PRESCRIPTIVE FIDUCIARY DUTIES

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I INTRODUCTION

The dominant view in Australian law appears to be that fiduciary duties are only proscriptive, and never prescriptive. In other words, they stipulate what a person who owes these duties *must not* do; they do not require him or her to do anything.

I believe that this is a misunderstanding. The reasons for my disagreement go beyond terminology because they are ultimately founded on the nature of fiduciary relationships and the justification for fiduciary duties. In this article I aim to set these reasons out. After this Introduction, the text has six parts. I will briefly set out the current proscriptive Australian orthodoxy as I understand it, in a descriptive way. Part III aims to answer the question why it is important whether fiduciary duties are prescriptive or proscriptive. In Part IV, I will explore how the proscriptive orthodoxy emerged, suggesting that its foundations are not deep but lie only in the 1980s. Part V asks a core question: which duties are fiduciary? But it only begins to answer that question. The reason is that the answer to that question depends entirely on one's view as to what are the justifications for fiduciary duties. I will explain how some accounts support the proscriptive Australian orthodoxy, but will also argue that those accounts are not persuasive. This will bring me to Part VI, in which I present my own account of fiduciary duties as duties that arise out of fiduciary relationships. My account, I suggest, is wholly orthodox and founded on authority from all over the common law world. The last part is the conclusion.

II THE CURRENT AUSTRALIAN ORTHODOXY

To repeat, Australian orthodoxy is that fiduciary duties are only proscriptive, and never prescriptive. A good statement of this position is found in the judgment of Gaudron and McHugh JJ in *Breen v Williams:*

> … equity imposes on the fiduciary proscriptive obligations — not to obtain any unauthorized benefit from the relationship and not to be in a position of conflict. … But the law of this country does not otherwise impose positive legal duties on the fiduciary to act in the interests of the person to whom the duty is owed.[1]

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[1] *Breen v Williams* (1995) 186 CLR 71, 113.

Although this view was expressed by only two judges in *Breen,* it has subsequently been adopted more definitively by the High Court.[2]

I am a little nervous coming here from far away to express a different view. I might be especially nervous coming from Canada, since in *Breen,* Dawson and Toohey JJ said, in relation to their understanding of Canadian law as imposing *prescriptive* fiduciary obligations:

> But, with respect, that is achieved by assertion rather than analysis and, whilst it may effectuate a preference for a particular result, it does not involve the development or elucidation of any accepted doctrine.[3]

I have a different view, and I will argue that this comment was not justified, inasmuch as my account will rely on the analysis of accepted doctrine that reaches back for centuries. Moreover, I take a great deal of heart in knowing that my disagreement with the Australian orthodoxy is not confined to Canadians. In the US, for example, it is normal to describe the duty of care and skill that is presumptively owed by every fiduciary as a fiduciary duty.[4] This usage is also found in English and Canadian courts.[5] I will argue below that this is entirely defensible, particularly since the duty of care and skill that is presumptively owed by every fiduciary is *not* the common law duty of care that we know from the law of negligence. To take another example, it has always been accepted doctrine that fiduciaries are, because they are fiduciaries, subject to rigorous duties of disclosure.[6] I will return to the importance of these duties.[7] In my view,

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2 *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165, [74] (McHugh, Gummow, Hayne and Callinan JJ), [127]-[128] (Kirby J, *dubitante)*; *Friend v Brooker* (2009) 239 CLR 129, [83] (French CJ, Gummow, Hayne and Bell JJ); *Howard v Federal Commissioner of Taxation* (2013) 253 CLR 83, [31] (French CJ and Keane J), [56] (Hayne and Crennan JJ); *Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society Ltd* [2018] HCA 43, [67] (Gageler J).

3 *Breen* (1995) 186 CLR 71, 95.

4 See the review of the law in C Bruner, 'Is the Corporate Director's Duty of Care a "Fiduciary" Duty? Does it Matter?' (2013) 48 *Wake Forest Law Review* 1027.

5 *Silven Properties Ltd. v Royal Bank of Scotland plc* [2004] 1 WLR 997, [2003] EWCA Civ 1409, [29]; *Williams Lake Indian Band v Canada (Aboriginal Affairs and Northern Development)* 2018 SCC 4 at [46], [55], [165], [176].

6 *Gibson v Jeyes* (1801) 6 Ves Jun 266, 31 ER 1044 (LC), 278, 1050; *Tate v Williamson* (1866) 2 Ch App 55 (LC), 65–7; *Nocton v Lord Ashburton* [1914] AC 932 (HL), as interpreted in *Hodgkinson v Simms* [1994] 3 SCR 377, 415, for the majority, in *Swindle v Harrison* [1997] 4 All ER 705 (CA), 732 (Mummery LJ), and in *Maguire v Makaronis* (1997) 188 CLR 449, 495 (Kirby J); *Moody v Cox* [1917] 2 Ch 71 (CA); *McKenzie v McDonald* [1927] VLR 134, 143–5; *London Loan & Savings Co v Brickenden* [1934] 3 DLR 465 (PC), 469; *Industrial Development Consultants Ltd v Cooley* [1972] 1 WLR 443, 453; *New Zealand Netherlands Society 'Oranje' Inc v Kuys* [1973] 1 WLR 1126, 1131–2; *Daly v Sydney Stock Exchange Ltd* (1986) 160 CLR 371, 377, (Gibbs CJ, Wilson and Dawson JJ); *Swindle* [1997] 4 All ER 705 (CA), 718 (Evans LJ), 720 (Hobhouse LJ), 735 (Mummery LJ); *Canson Enterprises Ltd. v Boughton & Co.* [1991] 3 SCR 534, 542, 558, 560, 572–3; *Clark Boyce v Mouat* [1994] 1 AC 428 (PC), 437; *Hodgkinson* [1994] 3 SCR 377, 393–4; *Hilton v Barker Booth & Eastwood (a firm)* [2005] 1 WLR 567 (HL), [30], [42]; *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111, [142]; *Williams Lake Indian Band* 2018 SCC 4 at [46], [55], [135], [165], [176]; *Valard Construction Ltd v Bird Construction Co* 2018 SCC 8, [2], [13], [18]–[20], [24], [34]. Although the judgments of the majority and of Kirby J in *Maguire* do make reference to non-disclosure as a breach of fiduciary duty (471, 488, 494, 495, 496), the majority judges are already influenced by the *Breen* orthodoxy to try to frame disclosure not as a prescriptive duty, but as a way to avoid breaching a proscriptive duty (466). We will return to this approach below, in Part VI E.

7 In Part VI E.

fiduciary law also includes the principles that govern fiduciaries in the exercise of the powers that they hold in a fiduciary capacity. In relation to both trustees and company directors, the Supreme Court of the United Kingdom has recently restated the law, to the effect that if their fiduciary powers are exercised for improper reasons, such exercise is voidable; and the Court has described that result as one flowing from a breach of fiduciary obligations, although the cases in question were not concerned with either of the proscriptive rules that I have mentioned.[8] In other words, the use of a fiduciary power for an improper purpose is a breach of fiduciary duty, even though there is no conflict and no unauthorized profit. I think that is largely correct, and I will explain why.

Perhaps more importantly, even some Australian judges and jurists are doubtful of the proscriptive orthodoxy. I mention the well-known decision of the Court of Appeal of Western Australia in *Bell Group,*[9] but also certain judicial and extra-judicial observations of Heydon J,[10] as well as a very careful and detailed analysis of Glenn Newton QC, which is not yet published but which he has generously allowed me to read.[11]

It is not my goal to argue that Australian law should follow what courts in the UK, Canada or anywhere else have done. I will aim to make my argument out of uncontroversial and foundational propositions, and to use Australian cases where I can.

III Why Does it Matter?

Arguments about which duties are properly called fiduciary are, in one sense, arguments about terminology. The protagonists are not typically arguing about *what* duties are owed by a person who stands in a fiduciary relationship to another. Rather, they are arguments about *which* of those duties deserve to be called fiduciary duties. This may seem like a debate with little practical importance, but this is not correct.

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8 *Pitt v Holt* [2013] UKSC 26, [2013] 2 AC 108, [70]–[73], [93], [96]–[97]; *Eclairs Group Ltd v JKX Oil & Gas plc* [2015] UKSC 71, [14]–[16]. As both cases make clear, this is based on longstanding Equitable doctrine; for an important Australian example, see *Whitehouse v Carlton Hotel Pty Ltd* (1987) 162 CLR 285.

9 *Westpac Banking Corporation v The Bell Group Ltd (No. 3)* [2012] WASCA 157, 44 WAR 1, [922], [932], [1956], [2733]. See also *Grimaldi v Chameleon Mining NL (No 2)* [2012] FCAFC 6, [174], stating that the control of fiduciary powers (even in the absence of conflict or unauthorized profit) is part of fiduciary law.

10 Judicially: *Byrnes v Kendle* (2011) 243 CLR 253, [122] (judgment with Crennan J). Extrajudicially: J D Heydon, 'Are the Duties of Company Directors to Exercise Care and Skill Fiduciary?' in S Degeling and J Edelman (eds) *Equity in Commercial Law* (Thomson/Law Book Co, 2005) 185; Hon Dyson Heydon, 'Modern Fiduciary Liability: The Sick Man of Equity?' (2014) 20 *Trusts & Trustees* 1006.

11 G Newton, 'Are Fiduciary Duties, Under Australian Law, Confined to the Two Proscriptive Duties of No Profit and No Conflict?', unpublished, on file with the author. Newton begins the Conclusion of his thorough analysis as follows: 'There is no authority, including in *Breen*, from the High Court which has held, whether as binding ratio or seriously considered dicta, that fiduciary duties, in Australia, are confined to the proscriptive duties of no profit, no conflict. To the contrary, there is longstanding authority against that proposition, including in *Whitehouse*'. See also the contributions of the Australian scholar Joshua Getzler: J Getzler, 'Duty of Care' in P Birks and A Pretto (eds) *Breach of Trust* (Hart, 2002) 41, 71–2; J Getzler, 'Am I My Beneficiary's Keeper? Fusion and Loss-Based Fiduciary Remedies' in S Degeling and J Edelman (eds) *Equity in Commercial Law* (Thomson/Law Book Co., 2005) 239, 259–65.

In the *Bell Group* litigation,[12] there was a question of accessory liability under *Barnes v Addy*.[13] That kind of liability depends in part upon participation in a breach of trust or fiduciary duty, not participation in a breach of any other kind of duty. This is a consideration that has also been mentioned by scholars and in other cases.[14] Others similarly point to the many remedies that may be made available when a breach of fiduciary duty is established, as a way of underlining the importance of the classification of duties as fiduciary or not. Some years ago, William Gummow noted that breach of fiduciary duty may allow a plaintiff to claim injunction, rescission, the declaration of a constructive trust, accounting of profits, and compensation for loss.[15] But of course, as he went on to discuss, it is not just because you establish a breach of fiduciary duty that you get to choose among those remedies; each one of them has its own logic, and is available only in the right context.[16]

Quite apart from the question of remedies, I think there is a much larger reason that it matters. Professor George Gretton often said, during his long career, 'there is nothing so practical as a good theory'.[17] A good theory solves practical problems, particularly in new situations that previously decided cases do not cover.

In my way of looking at things, generally in private law the reason why we owe a duty tells us also who owes it, and helps us to understand the content of the duty. The question, 'who owes fiduciary duties?' is a difficult question, and it is one which requires us to have an answer to the question, 'what is a fiduciary relationship?' And, I will argue, when we have an answer to that question, it helps us to know not only who owes fiduciary duties, but also what are fiduciary duties. Or, taking it from the other side, a conviction that the only fiduciary duties are proscriptive duties is in my view compatible with some, but not all, understandings of what is a fiduciary relationship. And it is not compatible with what I think is the best understanding. Thus the question, which duties are properly called fiduciary is, in my view, a question with very significant consequences for a very significant part of the legal landscape.

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12 *Westpac Banking Corporation* [2012] WASCA 157, 44 WAR 1.

13 *Barnes v Addy* (1874) LR 9 Ch App 244 (CA).

14 Those who defend the Australian proscriptive orthodoxy might ask why *Barnes v Addy* liability can arise for knowing assistance with *any* breach of trust. If *Barnes v Addy* liability could arise via a defendant's knowingly assisting a trustee who committed a breach of trust by failing in his duty to provide accurate information to the trust beneficiaries, should it not also arise through a defendant's knowingly assisting a non-trustee fiduciary who breached his duty to provide accurate information to his beneficiary (his duty of disclosure)? The proscriptive orthodoxy would imply that *Barnes v Addy* liability has an inexplicably different scope for trustees and for fiduciaries who are not trustees.

15 W Gummow, 'Compensation for Breach of Fiduciary Duty' in T Youdan (ed) *Equity, Fiduciaries and Trusts* (Carswell, 1989) 57, 61. Note that in this chapter, published shortly before the establishment of the *Breen* orthodoxy, Gummow also expressed the view (at 58, 59) that *Nocton* [1914] AC 932 (HL) was a case of breach of fiduciary duty, and indeed I read him as expressing (at 64–5) the view (with which I respectfully agree, as have others: see n 6) that the breach of fiduciary duty in *Nocton* was the breach of a prescriptive duty of disclosure. Gummow cites (at 57) a contemporaneous letter written by Sir Frederick Pollock following a conversation between Pollock and Viscount Haldane LC, after argument but before judgment in *Nocton,* in which Pollock reports that Haldane described *Nocton* as a case of a 'positive fiduciary duty'.

16 And conversely, each of those remedies may be available in some situations that do not involve fiduciary duties.

17 And this is the title of the book that was published to honour him on the occasion of his retirement: A Steven, R Anderson, and J MacLeod (eds) *Nothing So Practical As A Good Theory: Festschrift for George L Gretton* (Avizandum, 2017).

IV HOW DID WE GET HERE?

One factor that lies behind the development of the proscriptive orthodoxy is a judgment given by Southin J in the Supreme Court of British Columbia in 1987.[18] That was a time when more and more cases were being pleaded in fiduciary terms — at least in Canada. The gist of what she said, in a characteristically outspoken way, was that not every breach of duty by a fiduciary is a breach of fiduciary duty. A couple of years later, this element of her analysis was adopted in both of the principal judgments of the Supreme Court of Canada in the high-profile case of *LAC Minerals Ltd. v. International Corona Resources Ltd.*[19] That same year, a quotation from the judgment of Southin J was also chosen by Paul Finn as the opening of line of an article called 'The Fiduciary Principle', to which I will return.[20] And in 1998, her point was also adopted by Millett LJ, another plain-spoken judge, in the English Court of Appeal.[21]

Well, this must be true. If I am in a meeting with my lawyer, who owes me fiduciary obligations, and in sheer frustration at my obstinacy or perhaps my poor dress sense, he punches me in the face, this is not a breach of fiduciary duty. But even though it is clearly true, unfortunately it does not get us very far. Nor does it get us very far to remember, as Southin J said, that 'fiduciary' means 'trust-like' or relating to trust, or to trusts. Trustees owe lots of duties as trustees, and most people would say that not all of them are fiduciary.[22]

In 'The Fiduciary Principle', Finn contended that the only duties properly called fiduciary are proscriptive. But there is no sustained argument in favour of the view he presents. It goes rather quickly.[23] After mentioning the prescriptive view, which he rejects, he says:

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18 *Girardet v Crease & Co* (1987) 11 BCLR (2d) 361 (S.C.), 362.

19 *LAC Minerals Ltd v International Corona Resources Ltd* [1989] 2 SCR 574, 597–8, 647.

20 P D Finn, 'The Fiduciary Principle' in T Youdan (ed) *Equity, Fiduciaries and Trusts* (Carswell, 1989) 1, reprinted in P Finn, *Fiduciary Obligations: 40th Anniversary Republication with Additional Essays* (Federation Press, 2016) 308. In subsequent citations to this article, I will give both the original and reprint page references.

21 *Bristol & West Building Society v Mothew* [1998] Ch 1 (CA), 16. This in turn was endorsed by four of five members of the House of Lords in *Hilton* [2005] 1 WLR 567 (HL), [29], without reference to *Girardet.* Note that the House of Lords held that a fiduciary's breach of the duty of care and skill is not a breach of a 'fiduciary duty of loyalty'; they did not say that it was not a breach of a fiduciary duty.

22 In fact, for all its fame, it seems to me that there are some problems in the opening passage of Southin J's judgment. It concludes by saying that 'an allegation of breach of fiduciary duty carries with it the stench of dishonesty — if not of deceit then of constructive fraud'. But it is clear that fiduciary duties can be breached by defendants who are in perfect good faith and not dishonest in any way. This indeed is one of the characteristic features of fiduciary law. Her denial that carelessness by a lawyer should be called a breach of fiduciary duty is also weakened by her statements that '[s]olicitors have a duty in contract arising from an implied term (and also in tort) to conduct their clients' affairs with reasonable care and skill' and '[t]he obligation of a solicitor of care and skill is the same obligation of any person who undertakes for reward to carry out a task'. I think it is clear that a solicitor acting *pro bono* comes under a duty of care and skill, even though there is no contractual relationship and no reward. I will argue below that this duty is not a tort duty, but arises out of the fiduciary relationship, which of course can exist without reward or contract.

23 See also Heydon, 'Are the Duties of Company Directors to Exercise Care and Skill Fiduciary?', above n 10, 192, noting that the only authority cited by Finn was *Girardet.*

> The alternative view sees the fiduciary principle as a proscriptive one; it is concerned with the maintenance of fidelity to the beneficiary; and it is activated when the fiduciary seeks improperly to advance his own or a third party's interest in or as a result of the relationship.[24]

Shortly thereafter, he uses the word loyalty instead of fidelity: the fiduciary principle, he says, 'insists upon a fine loyalty'.[25] This explanation was invoked a few years later by Dawson and Toohey JJ in *Breen:* citing Finn's paper, they said, 'what the law exacts in a fiduciary relationship is loyalty'.[26] Finn's paper was cited also by Gaudron and McHugh JJ, just before their articulation, which was quoted earlier, of the proscriptive orthodoxy.[27]

As an argument in favour of the proscriptive orthodoxy, this is unsatisfying. It is quite typical to invoke the concept of loyalty as a way of articulating what is special about fiduciary relationships in law. But the argument of Finn is that the *only* legal implementation of loyalty is the imposition of proscriptive duties.[28] Proscriptive duties, by definition, do not require you to do anything; they only forbid certain conduct. The implication of this is that if a person — a person who owes fiduciary duties — does absolutely nothing, he is not disloyal. Imagine that he stays home with the blinds drawn and ignores the role which, typically, he has agreed to fulfil, whether it be trustee, company director, or whatever other fiduciary role; on this view, there is nothing in his conduct that amounts to disloyalty in the eyes of the law. I dissent from this view.[29]

There are two other elements of Paul Finn's 1989 argument which I would like to address. One is that the whole structure of his paper is based on the idea that what he calls the fiduciary principle is one step on a scale of three standards, which he calls the unconscionability standard, the good faith standard, and the fiduciary standard.[30] This is a spectrum that, he argues, governs all kinds of bilateral consensual relationships. He posits a set of questions for determining which of the three standards is applicable to a given relationship.[31] This approach, treating the fiduciary relationship as merely one point on a scale of standards, is in my experience not widely accepted. It does not treat the fiduciary relationship as a fully distinct juridical phenomenon.[32] It points rather in the direction of saying that the fiduciary relationship requires you to do things in a certain way, that you anyway should be doing. As I will explain, I think this fails to come to

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24 Finn, 'The Fiduciary Principle', above n 20, 25; 329.
25 Ibid 27; 330.
26 *Breen* (1995) 186 CLR 71, 93.
27 Ibid 113.
28 By contrast, in his earlier monograph, Finn took the view that there are many more than two fiduciary obligations, and that many fiduciary obligations are prescriptive: P D Finn, *Fiduciary Obligations* (Law Book Co, 1977), reprinted in P Finn, *Fiduciary Obligations: 40th Anniversary Republication with Additional Essays* (Federation Press, 2016) [11] and *passim* (the original monograph and the reprint employ the same paragraph numbers). Finn discussed the evolution of his thinking in P D Finn, 'Fiduciary Reflections' (2014) 88 *Australian Law Journal* 127, 131–5 (reprinted in the *40th Anniversary Republication*, 361–6). Finn remains of the view that the judicial control of the exercise by fiduciaries of their fiduciary powers is part of fiduciary law ('Fiduciary Reflections', 131 fn 41; 361 fn 41).
29 I would argue that such deliberate inaction is disloyal as a breach of the fiduciary's duty of good faith: below n 69.
30 Finn, 'The Fiduciary Principle', above n 20, 3; 310.
31 Ibid 5; 311–12.
32 The High Court has stressed that it is distinct from other private law relationships: *Pilmer* (2001) 207 CLR 165, [71] (McHugh, Gummow, Hayne and Callinan); see also *Maguire* (1997) 188 CLR 449, 463 (Brennan CJ and Gaudron, McHugh and Gummow JJ), and *Breen* (1995) 186 CLR 71, 93 (Dawson and Toohey JJ), 110 (Gaudron and McHugh JJ), 132–3 (Gummow J).

terms with the fact that a fiduciary relationship is unique in being a relationship in which one is obliged by the law to act for and on behalf of another person (or, sometimes, for a defined purpose).

The other and related observation is that the explanation Finn gives for what he calls the fiduciary principle is, he says, 'self-evidently' found in public policy.[33] Now he is not the only person to have said this, but I disagree. Public policy, as that phrase is traditionally used, refers to the situation, relatively rare in private law, where we override what might be called the private justice between the parties, in the pursuit of a wider, public form of justice. Imagine that Bonnie and Clyde rob a bank together, agreeing to split the proceeds. In the confusion of the getaway, Bonnie ends up with a suitcase full of money, and Clyde with nothing. What will happen if he brings an action for a partnership accounting? He will lose, because it is against public policy for the courts to resolve disputes tainted by criminal illegality. Note the effect of this: the law will perpetrate a private injustice in the support of a public policy. A public policy is a policy that exceptionally overrides the private justice between the parties before the court.[34]

If fiduciary obligations were thought to be grounded on public policy, it would not be surprising that the content of those duties might be disconnected from the relationship between the parties. Nor would it be surprising that the incidence of such obligations — who owes them — might similarly be disconnected from the relationship between the parties. On the public policy approach, the point of these obligations is not to give effect in law to the features of the parties' relationship, but to promote some goal that is external to that relationship, in the interests of the public at large. Also on that approach, these obligations could justifiably have any content that would tend to promote the favoured goal, and they could be imposed on anyone if it would tend to promote that goal. In what follows I will call these 'exceptionalist' accounts of fiduciary obligations, because they are grounded on the idea that fiduciary duties are based on a logic that stands apart from normal private law reasoning. This is a view from which I entirely dissent: for me, the law of fiduciary obligations follows the basic structure of private law, and gives direct legal effect to the bilateral relationship between the parties.[35]

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33 Finn, 'The Fiduciary Principle', above n 20, 27; 330.

34 *Re Millar Estate* [1938] SCR 1, at 4 (Duff CJC): 'It is the duty of the courts to give effect to contracts and testamentary dispositions according to the settled rules and principles of law, since we are under a reign of law; but there are cases in which rules of law cannot have their normal operation because the law itself recognizes some paramount consideration of public policy which over-rides the interest and what otherwise would be the rights and powers of the individual. It is, in our opinion, important not to forget that it is in this way, in derogation of the rights and powers of private persons, as they would otherwise be ascertained by principles of law, that the principle of public policy operates'.

35 It is, however, not clear that Finn means to refer to 'public policy' in this strict or technical sense. Sometimes when people refer to public policy, or to policy, they mean only to refer to the reasons underlying the legal principles in question: see R Grantham and D Jensen, 'The Proper Role of Policy in Private Law Adjudication' (2018) 68 *University of Toronto Law Journal* 187. In this sense, all legal principles are based on policy, so it does not add much to say so. Some passages of 'The Fiduciary Principle', above n 20, can be read as suggesting that Finn is not an exceptionalist: below n 77.

V WHICH DUTIES ARE FIDUCIARY?

Not all duties owed by a fiduciary are fiduciary duties. How will we decide which ones are?

Matthew Conaglen's well-known book is a sustained argument that the only duties that should be considered fiduciary are the ones that are 'peculiarly' fiduciary.[36] By this he means, the ones that are owed by fiduciaries but not owed by anyone else. And his argument is that the only peculiarly fiduciary duties are a duty to avoid conflicts and a duty not to acquire unauthorized profits.

This sounds promising, but I am not sure he always applies his own method consistently. For example, he says the fiduciary's duty of care cannot be fiduciary because lots of people owe a duty of care. But this needs more attention. The duty of care that presumptively applies to all fiduciaries is not the same as the general tort law duty of care that applies to everyone. This is one reason why some people, like me, prefer to call the one owed by fiduciaries a duty of care and skill, or even a duty of care, skill and diligence. The general tort law duty is proscriptive. You can avoid breaching it by staying home with the blinds drawn. But if a fiduciary does that, he or she will breach the duty of care and skill. More tellingly, the general tort law duty of care relates to personal injury and property damage. There is no duty not to cause pure economic loss, except where particular facts give rise to such a duty. By contrast, the fiduciary duty of care and skill is always, or almost always, about pure economic loss. If you sue your trustee for making bad investments, or a company director for making poor management decisions, you are claiming pure economic loss. I think it is clear that you are relying on a very different duty from the general tort law duty. Because it requires positive action and because it concerns pure economic loss, we know that it is different as to its content. It is also different as to its source, because while the tort duty arises between all of us in going about our daily lives, whenever we are in some proximity to others or their property, the duty of care and skill arises out of particular relationships.

So to say that the duty of care is not fiduciary because lots of people owe duties of care, it seems to me, goes much too quickly.[37] It is not surprising to me that the duty of care and skill that is presumptively owed by every fiduciary has been called a fiduciary duty in the UK, in Canada, and in the US, and that the same suggestion has been made by Heydon J.[38]

Conaglen's approach aims to identify 'peculiarly fiduciary duties' as those duties that are owed by fiduciaries and only by fiduciaries. But the discussion about the duty of care and skill shows that we must ask whether he is identifying duties by their content, or by their source, or perhaps by both. The way his argument unfolds suggests that he is looking at the content: that is, what must be done (or not done) by the person who owes the duty, in order to comply with it. Even on this content-based view, I think he too quickly dismisses some duties as not peculiarly fiduciary.[39] But the more significant point is that it is not enough to look only at the content. In the UK, it has been held that

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36 M Conaglen, *Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary Duties* (Hart, 2010), ch. 3 and especially at 32.

37 I would argue that another example of Conaglen's not applying his method consistently arises with respect to the duty to act in the best interests of the beneficiary (ibid 54–8). He argues that this duty is a kind of composite of three duties, and since none of the three is peculiarly fiduciary, then neither is the duty to act in the best interests of the beneficiary. Even if he were correct in so characterizing the duty to act in the best interests of the beneficiary, still on his own methodology, if there is no non-fiduciary who does not owe that particular (composite) duty, then it is a 'peculiarly fiduciary duty'.

38 See the references above nn 5 and 10.

39 Above n 37.

a professor is not a fiduciary towards his or her university.[40] I think that is correct. But in my university, by a policy which has contractual force, I am subject to a very extensive policy on conflicts of interest, which also includes unauthorized profits.[41] I suspect that this is true in many universities. How do we read this according to Conaglen's account? Am I, after all, a fiduciary because I do owe these peculiarly fiduciary duties? This suggests that a contractual employment relationship that is not fiduciary can be made into a fiduciary relationship by simply adding in the 'peculiarly' fiduciary duties as contractual terms. Personally, I don't think that constitutes a fiduciary relationship, because I don't think that fiduciary relationships can be properly understood as merely a type of contract.[42] My own view is that while the rules about conflicts and unauthorized profits are among the most characteristic features of fiduciary relationships, they are not what *constitutes* such relationships. But if my relationship with my university is not fiduciary, then it seems that we have proven that duties relating to conflicts and unauthorized profits are not peculiarly fiduciary. Like almost any non-contractual duty, they can be replicated as contractual duties.

Thus an attempt to identify 'peculiarly fiduciary duties' seems doomed to fail unless it pays attention not only to the content but also to the source of the duties. Conaglen takes the view that fiduciary obligations exist for instrumental purposes, in support of another legal relationship. In other words, he is an exceptionalist who invokes public policy as the source of fiduciary obligations. In Conaglen's case, the argument is that fiduciary obligations have one function only, which is to increase the probability that fiduciaries will fulfil their non-fiduciary obligations. I find this puzzling, for more than one reason.

First, we want *everyone* to fulfil their non-fiduciary obligations. His account ultimately says that the only difference between fiduciaries and non-fiduciaries is that while we want both to always fulfil their non-fiduciary obligations, we *really* want fiduciaries to do so. This hardly seems to respect the distinctiveness of fiduciary obligations: echoing Finn, it treats fiduciary relationships as one point on a scale.[43] This account also gives very little reason for fiduciary obligations to have the content that they do. If our only goal were to increase the likelihood that other obligations will be performed, we could come up with all sorts of ways to do that, and there is no particular reason we would come up with a rule against conflicts and a rule against unauthorized profits. Why not triple damages or triple the unauthorized profit? Quadruple would be even better; the exceptionalist approach, as we have seen, does not dictate the shape of the obligations it tries to explain.[44] This account also gives us little hint as to who should owe fiduciary obligations; since we want everyone to fulfil their non-fiduciary obligations, it is not at all obvious why extra sanctions are imposed on only some people

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40 *University of Nottingham v Fishel* [2000] ICR 1462 (QBD).

41 McGill University *Regulation on Conflict of Interest* (online) <www.mcgill.ca/secretariat/files/secretariat/conflict-of-interest-regulation-on_0.pdf>; see also *Recognizing Conflicts* (online) <www.mcgill.ca/secretariat/files/secretariat/recognizing-conflicts-jan_2015.pdf>.

42 L D Smith, 'Contract, Consent, and Fiduciary Relationships' in P B Miller and A S Gold, eds, *Contract, Status and Fiduciary Law* (Oxford UP, 2016) 117; see also *Pilmer* (2001) 207 CLR 165, [71] (McHugh, Gummow, Hayne and Callinan JJ).

43 Above, text between nn 30 and 32.

44 Conaglen, above n 36, 82, says that Equity does not punish, citing among other authorities *Harris v Digital Pulse Pty. Ltd.* (2003) 56 NSWLR 298 (NSWCA). In my view this only shows that he is making an impossible argument: he contends that fiduciary duties have no function except to deter, even while he argues that Equity forswears the only remedy that has, as one of its main functions, deterrence, and thus Equity only aims for 'imperfect deterrence'. I think Equity is more principled than that.

in the pursuit of that end. It is not surprising that Conaglen, like Finn, has little to say on this, arguing for a test based on 'reasonable expectations' which in my view is conclusory and descriptive rather than analytical and justificatory.[45]

Secondly, Conaglen's account does not seem true to Equity's practice, because we make fiduciaries liable *even if* they have fulfilled those other obligations. When we want to deter certain kinds of wrongful conduct, we may impose deterrent sanctions, like criminal penalties or punitive damages. But we only impose those deterrent sanctions on people who have engaged in the wrongful conduct that we aim to deter. Fiduciaries, we know, can be in breach of fiduciary obligations without having breached *any other* obligation. Thus fiduciary obligations are autonomous or free-standing. Surely it would be unjust to impose a sanction on someone to deter that person or others from committing conduct that the person being sanctioned did not even commit.[46] This point can be made even stronger. One of the standard critiques of some versions of the philosophy of utilitarianism is that it could be used to justify punishing the innocent, because such unjust punishment could have a utility-increasing deterrent effect if others were deterred from committing the crime that the punished person had supposedly committed. But if a person were punished for a crime even while it was publicly declared that he had not committed it, this would be both unjust and illogical; there could be no deterrent effect. The autonomy of fiduciary duties means that we impose the relevant sanctions while publicly declaring that these sanctions are applicable even to people who have not breached any non-fiduciary obligation.[47] For this reason, an account that says that the sole justification for fiduciary duties is to reduce the likelihood of committing other wrongs is implausible.

Fiduciary obligations, being autonomous or free-standing, must have their own reasons to exist, and if these reasons are not derived from some external public policy, as I think they are not, these reasons will also help to define their content and extent, and will help us to decide who owes them. As I said earlier, in private law all those things are linked.

I have called 'exceptionalist' those accounts of fiduciary duties that are based on deterrence or other public policies. Those are accounts that say that such duties are imposed instrumentally to try to achieve a given goal, rather than in order to give legal effect to the bilateral relationship between the parties. Here I mention a different kind of account, which has been presented by Edelman J.[48] He argues that fiduciary duties arise and take their shape from the undertaking that a person gives when he or she takes on a fiduciary role. This is not exceptionalist reasoning, but rather reductionist: he posits that there is nothing fundamentally distinctive about fiduciary obligations at all.[49] In my

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45 Conaglen, above n 36, 254–68.

46 For a fuller argument, see L Smith, 'Deterrence, Prophylaxis and Punishment in Fiduciary Obligations' (2013) 7 *Journal of Equity* 87.

47 Well-known examples include *Keech v Sandford* (1726) Sel Cas t King 61, 25 ER 223, 2 Eq Cas Abr 741, 22 ER 629 (LK), *Parker v McKenna* (1874) LR 10 Ch App 96 (Div Ct), *Regal (Hastings) Ltd v Gulliver* (1942) [1967] 2 AC 134 (HL), and *Boardman v Phipps* [1967] 2 AC 46 (HL).

48 J Edelman, 'When Do Fiduciary Duties Arise?' (2010) 126 *Law Quarterly Review* 302.

49 Edelman J's account differs slightly from 'contractarian' accounts which say that fiduciary obligations are basically contractual, because in Edelman J's account there is no need for a contract as the law understands it. Contractarian accounts might seem to be also reductionist accounts, inasmuch as they say there is nothing special or distinctive about fiduciary duties and they can be explained in terms of other fundamental categories. It is important to say, however, that many contractarian accounts are produced by economic analysts and what they mean by 'contractual' is not the same as what others may mean by that label. Some well-known examples of economic analysis are R Cooter and B J Freedman, 'The Fiduciary Relationship: Its Economic Character and Legal Consequences' (1991) 66 *NYU Law Review* 1045; F H Easterbrook and D R Fischel,

view, this account is not persuasive, for several reasons. First, the High Court, like other courts, has stressed that fiduciary relationships are indeed distinct from other legal categories.[50] Moreover, it is true that most fiduciary relationships are ones which the fiduciary enters voluntarily and, in that sense, gives an undertaking. Indeed, in *ad hoc* fiduciary relationships outside of the established categories, it may be essential to find an undertaking by the fiduciary to act for and on behalf of the beneficiary, since we may have no other foundation for saying that one person was obliged to act for and on behalf of another. It does not follow, however, that the (rather dramatic) fiduciary obligations that arise are created and shaped directly by the undertaking. If it were, fiduciary duties would be as variable as contracts, but instead what we have is a standard package that applies by default, albeit one that is modifiable in certain ways. Edelman J argues that what is important is not the subjective intention of the fiduciary but the objective interpretation of their undertaking, but this is also true in contract law and allows infinitely variable contractual obligations. It is quite common for a person to come under obligations from having entered voluntarily into a relationship, such as marriage or parenthood, but it does not at all follow that the legal obligations that so arise are created and shaped by the volition of the person who so acted.[51]

A third difficulty is that the objective interpretation theory makes it hard to explain why some relationships are *per se* fiduciary while others are not fiduciary at all. If you give me a cheque and ask me to deposit the cheque and to preserve the money separate and apart and hold it for you, and I agree, this makes a trust which is a fiduciary relationship. If you give me a valuable letter written by a famous jurist and ask me to preserve the letter separate and apart and hold it for you, and I agree, this makes a bailment which is not a fiduciary relationship. Is the undertaking, objectively interpreted, any different? Finally, Edelman J accepts that his argument has little to say about the situations in which fiduciary duties arise under statute, as is very often the case for company directors.[52] As I understand him, this is because his argument is that an undertaking creates the relevant duties in non-statutory settings, whereas if the duties are created by statute no such explanation is needed. In my view this is a shortcoming of his account, for two separate reasons. One is that in many cases, often including the company law context as Edelman J acknowledges, a statute gives the fiduciary the

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'Contract and Fiduciary Duty' (1993) 36 *Journal of Law and Economics* 425; R H Sitkoff, 'The Economic Structure of Fiduciary Law' (2011) 91 *Boston University Law Review* 1039. For some critiques that address the particular meaning given to 'contractual' by the economists, see P Miller, 'Justifying Fiduciary Duties' (2013) 58 *McGill Law Journal* 969, 983–4 and Smith, above n 42, 125–8.

50 Above n 32.

51 J Raz, 'Voluntary Obligations and Normative Powers' (1972) *46 Proceedings of the Aristotelian Society*, Supplementary Volumes 79, 97: 'Not every obligation created for a person by his own voluntary action is a voluntary obligation. … The only way in which voluntary obligations can be distinguished from other obligations which a person imposes on himself by his own action is by reference to their justification'. I thank Sandy Steel for this reference. The same point is made from a civilian perspective in B Moore, 'La théorie des sources des obligations : éclatement d'une classification' (2002) 36 *Revue Juridique Thémis* 689, 722–4. Moore gives (at 724) three examples of situations in which one enters a relationship voluntarily, but the resulting obligations are not shaped by consent but rather are imposed by law. One of his examples is a voluntary tutorship, corresponding roughly to guardianship and creating a fiduciary relationship in common law. The other two are marriage, and the voluntary acknowledgement of parenthood of a child, both of which create the obligation of support (and other legal effects).

52 J Edelman, 'The Role of Status in the Law of Obligations' in A Gold and P Miller (eds) *Philosophical Foundations of Fiduciary Law* (Oxford UP, 2014) 21, 23.

relevant fiduciary *powers,* but does not speak directly to fiduciary duties.[53] Some justification for those duties is needed. On a relational account, that situation is no different from a case that does not involve any statute: the crucial question is whether the powers are held for and on behalf of another, and since they are in the case of directors, there is a fiduciary relationship with the normal incidents. This is another way of saying that although the relationship is entered voluntarily, the fiduciary obligations arise by operation of law, for exactly the same reasons as in non-statutory fiduciary relationships. The other problem with an account that does not speak to the statutory context is more evident when one considers the modern civil law tradition. The fact that a norm is in legislation may mean that it has a different formal source from a norm that arises from case law; but this does not tell us what is the justification for the norm.[54] In a jurisdiction with a civil code, all (or almost all) of private law is codified, but jurists still have to think about why we enforce contracts or have fiduciary obligations. Only in this way can the law (statute law or case law) be properly interpreted and applied. So even in a case in which not only fiduciary powers but also fiduciary obligations are in statutory form, some inquiry as to the justification for the obligations is still needed.[55]

Exceptionalist accounts and reductionist accounts have at least one thing in common: their proponents do not think that it is very useful to talk about fiduciary relationships. Those accounts have their separate explanations for why fiduciary obligations arise, and on those accounts, to say there is a fiduciary relationship is just another way of saying that fiduciary obligations have arisen.[56] I dissent from this. The reasons we owe duties are in general linked to who owes those duties and what those duties require of us. In my view, when we wish to know which duties are properly called fiduciary, it is the *source* of the duties that should rightly guide us. A duty is a fiduciary duty if it is owed exactly because the person who owes it is in a fiduciary relationship.

My account of fiduciary obligations, therefore, is one that I would call 'relational'. We start with a bilateral relationship that has certain characteristics. The law aims to give effect, in law, to the normative features of the relationship that are juridically significant. What do I mean by this? Let us consider the relationship between two parents and their infant child. The child was brought into the world by the parents. They are responsible for the child's existence, and therefore for the existence of the child's needs. The child needs to be fed, sheltered, educated and loved. The law has its limits, and it cannot make one person love another; but in relation to food, shelter, education, and medical care, the parents' moral responsibilities are also legal responsibilities. Those are obligations owed by parents, and they grow out of the relationship of parenthood. We might call them parental obligations. We can notice some features of them: they are primary duties, which means they do not arise by wrongdoing; rather, they arise to implement the relationship in law. And some of them are prescriptive. As the child grows up and typically becomes capable of looking after herself and of making decisions for

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53 For example, federal business corporations in Canada are created under and governed by the *Canada Business Corporations Act,* RSC 1985, c C-44. There is a codification and modification of fiduciary duties in relation to contracts between corporate fiduciaries (directors and officers) and their own corporation (s 120); otherwise the statute merely says (s 122(1)(a)) that in exercising their powers they must 'act honestly and in good faith with a view to the best interests of the corporation'. The courts, not surprisingly, have applied the full scope of fiduciary doctrine, including the law in relation to corporate opportunities which is mentioned nowhere in the statute.

54 Moore, above n 51.

55 Such situations may become increasingly common as some jurisdictions attempt, wisely or not, to codify fiduciary obligations for trustees. See for example the New Brunswick *Trustees Act,* SNB 2015, c 21, s 31 and the New Zealand Trusts Bill, Part 3, Subpart 1.

56 Conaglen, above n 36, 10–11; Edelman, above n 48, 302.

herself, the relationship changes; the legal duties, and also the legal powers and the legal authority, of the parents diminish and eventually fall away.[57]

Obligations arising from a parental relationship may be called parental obligations, just as obligations arising out of a contractual relationship may be called contractual obligations. According to the traditional language of Equity, fiduciary obligations are obligations arising out of fiduciary relationships. Just as with parental and contractual obligations, these obligations may be prescriptive and they are, in the first instance, primary obligations (although in all three contexts, just as elsewhere in the law, a breach of a primary obligation may give rise to a secondary, remedial obligation). If fiduciary obligations grow out of fiduciary relationships, then they will be owed by and to certain persons — the ones in those relationships — and they will have a certain content — one that gives legal effect to the features of the relationship.[58] And in my view, it is not possible to formulate a theory of fiduciary relationships in which the only fiduciary duties are proscriptive.

VI What is A Fiduciary Relationship?

A *Definition of the Relationship*

To make my case, I do not have to start from my own definition of a fiduciary relationship. I do not even have to start from the definitions of people who agree with me about fiduciary duties. I can start from the definitions offered by the people with whom I am disagreeing.

As we have seen, the view that fiduciary duties are only proscriptive seems to have its source in Paul Finn's 1989 paper, 'The Fiduciary Principle'.[59] It was given the imprimatur of the High Court in *Breen.*[60] What definitions of fiduciary relationships do we find in these texts?

Finn said that a fiduciary relationship is one in which 'the law as a matter of course characterises one party's purpose as being *to act in the interests of the other,* or their joint interests, to the exclusion of his own several interests'.[61] In *Breen,* Dawson and Toohey JJ quoted this passage from the judgment of Mason J in *Hospital Products Ltd v United States Surgical Corp:*

> The critical feature of these relationships is that the fiduciary undertakes or agrees *to act for or on behalf of or in the interests of another person* in the

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[57] *Secretary, Department of Health and Community Services v JWB* (1992) 175 CLR 218 at 237–8.

[58] Examples of such accounts are found in E Weinrib, 'The Fiduciary Obligation' (1975) 25 *University of Toronto Law Journal* 1; Finn, *Fiduciary Obligations,* above n 28, [15]; J C Shepherd, 'Toward A Unified Concept of Fiduciary Relationships' (1981) 97 *Law Quarterly Review* 51; P B Miller, 'The Fiduciary Relationship' in A S Gold and P B Miller (eds) *Philosophical Foundations of Fiduciary Law* (Oxford UP, 2014) 63; L Smith, 'Fiduciary Relationships: Ensuring the Loyal Exercise of Judgement on Behalf of Another' (2014) 130 *Law Quarterly Review* 608; R Valsan, 'Fiduciary Duties, Conflict of Interest, and Proper Exercise of Judgment' (2016) 62 *McGill Law Journal* 1.

[59] Finn, 'The Fiduciary Principle', above n 20.

[60] *Breen* (1995) 186 CLR 71.

[61] Finn, 'The Fiduciary Principle', above n 20, 32; 334 (emphasis added); see also at 46; 347: a relationship in which 'one party is entitled to expect that the other *will act in his interests* in and for the purposes of the relationship' (emphasis added).

> exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense.[62]

Gaudron and McHugh JJ said:

> In this country, fiduciary obligations arise because a person has come under *an obligation to act in another's interests.*[63]

And Gummow J said:

> Fiduciary obligations arise (albeit perhaps not exclusively) in various situations where it may be seen that one person is under *an obligation to act in the interests of another.*[64]

Am I the only one who thinks it is a little odd that we would define or describe a fiduciary relationship as one in which one person is obliged — that must mean legally obliged — to act in another's interests, and then turn around and say, however, that fiduciary obligations do not involve any legal obligations to act at all, but only proscriptive obligations?[65] If the obligation to act in another's interests is so critical that it constitutes the very definition of the fiduciary relationship, surely the category 'fiduciary obligations' should include some obligation so to act.

There is a bit of a trap in formulating a fiduciary relationship as one which obliges one person to act in the interests of another. Imagine that I meet my lawyer, who is in a fiduciary relationship with me. I say, 'Give me all your money'. If he was obliged to act in my best interests, or even, a bit better, what he thought were my best interests, he would have to hand it over. And we know that is not right. It is a mistake to suggest that the only alternative to the proscriptive orthodoxy is a position in which fiduciaries owe an open-ended prescriptive duty to advance the interests of the beneficiary.[66] The position that I advocate in this article rejects the proscriptive orthodoxy, but does not argue in favour of an undefined duty to advance the interests of the beneficiary.[67]

But there is a reason that so many people say that a fiduciary relationship is one in which a person is obliged to act in the interests of another. It's because it's true. It just needs a little more attention to detail in how it is expressed. We will come back to that detail.[68]

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62 *Breen* (1995) 186 CLR 71 at 92–3, quoting *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41, 96–7 (emphasis added).

63 *Breen* (1995) 186 CLR 71, 113 (emphasis added).

64 Ibid 137 (emphasis added).

65 I have referred only to the judgments in *Breen,* but similar formulations are found throughout the jurisprudence of the High Court. See, most recently, *Ancient Order of Foresters in Victoria Friendly Society Ltd* [2018] HCA 43, [67] (Gageler J): '…a responsibility to act in the exclusive interests of that other person…'.

66 Such a proposition was rejected for Canadian law in *KLB v British Columbia* [2003] 2 SCR 403, 230 DLR (4th) 513.

67 It is a matter of some puzzlement that judges of the High Court of Australia have sometimes said, in asserting the proscriptive orthodoxy, that a fiduciary relationship does not impose a 'quasi-tortious' duty on the fiduciary: *Breen* (1995) 186 CLR 71, 137 (Gummow J); *Pilmer* (2001) 207 CLR 165, [74] (McHugh, Gummow, Hayne and Callinan JJ); *Howard* (2013) 253 CLR 83, [56] (Hayne and Crennan JJ). I am not aware of the assertion by any court or commentator of the existence of a 'quasi-tortious duty', and since most duties in tort are proscriptive, not prescriptive, it is unclear what this label refers to.

68 Below, Part VI C.

Private law generally allows people to look out for themselves. They must behave lawfully, but they may consult only their own interests in choosing how to exercise their freedom.

Fiduciary relationships are categorically different and this is why they are difficult to integrate with other private law categories, like contract law or tort law. This is why reductionist accounts, although they are attractive to some, are unsuccessful. Sometimes, we are in a relationship in which we must act for and on behalf of another. In such a relationship, we are not free to consult only our own interests. We need a different set of juridical tools to understand how the law implements such a relationship.

In my view, the law gives effect to fiduciary relationships by creating a set of legal incidents between the parties. They are not all proscriptive duties; indeed, they are not all duties in the strictest sense of the word. But they all arise from the relationship and in order to give it legal effect.

B *Duty of Care and Skill*

All fiduciaries presumptively owe a duty of care and skill. Carelessness is not disloyalty.[69] But there is a separate question: is the duty of care and skill owed by a fiduciary properly called a fiduciary duty? In the US, judges and commentators generally think it is; they distinguish fiduciary duties of loyalty from fiduciary duties of care.[70] In other words, they agree that carelessness is not disloyalty, but they still think that the duty of care that arises out of a fiduciary relationship is a fiduciary duty. Heydon J, as I read him, has expressed this view, as have the English Court of Appeal and the Supreme Court of Canada.[71] If this were true, this would be a prescriptive fiduciary duty, because as I have already explained, the fiduciary's duty of care and skill does not permit inaction.[72]

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69 Some have argued, persuasively in my view, that extreme carelessness — say, in the fiduciary context, doing nothing — can amount to disloyalty: Getzler, 'Duty of Care', above n 11, 72; L E Strine Jr et al, 'Loyalty's Core Demand: The Defining Role of Good Faith in Corporation Law' (2010) 98 *Georgetown Law Journal* 629, 635–6. In my view, such conduct reveals not only a breach of the duty of care and skill but also of the duty of good faith, a duty which is more demanding of fiduciaries than of those non-fiduciaries who are subject to a duty of good faith. A fiduciary is bound to act in the interests of the beneficiary, and conduct that consciously ignores those interests is not in good faith and can properly be described as disloyal.

70 Above n 4.

71 Above nn 10, 5.

72 This supposes the proposition that I defended above, that 'fiduciary obligations' means 'obligations arising from a fiduciary relationship'. In other words, it ties the label to the source of the obligation. We have seen another approach which is more concerned with the content of the obligation (above, text at nn 36–41), and I suggested that focusing solely on the content is not fruitful. Even on that approach, however, as we saw there, the fiduciary's duty of care and skill does not have the same content as the tort law duty of care. Is there any non-fiduciary who owes a duty of care and skill comparable in content to that owed by the fiduciary? It is plausible to suggest that the bailee does, since a bailee also may be required to take positive action. But this should not be surprising: a bailee has voluntarily taken custody of the bailor's tangible thing, while a fiduciary has voluntarily taken on a position of looking after intangible interests of the beneficiary. Since *this aspect* of the two relationships is similar, it is not surprising that the imposed primary legal obligations should be similar. Compare the comments of Lord Goff of Chieveley in *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 (HL), 205, with whom all the other judges agreed, referring to bailees and fiduciaries together and suggesting that their duties of care arise because 'they have all assumed responsibility for the property or affairs of others'.

Others like to confine the expression 'fiduciary duties' to matters of loyalty, as a matter of definition.[73] In this view, there cannot be a fiduciary duty of care and skill because 'fiduciary duties' simply means 'duties of or relating to loyalty'. I mentioned above that one version of this approach seems to lie behind the view that the only fiduciary duties are proscriptive ones.[74] I have some sympathy with the idea that the most intuitive meaning or extension of the word fiduciary confines it to loyalty. I think, however, that even on this view, fiduciary duties are not confined to proscriptive duties. For this reason, I will not rely on the duty of care and skill to make my case to that effect.

C *The Supervision of the Exercise of Fiduciary Powers*

I have described the fiduciary relationship as a relationship in which one person acts for and on behalf of another. In my view, this understanding of the fiduciary relationship reveals two distinct but overlapping aspects, both of which are given effect to in law. One of the things I consider most admirable about Australian law is that it continues to distinguish the rule against unauthorized profits from the rule against acting while in a conflict.[75] These two rules, in my view, correspond to the two overlapping aspects of the fiduciary relationship. But, differently from those who take the view that fiduciary obligations are only proscriptive, I do not think that these two rules exhaust those aspects of the relationship, still less do they exhaust the entire legal implementation of acting for and on behalf of another.

Almost universally — some would say, universally, but I do not stop on this here — a fiduciary holds legal powers that can affect some aspect of the rights or personality of the beneficiary.[76] What makes the relationship fiduciary is that these powers are held by the fiduciary for and on behalf of the beneficiary, not held by the fiduciary for his own benefit or to use as he pleases.[77] Once that interpretative conclusion has been

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Since bailees do not typically hold discretionary legal powers as fiduciaries, there is no need to apply the rules on the review of those powers or the rules on conflicts.

[73] In *Bristol & West Building Society* [1998] Ch 1 (CA), Millett LJ said (18) that incompetence is not disloyalty, and then, as if it followed ineluctably, that it was not a breach of fiduciary duty.

[74] Above, text at n 24.

[75] See *Chan v Zacharia* (1984) 154 CLR 178, 198–9 (Deane J), and *Warman International Ltd v Dwyer* (1995) 182 CLR 544, 557 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ); see also *Howard* (2013) 253 CLR 83, [33] (French CJ and Keane J). My only concern with these formulations is that they refer to both rules as profit-stripping. I am in agreement with the description of the rule against unauthorized profits as covering every benefit (including, I would add, valuable information) derived from the fiduciary role. In describing the rule against conflicts, these formulations say that the law takes away any benefit or gain realized by the fiduciary when in a conflict of self-interest and fiduciary duty. This is superfluous given the correct formulation of the no-profit rule. More seriously, it understates the scope of the conflict rules. Those rules can operate even in the absence of any benefit or gain. When a contract made by a fiduciary is voidable due to a conflict, there is no inquiry into whether it was fair or not, which means there is no inquiry into whether the fiduciary made any gain or profit: *Aberdeen Ry Co v Blaikie Brothers* (1854) 1 Macq 461, 1 Paterson 394 (HL); *Tito v Waddell (No. 2)* [1977] Ch 106, 241 (I leave aside here US and Canadian corporate law doctrine which has taken a different path on this point). And of course, the conflict rules are not confined to conflicts of fiduciary duty and self-interest: the fiduciary cannot unimpeachably exercise a fiduciary power when in a conflict between the fiduciary duty owed in relation to that power and another duty (a conflict of duty and duty).

[76] For one example, see the extract from *Hospital Products Ltd* (1984) 156 CLR 41, above n 62.

[77] Although I disagree with Finn, 'The Fiduciary Principle', above n 20, that the only fiduciary duties are proscriptive, and I disagree with his reliance on public policy for understanding this area of the law, I agree with him when he says (35, 37–9; 337, 339–340) that to decide whether a

reached, it does not surprise me at all that the law says that there is only one way in which these powers can be used properly: that is, in what the fiduciary believes to be the best interests of the beneficiary. If they are used otherwise, their exercise is voidable. This is why the UK Supreme Court has said that the exercise of a fiduciary power can be reviewed for breach of fiduciary duty, quite apart from any conflict or unauthorized profit.[78] The Full Court of the Federal Court of Australia has also affirmed that this type of review is part of fiduciary law:

> There are two discrete parts to modern Australian fiduciary law. The better known and understood part is concerned with [the rules against unauthorized profits and against acting in situations of conflict]. The other part serves a different function and is often overlooked in discussion of fiduciary law. Its essential concern is with judicial review of the exercise of powers, duties and discretions given to a fiduciary to be exercised in the interests of another ('the beneficiary') where the beneficiary does not have the right to dictate or to veto how the power, discretion, etc is exercised by the fiduciary. Here the law channels and directs how 'fiduciary discretions' are exercised.[79]

In a well-known passage, Mason J stated that a fiduciary, in exercising his powers, comes under 'a duty to exercise his power or discretion in the interests of the person to whom it is owed'.[80] This passage, incorporating a prescriptive duty at the core of fiduciary law, without any reference to conflict or unauthorized profit, has been quoted with approval by a majority of the High Court, even after the appearance of the proscriptive orthodoxy.[81]

A fiduciary holding fiduciary powers does not have a duty to exercise them; that is impossible, because they are powers, not duties. But in deciding whether or not to exercise them, the fiduciary must do so for the right reasons. That is why it is not wrong to say, as all the judges did in *Breen,* that a fiduciary is obliged to act in another's interests. But it is not quite accurate, as we have seen. We can improve it by saying that in relation to his or her powers, the fiduciary is required to exercise them in what he or she believes are the best interests of the beneficiary.

But if there is a particular kind of legal review of the exercise, by fiduciaries, of the legal powers that they hold in a fiduciary capacity, and which is relevant and applicable even in the absence of any conflict or unauthorized profit, why would anyone insist that the only fiduciary obligations are the proscriptive rules against conflicts and unauthorized profit?

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relationship is fiduciary, one must ask for what purpose the powers held by one of them were granted: for his own benefit, or for and on behalf of another? That is a relational approach that bases fiduciary duties on the bilateral relationship of the parties and has no need to call on public policy. Finn also took a relational approach in Finn, *Fiduciary Obligations,* above n 28, [15].

[78] Above n 8 and text.

[79] *Grimaldi* [2012] FCAFC 6, [174]. Finn J was a member of the panel that rendered this judgment. In Finn, 'Fiduciary Reflections', above n 28, Finn stated that he had not changed his mind about the proscriptive-only view of fiduciary obligations (136; 368–9); he only mentioned in a footnote, and only to say that he was leaving it 'out of account', the law on the review of fiduciary powers (131 note 41; 361 note 41). I agree that there are two aspects to fiduciary law (above, text at n 75), but in my view they are overlapping and neither can be left out of account; and I would not describe them in the way they were described in *Grimaldi*.

[80] *Hospital Products Ltd* (1984) 156 CLR 41, 97.

[81] *Pilmer* (2001) 207 CLR 165, [70] (McHugh, Gummow, Hayne and Callinan JJ); see also *Howard* (2013) 253 CLR 83, [32] (French CJ and Keane J).

Other aspects of fiduciary law grow directly out of the consideration that a fiduciary must exercise his or her powers properly. A fiduciary holding fiduciary powers cannot generally delegate them, nor can she fetter her discretion in advance. Why not? Because then she would not be exercising her powers in what she thinks, from time to time, are the best interests of the beneficiary. In other words, these are also rules that protect the proper exercise of other-regarding judgment. They are rules that apply to fiduciaries, not to holders of non-fiduciary powers, and they can certainly be considered fiduciary obligations.[82]

D *Conflicts*

What is more, far from belonging to another part of the law, the rules about conflicts also grow directly out of the same concern. A conflict, whether it is a conflict of self-interest and fiduciary duty or a conflict of one fiduciary duty with another fiduciary duty, creates a situation in which an external influence has the potential to affect, in an inappropriate way, the fiduciary's judgment in relation to his or her exercise of a fiduciary power. A trustee is selling land held in trust, and proposes to sell it to a company in which the fiduciary has a financial interest. The trustee must exercise the power to sell trust property in what he thinks are the best interests of the beneficiaries. The presence of his own financial interest on the other side of the contract does more than just create a risk of corruption. It actually makes it impossible to know whether his judgment was untainted.[83] This is why such a contract is voidable: it is impossible to know whether the fiduciary power was used in the only way it could properly be used, that is, solely for the benefit of the beneficiaries. Even the fiduciary cannot be sure whether his judgment was affected, which is why good faith is no defence, and why the question cannot be resolved by any amount of evidence. As an American judge wrote in a law review article in 1956: 'Conflict destroys an essential ingredient without which a fiduciary relation cannot function — disinterested judgment'.[84]

It will be seen that in the previous paragraph, I described a conflict of self-interest and duty as a conflict of self-interest and *fiduciary* duty, meaning the duty to exercise a fiduciary power properly. In a similar vein, a conflict of duty and duty is properly described as a conflict between a fiduciary duty to one person and a duty owed to another. It is a striking feature of the legal analysis of fiduciary law over the last several decades that there has been no consensus on exactly what is meant by a conflict. Many jurists seem to think it is obvious, but as in everything legal, the devil is in the details and a proper definition of a conflict is inevitably tied to the underlying theory. Conaglen seems drawn by his own theory of fiduciary obligations to conclude that a conflict arises when the fiduciary is in a situation in which his self-interest is in conflict with a *non-*

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[82] As they were in Finn, *Fiduciary Obligations,* above n 28, chs 5–7.

[83] *Furs Ltd v Tomkies* (1936) 54 CLR 583, 592 (Rich, Dixon and Evatt JJ): 'The consequences of such a conflict are not discoverable'.

[84] E R Hoover, 'Basic Principles Underlying Duty of Loyalty' (1956) 5 *Cleveland-Marshall Law Review* 7, 10. For a comprehensive list of judicial statements that indicate that this is the basis of the rule against exercising fiduciary powers while in a conflict, see M Conaglen, 'Public-Private Intersection: Comparing Fiduciary Conflict Doctrine and Bias' [2008] *Public Law* 58, 67–8, and the cases cited there from the 18th to the 20th centuries, to which may now be added *Canadian National Railway Co v McKercher LLP* [2013] 2 SCR 649, 2013 SCC 39, [38], [40]. We know that fiduciary powers must be exercised for a proper purpose, and since Conaglen agrees that in conflict situations it is impossible to know whether the fiduciary has acted for a proper or improper purpose, it is not clear to me why he feels the need to invoke public policy to explain the rules about conflicts (at 77, and in Conaglen, above n 36).

fiduciary duty that he owes to the beneficiary.[85] The no-conflict duty requires the fiduciary to 'eschew situations' of this kind.[86] But this is far too wide. If a fiduciary agent is offered a bribe, then even before she responds, she is in a situation in which her self-interest is in conflict with her non-fiduciary duties. Can we really say that she is in breach of duty? If she is, it seems that this breach cannot be erased if she rejects the offer.[87] Take a stronger case. Imagine that a company director is not an independent director but rather a managing director, what might be called an officer in some jurisdictions. She is a director but is also a senior employee, and is undoubtedly a fiduciary. Imagine that this person receives a phone call on Friday at lunch time, from a friend who invites her to join a golf game that afternoon. Assume, for the purposes of the example, that if she were to take the afternoon off, she would be in breach of her duties of employment. Is this a conflict as fiduciary law understands it? I don't think it is. But it fits Conaglen's definition, as she is in a position in which her self-interest conflicts with her non-fiduciary duties. If it is a conflict, note that it is a conflict *even before* the director decides whether to accept the invitation, because that is when the conflict arises between her self-interest and her non-fiduciary duty. Moreover, on Conaglen's theory, which in this respect (and in others) corresponds to the Australian proscriptive orthodoxy, the rule about conflicts is a *duty* to avoid conflicts, so this director has breached a duty — again, even before deciding whether or not to take the afternoon off. That also does not seem correct to me.[88]

If this is not a conflict as fiduciary law understands it, why not? It is because a fiduciary conflict of interest is not a conflict between self-interest and any old duty, but between self-interest and a *fiduciary* duty. This is how the High Court has described the rules against conflicts.[89] More precisely, a conflict arises in relation to the exercise by a fiduciary of their fiduciary powers, powers which they are legally bound to exercise in accordance with their fiduciary duties. When conflicts (including also conflicts of duty and duty) are tied to the exercise of fiduciary powers, the scope of the prohibition against conflicts comes under control, and it is properly tied to what we actually mean by conflicts in fiduciary law.[90] The rules about conflicts are not, strictly speaking, duties to avoid situations; they are rules that say that fiduciary powers cannot be unimpeachably exercised in certain situations, because a power exercised in a conflict situation is

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85 Conaglen, above n 36, 63 and *passim*.

86 Ibid.

87 Unless perhaps she obtains informed consent from the principal to having been offered a bribe, which seems slightly pointless.

88 One could indeed argue that all fiduciaries are always in a conflict as Conaglen describes it, and therefore in breach of duty. The fiduciary, whether paid or unpaid, has a self-interest in pursuing her own activities, whether for leisure or personal profit. This interest conflicts with the non-fiduciary duties that she owes to the beneficiary, which require her to do certain things that benefit the beneficiary and take up the time and effort of the fiduciary. Some authors have distinguished a conflict of *interests* from a conflict of interest. A conflict of interests is simply a situation in which the interests of two persons are in conflict, while a conflict of interest only arises where one person is required to exercise duty-bound judgment on behalf of another: M Davies, 'Conflict of Interest' in R Chadwick (ed) *Encyclopedia of Applied Ethics* (Elsevier, 2nd ed, 2012) 571; Valsan, above n 58, 16. Conaglen's definition, it seems, corresponds to a conflict of interests.

89 *Chan* (1984) 154 CLR 178, 198 (Deane J); *Warman International Ltd* (1995) 182 CLR 544, 557 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ); *Howard* (2013) 253 CLR 83, [33] (French CJ and Keane J), [108] (Gageler J).

90 On this approach, it is important to say that there can be potential conflicts, namely situations which may in the future call for the exercise of a fiduciary power in a conflict situation. These, like actual conflicts, need to be disclosed; and it is the actual use of a power in a conflict situation that leads to voidability of that exercise. Both points are discussed in the next Part.

voidable. And we can see why it is only fiduciaries who, in private law, are subject to the conflict rules: they are the ones who have fiduciary powers.

E *Duties of Disclosure*

The rules about the supervision of fiduciary powers, including the rules about conflicts, are aspects of the legal implementation of loyalty: of other-regarding exercise of judgment. They may not be duties in the strictest sense, some of them rather being rules or requirements that are prerequisites for the valid exercise of powers, but they can be called fiduciary duties without error. But the fiduciary relationship, in which we act for and on behalf of another, has another aspect. The disinterested and other-regarding nature of the relationship is not only implemented in relation to the exercise of fiduciary powers. It is also implemented by various rules and principles that give effect precisely to the fact that the fiduciary, when so acting, is not acting for himself, but for and on behalf of another.

When you are acting for yourself, you can keep yourself to yourself. You are not allowed to tell lies, but you are not obliged to volunteer information. We should not be surprised to find that in the fiduciary relationship, which is a relationship in which one acts for and on behalf of another, the opposite is true. You do have to provide information, all the time. And this is a primary duty. What I mean is this: you are not obliged to provide information because you have done something wrong, or breached some other duty. You are obliged to provide information because that is what is right. It's like the example of being a parent that I used earlier: you are not obliged to feed and clothe your minor children because you've done something wrong. You are obliged to feed and clothe them because that is the legal implementation of the relationship you have with them.

Consider how extensive are the obligations of disclosure of information that fall on fiduciaries. A fiduciary must disclose actual or potential conflicts, and as we will see, this is a duty in a strict sense, that can create liability for loss caused by a breach of it. But the fiduciary's duties of disclosure are not only about conflicts. Fiduciaries must provide to their beneficiaries all of the relevant information concerning their performance of their fiduciary role. How could anything else make sense? How could you lawfully keep secrets regarding your management of another person's affairs from that person? Trustees and executors, agents and partners, must keep accounts and must allow the beneficiaries to see them, as a matter of primary right not as a remedy for wrongdoing. *Non*-disclosure is a wrong, a breach of that primary duty of disclosure. When you are managing property that does not belong to you, it only makes sense that you have to explain what you have done with it. This duty can go beyond keeping and producing accounts, to producing other relevant information. Trustees must tell their beneficiaries of the existence of the trust.[91] They must also be ready to produce the documents that support their accounts.

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[91] D Hayton, P Matthews, and C Mitchell, *Underhill and Hayton: Law Relating to Trusts and Trustees*, 19th ed (London: LexisNexis, 2016), [50.2], [56.11]; *Valard Construction Ltd* 2018 SCC 8. In *Segelov v Ernst & Young Services Pty Ltd* [2015] NSWCA 156, the Court cast doubt on this duty and in any event held that it could be excluded by the trust instrument; but note that the plaintiff in that case was not a trust beneficiary but only one of many objects of a discretionary power of distribution. On the importance of this distinction, see L Smith, 'Massively Discretionary Trusts' (2017) 70 *Current Legal Problems* 17. The law allows the creation of discretionary powers in favour of enormously wide classes of persons, and it is not possible for trustees to be accountable towards such persons in the same way that they are accountable to beneficiaries in the strict sense — that is, persons who are entitled (even if defeasibly) to trust property.

In my view, and I think this is the traditional view, the obligations of trustees to provide information grow out of the fiduciary relationship between trustee and beneficiary.[92] It is often said that those obligations grow out of the accountability of trustees.[93] Trustees are accountable in the strict sense of that word: they must keep accounts. And since they must keep accounts for the benefit of those to whom they are accountable, it naturally follows that those beneficiaries have a primary right to see the accounts. Some other fiduciaries are accountable in this strict sense, but not all are, because not all fiduciaries have stewardship over property for the benefit of the beneficiary.[94] But every fiduciary is accountable in a wider sense: in the sense that they have to give an account of what they have done in their role of acting for and on behalf of the beneficiary. This is why any fiduciary, even if they are not bound to keep accounts, will be 'accountable as a constructive trustee' if they acquire an unauthorized profit.[95] Being accountable, in this sense of being responsible for one's actions on behalf of another, is the reason that every fiduciary must provide information to that other about what they have done and are doing.[96] Since these prescriptive obligations grow out of and give effect to the fiduciary relationship, it is perfectly logical that courts have for so long called them fiduciary obligations.[97]

Following the establishment of what I called earlier the proscriptive orthodoxy, it was of course necessary to make sense of fiduciaries' positive duties of disclosure within that orthodoxy. The High Court of Australia has suggested that a fiduciary does not have a duty to disclose a conflict or an unauthorized profit; rather, disclosure of these things is a way of avoiding breaching the proscriptive duties against being in a conflict or acquiring an unauthorized profit, assuming of course that the beneficiary gives consent.[98] In my view, this does not work, and I will give five distinct arguments.

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[92] In *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709 (PC) it was suggested that those obligations arise out of the court's supervisory jurisdiction over trusts. Although the supervisory jurisdiction is very important, trusts since the time of Lord Nottingham have been founded on bilateral rights and obligations between trustees and beneficiaries, and it would be a mistake to turn them into a kind of public institution in which the courts decide what is best for all. *Schmidt* on this point is inconsistent with *Armitage v Nurse* [1998] Ch 241 (CA), 261 ('Every beneficiary is entitled to see the trust accounts, whether his interest is in possession or not'); the result is that *Schmidt,* being a decision of the Privy Council on appeal from the courts of the Isle of Man, is only binding in that jurisdiction (see *Willers v Joyce* [2016] UKSC 44).

[93] *Re Simersall; Blackwell v Bray* [1992] FCA 310, 35 FCR 584 (Gummow J).

[94] J Penner, 'Distinguishing Fiduciary, Trust, and Accounting Relationships' (2014) 8 *Journal of Equity* 202.

[95] E.g. *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45.

[96] For discussion in addition to the examples given in this paragraph, see, for partners, R l'A Banks, *Lindley & Banks on Partnership*, (Sweet & Maxwell, 20th ed, 2017), 629–42, treating duties of disclosure along with the rule against unauthorized profits as part of the fiduciary duty of good faith; for agents, also with case law citations concerning company directors, see P Watts and F M B Reynolds, *Bowstead and Reynolds on Agency* (Sweet & Maxwell, 21st ed, 2018), 241–3. This text notes the Australian proscriptive position, but suggests that that approach is not capable of explaining all of the positive duties of disclosure that fall on fiduciaries.

[97] Above n 6; see also Scottish Law Commission, *Report (No. 239) on Trust Law* (The Stationery Office, 2013), [11.11]. Of course, there can be purely contractual obligations of disclosure, but as we have seen, it is not fruitful to try to identify fiduciary obligations by looking only at the content of the obligations and ignoring their source (above, Part V). Almost any obligation (fiduciary, tortious, equitable, etc.) can be replicated in contract, but this tells us nothing about the obligation when it does not so arise.

[98] *Maguire* (1997) 188 CLR 449, 466 (Brennan CJ and Gaudron, McHugh and Gummow JJ); see also *Blackmagic Design Pty Ltd v Overliese* [2011] FCAFC 24, [105].

First, it is difficult to understand how it works analytically. Imagine I am your agent to sell your land, and a potential buyer makes an offer, but the person is my brother. This puts me in a conflict situation and on the proscriptive orthodoxy, it appears that simply by hearing (not accepting) the offer, I have breached the proscriptive duty not to be in a conflict. That seems a difficult position to defend, since I could not stop my brother from making the offer before I knew he was going to do so.[99] Assume I now make disclosure of the offer to you, and you say that I may not sell to my brother. Are we supposed to say that I have now received consent, however, to the conflict that I was in when the offer was made? Is the breach of proscriptive duty cured retroactively?[100] Did I really do anything legally wrongful, and can you really be said to have given consent to that wrong?

Secondly, it seems like an awkward way to describe duties of disclosure that functions only to preserve the proscriptive orthodoxy. Let us consider another duty of disclosure. At common law, an insured person has a duty to disclose to the insurer all information relevant to the risks insured.[101] Would we say that the insured has a proscriptive duty not to be in a situation in which the insurer was unaware of the extent of the insured risks, and that breach of this duty can be avoided by making disclosure? Only if, for some reason, we were committed to the proposition that there was no prescriptive duty of disclosure.

Thirdly, this account must posit multiple bases for fiduciaries' duties to disclose. On this approach, there is no duty to disclose a conflict, but rather this is merely a means of avoiding breach of a proscriptive duty. But this cannot explain the positive duties of disclosure that otherwise fall on fiduciaries, such as the duty of a trustee to provide information about the trust or the duty of an agent to provide information about the contracts he has made on behalf of the principal. Since those are clearly prescriptive duties, and primary duties that do not arise from wrongdoing, they must have a different basis. What of the fiduciary's duty to disclose their own breach of duty?[102] This cannot be a means of avoiding a breach of duty, as it comes too late. Moreover it is a duty, not merely a way of getting consent to the earlier breach, since the breach of it allows recovery of a loss that was caused by that breach but not caused by the earlier breach.[103] Are there then (at least) three different bases for fiduciaries' duties to disclose? I would argue, on the contrary, that all these duties arise from the accountability that is inherent in every fiduciary relationship; that is, to give effect to the fact that the fiduciary is acting for and on behalf of the beneficiary.

Fourthly, this explanation of the duty to disclose does not explain its extent. In many cases, the beneficiary is well aware of the conflict, because she is contracting with her own fiduciary. In order to ensure that the contract is immune from rescission, the

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[99] On my approach, the offer creates a potential conflict (above n 90), but simply *being in* the conflict is not itself a breach of a legal duty. Exercising a fiduciary power in a conflict situation makes the exercise voidable. A potential conflict should be disclosed to the beneficiary, although an agent selling land must anyway disclose all offers to the principal.

[100] Again, this puzzle is solved by tying the conflict rules to the exercise of fiduciary powers. What I need informed consent to is the exercise of a power (in this case, to sell your land) in a conflict situation; that will make the exercise unimpeachable.

[101] H K Wham, '"If They Wanted to Know, Why Didn't They Ask?" A Review of the Insured's Duty of Disclosure' (2014) 20 *Auckland University Law Review* 73, explaining the common law duty and how it has been modified in some jurisdictions, and calling for reform in New Zealand.

[102] *Item Software (UK) Ltd v Fassihi* [2004] EWCA Civ 1244, [2005] 2 BCLC 91, approving *Tesco Stores Ltd v Pook* [2003] EWHC 823, [2004] IRLR 618, [65] and *Crown Dilmun v Sutton* [2004] EWHC 52, [2004] 1 BCLC 468.

[103] This was the holding in *Item Software (UK) Ltd v Fassihi* [2004] EWCA Civ 1244, [2005] 2 BCLC 91.

fiduciary must disclose more than the conflict. He may need to disclose information that he has about the value of property that he is buying from the beneficiary.[104] On my argument, because there is a fiduciary relationship, the fiduciary has a (prescriptive fiduciary) duty to disclose everything that is relevant to the beneficiary to help the beneficiary decide whether to enter the transaction with the fiduciary. But if there is a proscriptive duty to avoid *being in* a conflict, which can be cured by disclosure and consent, this could only explain an obligation to disclose the conflict.[105]

Fifthly, this account cannot explain the cases on compensation for breach of fiduciary duty. These are cases in which the beneficiary enters a transaction, typically with someone other than the fiduciary, but the fiduciary has an undisclosed interest. Then the beneficiary suffers a loss, caused by some external event such as a fall in the market or a business failure. The beneficiary sues the defendant fiduciary for this loss, on the basis that it was caused by a wrong of the defendant. But what is the wrong on which the claim is founded? It cannot simply be the existence of the conflict. The reason is that the conflict as such is not a but-for cause of the loss. The causal analysis requires us to imagine the same facts but without the wrongful act or omission; if the loss would still have occurred, the wrongful act or omission is not a but-for cause of it. On the proscriptive orthodoxy, the duty is not to be in a conflict. Conducting the standard causal analysis, if we imagine the same transaction occurring but without the fiduciary's being in a conflict, we will see that the same loss would have occurred. Nor does the plaintiff's claim take the form that because of the conflict, the fiduciary gave bad advice that would not have been given had the fiduciary been unconflicted. There is no hint of that in the cases, and if the claim was made in that way, it would probably be argued as a breach of the duty of care and skill. The gravamen of the claim, over and over, is that but for the fiduciary's failure to disclose, the client would not have entered into the transaction at all.[106] In other words, the wrong that is the foundation of the claim is non-disclosure. In *Swindle v Harrison,* each of the judges explicitly stated that the wrong in question was non-disclosure.[107]

There are two different kinds of rescission that can arise in fiduciary relationships. One kind arises where the beneficiary of the relationship contracts with the fiduciary.[108] It is important to see that here the fiduciary is not contracting in a fiduciary capacity or in the use of her fiduciary powers; she is contracting in her personal capacity. There is typically nothing wrong with the contract from her side. When the beneficiary wishes to rescind, he says: 'I did not fully or properly consent to the contract, because I was missing relevant information'. It is not that different from rescission based on misrepresentation. When I was small, I was taught that saying nothing does not count as a misrepresentation that allows the other party to rescind a contract, *except* in two

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104 *Tate* (1866) 2 Ch App 55 (LC); *McKenzie* [1927] VLR 134.

105 The response might be that it is only with full information that the beneficiary can meaningfully consent to the conflict. Of course this is true; but the question is why the beneficiary is entitled to that further information, such as information held by the fiduciary about the value of the beneficiary's own property. This cannot be explained by saying that disclosure is just a way to avoid a breach of a duty *not to be in a conflict.*

106 *Nocton* [1914] AC 932 (HL), as interpreted in *Hodgkinson* [1994] 3 SCR 377, 415, for the majority, in *Swindle* [1997] 4 All ER 705 (CA), 732 (Mummery LJ), and in *Maguire* (1997) 188 CLR 449, 495 (Kirby J); *London Loan & Savings Co* [1934] 3 DLR 465 (PC), 469; *Canson Enterprises Ltd* [1991] 3 SCR 534, 542, 558; *Hodgkinson* [1994] 3 SCR 377, 393–4.

107 *Swindle* [1997] 4 All ER 705 (CA), 718 (Evans LJ), 720 (Hobhouse LJ), 735 (Mummery LJ). In *Swindle* the plaintiff was not able to establish that the loss was causally linked to the non-disclosure.

108 In trust law this is the domain of the 'fair-dealing' rule, but the same principles apply to all fiduciaries: *Tito* [1977] Ch 106, 225; Conaglen, above n 36, 128–38.

situations: insurance and fiduciary relationships.[109] In those situations, I learned, there is a duty of disclosure, with the result that non-disclosure has the same legal effect as a misrepresentation.[110] So if a fiduciary, acting personally, contracts with her beneficiary without making full disclosure of all relevant information in her possession, the beneficiary can rescind.[111] It is not actually necessary, and may be positively misleading, to discuss this in terms of conflicts. It is much simpler to say that the beneficiary is entitled to full information, including the disclosure of any relevant interest of the fiduciary but also any available information about the value of the property, and the solvency of the fiduciary if the proposed transaction is a loan of money from the beneficiary to the fiduciary.[112]

Analytically different is the case in which the fiduciary enters a contract, almost always with some other party, in her fiduciary capacity and using her fiduciary powers, but while in a conflict of self-interest and fiduciary duty (or a conflict of fiduciary duty to the plaintiff beneficiary and fiduciary duty to someone else).[113] In this case, the conflict is crucial to the analysis, because (as we have seen) it means that we cannot be sure that the fiduciary has used the fiduciary power in the only way that it can properly be used, namely, in what the fiduciary believes are the best interests of the beneficiary. A typical example would be a case in which a trustee, acting as such, sells trust property to a company in which the trustee has a financial interest. When the beneficiary attacks this transaction, she is not calling into question her own consent to the contract, since she is not a party to it. She is calling into question the validity of the exercise by the fiduciary of the fiduciary power to make the contract. If the fiduciary was in a conflict, their exercise of the fiduciary power is voidable and this is how the transaction may be rescinded.[114] The operation of the conflict rules in this context is quite independent of the rule against unauthorized profits, which is why it is no defence to argue that the transaction was substantively fair.[115] Fully informed consent to the conflict is one way to ensure that the exercise of the fiduciary power is valid.

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[109] Both discussed in the judgment of Scrutton LJ in *Moody* [1917] 2 Ch 71 (CA).

[110] This is still largely true, although a thorough analysis requires more detail: E Peel, *Treitel: The Law of Contract* (Sweet & Maxwell, 14th ed, 2015), 479–90.

[111] And, especially if rescission is impossible, monetary adjustments may be imposed, as for example in *McKenzie* [1927] VLR 134 and *Maguire* (1997) 188 CLR 449.

[112] *Daly* (1986) 160 CLR 371.

[113] In trust law this is the domain of the 'self-dealing' rule but the same principles apply to all fiduciaries: *Tito* [1977] Ch 106, 225; Conaglen, above n 36, 126–8.

[114] Again, if rescission is impossible, monetary adjustments may be used: *Estate of Rothko* 372 NE2d 291 (NY, 1977).

[115] Moreover, as a matter of general principle (which may be modified by statute in some contexts), even if the contract is not rescinded, the fiduciary remains accountable for any profit: *Gray v New Augarita Porcupine Mines Ltd* [1952] 3 DLR 1 (PC), 13. This is one of many considerations that make it important not to treat rescission and accounting for profits as two possible remedies for a single problem. Even though their operation often overlaps, the rule against unauthorized profits and the rules against using fiduciary powers in conflict situations are separate norms that have separate justifications and separate remedies.

F *Unauthorised Profits (and Reimbursement of Expenses)*

As it is with information, so it is with rights. What the fiduciary extracts from acting as a fiduciary is held for the beneficiary, because the fiduciary relationship involves acting for another. If that is information, this creates a duty to disclose. If what is extracted is a right, such as a valuable contract or ownership of a large amount of money, this creates a duty to give it up to the beneficiary. It is not an accident that the word 'accountable' has a wide sense that covers both information and rights. You are accountable to your beneficiary, which means you must produce an account if you are handling their property, and it also means you must hand over the bribe that you got from a third party.

This brings me to an important point. In my view the duty on a fiduciary to surrender an unauthorized profit is, just like the duty to provide information, a primary duty. It is not the case that there is a duty not to make an unauthorized profit and then, when that duty is breached, there is a remedy for breach that requires the fiduciary to give up the profit. To look at it that way is analytically superfluous, but it also leads to the wrong results. It would allow a fiduciary who makes an unauthorized profit from his fiduciary role to escape liability by showing that he could have made the profit in a different way. When this argument was tried in the English Court of Appeal, it was rejected, and rightly in my view.[116] Once it is shown that the profit was derived from the fiduciary role, there is no room for any further argument about causation, because the duty is primary, not secondary and remedial.[117] If the profit was made through the

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[116] *Murad v Al-Saraj* [2005] EWCA Civ 959. The same point was made in *Furs Ltd* (1936) 54 CLR 583, 598 (Rich, Dixon and Evatt JJ), and in *Gray* [1952] 3 DLR 1 (PC), 15. *Murad* and *Gray* were mentioned with approval by the majority in *Ancient Order of Foresters in Victoria Friendly Society Ltd* [2018] HCA 43, [9] (Kiefel CJ, Keane and Edelman JJ), while only *Murad* was mentioned by the other judges ([83] (Gageler J), [192]–[194] (Nettle J), both seemingly doubtful of the English decision.

[117] It is very important to say that this reasoning would not apply to a case in which an accounting of profits is used as a remedy for a wrongful act, as it is in a number of contexts including intellectual property infringements and accessory liability under *Barnes v Addy*. In these cases, the accounting is used to measure a *secondary* duty to surrender the profit acquired by a breach of another duty; it is a remedial secondary duty. In such a case, the plaintiff's only title to the gain is by showing that it was causally connected to the wrong, so it would be open to the defendant to raise questions about the causal link between the breach and the gain, including whether the gain would have been made even without the breach (although, in line with general principles of both common law and equity, evidentiary difficulties created by a wrongful act may be resolved against the wrongdoer: L Smith, 'The Measurement of Compensation Claims Against Trustees and Fiduciaries' in E Bant and M Harding (eds) *Exploring Private Law* (Cambridge UP, 2010) 363, 373–5). An example of the failure of the causal link, in the intellectual property context, is *Monsanto Canada Inc v Schmeiser* 2004 SCC 34, [2004] 1 SCR 902. *Ancient Order of Foresters in Victoria Friendly Society Ltd* [2018] HCA 43 concerned an accounting of profits for the wrongful act of knowing assistance in a breach of fiduciary duty. With respect, it is a weakness of the judgments in the case that they seem to assume (albeit in *obiter)* that the liability of a fiduciary to surrender an unauthorized gain is a secondary liability that arises from a wrongful act ([9] (Kiefel CJ, Keane and Edelman JJ), [80]–[81] (Gageler J), [191]–[194] (Nettle J). This is inconsistent with the High Court's own formulations of the rule against unauthorized profits as it applies to fiduciaries (see the citations in n 114 below). In other words, the principle that was applied in *Furs Ltd, Gray* and *Murad* (ibid) has no application to a case in which an accounting of profits is deployed as a remedy for a wrongful act.

fiduciary role, you have to give it to the beneficiary.[118] In principle, since a trust is an obligation as to the benefit of particular property, you hold it in trust.[119]

In my view, therefore, obligations relating to information are not that different from obligations relating to unauthorized profits. Either way, the law says that if you got it while acting for and on behalf of another person, you must hand it over. There is a logical corollary to this rule. At least in general, when a fiduciary properly incurs *expenses* while acting for and on behalf of the beneficiary, the beneficiary (or, perhaps, the trust fund) is chargeable for that expense.[120] That is the flip side of the same principle. You do not have to bear the expenses of acting for and on behalf of another, but you cannot extract profits from so acting.

This leads to the following proposition: the obligation to surrender unauthorized profits, which everyone agrees is one of the core features of fiduciary law, is prescriptive, not proscriptive. It is a primary obligation to give up the unauthorized profit.

VII CONCLUSION

Academics and judges have at least this in common: sometimes, we publish ideas and then change our minds.[121] We publish a different and inconsistent way of looking at

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118 *Furs Ltd* (1936) 54 CLR 583, 598, (Rich, Dixon and Evatt JJ): '… the fact of paramount legal significance is that the payment was obtained by the respondent in course of a transaction which he was carrying out on behalf of the company in execution of his office of managing director. … His fiduciary character was alike the occasion and the means of securing the profit for himself'. In *Regal (Hastings) Ltd* (1942) [1967] 2 AC 134 (HL), 145, Lord Russell of Killowen said: 'The liability arises from the mere fact of a profit having, in the stated circumstances [*scil,* by use of a fiduciary position], been made'. In *Chan* (1984) 154 CLR 178, 198, Deane J described the rule as one '…which requires the fiduciary to account for any benefit or gain obtained or received by reason of or by use of his fiduciary position or of opportunity or knowledge resulting from it'. In *Warman International Ltd.* (1995) 182 CLR 544, 557 the unanimous High Court used almost exactly the same language. In *Howard* (2013) 253 CLR 83, [37] French CJ and Keane J stated that the liability arises where the gain or benefit is 'obtained by use or by reason of the fiduciary position', while Hayne and Crennan JJ said ([62]): 'A fiduciary must account for a profit or benefit obtained or received by reason or by use of the fiduciary position or by reason or by use of any opportunity or knowledge resulting from the position'. They also said ([63], emphasis in original) that the question is whether the fiduciary 'has obtained a benefit *by reason or by use of* the relationship between' the fiduciary and the beneficiary. See also *Gibson* (1801) 6 Ves Jun 266, 31 ER 1044 (LC), 277, 1050, in which Lord Eldon said '… even a benefit arising by accident upon the principles of this Court should accrue to the … ' beneficiary of the fiduciary relationship. Note that none of these formulations ties the rule to any breach of duty (because it is a primary duty), or requires the presence of a conflict (because the rule against unauthorized profits is a separate norm from the rules about conflicts). It is important to add that some but not all fiduciaries (those who owe additional, positive duties, usually contractual in origin) may be accountable even for certain benefits that were acquired independently from the fiduciary role. This accountability is due to those additional duties, not to the fiduciary rule against unauthorized profits; see Smith, 'Judgement', above n 58, 629 note 90.

119 *Furs Ltd* (1936) 54 CLR 583, 592 (Rich, Dixon and Evatt JJ): 'An undisclosed profit which a director so derives from the execution of his fiduciary duties belongs in equity to the company'. Note that the majority uses the phrase 'fiduciary duties' here to refer not to a proscriptive duty but rather to the set of duties inherent in the fiduciary relationship of acting for and on behalf of another. On the trust, see also *FHR European Ventures LLP* [2014] UKSC 45.

120 For references in different fiduciary contexts, see Smith 'Deterrence', above n 46, 101.

121 Recall the immortal words of Bramwell B during argument in *Styrap v Edwards* (1872) 26 LT (NS) 704 (Exch), 706, when counsel invoked his earlier decision: 'The matter does not appear to me now as it appears to have appeared to me then'. See also Lord Eldon in *Ex parte Nolte* (1826)

the same matter. One of the disadvantages of the academic life is that when we change our mind, we cannot stop people from preferring what we said before to what we want to say now.

Paul Finn's 1977 monograph on fiduciary obligations remains a seminal work.[122] Some of what he said there was retracted by his 1989 paper.[123] There are many things in both the book and the paper with which I agree, even if there are a few things with which I do not. I am heavily indebted to his ground-breaking scholarship, albeit I see the overall picture in a different way. As I have explained, I do not agree that fiduciary duties are only proscriptive.

Nor do I agree with the statement, on the first page of the monograph, that '…it is meaningless to talk of fiduciary relationships as such'. It may be that this is one of the things on which Finn changed his mind over time.[124] My own view is that it is impossible to understand fiduciary law without understanding the nature of a fiduciary relationship. I have described a fiduciary relationship — as has the High Court of Australia, and many other courts and commentators — as a relationship in which one person is obliged to act for and on behalf of another. I have suggested that most of the legal incidents of the fiduciary relationship — which include fiduciary duties but also rules for the proper use of fiduciary powers and even, in the case of proper expenses, what might be called fiduciary rights — grow out of the legal implementation of that basic idea of acting for and on behalf of another. In Finn's monograph there are 24 chapters. In my view, the rules set out in 22 of those 24 chapters all flow directly from that understanding of the fiduciary relationship.[125]

I close with one other observation. In his most recent paper on fiduciary law, Finn discusses the parallels between the judicial control of fiduciary powers and the judicial control of power and authority in public law, and he describes how, as a doctoral student, he was discouraged from exploring this in the research that led to the 1977 monograph.[126] I think these parallels are very significant indeed. We don't like judges or cabinet ministers to acquire unauthorized profits or to exercise their powers for an improper purpose or while in a conflict of interest, any more than we like trustees doing these things. The reason is the same: they hold discretionary powers, that require the exercise of judgment, but they do not hold them for their own benefit. Little surprise, then, that rules with recognizably the same shape and justification should take form in order to regulate the situation.

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2 Glynn & James 295 (LC), 308: 'I feel myself bound to state that I must, when I decided that case, have seen it in a point of view, in which, after most laborious consideration, I cannot see it now'.

[122] Finn, *Fiduciary Obligations,* above n 28.

[123] Finn, 'The Fiduciary Principle', above n 20.

[124] Finn, 'Fiduciary Reflections', above n 28, 131; 362.

[125] The only chapters not so included are ch 16 on undue influence and ch 19 on duties relating to confidential information. Developments in the law since the monograph was published make clear that these two bodies of doctrine, while they overlap with fiduciary relationships, stand apart from them in the sense that both undue influence and duties relating to confidential information can arise outside of a fiduciary relationship. Indeed this was already noted by Gummow when he reviewed the book: W M Gummow, 'Review: *Fiduciary Obligations*' (1978) 2 *University of New South Wales Law Journal* 408, 410.

[126] Finn, 'Fiduciary Reflections', above n 28, 127–9; 357–9. See also P D Finn, 'The Forgotten 'Trust': The People and the State' in M Cope (ed) *Equity: Issues and Trends* (Annandale: Federation Press, 1995) 131; Sir Anthony Mason, 'The Place of Equity and Equitable Doctrines in the Contemporary Common Law World' (1994) 110 *Law Quarterly Review* 238, 238; and J J Spigelman, 'Foundations of Administrative Law: Toward General Principles of Institutional Law' (1999) 58(1) *Australian Journal of Public Administration* 3, 9–10.