This part of the article expounds that thesis, while the next part considers some of the implications of understanding fiduciary doctrine in that way.

(a) Protective function of fiduciary doctrine

The proposition that the function of fiduciary duties is to protect the proper performance of non-fiduciary duties is best illustrated by reference to the fundamental fiduciary principle that prohibits a fiduciary from acting where there is a "real sensible possibility of conflict" [49] between his duty and his personal interest. In *Aberdeen Railway Co v Blaikie Bros,* Lord Cranworth L.C. stated the principle in clear terms [50]:

"it is a rule of universal application, that no one having [fiduciary] duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which may possibly conflict, with the interests of those whom he is bound to protect."

Blaikie Bros illustrates this protective function in operation. Blaikie, who was a director of a railway company, caused it to enter into a contract to buy iron chairs for use on the railway. The company accepted around two- ***L.Q.R. 461*** thirds of the chairs, but then refused to accept delivery of any more on the basis that Blaikie was also a principal of the firm selling the chairs. The company succeeded in the House of Lords. Lord Cranworth explained that Blaikie's position as a director meant he owed the company a duty "to make the best bargains he could", [51] whereas his personal interest as a principal of the vendor "would lead him in an entirely opposite direction, would induce him to fix the price as high as possible. This is the very evil against which the rule in question is directed". [52] In other words, a fiduciary is prohibited from acting in a situation where there is a conflict between the basic duty which he owes to his principal and his own personal interest because that personal interest is likely to lead the fiduciary away from proper performance of his duty. [53]

This understanding of the function served by fiduciary doctrine can be traced throughout the case law. In *Whichcote v Lawrence,* Lord Loughborough L.C. explained that the concern when a trustee buys trust property for himself is that he "is not acting with that want of interest, that total absence of temptation" [54] because "where a trustee has a prospect of advantage to himself, it is a great temptation to him to be negligent." [55] In other words, the fiduciary conflict principle is concerned with avoiding situations where there is a temptation not to perform properly one's other duties: if the trustee does not have a personal interest in a transaction he does not have the temptation to breach his duty and sell the trust property at a price which would be negligent were it sold to a third party. In *Hamilton v Wright,* Lord Brougham pointed out that [56]

"There cannot be a greater mistake than to suppose … that a trustee is only prevented from doing things which bring an actual loss upon the estate under his administration. It is quite enough that the thing which he does has a tendency to injure the trust; a tendency to interfere with his duty."

The fiduciary conflict principle is not concerned with determining whether the fiduciary actually *has acted* in breach of his duty, but rather focuses its attention on circumstances where there is a *risk* that the duty might be breached.

It is important to be clear here about the two kinds of duty involved: the *fiduciary* duty prohibits conflict between duty and interest, but there is also a *non-fiduciary* duty, the protection of which is the purpose of the fiduciary duty. In *Blaikie Bros,* for example, Blaikie owed a non-fiduciary duty to the ***L.Q.R. 462*** company to negotiate contracts on behalf of the company on terms most beneficial to the company. That duty arose because of his position as a director of the company, but it is not a fiduciary duty. If a director acts incompetently in negotiating a contract, he acts in breach of a duty owed to the company, but he does not thereby commit a breach of fiduciary duty. The fiduciary duty is separate, designed to protect proper performance of the non-fiduciary duty from inconsistent influences; it prohibits the fiduciary from acting in a situation where he has a personal interest which is inconsistent with his non-fiduciary duty. If one does not separate the fiduciary conflict principle from the non-fiduciary duties which it protects, and instead treats all of the duties involved as fiduciary, then the conflict principle amounts to the proposition that a fiduciary owes a fiduciary duty to avoid conflicts between his fiduciary duty and his personal interest. That formulation is confusing and unhelpful, [57] especially when compared with the clearly understandable proposition that a fiduciary owes a fiduciary duty to avoid conflicts between his non-fiduciary duty and his personal interest: the fiduciary duty contained in the conflict principle and the non-fiduciary duty which it protects "must be different duties." [58] Birks described the fiduciary duty as "parasitic", [59] to explain that the two duties are not both fiduciary duties and to describe the relationship between the two kinds of duty. While he is correct to point out the need for both a fiduciary and a non-fiduciary duty to make sense of the conflict principle, it is suggested that the relationship is better understood if the fiduciary duty is seen as *protective* of non-fiduciary duties. As Lord Cottenham L.C. said in *Knight v Marjoribanks,* "its object is to secure the due execution of the duty which the trustee takes upon himself to perform." [60]

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The function of fiduciary duties is, therefore, to strike at situations where there is a temptation for the fiduciary to act in breach of non-fiduciary duty. In *Boston Deep Sea Fishing and Ice Co v Ansell,* for example, a director acted in breach of fiduciary duty when he bought ice for use by the company from another company in which he held shares and from which he received bonuses. Cotton L.J. indicated the protective function of the fiduciary doctrine by explaining that the director put "himself in such a position that he has a temptation not faithfully to perform his duty to his ***L.Q.R. 463*** employer." [61] Acting in a situation where there is temptation to breach one's non-fiduciary duties suffices, as the Court of Appeal explained in *De Bussche v Alt* [62] :

"the honesty of the agent concerned in the particular transaction should not be inquired into as a question upon which its validity depends, for by this strictness the temptation to embark in what must always be a doubtful transaction is removed."

This protective understanding of fiduciary duties is further supported when one considers the remedies for breach of fiduciary duties. Fiduciary doctrine provides a series of remedies from which the principal may choose as he sees fit. The pre-eminent [63] remedies for breach of fiduciary duty are rescission of the resultant transaction or profit-stripping. Where, for example, a trustee purchases trust property for himself, "the sale is voidable by any beneficiary *ex debito justitiae,* however fair the transaction." [64] The beneficiaries have the same power to rescind where a trustee has sold his own property to the trust. [65] Alternatively, the beneficiaries may be able to strip any profit which the fiduciary has made on the transaction. Thus, if an agent has taken a bribe, the principal can force the agent to disgorge the profit, through either an account [66] or a proprietary constructive trust. [67] Compensation is also potentially available as a remedy, which will be important where the breach of fiduciary duty has caused the principal loss rather than created a gain for the fiduciary. [68] The important point in the present context is that the pre-eminent remedies of rescission and profit-stripping both exist to remove from the fiduciary any benefit which he receives from a transaction entered into while he had a conflict between duty and interest. Rescission clearly supports the prophylactic function served by fiduciary duties: the transaction should not have taken place and so the principal may have it undone. The purpose of it and of the other profit-stripping remedies is to remove any attraction which such a transaction might hold for the fiduciary, in order to deter the fiduciary from entering into the transaction. Removing the fruits of temptation is designed to neutralise the temptation itself by rendering it pointless. [69]

L.Q.R. 464 Lionel Smith has argued recently that this view of fiduciary doctrine is inadequate and "implausible". [70] He points out that "a rule that only takes away the defendant's gain is not much of a deterrent", [71] and argues that a rule which is concerned with deterrence is inconsistent with the internal rationality of private law. As to the first point, it is true that perfect disgorgement does not provide the same degree of deterrence as could be achieved by a penalty. [72] However, Anglo-Australian equitable doctrine has historically set its face against punitive action, [73] because its fundamental concern was to hold trustees to account for what they had received and for what they ought to have received if they had acted properly. The policy underlying the fiduciary conflict principle is to discourage [74] fiduciaries from acting in situations that carry a heightened risk of breach of non-fiduciary duties. Fiduciary doctrine's profit-stripping remedies give effect to that deterrent, perhaps imperfectly but as fully as possible while remaining within the constraints of traditional equitable doctrine. As Lord Brougham L.C. said in *Docker v Somes,* the situation is "discouraged by intercepting its gains, and thus frustrating the intentions that caused it". [75]

As to Smith's second point, that seeking to influence the conduct of others in the future is inconsistent with the internal or "immanent" [76] rationality of private law, as it is not concerned with issues of corrective justice between two parties, [77] the short answer is that this does not make it any less a part of private law. Exemplary damages, which serve a similarly deterrent function in part, can be criticised on this basis, [78] and yet they exist nonetheless. [79] Indeed, as the House of Lords have recognised, a single award of damages can serve multiple purposes, [80] as does the law of tort ***L.Q.R. 465*** generally, [81] and yet both are fundamental aspects of private law. The common law, including equity in this respect, "is a pragmatic, working, authority-based system. It is not a school of philosophy." [82]

Fiduciary doctrine's concern to protect the proper performance of non-fiduciary duties is also given vent in the fiduciary principle that prohibits a fiduciary from acting, or continuing to act, where there is a conflict between duties owed to multiple principals. Millett L.J. explained in *Mothew* that a "fiduciary who acts for two principals with potentially conflicting interests without the informed consent of both is in breach of the obligation of undivided loyalty; he puts himself in a position where his duty to one principal *may* conflict with his duty to the other …. Breach of the rule automatically constitutes a breach of fiduciary duty." [83] This principle developed out of the principle regarding conflicts between duty and interest. Lord Eldon L.C., who contributed significantly to the shaping of fiduciary doctrine into the form in which we now know it, explained in *Ex p. Bennett* that the concern which multiple conflicting duties raise is fiduciary doctrine's fundamental concern with temptation to breach those non-fiduciary duties [84]:

"if the principle be, that the Solicitor cannot buy for his own benefit, I agree, where he buys for another, the temptation to act wrong is less: yet, if he could not use the information he has for his own benefit, it is too delicate to hold, that the temptation to misuse that information for another person is so much weaker, that he should be at liberty to bid for another … That distinction is too thin to form a safe rule of justice."

The fiduciary "profit" principle (as opposed to the two "conflict" principles just examined) is a little less clearly concerned with protection of non-fiduciary duties, but it is suggested that it too can be understood as providing a penumbral part of that protection. The profit principle is hard to analyse as it is difficult to find much material from which to do so. The reason for this is that most of the cases where a profit is made in breach of fiduciary duty also involve the fiduciary acting in a situation of conflict between duty and interest. *De Bussche v Alt* provides an example of the difficulty. An agent, who had been contracted to sell his principal's ship in the Orient, had some trouble arranging a sale but eventually arranged to sell the ship to a Japanese prince for $160,000. Instead of arranging the transaction directly between the prince and his principal, the agent interposed himself, buying the ship from his principal for $90,000 and then completing the sale to the prince. The consequent profit of $70,000 was ***L.Q.R. 466*** clearly made in breach of fiduciary duty and the agent was required to account to the principal. In explaining the "law under which an agent is prevented from making a profit out of his employment", [85] the Court of Appeal stated the problem with the situation in terms of the conflict between the agent's personal interest and the non-fiduciary duty owed to his principal: "one cannot but feel some doubt whether [the prince] might not possibly, if the Defendant's own interest had been out of the way, have been induced to give … a sum … exceeding, at least to a small amount, the limit of $90,000 fixed by the Plaintiff." [86] This difficulty has caused numerous observations in dicta to the effect that the profit principle is merely a subset of the conflict principle: in *Boardman v Phipps,* for example, Lord Upjohn referred to "the fundamental rule of equity that a person in a fiduciary capacity must not make a profit out of his trust which is part of the wider rule that a trustee must not place himself in a position where his duty and his interest may conflict." [87]

On the other hand, the High Court of Australia has suggested that the conflict and profit principles, "while overlapping, are distinct". [88] This appears now to be the mainstream view and is supported by cases decided in the House of Lords. In *Brown v Inland Revenue Commissioners,* for example, Lord Reid and Lord Upjohn both referred to what appears to be a separate profit rule, [89] although without analysing its relationship to the conflict rule. And the decisions in *Regal (Hastings) Ltd v Gulliver* [90] and *Boardman v Phipps* [91] both seem to have been based more on the finding that the fiduciaries in those cases had made a profit by reason of their fiduciary position rather than on there having been a conflict between duty and interest. [92] The question which then arises is, what is the basis of this fiduciary profit principle?

When separating the two principles, the High Court of Australia opined that the conflict rule was designed "to preclude the fiduciary from being swayed by considerations of personal interest", [93] but the profit rule was designed "to preclude the fiduciary from actually misusing his position for personal advantage." [94] It is suggested that Lord Upjohn's observation in ***L.Q.R. 467*** *Boardman v Phipps,* [95] that the profit rule is part of the wider conflict rule, provides the key to this conundrum. His observation is incorrect insofar as it suggests that the profit rule is merely a subset of the conflict rule, as not all profit cases necessarily involve an identifiable conflict between duty and interest: if he were correct, there would be no need for a separate profit rule. But Lord Upjohn's observation is important as it reflects the genesis of the profit rule. The historical development of the profit rule suggests that it was born out of the conflict rule. [96] It is suggested that the reason for the profit rule having developed an existence of its own is that it was recognised that situations where a fiduciary has made an unauthorised profit out of his fiduciary position are situations where there will *commonly* or *generally* be a conflict between duty and interest. In other words, in virtually all cases where a profit is made out of a fiduciary position, the fiduciary will have acted in a way that involves a conflict between his non-fiduciary duty and his personal interest. That explains the difficulty in separating the two rules from one another, while also explaining the reason for the existence of the profit rule: it is simply a pragmatic response to the likelihood of a conflict being present in such settings. As Lord Nicholls of Birkenhead said recently [97]:

"Equity reinforces the duty of fidelity owed by a trustee or fiduciary by requiring him to account for any profits he derives from his office or position. This ensures that trustees and fiduciaries are financially disinterested in carrying out their duties. They may not put themselves in a position where their duty and interest conflict. To this end they must not make any unauthorised profit."

In other words, rather than being concerned with situations where there is an "actual misuse" [98] of the fiduciary position, the profit rule is based fundamentally on the same concern as the conflict rule: it too focuses on situations which carry an increased *risk* of the fiduciary abandoning his non-fiduciary duty in favour of his personal interest. Fiduciary doctrine has not developed a sophisticated understanding of what it means to "misuse" a fiduciary position, as one would expect it to have done over several hundred years of evolution if that were its central concern. Instead, it has developed sophisticated rules which are designed to enhance the chances of proper performance of non-fiduciary duties by requiring fiduciaries to eschew situations where there is a risk that they will be swayed away from such performance. The profit principle appears to have been an outgrowth from

the more fundamental conflict principle, rather than a separate kind of **L.Q.R. 468* doctrine, which explains the relatively small number of cases involving a breach of the profit rule without there also being identifiable a sensible possibility of conflict between duty and interest.

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(b) Prophylaxis in fiduciary doctrine

The protection that fiduciary doctrine provides with respect to non-fiduciary duties is prophylactic in nature. While it is quite commonly observed that fiduciary duties are prophylactic, [99] it is suggested that there is more to the prophylactic aspect of fiduciary doctrine than is ordinarily meant by such observations. Such observations generally refer to equity having set the boundaries of liability for fiduciaries more widely than might strictly be necessary to meet the normative justifications for that liability. [100] Thus, for example, in the famous case of *Keech v Sandford,* [101] a trustee was in breach of fiduciary duty when he bought the lease of Romford market for himself after the previous lease, which he had been holding on trust for an infant, had expired and the landlord had refused to renew the lease in favour of the infant. The trustee was under a duty to attempt to obtain a renewal of the lease for the benefit of the infant, but he acted in breach of fiduciary duty despite the fact that in the circumstances he could not achieve that end. Lord King L.C. said, "if a trustee, on the refusal to renew, might have a lease to himself, few trust-estates would be renewed to *cestui que* use". [102] It is the harsh or strict application of the rule, in circumstances where it seems the fiduciary has done no apparent "wrong", which traditionally attracts the prophylactic epithet. [103] The rationale for this aspect of fiduciary doctrine's prophylaxis is the difficulty of proving in any given case whether or not the fiduciary actually has done everything he ought to have done. As Lord Eldon L.C. said in *Ex p. Lacey* [104]:

"though you may see in a particular case, that [the trustee] has not made advantage, it is utterly impossible to examine upon satisfactory evidence in the power of the Court, by which I mean, in the power of **L.Q.R. 469* the parties, in ninety-nine cases out of an hundred, whether he has made advantage, or not."

This form of prophylaxis in fiduciary doctrine is essentially a matter of methodology; it concerns difficulties of proof and the way fiduciary doctrine is applied. [105] However, it is suggested that there is a further aspect of prophylaxis in fiduciary doctrine that is not quite reached by the sorts of observations which have just been mentioned. The very nature of fiduciary doctrine, as opposed merely to its methodology, is itself prophylactic in the sense that the very object of its rules and principles is to try to remove or neutralise incentives that might tempt or otherwise motivate a fiduciary not to perform properly his non-fiduciary duties.

Some commentators have noted this aspect of prophylaxis, although without discussion of its relationship to the more commonly identified prophylactic element in fiduciary doctrine. Birks, for example, said that "one prophylactic technique is to impose a duty not to bring about a situation in which the mischief in question *might* happen … The mischief which equity seeks to avoid is the sacrifice of the beneficiary's interests which is likely to happen if the fiduciary pursues such an opportunity." [106]

Both forms of prophylaxis involve rules that are crafted more widely than is strictly necessary to capture the situations that cause concern. However, the traditionally recognised form of prophylaxis is intended to try to capture *all* of the situations that are considered "wrong", recognising that, in order to do so, some "non-wrongs" will also be caught. Here, a cause of action responds to more situations than are justified by the policy concerns that underlie it because procedural and evidential difficulties mean a more narrowly crafted cause of action might fail to meet those concerns. In contrast, the less recognised form of prophylaxis, which is central to the analysis developed in this article, simply operates to make a wrong *less likely,* by attempting to avoid situations where that wrong is more likely to occur. Here, prophylaxis forms the very reason for the existence of the cause of action, rather than merely the reason for the overinclusive breadth of a cause of action.

Fiduciary doctrine seeks to avoid breaches of non-fiduciary duties, but it cannot guarantee that such breaches will never occur as non-fiduciary duties can be breached for many reasons entirely unrelated to the concerns that attract fiduciary liability. Hence, while fiduciary doctrine certainly captures situations in which there has been no breach of non-fiduciary duty (and, indeed, where the fiduciary's conduct has actually benefited his **L.Q.R. 470* principal [107]), it is not simply an over-broad capturing of all of the "wrongs" that constitute breach of non-fiduciary duty. Rather, its purpose is to provide prophylactic protection designed to make such wrongs less likely to occur.

Lord Herschell's famous dictum in *Bray v Ford* highlights the prophylactic purpose of fiduciary doctrine [108]:

"It is an inflexible rule of a Court of Equity that a person in a fiduciary position … is not allowed to put himself in a position where his interest and duty conflict. It does not appear to me that this rule is, as has been said, founded upon principles of morality. I regard it rather as based on the consideration that, human nature being what it is, there is danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he is bound to protect."

Fiduciary doctrine's fundamentally prophylactic nature is apparent here; it is clear that the normative justification for its existence is to avoid situations which involve a risk of breach of non-fiduciary duties. Thus, in *Keech v Sandford,* the trustee's fiduciary duty existed in order to make it more likely that he would perform his non-fiduciary duty to seek to obtain a renewal of the lease for the benefit of his beneficiary.

It is suggested, therefore, that fiduciary doctrine is prophylactic *both* in its strict mode of application *and,* importantly, in its fundamental nature. The two forms of prophylaxis are related in the sense that fiduciary duties are applied strictly in order to assist with achieving the normative prophylactic function that fiduciary doctrine serves. As Heydon J.A. recently observed in *Harris v Digital Pulse Pty Ltd* [109] :

"[fiduciary rules] are prophylactic in the sense that they tend to prevent the disease of temptation in the fiduciary--they preserve or protect the fiduciary from that disease …

The prevention of or protection from the relevant disease is assisted by the strictness of the standard imposed and the absence of defences justifying departure from it."

The second part of this observation reflects the form of prophylaxis traditionally associated with fiduciary doctrine, while the first part of the observation reflects the prophylactic essence of fiduciary doctrine. Heydon J.A. did not identify precisely what is "the disease of temptation", but it is ***L.Q.R. 471*** suggested that the "disease" protected against is the temptation to breach non-fiduciary duties. Fiduciary doctrine protects against that "disease" by seeking to neutralise the temptation and is in that sense prophylactic: it protects against breach of non-fiduciary duties by removing incentives which increase the risk of such breaches occurring. This sort of protection is not perfect, as the removal of temptations to breach non-fiduciary duties is not a guarantee that those non-fiduciary duties will be performed properly. However, fiduciary doctrine seeks to make such breaches less likely than if temptation were allowed to remain. Heydon J.A.'s comment also highlights that fiduciary doctrine's prophylactic *methodology* is best understood and explained by reference to its fundamentally prophylactic *nature.* Identifying that it is difficult to prove certain matters does not establish that proof of, or failure to prove, those matters should cause any concern. On the other hand, a prophylactic approach to issues of proof and enforcement is far more easily understood if the very reason for the existence of the relevant rule is to provide prophylactic protection for other legal duties.

信託義務的輔助性

(c) Subsidiarity of fiduciary duties

Referring to fiduciary doctrine as "subsidiary" in nature captures the distinct nature of fiduciary and non-fiduciary duties respectively. Fiduciary duties are subsidiary to non-fiduciary duties in the sense that they can be seen to perform a different, prophylactic protective, function when compared with non-fiduciary duties. Fiduciary duties are distinct from non-fiduciary duties and proof of breach of a fiduciary duty is in no way dependent upon proof of breach of a non-fiduciary duty. Hence, fiduciary doctrine does not achieve its protective function merely by increasing or superseding the remedies made available for breach of non-fiduciary duties. Fiduciary doctrine seeks to *avoid* breaches of non-fiduciary duty, not to stigmatise them as a more egregious form of such breach. [110] . 信託學說試圖避免違反非信託義務的行為，而不是將其汙衊為這種違反行為的更惡劣形式

Fiduciary duties are subsidiary duties, in the sense that they protect non-fiduciary duties, but they are not secondary duties as that concept is normally understood in the law of contract and tort. Secondary duties are duties that arise upon breach of primary duties, such as the secondary duty to pay damages that arises where the primary duty to perform a contract has been breached. [111] Fiduciary duties do not serve that sort of function. As Finnis has explained in a different context, ""subsidiarity' [here] signifies not secondariness or subordination, but assistance: the Latin for help or assistance is *subsidium.*" [112] Fiduciary duties assist with securing the proper ***L.Q.R. 472*** performance of non-fiduciary duties by seeking to insulate fiduciaries against situations where they might be swayed away from providing such proper performance.

IV. IMPLICATIONS

Having outlined what is meant by the proposition that fiduciary doctrine provides a subsidiary and prophylactic form of protection for non-fiduciary duties, it is now possible to consider some of the implications of conceiving of fiduciary doctrine in this way.

(a) Morality

The foregoing argument suggests, for example, that the relatively common view of fiduciary doctrine as moralistic in its outlook is an inaccurate representation of the purpose of fiduciary doctrine. The moralistic view, that fiduciary doctrine is concerned with maintaining "the highest standards of probity" [113] in fiduciaries, was given much impetus by Cardozo C.J.'s well-known dictum in *Meinhard v Salmon*: "A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior." [114] English judges have also, at times, referred to the fiduciary conflict principle as "founded upon the highest and truest principles of morality", [115] as have other Commonwealth judges. [116]

Fiduciary doctrine is not concerned with eliciting more moral conduct on the part of a fiduciary, nor with eliciting more than proper performance of the non-fiduciary duties he owes. Its purpose, as has been explained, is to increase the likelihood of proper performance of those duties by insulating the fiduciary from situations that involve temptations not to do so. In addition to the points already made about the nature and function of fiduciary doctrine, two further points reinforce its amoral nature. First, English fiduciary doctrine does not interfere with the proposition that trustees may be duty-bound "to act dishonourably (though not illegally) if the interests of their beneficiaries require it", [117] contrary to what one might expect if Cardozo C.J. were correct in saying that fiduciary doctrine is designed to ensure that "the level of conduct of fiduciaries [is] kept at a level higher than that trodden by the crowd." [118] Secondly, in addition to ***L.Q.R. 473*** observing that fiduciary doctrine is based on a cynical view of human nature rather than on considerations of morality, [119] Lord Herschell, and also Lord Watson, both emphasised in *Bray v Ford* that "a breach of [fiduciary duty] may be attended with perfect good faith, and it is … insufficient to justify a charge of moral obliquity, unless it is shewn to have been committed knowingly or with an improper motive." [120] In other words, fiduciary doctrine applies no matter how honest the fiduciary may have been. [121] Similarly, courts refuse to consider whether the fiduciary's conduct was for the benefit of the principal. [122] Fiduciary analysis does not depend upon such matters as the doctrine's fundamental concern is not with improving the standards of conduct of fiduciaries.

It can, of course, be argued that increasing the chance of proper performance of non-fiduciary duties could be described as a moral outcome, in the sense that it is for the benefit of the principal. If all that were meant when fiduciary doctrine is described as based on principles of "morality" is that it is moral to make proper performance of someone's duties more likely, then the proposition is unobjectionable, although relatively uninformative. But that is not what is normally meant by the high-handed moral rhetoric which frequently encrusts discussion of fiduciary doctrine. Such rhetoric should be discarded as it misguides inquiry into the true nature and function of fiduciary doctrine. Fiduciary doctrine is fundamentally far more instrumentalist or functionalist in outlook than it is moralist.

(b) Motives

Smith has argued recently that "the essence of the fiduciary obligation … lies in the justiciability of motive." [123] More fully, his argument is that "the attempt to understand the duty of loyalty in terms of results will always fail, because the duty is not directed to any result, not even a negative one. Rather, it is a required *manner* of doing what one does, or not doing what one does not do … It is a duty to act (or not) with the right motive." [124] Smith's focus on ensuring that fiduciaries act for the right purposes or motive leads him to conclude, somewhat surprisingly, that, because the ***L.Q.R. 474*** fiduciary duty is concerned with motive, the conflict and profit rules are not themselves fiduciary duties; rather, they are prophylactic rules designed to protect against violation of the fiduciary obligation to act with the right motive. [125]

It is a fundamental premise of Smith's argument that the requirement that holders of powers exercise those powers for a proper purpose is a fiduciary doctrine. [126] That doctrine arguably is concerned with the propriety or otherwise of the reasons for action or inaction of the person whose decision is under review, rather than with the result of that decision. [127] However, as was

discussed in detail earlier, [128] it is far from clear that the doctrine is peculiar to fiduciaries and so it is far from clear that it provides a solid foundation on which to construct a theory as to the nature of fiduciary doctrine.

Smith's argument is consistent with, and seeks to support, the North American view that there is a "fiduciary duty to act in what [the fiduciary] perceives to be the best interests of the beneficiary." [129] This duty seems to derive from the frequent failure in American fiduciary jurisprudence to distinguish between doctrines that apply only to fiduciaries and those that apply both to fiduciaries and to non-fiduciaries. Canadian fiduciary jurisprudence seems to have been influenced by this approach, "developing notions of "the fiduciary' and "fiduciary duties' which are rather different from those used elsewhere in the Commonwealth." [130] English and Australian courts have refused to accept that the positive duties [131] that flow from such analysis are fiduciary in nature: Anglo-Australian fiduciary doctrine "tells the fiduciary what he must not do. It does not tell him what he ought to do." [132] In Anglo-Australian law, a fiduciary's duty to act in the interests **L.Q.R. 475* of his or her principal is given legal force through positive non-fiduciary duties which are protected by negative fiduciary duties. Smith's analysis does not sit well with the fundamental precepts and case law of Anglo-Australian fiduciary doctrine.

At one level, fiduciary doctrine can be said to be concerned with motive: removing the fruits of temptation is designed to avoid fiduciaries being motivated by those temptations. Smith is also correct that fiduciary doctrine is not generally "judged by result", [133] but this does not mean that motives, rather than results, are the normative concern underpinning fiduciary doctrine. Smith argues that "the prophylactic rules entitle the beneficiary *not to have to wonder about the fiduciary's motive.*" [134] But prophylaxis is not merely an evidential or methodological aspect of fiduciary doctrine; it is its fundamental purpose. That purpose is prophylactic in the sense that it is concerned to reduce the likelihood of a fiduciary acting in breach of non-fiduciary duty; it is "based on the consideration that, human nature being what it is, there is danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than by duty, *and thus prejudicing those whom he is bound to protect.*" [135] Motives do not cause prejudice in themselves; fiduciary doctrine protects against the possibility of prejudice being caused by breach of non-fiduciary duties.

(c) Scope of fiduciary duties and relationship to non-fiduciary duties

Understanding fiduciary duties as providing subsidiary, prophylactic protection for non-fiduciary duties also explains a number of important tenets of fiduciary doctrine.

For example, it is frequently observed that "the scope of the fiduciary duty must be moulded according to the nature of the relationship and the facts of the case". [136] This proposition is sometimes thought to buttress the view that fiduciary duties are concerned with exhorting moral behaviour on the part of fiduciaries and are therefore merely a matter of unruly judicial discretion. That is a misunderstanding. It fails to take account of, and it cannot explain, the frequent references to fiduciary duties as inexorable and inflexible in their operation. [137] The explanation for fiduciary duties being moulded to each fiduciary relationship, yet inexorable in their operation, lies in the protective function which fiduciary doctrine serves *vis-à-vis* non- **L.Q.R. 476* fiduciary duties. If the purpose of fiduciary doctrine is to avoid situations where a fiduciary might be swayed by incentives inconsistent with his non-fiduciary duties, it is a logically prior inquiry to ascertain what those non-fiduciary duties actually entail. Only then can one sensibly begin to determine whether the fiduciary's personal interests are reasonably considered in conflict with those duties: "You must ascertain what the fiduciary has undertaken to do, before you can say he has permitted his interests to conflict with his undertaking." [138] The non-fiduciary duties which comprise the fiduciary's undertaking depend, naturally enough given they are normal legal and equitable duties, upon the factual circumstances of the particular relationship. It is therefore crucial to analyse carefully *both* non-fiduciary *and* fiduciary duties when considering whether fiduciary liability has been made out in a particular case. This helps explain the Privy Council's observation in *Kelly v Cooper* that "the scope of the fiduciary duties owed by the defendant to the plaintiff (and in particular the alleged duty not to put themselves in a position where their duty and their interest conflicted) are to be defined by the terms of the contract of agency." [139] The fiduciary duty applies inexorably [140] if there is a real sensible possibility of conflict between duty and interest, but that analysis must logically be moulded to the particular duties and interests that actually exist in each fiduciary relationship. [141]

Fiduciary doctrine's subsidiary nature also explains why "the essence of a fiduciary relationship is that it creates obligations of a different character from those deriving from the contract itself." [142] While fiduciary duties can legitimately be considered part of the law of civil wrongs, [143] it risks losing sight of their true nature and function to treat them as equivalent to, or part of,

the law of torts or of contract. The doctrines that constitute the "ragbag" [144] of tort law do not serve the protective function that fiduciary duties serve with respect to other duties. Tort law obligations are generally either directly responsive to the infliction of harm, such as negligence, or constitutive of property rights, such as trespass and conversion. Nor do ***L.Q.R. 477*** contractual obligations generally exhibit the protective function of fiduciary doctrine. It is, of course, possible for contractual rights to be crafted in such a way as to be protective of other rights, but this reflects the flexibility of the institution of contract rather than its fundamental nature or purpose.

The prophylactic protective function served by fiduciary doctrine also helps to explain the Anglo-Australian maxim which holds that fiduciary duties are proscriptive, rather than prescriptive. [145] The proscriptive nature of fiduciary duties is a consequence of the protective function they serve. Fiduciary doctrine seeks to increase the likelihood that a fiduciary will properly perform his non-fiduciary duties by insulating him from influences which have a tendency to sway the fiduciary away from such proper performance. As the removal of such influences is an essentially negative task, it is quite natural that the fiduciary duties imposed to achieve that result are themselves essentially proscriptive or negative in nature.

(d) Approaching unresolved issues

The understanding of the nature and function of fiduciary doctrine advanced here is also potentially helpful in approaching currently unsettled issues within fiduciary doctrine.

An example is the question whether a fiduciary might be able to argue contributory fault on the part of his principal to reduce an award of equitable compensation made for breach of fiduciary duty. It is clear in England that where a breach of fiduciary duty involved *intentionally* favouring one client over another, contributory fault on the part of the principal cannot be claimed. [146] It has been assumed that this means contributory fault cannot be claimed in *any* case involving breach of fiduciary duty, [147] although this has not yet been decided formally in England. Such pleas are unavailable in Australia, [148] but have been upheld in New Zealand. [149] Remaining true to its protective function, fiduciary doctrine ought not to allow such pleas. Consider, for example, a situation where a fiduciary is acting for two principals and owes duties to each which are inconsistent, such that the fiduciary cannot perform his duty to one principal without breaching his duty to the other. The fiduciary principle regarding conflicts between inconsistent duties requires the fiduciary to ***L.Q.R. 478*** cease acting for at least one principal, and preferably both, [150] in order to avoid breach of the fiduciary's non-fiduciary duties. If the fiduciary fails to heed that proscription and continues to act, thereby breaching at least one non-fiduciary duty, he ought to be liable for the loss which flows from that breach without reduction for contributory fault, as it was that very result against which fiduciary doctrine sought to protect.

Further, a proper understanding of the nature and function of fiduciary doctrine is vital when considering the increasingly frequent calls for alleviation of its strictness. [151] For example, when debating whether mechanisms such as Chinese walls ought to provide immunity from allegations of breach of fiduciary duty where solicitors act for more than one principal in a single matter, Mitchell has argued that the disqualification rules that fiduciary duties create "may limit the scope for multidisciplinary practices, seen by some consumers of legal services as the way of the future." [152] It is not suggested that analysing fiduciary doctrine as serving a protective function necessarily resolves this debate, as the question is ultimately one of public policy. It is, however, suggested that the debate can only proceed at an impoverished level of sophistication if it fails to recognise, and to engage with, the fundamental nature and function served by fiduciary doctrine as it presently stands. Understanding that fiduciary doctrine serves to protect non-fiduciary duties from situations involving heightened risk of their breach tends to militate against alleviating too readily the strict prophylaxis of fiduciary doctrine in order to sanction recent developments in commercial practice. Norris J.A.'s observation in *Peso Silver Mines v Cropper* seems no less relevant today, in light of recent experiences with companies such as Enron, than it did 40 years ago [153] :

"The history today of the activities of many corporate bodies has disclosed scandals and loss to the public due to failure of the directors to recognize the requirements of their fiduciary position."

Another point that calls for mention is the effect that understanding fiduciary doctrine as suggested in this article might have on the extent of ***L.Q.R. 479*** secondary liability for assistance provided to those who act in breach of fiduciary duty or for receipt of property transferred in breach of fiduciary duty. As is well known, persons who are not trustees or fiduciaries themselves, may nevertheless be held personally liable if they assist in a breach of trust or of fiduciary duty, or if they receive property that was transferred to them as a direct result of a breach of trust or of fiduciary duty. [154] Treating fiduciary duties as only

those duties that are peculiar to fiduciaries [155] need not limit the extent of such accessory liability. The reason is that in the context of accessory liability the fiduciary concept is being used only in order to export the incidents of the trustee-beneficiary relationship to other relationships. [156] When that is understood, a breach of any duty which would constitute a breach of trust in an ordinary trust situation should suffice for accessory liability in other fiduciary relationships; not merely those breaches which would constitute a breach of fiduciary duty in the restricted sense. [157] In other words, not every breach of duty by a fiduciary is a breach of fiduciary duty, but a breach of duty by a fiduciary can nonetheless suffice for accessory liability to arise in third parties on the basis that it is sufficiently similar to a breach of trust. [158]

V. CONCLUSION

In 1981, Shepherd observed that the "terms fiduciary relationship and duty of loyalty are so much co-extensive as to be, in effect, alternate descriptions of the same thing." [159] As alternate descriptions of the same thing, neither can tell us much about the other. The notion of loyalty in Anglo-Australian fiduciary doctrine is an umbrella concept, much like the concept of unjust enrichment in the law of restitution. It is not something to which fiduciary doctrine resorts directly in order to ascertain the appropriate way to resolve particular disputes. Fiduciary doctrine is not comprised merely of a single and simple duty to be loyal. Rather, fiduciary doctrine comprises several doctrines, such as the prohibition on fiduciaries acting where there is a conflict between duty and interest, and it is those doctrines that constitute the concept of fiduciary loyalty. The concept of loyalty is equated at times with a duty to act in the best interests of the principal but this "provide[s] no immediate yardstick against which to measure the ***L.Q.R. 480*** propriety or impropriety of a fiduciary's actions in a particular case." [160] Instead, the "distinguishing" or "core" [161] fiduciary obligation of loyalty is best understood as an encapsulation of an idea which is given effect through the various doctrines peculiar to fiduciaries, rather than as a directly enforceable duty. It is through those doctrines that the principal's interests in the relationship are secured as paramount.

The idea encapsulated by the phrase "fiduciary loyalty" is a subsidiary and prophylactic mode of protection for non-fiduciary duties. The purpose of fiduciary duties, and the function served by fiduciary doctrine generally, is to enhance the chance of proper performance of the non-fiduciary duties that comprise the fiduciary's undertaking by protecting against influences that might sway the fiduciary away from such proper performance. This understanding of fiduciary doctrine allows it to be sensitive to, and moulded by, the different non-fiduciary duties inherent in the fact that fiduciary duties protect a variety of different kinds of undertaking. It is suggested that this understanding of fiduciary doctrine is well-grounded in Anglo-Australian case law, that it provides a powerful theoretical basis for the explanation of numerous important tenets within fiduciary doctrine, and that it has the potential to help in resolving currently unsettled issues regarding the practical application of that doctrine.

MATTHEW CONAGLEN.

Footnotes

1 Mason, "Themes and Prospects" in Finn (ed), *Essays in Equity* (1985), p.242 at p.246. See also *LAC Minerals Ltd v International Corona Resources Ltd* [1989] 2 S.C.R. 574 at 643-644; (1989) 61 D.L.R. (4th) 14 at 26.

2 See, *e.g. Hospital Products Ltd v United States Surgical Corp* (1984) 156 C.L.R. 41 at 96 and 141; *Lloyds Bank Ltd v Bundy* [1975] Q.B. 326 at 341; *Maclean v Arklow Investments Ltd* [1998] 3 N.Z.L.R. 680 at 691.

3 *Bristol and West BS v Mothew* [1998] Ch. 1 at 18; *Boulting v Association of Cinematograph, Television and Allied Technicians* [1963] 2 Q.B. 606 at 636; *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 N.Z.L.R. 664 at 680-681 and 687; *K.L.B. v British Columbia* [2003] 2 S.C.R.403 at 432-433; (2003) 230 D.L.R. (4th) 513 at 535; *Chirnside v Fay* [2004] 3 N.Z.L.R. 637 at 647; and see Millett, "Equity's Place in the Law of Commerce" (1998) 114 L.Q.R. 214 at 219.

4 See, *e.g.* Butler and Ribstein, "Opting out of Fiduciary Duties: a Response to the Anti-Contractarians" (1990) 65 Washington L.Rev. 1 at pp.19, 30 and 32; Easterbrook and Fischel, "Contract and Fiduciary Duty" (1993) 36 J. Law and Econ. 425 at pp.427 and 431; Whincop, "Of Fault and Default: Contractarianism as a Theory of Anglo-Australian Corporate Law" (1997) 21 Melb.U.L.R. 187 at 189, 199-200 and 207.

5 See, *e.g.* Birks, "The Concept of a Civil Wrong" in Owen (ed), *Philosophical Foundations of Tort Law* (1995), p.31 at p.35; Birks "Definition and Division: a Meditation on *Institutes* 3.13" in Birks (ed), *The Classification of Obligations* (1997), p.1 at p.14 (referring to them as "meta-torts"); Burrows, *Understanding the Law of Obligations: Essays on Contract, Tort and Restitution* (1998), pp.14 and 31; Dugdale (ed), *Clerk and Lindsell on Torts* (18th ed., 2000), paras 1-02, 1-12 and Ch.28.

6 *Mothew,* above, n.3 at 17.

7 See, *e.g. ibid.,* at 16; *Henderson v Merrett Syndicates Ltd* [1995] 2 A.C. 145 at 205; *Aquaculture Corp v New Zealand Green Mussel Co Ltd* [1990] 3 N.Z.L.R. 299 at 301; *Lockwood Buildings Ltd v Trust Bank Canterbury Ltd* [1995] 1 N.Z.L.R. 22 at 26; *B.N.Z. v Guardian Trust,* above, n.3 at 686-687; Mason, "The Place of Equity and Equitable Remedies in the Contemporary Common Law World" (1994) 110 L.Q.R. 238 at 258; Maxton, "Equity and the Law of Civil Wrongs" in Rishworth (ed), *The Struggle for Simplicity in the Law: Essays for Lord Cooke of Thorndon* (1997), p.91 at p.94; Tipping, "Causation at Law and in Equity: Do We Have Fusion?" (2000) 7 Canterbury L.R. 443 at p.448.

8 See, *e.g.* the discussion in Pt IV(d), below.

9 See also Austin, "Moulding the Content of Fiduciary Duties" in Oakley (ed.), *Trends in Contemporary Trust Law* (1996), p.153 at p.159; Birks, "The Content of Fiduciary Obligation" (2000) 34 Israel L.Rev. 3 at 4 (re-published at (2002) 16 T.L.I. 34).

10 There is a strong, yet rebuttable, presumption that fiduciary duties will be owed in such relationships: *LAC Minerals,* above, n.1 at 646-647 (S.C.R.); 28 (D.L.R.).

11 See, *e.g.* Hayton and Marshall, *Commentary and Cases on the Law of Trusts and Equitable Remedies* (11th ed., 2001), para.6-13; Meagher, Heydon and Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (4th ed., 2002), para.5-005.

12 See, *e.g. Corpus Juris Secundum* (1990), Vol.19: *Corporations,* para.478; Block, Barton and Radin, *Business Judgment Rule: Fiduciary Duties of Corporate Directors* (3rd ed., 1989), p.27; Frankel, "Fiduciary Duties as Default Rules" (1995) 74 Oregon L.Rev 1209 at 1213; Langbein, "The Contractarian Basis of the Law of Trusts" (1995) 105 Yale L.J. 625 at 642, 643 and 655; Hansmann and Mattei, "The Functions of Trust Law: a Comparative Legal and Economic Analysis" (1998) 73 N.Y.U.L.R. 434 at 447; Smith, "The Critical Resource Theory of Fiduciary Duty" (2002) 55 Vand.L.Rev. 1399 at 1453.

13 See, *e.g.* Brudney, "Contract and Fiduciary Duty in Corporate Law" (1997) 38 Boston Coll.L.Rev. 595 at 599, n.9; Cox, Hazen and O'Neal, *Corporations* (looseleaf ed.), para.10.19, n.1. Not all North Americans adopt this approach, however: see, *e.g.* Shepherd, *Law of Fiduciaries* (1981), p.49; Flannigan, "Fiduciary Duties of Shareholders and Directors" [2004] J.B.L. 277 at 279.

14 See *In re West of England and South Wales District Bank, ex p. Dale and Co* (1879) 11 Ch.D. 772 at 778; *Swindle v Harrison* [1997] 4 All E.R. 705 at 734; *Gwembe Valley Devt Co Ltd v Koshy* [2003] EWCA Civ 1478; [2004] 1 B.C.L.C. 131 at [89]; Finn, *Fiduciary Obligations* (1977), para.7; Finn, "The Fiduciary Principle" in Youdan (ed.), *Equity, Fiduciaries and Trusts* (1989), p.1 at pp.34-35; Birks, above, n.9 at pp.3 and 8-9.

15 Weinrib, "The Fiduciary Obligation" (1975) 25 U.T.L.J. 1 at 5.

16 The search for a principle to identify such relationships has been compared to the search for the Holy Grail: Waters, "Banks, Fiduciary Obligations and Unconscionable Transactions" (1986) 65 Can. Bar Rev. 37 at 56.

17 None of the numerous academic suggestions has yet gained universal judicial acceptance: see, *e.g.* Scott, "The Fiduciary Principle" (1949) 37 Calif.L.Rev. 539 at 540; Sealy, "Fiduciary Relationships" [1962] C.L.J. 69 at 72-79; Weinrib, above, n.15 at 4 and 15; Finn, *Fiduciary Obligations* (1977), para.467; Shepherd, *Law of Fiduciaries* (1981), p.96; Shepherd, "Towards a Unified Concept of Fiduciary Relationships" (1981) 97 L.Q.R. 51 at 74-76; Finn, "The Fiduciary Principle" in Youdan (ed), *Equity, Fiduciaries and Trusts* (1989), p.1 at pp.46 and 54; Flannigan, "The Fiduciary Obligation" (1989) 9 O.J.L.S. 285 at 309-310.

18 n.3 above.

19 See, *e.g.* in Australia: *Permanent BS v Wheeler* (1994) 14 A.C.S.R. 109 at 157; in Canada: *Girardet v Crease and Co* (1987) 11 B.C.L.R. (2d) 361 at 362; *LAC Minerals,* above, n.1 at 597 and 647 (S.C.R.);

61 and 28 (D.L.R.); *Roberts v R.* [2002] 4 S.C.R. 245 at 288; (2002) 220 D.L.R. (4th) 1 at 37; and in New Zealand: *B.N.Z. v Guardian Trust,* above, n.3 at 680.

20 *Mothew,* above, n.3 at 16.

21 *ibid.*

22 *Hilton v Barker Booth and Eastwood (a firm)* [2005] UKHL 8; [2005] 1 W.L.R. 567 at [29] approving Millett L.J.'s observations in *Mothew,* above, n.3 at 16-17; see also *Wheeler,* above, n.19 at 157; *Base Metal Trading Ltd v Shamurin* [2004] EWCA Civ 1316; [2005] 1 W.L.R. 1157 at [19]. *Cf.* Goldfinch, "Trustee's Duty to Exercise Reasonable Care: Fiduciary Duty?" (2004) 78 A.L.J. 678, especially at 680-681, which purports to adopt the distinction but fails to identify how it is drawn.

23 See, *e.g. Medforth v Blake* [2000] Ch. 86 at 98; *Yorkshire Bank Plc v Hall* [1999] 1 W.L.R. 1713 at 1728; *Downsview Nominees Ltd v First City Corp Ltd* [1993] A.C. 295 at 316.

24 See, *e.g. Lagunas Nitrate Co v Lagunas Syndicate* [1899] 2 Ch. 392 at 435 and 437.

25 *Wheeler,* above, n.19 at 158.

26 *Mothew,* above, n.3 at 18.

27 *Armitage v Nurse* [1998] Ch. 241 at 253-254. See also Hayton, "The Irreducible Core Content of Trusteeship" in Oakley (ed), *Trends in Contemporary Trust Law* (1996), p.47 at pp.57-58.

28 See, *e.g. Groom v Crocker* [1939] 1 K.B. 194 at 203; *Price v Bouch* (1986) 53 P. & C.R. 257 at 261; *Downsview Nominees Ltd v First City Corp Ltd* [1993] A.C. 295 at 317; *Abu Dhabi National Tanker Co v Product Star Shipping Line Ltd (The Product Star) (No.2)* [1993] 1 Lloyd's Rep. 397 at 404; *Yorkshire Bank Plc v Hall* [1999] 1 W.L.R. 1713 at 1728; *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (No.2)* [2001] EWCA Civ 1047; [2001] 2 All E.R. (Comm) 299 at [67]-[68], [76] and [81]; *Paragon Finance Plc v Nash* [2001] EWCA Civ 1466; [2002] 1 W.L.R. 685 at [32] and [36].

29 See, *e.g. Price v Bouch, ibid.*, at 260; *Gan Insurance, ibid.*, at [68].

30 See, *e.g. Knight v Marjoribanks* (1849) 2 Mac. & G. 10 at 13-14; 42 E.R. 4 at 5; *Warner v Jacob* (1882) 20 Ch.D. 220 at 224; *Farrar v Farrars Ltd* (1888) 40 Ch.D. 395 at 398 and 410-411; *Colson v Williams* (1889) 58 L.J. Ch. 539 at 540; *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] Ch. 949 at 965-966; *Bishop v Bonham* [1988] 1 W.L.R. 742 at 749-750; *China and South Sea Bank Ltd v Tan* [1990] 1 A.C. 536 at 545; Harpum, *Megarry and Wade's Law of Real Property* (6th ed., 2000), para.19-061; Finn, *Fiduciary Obligations* (1977), para.17; McGhee (Gen. ed.), *Snell's Equity* (31st ed., 2005), para.38-38.

31 See, *e.g. Yorkshire Bank v Hall,* above, n.23 at 1728; *Downsview Nominees,* above, n.23 at 317; Finn, *ibid.*; *Megarry and Wade, ibid.*; *Snell's Equity, ibid.*

32 See, *e.g. Malik v Bank of Credit and Commerce International SA* [1997] I.R.L.R. 462 at 465-466 and 468-469; *Fortex Group Ltd v MacIntosh* [1998] 3 N.Z.L.R. 171 at 180; *Nottingham University v Fishel* [2000] I.R.L.R. 471 at 482-484.

33 See, *e.g. Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd* [1991] 1 W.L.R. 589 at 596-597.

34 In other words, for purposes unrelated to the effective realisation of the mortgagee's security. See *Downsview Nominees,* above, n.23 at 317; *Snell's Equity,* above, n.30 at para.38-38.

35 See *Groom v Crocker,* above, n.28 at 203, 224 and 228; *Price v Bouch,* above, n.28 at 261; *Gan Insurance,* above, n.28 at [67], [76] and [81]; *Paragon Finance,* above, n.28 at [32] and [36].

36 See, *e.g. Spackman v Evans* (1868) L.R. 3 H.L. 171 at 189-90; *Mills v Mills* (1938) 60 C.L.R. 150 at 185-186; *In re Smith and Fawcett Ltd* [1942] Ch. 304 at 308; *Hogg v Cramphorn Ltd* [1967] 1 Ch. 254 at 269; *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] A.C. 821 at 834 and 837-838; *Bishopsgate Investment Management Ltd v Maxwell (No.2)* [1994] 1 All E.R. 261 at 265; *Extrasure Travel Insurances Ltd v Scattergood* [2002] EWHC 3093 (Ch); [2003] 1 B.C.L.C. 598 at [87]; Davies, *Gower and Davies' Principles of Modern Company Law* (7th ed., 2003), pp.380-381 and 385-387; Birds, Boyle, Ferran and Villiers, *Boyle and Birds' Company Law* (4th ed., 2000), pp.500-501 and 504-506; Ferran, *Company Law and Corporate Finance* (1999), pp.157-160 and 162-168; Nolan, "The Proper Purpose Doctrine and Company Directors" in Rider (ed), *The Realm of Company Law* (1998), p.1 at p.12. See also Smith, "The Motive, Not the Deed" in Getzler (ed), *Rationalizing Property, Equity and Trusts* (2003), p.53 at pp.68-69.

37 See also Lindgren, "The Fiduciary Nature of a Company Board's Power to Issue Shares" (1972) 10 U.W.A.L.R. 364 at 369; Ford, Austin and Ramsay, *Ford's Principles of Corporations Law* (8th ed., 1997), para.8.200; Grantham, "Company Directors and Compliance with the Company's Constitution" (2003) 20 N.Z.U.L.R. 450 at 475.

38 See Sealy, "The Director as Trustee" [1967] C.L.J. 83 at 85-86 and 91-103, Sealy, "Fiduciary Relationships" [1962] C.L.J. 69 at 71-73, and see, *e.g.* the approach in *Spackman v Evans,* above, n.36 at 189-190; *In re Gresham Life Assurance Society* (1872) L.R. 8 Ch. App. 446 at 449; *In re Lands Allotment*

Co [1894] 1 Ch. 616 at 631 and 638; *New Lambton Land and Coal Co Ltd v London Bank of Australia Ltd* (1904) 1 C.L.R. 524 at 541-542; *Wallersteiner v Moir (No.2)* [1975] 1 Q.B. 373 at 397-398. Indeed, directors were even sometimes referred to *as* trustees: see, *e.g. Great Eastern Railway Co v Turner* (1872) 8 Ch. App. 149 at 152. See also *Charitable Corp v Sutton* (1742) 2 Atk. 400 at 405; 26 E.R. 642 at 644; *Selangor United Rubber Estates Ltd v Cradock (No.3)* [1968] 1 W.L.R. 1555 at 1575.

39 *Spackman v Evans* (1868) L.R. 3 H.L. 171 at 189-190.

40 *Vatcher v Paull* [1915] A.C. 372 at 378. See also Farwell, *Powers* (3rd ed., 1916), pp.459-460.

41 *In re Courage Group's Pension Schemes* [1987] 1 W.L.R. 495 at 505. See also *Aleyn v Belchier* (1758) 1 Eden 132 at 138; 28 E.R. 634 at 637; *Duke of Portland v Lady Topham* (1864) 11 H.L.C. 32 at 54; 11 E.R. 1242 at 1251; *Molyneux v Fletcher* [1898] 1 Q.B. 648 at 654.

42 See above, nn.34-35 with accompanying text.

43 *Peters' American Delicacy Co Ltd v Heath* (1939) 61 C.L.R. 457 at 482 and 504; *North-West Transportation Co Ltd v Beatty* (1887) 12 App. Cas. 589 at 601; *Gower and Davies,* above, n.36 at pp.486-487.

44 *British Equitable Assurance Co Ltd v Baily* [1906] A.C. 35 at 42. See also *Allen v Gold Reefs of West Africa Ltd* [1900] 1 Ch. 656 at 671; *Ngurli Ltd v McCann* (1953) 90 C.L.R. 425 at 438-439; *Peters' American Delicacy, ibid.,* at 495, 505 and 511-512; *Gambotto v W.C.P. Ltd* (1995) 182 C.L.R. 432 at 444-446 and 451-453. This restriction clearly applies where shareholders exercise their powers to alter the articles of association (see the cases just cited and Alcock (Gen. ed.), *Gore-Browne on Companies* (44th ed., 1986), para.4.8), and it may apply more broadly to other resolutions where a majority of shareholders affect the position of a minority (see, *e.g. Gower and Davies,* above, n.36 at pp.490 and 494, n.51; *Menier v Hooper's Telegraph Works* (1874) L.R. 9 Ch. App. 350; *Burland v Earle* [1902] A.C. 83 at 93-94; *Dominion Cotton Mills Co Ltd v Amyot* [1912] A.C. 546 at 552-553; Worthington, "Corporate Governance: Remedying and Ratifying Directors' Breaches" (2000) 116 L.Q.R. 638 at 647-648).

45 See, *e.g. Fearon v Desbrisay* (1851) 14 Beav 635 at 642; 51 E.R. 428 at 431; *Beere v Hoffmister* (1856) 23 Beav 101 at 105-106; 53 E.R. 40 at 42; *In re Crawshay dec'd* [1948] Ch. 123 at 144; *In re Dick* [1953] Ch. 343 at 366; *In re Brook's Settlement* [1968] 1 W.L.R. 1661 at 1669. The fact that the beneficiaries in these cases were mostly tenants for life does not diminish the point: life tenants are not fiduciaries *vis-à-vis* the remaindermen (*In re Biss* [1903] 2 Ch. 40 at 61) and, in *Beere v Hoffmister,* the appointment was scrutinised against the fraud on a power doctrine despite the fact that one of the holders of the power that had been exercised was not a life tenant. The cases cited also involved trusts of funds rather than land. Even where the life tenancy is in settled land, the trusteeship imposed on the life tenant under the Settled Land Acts (see, *e.g.* Settled Land Act 1925, s.107) was not as "stringent" as that imposed on ordinary trustees (Harvey, *Settlements of Land* (1973), p.96).

46 Farwell, above, n.40 at pp.458-459. See also Hanbury, "Frauds on a Power--an Opportunity for Stocktaking" (1948) 64 L.Q.R. 221 at 226; Finn, *Fiduciary Obligations* (1977), para.84; Worthington, "Directors' Duties, Creditors' Rights and Shareholder Intervention" (1991) 18 Melb.U.L.R. 121 at 122; Thomas, *Powers* (1998), paras 9-07 and 9-14; Worthington, above, n.44 at 648.

47 Harpum, "Fiduciary Obligations and Fiduciary Powers--Where Are We Going?" in Birks (ed.), *Privacy and Loyalty* (1997) 145 at p.147.

48 Weinrib, above, n.15 at 16.

49 *Boardman v Phipps* [1967] 2 A.C. 46 at 124; *Boulting,* above, n.3 at 637-638.

50 (1854) 1 Macq. 461 at 471; 149 R.R. 32 at 39.

51 *ibid.*, at 473; R.R. at 40.

52 *ibid.*

53 See also *ex p. Bennett* (1805) 10 Ves. 381 at 394; 32 E.R. 893 at 897; *Re Bloye's Trusts* (1849) 1 Mac. & G. 488 at 495; 41 E.R. 1354 at 1357; upheld on appeal to the House of Lords: *sub nom. Lewis v Hillman* (1852) 3 H.L.C. 607 at 629-630; 10 E.R. 239 at 249.

54 (1798) 3 Ves. 740 at 750; 30 E.R. 1248 at 1253.

55 *ibid.*, at 752; 30 E.R. at 1254.

56 (1842) 9 Cl. & Fin. 111 at 123; 8 E.R. 357 at 362.

57 Although such comments are not uncommon: see, *e.g.* Mowbray, Tucker, Le Poidevin and Simpson, *Lewin on Trusts* (17th ed., 2000), para.20-12; Hollander and Salzedo, *Conflicts of Interest and Chinese Walls* (2000), para.3-21; *Chan v Zacharia* (1984) 154 C.L.R. 178 at 198; *Armitage v Paynter Construction Ltd* [1999] 2 N.Z.L.R. 534 at 545; *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 212 C.L.R. 484 at

[18]; *Marks and Spencer Plc v Freshfields Bruckhaus Deringer (a firm)* [2004] EWHC 1337 (Ch); [2004] 1 W.L.R. 2331 at [12].

58 Smith, "The Motive, Not the Deed" in Getzler (ed), *Rationalizing Property, Equity and Trusts* (2003), p.53 at p.56.

59 Birks, above, n.9 at 29, 31 and 33.

60 (1849) 2 Mac. & G. 10 at 12; 42 E.R. 4 at 5. See also *Costa Rica Railway Co Ltd v Forwood* [1901] 1 Ch. 746 at 753.

61 (1888) 39 Ch.D. 339 at 357.

62 (1878) 8 Ch.D. 286 at 316.

63 *cf.* Burrows, above, n.5 at p.14; *Clerk and Lindsell,* above n.5, para.1-12.

64 *Tito v Waddell (No.2)* [1977] Ch. 106 at 241.

65 See, *e.g. Armstrong v Jackson* [1917] 2 K.B. 822 at 824.

66 See, *e.g. Boston Deep Sea Fishing v Ansell,* above, n.61 at 355 and 367.

67 See, *e.g. Att.-Gen. for Hong Kong v Reid* [1994] 1 A.C. 324 at 336; *Daraydan Holdings Ltd v Solland International Ltd* [2004] EWHC 622 (Ch); [2005] Ch. 119 at [86]-[88].

68 As to the availability and relevance of equitable compensation as a remedy for breach of fiduciary duty, see the discussion in Conaglen, "Equitable Compensation for Breach of Fiduciary Dealing Rules" (2003) 119 L.Q.R. 246.

69 *Harris v Digital Pulse Pty Ltd* (2003) 56 N.S.W.L.R. 298 at [161], [169]-[170] and [407]-[408].

70 Smith, above, n.58 at pp.60-61.

71 *ibid.,* at p.60.

72 This point has been made before: see Shepherd, *Law of Fiduciaries* (1981), p.82, n.122; Cooter and Freedman, "The Fiduciary Relationship: its Economic Character and Legal Consequences" (1991) 66 N.Y.U.L.R. 1045 at 1053. See also Williams, "The Aims of the Law of Tort" [1951] C.L.P. 137 at 147.

73 See, *e.g. Att.-Gen. v Alford* (1855) 4 De G.M. & G. 843 at 851; 43 E.R. 737 at 741; *Burdick v Garrick* (1870) L.R. 5 Ch. App. 233 at 241; *Vyse v Foster* (1872) L.R. 8 Ch. App. 309 at 333 (affirmed on appeal: *Vyse v Foster* (1874) L.R. 7 H.L. 318 at 336); *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] A.C. 669 at 692-693 and 723; *Harris v Digital Pulse,* above, n.69 at [336]-[337], [408], [415] and [420]. *Cf.* the position in New Zealand: *Aquaculture,* above, n.7 at 301-302; *Cook v Evatt (No.2)* [1992] 1 N.Z.L.R. 676 at 705.

74 *Guinness Plc v Saunders* [1990] 2 A.C. 663 at 701.

75 (1834) 2 My. & K. 655 at 665; 39 E.R. 1095 at 1098. See also *Harris v Digital Pulse,* above, n.69 at [407]-[408]; *Lindsley v Woodfull* [2004] EWCA Civ 165; [2004] 2 B.C.L.C. 131 at [30].

76 Weinrib, *The Idea of Private Law* (1995), pp.206-208.

77 See Weinrib, "Corrective Justice in a Nutshell" (2002) 52 U.T.L.J. 349 at 349.

78 See, *e.g. Cassell & Co Ltd v Broome* [1972] A.C. 1027 at 1086-1087; *Kuddus v Chief Constable of Leicestershire Constabulary* [2001] UKHL 29; [2002] 2 A.C. 122 at [95] and [110]; *Aggravated, Exemplary and Restitutionary Damages* (Law Com. No.247, 1997), paras 5.20-5.21 and 5.28; Beever, "The Structure of Aggravated and Exemplary Damages" (2003) 23 O.J.L.S. 87 at 105-110.

79 See, *e.g. Cassell v Broome, ibid.,* at 1114; *Kuddus, ibid.,* at [4] and [68]; *A v Bottrill* [2002] UKPC 44; [2003] 1 A.C. 449 at [3] and [20]; *Taylor v Beere* [1982] 1 N.Z.L.R. 81 at 89-91; *Daniels v Thompson* [1998] 3 N.Z.L.R. 22 at 28-29 and 68-69; Law Com. No.247, above, at paras 5.22-5.27 and 5.29-5.39; Edelman, *Gain-Based Damages: Contract, Tort, Equity and Intellectual Property* (2002), pp.9-21.

80 *Smith New Court Securities Ltd v Citibank NA* [1997] A.C. 254 at 279-280.

81 Williams, above, n.72 at 172.

82 Hackney, "More than a Trace of the Old Philosophy" in Birks (ed), *The Classification of Obligations* (1997), p.123 at p.155.

83 *Mothew,* above, n.3 at 18-19 (emphasis original).

84 (1805) 10 Ves. 381 at 399; 32 E.R. 893 at 899.

85 *De Bussche v Alt* (1878) 8 Ch.D. 286 at 316.

86 *ibid.*

87 *Boardman v Phipps* [1967] 2 A.C. 46 at 123. See also *Bray v Ford* [1896] A.C. 44 at 51; *New Zealand Netherlands Society "Oranje" Inc v Kuys* [1973] 1 W.L.R. 1126 at 1129.

88 *Chan v Zacharia* (1984) 154 C.L.R. 178 at 199. Adopted in *Don King Productions Inc v Warren* [2000] Ch. 291 at [40]-[43]. See also *Quarter Master UK Ltd v Pyke* [2004] EWHC 1815 (Ch); [2005] 1 B.C.L.C. 245 at [53]-[55] and [70]-[72].

89 [1964] A.C. 244 at 256 and 265. See also *Re Lewis* (1910) 103 L.T. 495 at 497.
90 [1967] 2 A.C. 134n.
91 [1967] 2 A.C. 46.
92 Lord Cohen and Lord Hodson did consider there to be a possibility of conflict between duty and interest in *Boardman v Phipps* [1967] 2 A.C. 46 at 103-104 and 111, but upon close inspection the conflict seems wholly illusory: see Finn, *Fiduciary Obligations* (1977), para.567.
93 *Chan v Zacharia* (1984) 154 C.L.R. 178 at 198.
94 *ibid.*, at 199.
95 [1967] 2 A.C. 46 at 123.
96 See McClean, "The Theoretical Basis of the Trustee's Duty of Loyalty" (1969) 7 Alberta L.Rev. 218, especially at 219-227.
97 *Att.-Gen. v Blake* [2001] 1 A.C. 268 at 280. Similarly, see *Boston Deep Sea Fishing and Ice Co v Ansell* (1888) 39 Ch.D. 339 at 363; *Williams v Barton* [1927] 2 Ch. 9 at 11 and 12.
98 See *Chan v Zacharia,* above, n.93 at 199.
99 See, *e.g.* Hayton and Marshall, above, n.11 at para.6-24; *Pilmer v Duke Group Ltd* (2001) 207 C.L.R. 165 at [153]; *Maguire v Makaronis* (1997) 188 C.L.R. 449 at 492; Brudney, above, n.13 at 603; Berryman, "Equitable Compensation for Breach by Fact-based Fiduciaries: Tentative Thoughts on Clarifying Remedial Goals" (1999) 37 Alberta L.Rev. 95 at 98 and 107.
100 See, *e.g.* references to "over-inclusion" and "under-inclusion" in rules in Brudney, *ibid.,* at 604, n.20.
101 (1726) Sel. Cas. t. King 61; 25 E.R. 223.
102 *ibid.,* at 62; 25 E.R. at 223.
103 See, *e.g.* Beck, "The Sage of Peso Silver Mines: Corporate Opportunity Reconsidered" (1971) 49 Can. Bar Rev. 80 at 86; Austin, "Fiduciary Accountability for Business Opportunities" in Finn (ed), *Equity and Commercial Relationships* (1987), p.141 at pp.177-178.
104 (1802) 6 Ves. 625 at 627; 31 E.R. 1228 at 1229. See also *ex p. James* (1803) 8 Ves. 337 at 345 and 349; 32 E.R. 385 at 388 and 389; *ex p. Bennett* (1805) 10 Ves. 381 at 385-386; 32 E.R. 893 at 894; *Parkes v White* (1805) 11 Ves. 209 at 226; 32 E.R. 1068 at 1074; Hayton and Marshall, above, n.11 at para.6-24.
105 See, *e.g.* Langbein, above, n.12 at 655-656; Palmer, "The Availability of Allowances in Equity: Rewarding the Bad Guy" (2004) 21 N.Z.U.L.R. 146 at 169.
106 Birks, *Introduction to the Law of Restitution* (rev ed., 1989), pp.332-333 (emphasis original). See also Smith, above, n.58 at p.56.
107 The classic examples are *Regal (Hastings) Ltd v Gulliver* [1967] 2 A.C. 134n. at 53 and *Boardman v Phipps,* above, n.49 at 129. See also *ex p. James,* above, n.104 at 349 (E.R. at 389); and see the comments in *Aberdeen Railway v Blaikie Bros,* above, n.50 at 472 (R.R. at 39); *Canadian Aero Service Ltd v O'Malley* [1974] S.C.R. 592 at 608-610; (1973) 40 D.L.R. (3d) 371 at 383-384; *Swain v Law Society* [1982] 1 W.L.R. 17 at 29.
108 [1896] A.C. 44 at 51. This statement was cited with approval by Lord Hodson and Lord Upjohn in *Boardman v Phipps,* above, n.49 at 111 and 123.
109 Above, n.69 at [414]-[415].
110 This is emphasised by the fact that a fiduciary can act in breach of fiduciary duty despite there being no breach of non-fiduciary duty and despite the fact that his action has benefited the principal: see above, n.107.
111 See, *e.g. Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827 at 848-849.
112 Finnis, *Natural Law and Natural Rights* (1980), p.146.
113 Hayton, *Law of Trusts* (4th ed., 2003), p.37. See also Langbein, above, n.12 at 658.
114 164 N.E. 545 at 546 (1928).
115 *Parker v McKenna* (1874) L.R. 10 Ch. App. 96 at 118. See also *Aberdeen Town Council v Aberdeen University* (1877) 2 App. Cas. 544 at 549; *Lagunas Nitrate,* above, n.24 at 442; *Armstrong v Jackson* [1917] 2 K.B. 822 at 824; *O'Sullivan v Management Agency and Music Ltd* [1985] 1 Q.B. 428 at 455.
116 See, *e.g. Girardet,* above, n.19 at 362; *Warman International Ltd v Dwyer* (1995) 182 C.L.R. 544 at 557; *B.N.Z. v Guardian Trust,* above, n.3 at 688.
117 *Cowan v Scargill* [1985] Ch. 270 at 288; *Buttle v Saunders* [1950] 2 All E.R. 193 at 195; Hayton and Marshall, above, n.11 at para.1-15.
118 Above, n.114.
119 *Bray v Ford* [1896] A.C. 44 at 51. See also *Costa Rica Railway Co Ltd v Forwood* [1901] 1 Ch. 746 at 761.

120 [1896] A.C. 44 at 48, *per* Lord Watson and 52, *per* Lord Herschell. Lord Herschell's comment at 52 is often misunderstood and thought to recognise exceptions to fiduciary liability (see, *e.g. Badfinger Music v Evans* [2001] W.T.L.R. 1 at 14; Palmer, above, n.105 at 170; Thomas and Hudson, *Law of Trusts* (2004), para.10.111) but a careful reading of the case makes it clear that he meant precisely the opposite (see also *In re Drexel Burnham Lambert UK Pension Plan* [1995] 1 W.L.R. 32 at 37).

121 See, *e.g. ex p. Lacey* (1802) 6 Ves. 625 at 630; 31 E.R. 1228 at 1230; *ex p. James* (1803) 8 Ves. 337 at 345; 32 E.R. 385 at 388; *Hamilton* v *Wright* (1842) 9 Cl. & Fin. 111 at 124; 8 E.R. 357 at 362; *De Bussche v Alt* (1878) 8 Ch.D. 286 at 316. See also above, n.107.

122 See, *e.g. Aberdeen Railway Co v Blaikie Bros* (1854) 1 Macq. 461 at 472; 149 R.R. 32 at 39; *Wright v Morgan* [1926] A.C. 788 at 798.

123 Smith, above, n.58 at p.53; see also at pp.64 and 68-69.

124 *ibid.*, at p.65 (emphasis original).

125 *ibid.*, at p.73.

126 See *ibid.*, at pp.67-71.

127 That it is the reasons that matter rather than the results appears from *Henty v Wrey* (1882) 21 Ch.D. 332 at 354; *Vatcher v Paull,* above, n.40 at 379-380; *In re Burton's Settlement* [1955] 1 Ch. 82 at 100; *In re Brook's Settlement* [1968] 1 W.L.R. 1661 at 1666. However, the doctrine is concerned with purpose, rather than with motive (see, *e.g. Vane v Lord Dungannon* (1804) 2 Sch. & Lef. 118 at 130-131; 9 R.R. 63 at 71; *Topham v Duke of Portland* (1863) 1 De G. J. & S. 517 at 570-571; 46 E.R. 205 at 227; *Topham v Duke of Portland* (1869) L.R. 5 Ch. App. 40 at 57; Farwell, above, n.40 at pp.484-485; *cf. Hogg v Cramphorn,* above, n.36 at 269; *Howard Smith v Ampol,* above, n.36 at 834-835). As such, it is arguable that "the proper purpose doctrine is not about reviewing the manner in which power is exercised, but about controlling the ends for which it is exercised": Nolan, above, n.36 at p.21.

128 Above, nn.34-46 and accompanying text.

129 Smith, above, n.58 at p.76. See also, *e.g. Norberg v Wynrib* [1992] 2 S.C.R. 226 at 272-273; (1992) 92 D.L.R. (4th) 449 at 487; *Canson Enterprises Ltd v Boughton and Co* [1991] 3 S.C.R. 534 at 543; (1991) 85 D.L.R. (4th) 129 at 154; Palmer, above, n.105 at 167.

130 Nolan, "A Fiduciary Duty to Disclose?" (1997) 113 L.Q.R. 220 at 225. See also Waters, "The Reception of Equity in the Supreme Court of Canada (1875-2000)" (2001) 80 Can. Bar Rev. 620 at 676.

131 See, *e.g. McInerney v MacDonald* [1992] 2 S.C.R. 138 at 150; (1992) 93 D.L.R. (4th) 415 at 424.

132 *Att.-Gen. v Blake* [1998] Ch. 439 at 455. See also *Breen v Williams* (1996) 186 C.L.R. 71 at 95, 113 and 137-138; *Pilmer v Duke Group,* above, n.99 at [74] and [127]; *Youyang,* above, n.57 at [41]. *Fassihi v Item Software (UK) Ltd* [2004] EWCA Civ 1244; [2005] I.C.R. 450 may appear inconsistent with this, but closer inspection suggests that the court was not identifying the duty of disclosure in that case as a peculiarly fiduciary duty in the sense under discussion in this article (see Armour and Conaglen, "Directorial Disclosure" [2005] C.L.J. 48 at 50-51).

133 Smith, above, n.58 at p.73.

134 *ibid.*, at p.75 (emphasis original).

135 *Bray v Ford* [1896] A.C. 44 at 51 (emphasis added).

136 *Hospital Products,* above, n.2 at 102. See also, *e.g. Re Coomber* [1911] 1 Ch. 723 at 729; *New Zealand Netherlands Society v Kuys,* above, n.87 at 1130; *LAC Minerals,* above, n.1 at 646-647 (S.C.R.), 28 (D.L.R.); *Kelly v Cooper* [1993] A.C. 205 at 214; *Henderson v Merrett,* above, n.7 at 206; *Clay v Clay* (2001) 202 C.L.R. 410 at [46].

137 See, *e.g. Aberdeen Railway v Blaikie Bros,* above, n.50 at 472 (R.R. at 39); *Parker v McKenna,* above, n.115 at 124.

138 Finn, *Fiduciary Obligations* (1977), para.541.

139 *Kelly v Cooper,* above, n.136 at 215.

140 Unless, of course, the principal's fully informed consent is obtained: see, *e.g. Regal (Hastings) v Gulliver,* above, n.107 at 150; *Quarter Master UK Ltd v Pyke* [2004] EWHC 1815 (Ch); [2005] 1 B.C.L.C. 245 at [70]. Fiduciary doctrine is not a shield behind which a fiduciary may hide: *Boulting,* above, n.3 at 636-637.

141 Hence, *e.g.* where a director's normal duties had, in the particular circumstances of the case, been "reduced to vanishing point", he had no conflict between his *duty* and his personal interest when he contracted independently with one of the company's clients: *In Plus Group Ltd v Pyke* [2002] EWCA Civ 370; [2002] 2 B.C.L.C. 201 at [90].

142 *In re Goldcorp Exchange Ltd* [1995] 1 A.C. 74 at 98.

143 Birks, "The Concept of a Civil Wrong" in Owen (ed), *Philosophical Foundations of Tort Law* (1995), p.31 at p.35.
144 Weir, *Tort Law* (2002), p.ix. See also Rogers, *Winfield and Jolowicz on Tort* (16th ed., 2002), para.1.2.
145 *Breen v Williams,* above, n.132 at 113; *Att.-Gen. v Blake,* above, n.132 at 455; *Pilmer v Duke Group,* above, n.99 at [74] and [127]; *Youyang,* above, n.57 at [41].
146 *Nationwide BS v Balmer Radmore (a firm) (Introductory Sections)* [1999] Lloyd's Rep. P.N. 241 at 281.
147 See, *e.g. Day v Cook* [2001] P.N.L.R. 755 at 772; *Leeds and Holbeck BS v Arthur and Cole (a firm)* [2002] P.N.L.R. 78 at 80.
148 *Pilmer v Duke Group,* above, n.99 at [85]-[86] and [165]-[176].
149 See, *e.g. Day v Mead* [1987] 2 N.Z.L.R. 443 at 451; *Taylor v Schofield Peterson* [1999] 3 N.Z.L.R. 434 at 447-448.
150 *Mothew,* above, n.3 at 19; *Neushul v Mellish and Harkavy* (1967) 111 S.J. 399; *Goody v Baring* [1956] 1 W.L.R. 448 at 450; *Moody v Cox and Hatt* [1917] 2 Ch. 71 at 81; *Commonwealth Bank of Australia v Smith* (1991) 102 A.L.R. 453 at 478; *Armitage v Paynter,* above, n.57 at 544.
151 See, *e.g.* Sealy, *Company Law and Commercial Reality* (1984), pp.38-40; Teele, "The Necessary Reformulation of the Classic Fiduciary Duty to Avoid a Conflict of Interest or Duties" (1994) 22 A.B.L.R. 99 at 111; Lowry and Edmunds, "The Corporate Opportunity Doctrine: the Shifting Boundaries of the Duty and its Remedies" (1998) 61 M.L.R. 515 at 517-518; Hollander and Salzedo, *Conflicts of Interest and Chinese Walls* (2000), para.3-01; Lowry and Edmunds, "The No Conflict--No Profit Rules and the Corporate Fiduciary: Challenging the Orthodoxy of Absolutism" [2000] J.B.L. 122 at 123.
152 Mitchell, "Chinese Walls in Brunei: *Prince Jefri Bolkiah v KPMG*" (1999) 22 U.N.S.W.L.J. 243 at 254.
153 (1965) 56 D.L.R. (2d.) 117 at 139 (CA, BC). For other views contrary to Mitchell's, see, *e.g.* Waller, book review: "Conflicts of Interest and Chinese Walls" (2001) 117 L.Q.R. 335 at 337-338; McVea, "Predators and the Public Interest--the "Big Four' and Multi-Disciplinary Practices" (2002) 65 M.L.R. 811 at 816-833.
154 See, *e.g.* Hayton, *Underhill and Hayton: Law Relating to Trusts and Trustees* (16th ed., 2003), pp.956-979; *Lewin,* above, n.57 at paras 40-09 to 40-41 and 42-18 to 42-59.
155 *Mothew,* above, n.3 at 16.
156 See above, n.14.
157 See, *e.g.* Morritt L.J.'s reference in this context to a breach of "fiduciary" duty where a (hypothetical) trustee allows the trust property to fall into appalling disrepair: *Brown v Bennett* [1999] 1 B.C.L.C. 649 at 655.
158 See, *e.g.* the treatment of breaches of duty by directors as breaches of trust for the purposes of accessory liability in *Selangor United Rubber Estates Ltd v Cradock (No.3)* [1968] 1 W.L.R. 1555 at 1574-1575 and 1577; see also *In re Lands Allotment Co* [1894] 1 Ch. 616 at 631 and 638; *Belmont Finance Corp v Williams Furniture Ltd (No.2)* [1980] 1 All E.R. 393 at 405.
159 Shepherd, *Law of Fiduciaries* (1981), p.48.
160 Finn, *Fiduciary Obligations* (1977), para.27; *K.L.B. v British Columbia,* above, n.3 at 431-432 (S.C.R.); 534 (D.L.R.). *cf.* Palmer, above, n.105 at 167 and 171-172; Grantham, "The Doctrinal Basis of the Rights of Company Shareholders" [1998] C.L.J. 554 at 576-577.
161 *Mothew,* above, n.3 at 18.

