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Expansion of the Fiduciary Paradigm into Commercial Relationships: The Australian Experience

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I. Introduction

Before he wrote *The Wealth of Nations*,[1] the enlightenment philosopher and founder of the modern discipline of economics, Adam Smith, wrote *The Theory of Moral Sentiments*.[2] Each book was a study of human interaction. The focus of the earlier book was on dynamic and interactive relationships in which Smith saw principles of behaviour as governed by conscience attuned to the interests of others. The focus of the later book was on the creation of wealth through the pursuit of self-interest. There is no inherent contradiction between those two perspectives. Individuals create wealth through participation in a market economy ordinarily by pooling their resources and co-ordinating their actions. Their pursuit of self-interest is the pursuit of mutual self-interest.

By the time Smith wrote at the end of the eighteenth century, the judge-made law of England had taken form as two distinct streams. As Smith foreshadowed, each was peculiarly adapted to contribute to the development of the market economy of the nineteenth century. Equity, with its focus on conscience, its emphasis on principle and its flexible application of remedies, was peculiarly adapted to provide a law of business organisations. Common law, with its focus on the external perception of conduct, its emphasis on rules, and its relatively certain ability to provide monetary compensation for proved compensable loss, was peculiarly adapted to provide a law of the marketplace.

* My thanks to Glyn Ayres for his research assistance. My thanks also to Paul Finn for his comments. I trust he will forgive me for not sharing his pessimism.

[1] A Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (London, W Strahan and T Cadell, 1776).

[2] A Smith, *The Theory of Moral Sentiments* (London, printed for A Millar, A Kincaid and J Bell, 1759).

Equity went on in the nineteenth century to evolve into something resembling a law of business organisations essentially by analogising a range of emergent commercial relationships to the historically familiar and distinctly uncommercial relationship of beneficiary and trustee. Those analogised commercial relationships came by the end of the nineteenth century uncontroversially to include the relationships of company and director, of principal and commercial agent, of employer and employee, and of partners between each other. Persons in what were considered sufficiently 'trust-like' commercial relationships came in that way to be subjected to 'trust-like' duties which, for want of a better word, came by common acceptance to be labelled 'fiduciary'. A relationship would warrant that label, it came to be said with a circularity of language borne of reasoning solely by analogy, if the relationship was one in respect of which a 'wrong' would result in the same remedy against the 'wrongdoer' as a beneficiary would have against a trustee.[3] Common law went on in the same period to evolve a law of the marketplace, essentially through the development of the law of contract.

There was an obvious overlap in the application of common law and of equity to business organisations in that it was engagement by or pursuant to contract which commonly gave rise to a relationship which equity then treated as sufficiently analogous to the relationship of beneficiary and trustee to result in the imposition of trust-like duties. There could never have been any doubt that trust-like duties could be imposed in respect of a relationship formed for commercial purposes independently of contract. Equally, there appears never to have been any doubt that trust-like duties could be imposed in equity in virtue of the trust-like character of a commercial relationship formed by contract, in which case these duties would co-exist with and transcend such duties as were imposed at common law in virtue of the contract. Neither source of obligation was wholly dependent on the other.

By the beginning of the twentieth century, so complete was the assimilation of principles applicable historically to the relationship of trustee and beneficiary to the subject-matter of business organisations that when Cardozo CJ wrote famously in *Meinhard v Salmon*[4] of a 'trustee' being held to 'something stricter than the morals of the marketplace' and went on to refer to 'the level of conduct for fiduciaries' being 'kept at a level higher than that trodden by the crowd', he was not referring to any duty which arose in the circumstances of that case from the traditional relationship of beneficiary and trustee. He was referring to a duty which he explained that 'Joint adventurers, like copartners, owe to one another', a duty which he went on to describe in characteristically evocative language as 'the duty of the finest loyalty' requiring a standard of behaviour comprising 'Not honesty alone, but the punctilio of an honor the most sensitive'.[5] The following year, in

[3] eg *Re Hallett's Estate* (1880) 13 Ch D 696 (CA) 712–13.
[4] *Meinhard v Salmon* 249 NY 458, 164 NE 545 (1928) 546.
[5] ibid 546.

Birtchnell v Equity Trustees, Executors and Agency Co Ltd,[6] Dixon J wrote that the relationship between partners 'is, of course, fiduciary', adding that 'a stronger case of fiduciary relationship cannot be conceived than that which exists between partners' and explaining that the fiduciary nature of the relationship between partners 'is based, in some degree, upon a mutual confidence that the partners will engage in some particular kind of activity or transaction for the joint advantage only'. Nearly thirty years later, *Birtchnell* was explained by a court which included Dixon CJ[7] as an instance of the 'rule' applicable 'to all cases in which one person stands in a fiduciary relation to another' that 'a trustee must not use his position as trustee to make a gain for himself'.

Meinhard and *Birtchnell* were both what might be described as 'business opportunity' cases. The miscreant 'joint adventurer' in *Meinhard* and the miscreant partner in *Birtchnell* were each ultimately held liable to disgorge a benefit obtained as a result of their individual exploitation of an opportunity for investment found to fall within the scope of the joint undertaking to which they had subscribed. The 'joint adventurer' in *Meinhard* was liable through the mechanism of a remedial constructive trust; the partner in *Birtchnell* was liable initially through the mechanism of an account of profits (with the question of whether other relief might be ordered being reserved for further consideration).

Meinhard and *Birtchnell* share features which together provide a theme for some of the discussion which follows. One was that there was no dispute in either case as to the existence of a fiduciary duty not to take individual advantage of a business opportunity within the scope of the joint undertaking. The dispute was whether the advantage obtained fell within the scope of the joint undertaking. Another was that in neither case was determination of the scope of the joint undertaking seen to rest solely on an examination of the terms of the contract between the parties. Rather, as Dixon J explained in *Birtchnell*, the subject matter over which the fiduciary obligations extended were determined by the 'character of the venture or undertaking' for which the business relationship existed, which fell to be ascertained 'not merely from the express agreement of the parties, whether embodied in written instruments or not, but also from the course of dealing actually pursued by the firm'.[8] In *Meinhard,* the determinative question was whether a joint undertaking to manage a hotel leased for twenty years encompassed an opportunity, which arose after the end of the lease, for the lessee to take on a new lease of a substantially enlarged building at a much higher rent. In *Birtchnell,* the determinative question was whether a joint undertaking of conducting a real estate business extended to encompass an opportunity to engage in land speculation.

Another common feature of *Meinhard* and *Birtchnell* was that resolution of the determinative question involved the court in a detailed examination of the factual relationship between the participants in the joint undertaking. Both courts were

[6] *Birtchnell v Equity Trustees, Executors & Agency Co Ltd* (1929) 42 CLR 384, 407–08.
[7] *Keith Henry & Co Pty Ltd v Stuart Walker & Co Pty Ltd* (1958) 100 CLR 342, 350.
[8] *Birtchnell* (n 6) 408 (Dixon J).

closely divided. In *Meinhard,* the Court of Appeals of New York split four–three. In *Birtchnell*, the High Court of Australia split three–two.

When, in 1994, Sir Anthony Mason referred to 'the fiduciary relationship' as having been 'the spearhead of equity's incursions into the area of commerce',[9] he cannot be taken to have been referring to some recent foray. He was alluding to the problem – highlighted by the decision of the High Court ten years earlier in *Hospital Products Ltd v United States Surgical Corporation*,[10] in which he had dissented – of arriving at a satisfactory principle for determining when trust-like duties will arise in respect of a relationship formed by contract that is outside the standard business relationships of corporation, agency, employment and partnership. The premise on which issue had been joined in *Hospital Products* was that a relationship formed by contract outside those standard business relationships was not incapable of bearing a fiduciary character. *Hospital Products* had demonstrated that the time had come when merely analogical reasoning had ceased to provide a satisfactory basis to explain and to extend established categories. The problem which the case had exposed was the absence of established criteria by reference to which the existence or non-existence of a fiduciary relationship was to be determined in a novel commercial setting. The 'fiduciary relationship', Sir Anthony Mason had written the year after *Hospital Products*, was 'a concept in search of a principle'.[11]

In the decades since 1994, the quest for the 'fiduciary principle' has continued across many jurisdictions. The field of inquiry, as was not long ago observed, has been 'characterised, in the law reports, and in the law reviews, by disagreement, uncertainty and controversy'.[12] Yet one of the strengths of the methodology of the common law, within which for present purposes can be located the methodology of equity, is its ability to function in spite of, or perhaps as a result of, incomplete theorisation.

The quest to distil the essence of the 'fiduciary relationship' would have the contemporary relevance of an Arthurian legend were it pursued independently of the practical question of what follows from a relationship of that character being found. Frankfurter J, no respecter of abstract legal categories, made that point more than half a century ago when he said:

> [T]o say that a man is a fiduciary only begins analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary? In what respect has he failed to discharge these obligations? And what are the consequences of his deviation from duty?[13]

[9] A Mason, 'The Place of Equity and Equitable Remedies in the Contemporary Common Law World' (1994) 110 *LQR* 238, 245.

[10] *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41.

[11] A Mason, 'Themes and Prospects' in PD Finn (ed), *Essays in Equity* (North Ryde (NSW), Law Book Co, 1985) 246.

[12] L Smith, 'Fiduciary Relationships: Ensuring the Loyal Exercise of Judgement on behalf of Another' (2014) 130 *LQR* 608, 608.

[13] *Securities and Exchange Commission v Chenery Corp* 318 US 80 (1943) 85–86.

Sarah Worthington recently made essentially the same point in linking the question of 'Who is a fiduciary?' to the questions of 'What distinctive obligations rest on a fiduciary's shoulders?' and 'What particular and distinguishing consequences follow upon a breach of these special restrictions?'.[14] In short: 'who, what, and so what?' The answer to the first question can have no practical consequence, and the question itself cannot meaningfully be framed, other than in light of the answers to the other two.

Turning to survey the current state of what is on any view a complex and dynamic field of law, there is utility in starting with the question of 'what', touching briefly on the question of 'so what', and then coming back to the difficult question of 'who', and the related questions of 'when' and 'in what respect'.

What can be seen is that, notwithstanding historical and continuing disputation, a measure of consensus concerning the 'fiduciary principle' has emerged in Australia. That consensus has centred on the pioneering scholarship of Paul Finn[15] and has benefited from his later judicial elaboration of principle as a judge of the Federal Court of Australia. Contributing to the emergence of that consensus has also been a series of decisions of the High Court since the mid-1990s which have resolved some related issues and clarified others.

II. What, and So What?

At least in Australia, the question of what obligations are imposed on a fiduciary now yields a straightforward answer based on binding authority. In *Breen v Williams*,[16] the High Court rejected the proposition that a doctor owes an affirmative fiduciary duty to provide medical records to a patient, refusing to follow the approach taken to the issue by the Supreme Court of Canada in *McInerney v MacDonald*.[17] The basis of the holding in *Breen* was that any fiduciary duties owed by a doctor must be limited to 'proscriptive obligations – not to obtain any unauthorised benefit from the relationship and not to be in a position of conflict'.[18] '[T]he law of this country', it was said, 'does not otherwise impose positive legal duties on the fiduciary to act in the interests of the person to whom the duty is owed'.[19]

Breen was followed in *Pilmer v Duke Group Ltd (in liq)*,[20] resulting in rejection of the proposition that an accountant owed a fiduciary duty to a company

[14] S Worthington, 'Four Questions on Fiduciaries' (2016) 2 *Canadian Journal of Comparative and Contemporary Law* 723.

[15] Now conveniently collected in PD Finn, *Fiduciary Obligations: 40th Anniversary Republication with Additional Essays* (Annandale (NSW), Federation Press, 2016).

[16] *Breen v Williams* (1996) 186 CLR 71, 83.

[17] *McInerney v MacDonald* [1992] 2 SCR 138, 149–51.

[18] *Breen* (n 16) 113.

[19] ibid 113. See also 83, 93–95, 137–38.

[20] *Pilmer v Duke Group Ltd (in liq)* [2001] HCA 31, (2001) 207 CLR 165.

not to act contrary to the interests of the company in preparing a report to be placed before a meeting of shareholders concerning whether a price being offered to take over the company was fair and reasonable in all the circumstances. *Breen* was said in *Pilmer* to have determined, 'by way of contrast to what is said in some of the Canadian judgments, that fiduciary obligations are proscriptive rather than prescriptive in nature; there is not imposed upon fiduciaries a quasi-tortious duty to act solely in the best interests of their principals'.[21]

Just before the decision in *Breen*, and conforming to and reinforcing the holding in that case, came the influential reasoning of Millett LJ in *Bristol and West Building Society v Mothew*[22] in support of the conclusion that failure of a fiduciary, in that case a company director, to use proper skill and care in the discharge of his duties was not a breach of any fiduciary duty. The reasoning in *Mothew* explained that a person in a fiduciary relationship was capable of coming under a range of statutory, common law and equitable obligations which were not fiduciary. Not every breach of an obligation by a fiduciary is a breach of a fiduciary obligation. That the source of an obligation is in equity is insufficient to make the obligation a fiduciary obligation.

The precise formulation of the proscriptive obligations identified in *Breen* and *Pilmer* – not to obtain any unauthorised benefit and not to be in a position of conflict – reflected the pervasive influence of the earlier analysis of Deane J in *Chan v Zacharia*.[23] In that case, concerning partnership, his Honour had identified two overlapping but distinct 'themes' informing 'the general principle of equity requiring a person in a fiduciary relationship to account for personal benefit or gain'.[24] One was that which 'appropriates for the benefit of the person to whom the fiduciary duty is owed any benefit or gain obtained or received by the fiduciary in circumstances where there existed a conflict of personal interest and fiduciary duty or a significant possibility of such conflict', the objective of which is 'to preclude the fiduciary from being swayed by considerations of personal interest'.[25] The other was that 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', the objective of which is 'to preclude the fiduciary from actually misusing his position for his personal advantage'.[26] Not to obtain an unauthorised benefit and not to be in a position of conflict together

[21] ibid [74]. The holding in *Breen* and *Pilmer* that fiduciary duties are limited to proscriptive duties was departed from by the Court of Appeal of the Supreme Court of Western Australia in *Westpac Banking Corp v Bell Group Ltd (in liq) (No 3)* [2012] WASCA 157, (2012) 44 WAR 1. The High Court granted special leave to appeal on the question of whether the affirmative duties of directors found to have been breached in that case were fiduciary. The case was settled before the appeal could be heard. For a discussion of this aspect of the case: see W Gummow, 'The Equitable Duties of Company Directors' (2013) 87 *Australian Law Journal* 753.

[22] *Bristol and West Building Society v Mothew* [1998] Ch 1 (CA) 16–17.

[23] *Chan v Zacharia* (1984) 154 CLR 178.

[24] ibid 198.

[25] ibid 198.

[26] ibid 198–99.

defined the content of the obligations of one partner to another which were properly and uniquely 'fiduciary', albeit that neither obligation was immutable. '[T]he implication, by statute or the general law, of general or particular obligations or standards is, as between the partners, ordinarily subject to any contrary provision in the agreement between them', Deane J had explained, with the result that, 'It is conceivable that the effect of the provisions of a particular partnership agreement, in the context of the nature of the particular partnership, could be that any fiduciary relationship between the partners was excluded'.[27]

Embedded within the analysis of Deane J in *Chan*, and speaking directly at the level of principle to the question of 'so what', is the critical point that what follows from a breach of one or other of those proscriptive obligations not to obtain an unauthorised benefit from the relationship and not to be in a position of conflict, is the enlivening of what has historically been described in general and generic terms as a secondary or consequential obligation to 'account'. That term, in its relevant and most generic usage, has not been tied to a particular personal or proprietary remedy but has been used to refer more generally to the identification and disgorgement of gain.[28]

The significance which a secondary or consequential obligation to 'account' has to an understanding of the primary proscriptive obligations was given emphasis by Mason CJ, Brennan, Deane and Gaudron JJ in *Warman International Ltd v Dwyer*,[29] where, under the heading 'The consequences of a breach of a fiduciary obligation', the general rule was stated that:

> A fiduciary must account for a profit or benefit if it was obtained either (1) when there was a conflict or possible conflict between his fiduciary duty and his personal interest, or (2) by reason of his fiduciary position or by reason of his taking advantage of opportunity or knowledge derived from his fiduciary position.[30]

With specific reference to the analysis of Deane J in *Chan*, their Honours added that 'The objectives which the rule seeks to achieve are to preclude the fiduciary from being swayed by considerations of personal interest and from accordingly misusing the fiduciary position for personal advantage'.[31] To the criticism that the rule might appear over-inclusive in so far as it operates irrespective of whether the fiduciary is in fact swayed by any consideration of personal interest, the traditional answer has been that 'justice and policy' justify blanket prophylactic proscription 'beyond which it is neither wise nor practicable for the law to look for a criterion of liability'.[32]

Australian authorities have not encountered conceptual difficulty in holding a fiduciary liable to 'account' for an unauthorised benefit or gain, according to the

[27] ibid 196.
[28] *cf Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373, 395.
[29] (1995) 182 CLR 544.
[30] ibid 557.
[31] ibid 557–58.
[32] *Furs Ltd v Tomkies* (1936) 54 CLR 583, 592.

justice of the case, either by the ordering of the personal remedy of an account of profits or by the declaration of a remedial constructive trust.[33] Embracing of the remedial constructive trust has led, perhaps more easily than elsewhere, to the ultimate rejection of the longstanding rule[34] that a fiduciary in receipt of a bribe or secret commission in the form of money could be held to account only as a debtor: a bribed fiduciary can be held to a remedial constructive trust, and will be so held where other orders are incapable of doing complete justice.[35] Other potential remedies include rescission of an affected transaction,[36] declaratory or injunctive relief to prevent the fiduciary from relying on rights gained in breach of duty,[37] and an award of equitable compensation.[38] In each instance, the objective of holding the fiduciary to account for an unauthorised benefit or gain can be seen to be at work.

Held also to account, albeit in more confined circumstances than the fiduciary, are third parties who participate in or benefit from a breach by the fiduciary.[39] The liability of a third party who knowingly participates in a breach of fiduciary duty to account to the person to whom the duty is owed by the fiduciary has been explained as being based in part on the need to deter third-party conduct that undermines the 'higher standard of conduct' required of the fiduciary and in part on the inequity of permitting the third party to retain a benefit or gain which results from such conduct.[40]

III. Who, When and in What Respect?

The relative clarity which has come to attend the answers to the questions of 'what, and so what' has in turn provided focus to the question of 'who'. The orthodox understanding is that fiduciary obligations are imposed in equity by reference to the character of the relationship which has come to exist in fact[41] (and are not, for

[33] See *Grimaldi v Chameleon Mining NL (No 2)* [2012] FCAFC 6, (2012) 200 FCR 296 [503]–[11].

[34] *Lister & Co v Stubbs* (1890) 45 Ch D 1 (CA).

[35] See *Grimaldi* (n 33) [569]–[84]; W Gummow, 'Bribes and Constructive Trusts' (2015) 131 *LQR* 21.

[36] *Maguire v Makaronis* (1997) 188 CLR 449.

[37] eg *United Dominions Corp Ltd v Brian Pty Ltd* (1985) 157 CLR 1, 13–14.

[38] *Warman International Ltd* (n 29) 559.

[39] The principles stated by Lord Selborne LC in *Barnes v Addy* (1874) LR 9 Ch App 244 (CA) 251–52, have commonly been assumed to extend to 'persons dealing with at least some other types of fiduciary': *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22, (2007) 230 CLR 89 [113]. For a list of cases dealing with the applicability of *Barnes v Addy* to breaches of fiduciary duty other than by a trustee: see JD Heydon, MJ Leeming and PG Turner, *Meagher, Gummow & Lehane's Equity: Doctrines and Remedies*, 5th edn (Chatswood (NSW), LexisNexis Butterworths, 2015) 219 fns 656, 657. For a discussion of the liability of a third-party participant in a breach of fiduciary duty: see W Gummow, 'Knowing Assistance' (2013) 87 *Australian Law Journal* 311.

[40] *Zhu v Treasurer of the State of New South Wales* [2004] HCA 56, (2004) 218 CLR 530 [121], referring to *Consul Development Pty Ltd* (n 28) 397.

[41] See generally M Leeming, 'The Scope of Fiduciary Obligations: How Contract Informs, But Does Not Determine, the Scope of Fiduciary Obligations' (2009) 3 *Journal of Equity* 181.

example, merely obligations expressed or implied into voluntary undertakings[42]). Again, it can be accepted that fiduciary obligations are limited to proscriptive obligations not to obtain unauthorised benefits and not to place oneself in a position of conflict, breach of which may result in proprietary relief. On the basis of these assumptions, the identification of a fiduciary is critically informed by an understanding of a scheme of strong but limited proscriptive obligations of that strong but limited nature. 'Who' becomes 'why': why only proscriptive obligations, and (more importantly) why only these two remarkably astringent and prophylactic proscriptive obligations, breach of which enlivens a secondary or consequential obligation to 'account', rather than lesser or less potent proscriptive obligations which might be imposed at common law through an implied term[43] (or perhaps through a doctrine of good faith recast as an obligation to refrain from acting in bad faith) or in equity through the operation of the distinct doctrine of unconscionability?

That compound question was isolated and explored in an important work of scholarship which appeared in print in 1989. Paul Finn, whose pioneering research into fiduciary law had begun nearly two decades before, then proffered the view that the proscriptive obligations are imposed in order to extract selfless and undivided loyalty from someone expected to act exclusively in the interests of another or in their joint interests.[44]

There was nothing especially novel about that perspective: it accorded with Lord Herschell's description at the end of the nineteenth century of equity's imposition of obligations on 'a person in a fiduciary position' as being based not on 'principles of morality' but 'on the consideration that, human nature being what it is, there is danger … of the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect'.[45] The same perspective has been carried through in this century in the scholarship of Matthew Conaglen, emphasising that 'Removing the fruits of temptation is designed to neutralise the temptation itself by rendering it pointless'.[46] In economic terms, the proscriptive obligations coupled with the secondary or subsidiary obligation to account for their breach can be seen to create an incentive

[42] *cf* J Edelman, 'When Do Fiduciary Duties Arise?' (2010) 126 *LQR* 302; M Conaglen, 'Fiduciary Duties and Voluntary Undertakings' (2013) 7 *Journal of Equity* 105.

[43] Stripped of the secondary obligation to 'account' for breach, the distinction between the proscriptive content of a contractual obligation and a proscriptive fiduciary obligation could in some cases be exceedingly subtle. Compare, for example, the scope of the distributor's contractual obligation which arose under the implied term of the distribution agreement found in *Hospital Products* (n 10) (that the distributor would not do anything inimical to the market in Australia for the manufacturer's products) with the scope of the fiduciary obligations which would have arisen had the dissenting view of Mason J prevailed with the result that the distributor was a fiduciary of the manufacturer in respect of the protection and promotion of the manufacturer's Australian product goodwill.

[44] PD Finn, 'The Fiduciary Principle' in TG Youdan (ed), *Equity, Fiduciaries and Trusts* (Toronto, Carswell, 1989), now reproduced in Finn, *Fiduciary Obligations* (n 15) ch 25.

[45] *Bray v Ford* [1896] AC 44 (HL) 51.

[46] M Conaglen, 'The Nature and Function of Fiduciary Loyalty' (2005) 121 *LQR* 452, 463. See also *Fenwick v Naera* [2015] NZSC 68, [2016] 1 NZLR 354 [73].

structure within which self-interest directs that the fiduciary act only in the interests of another or in their joint interests.[47]

The significance of the contribution which Paul Finn then made to the emergent understanding of the nature of the fiduciary relationship lay in him being the first to make an explicit link between 'why' and 'who'. To ask whether a particular relationship warranted the description of a fiduciary, he suggested, was to ask 'Against the background of the relationship, its nature and its purpose … for what purpose one party has acquired rights, powers and duties in the relationship: to promote his own interests, the joint interest, or the interests of the other party alone'. He concluded that 'Insofar as it is either of the latter two, the relationship will be fiduciary to that extent'.[48] To establish a fiduciary relationship:

> What must be shown … is that the actual circumstances of a relationship are such that one party is entitled to expect that the other will act in his interests in and for the purposes of the relationship. Ascendancy, influence, vulnerability, trust, confidence or dependence doubtless will be of importance in making this out, but they will be important only to the extent that they evidence a relationship suggesting that entitlement.[49]

The Full Court of the Federal Court quoted in full, and specifically endorsed, that statement seven years later in *News Ltd v Australian Rugby Football League Ltd* as identifying 'an important question – if not the question' in determining the existence or non-existence of a fiduciary relationship in a novel commercial setting.[50] No court in Australia has since disagreed or attempted to propound an alternative conceptual approach.

Difficulty and attendant controversy has arisen less in relation to the articulation of the relevant principle than in relation to its application. Interests of parties in complex commercial relationships rarely lend themselves to compartmentalisation into the interests of one party alone as distinct from the parties' joint interests. More often than not, the interests of the parties are several, the objectively discerned commercial expectation of each party being that its own self-interest will be promoted by the other party pursuing that other party's own self-interest within the confines set by their agreement.

Paul Finn anticipated that difficulty of application in a preamble to his articulation of principle. Having noted that in ordinary contractual dealings such as a distributorship or a franchise each party will be required to do acts for the benefit of the other, he continued:

> Cooperation, often in a high degree as in long-term contracts, may be necessary if the anticipated benefits of the contract are to be realised. One party's hopes in the dealing's

[47] R Cooter and BJ Freedman, 'The Fiduciary Relationship: Its Economic Character and Legal Consequences' (1991) 66 *New York University Law Review* 1045.
[48] Finn, *Fiduciary Obligations* (n 15) para 714.
[49] ibid para 736.
[50] *News Ltd v Australian Rugby Football League Ltd* [1996] FCA 870, (1996) 64 FCR 410, 541.

> outcomes may well be informed by his trust in the integrity, reliability, skill or fairness of the other. In any of these matters there may be disappointed expectations: expectations which may explain why the dealing has come about or how it is hoped it will work. But none of these matters, ordinarily, will alter the essential nature and purpose of the relationship itself – to serve the several interests of each party. For it to become fiduciary, 'something more is needed'.[51]

In the search for that 'something more', the devil has more often than not been in the detail. Courts have repeatedly acknowledged that fiduciary relationships may exist outside the traditional categories and their very close analogues. Yet in Australia, in contrast perhaps to New Zealand where from across the Tasman it appears that courts may have been 'bolder',[52] such relationships have not often been found to exist.

The decision of the Full Court of the Federal Court in *Gibson Motorsport Merchandise Pty Ltd v Forbes*[53] provides a useful illustration. The parties there had cooperated in various ways for nearly a year with a view to the possibility of establishing a motor-racing business. Ultimately, some of the parties proceeded with the establishment of such a business to the exclusion of the others. Upholding the conclusion of the primary judge, the Full Court unanimously rejected an argument that the relationship between the parties was fiduciary in character on the basis that they had 'reposed in the others mutual trust and confidence'. One of the members of the Full Court was Finn J.

Summarising the Australian law of fiduciary obligations, Finn J explained:

> It is accepted in this country that a fiduciary's duty of loyalty is essentially proscriptive in character … and embodies the twin themes of precluding undisclosed conflict of duty and interest (or of duty and duty), and of prohibiting misuse of fiduciary position … Put compendiously the duty of loyalty can be said to oblige a fiduciary to act in the interests of the other party to the relationship or, in the case of a partnership or a joint venture having fiduciary incidents, in their joint interests to the exclusion of his or her own interests … If there be trust and confidence present in a business relationship and if it be claimed that that trust and confidence is a building block in establishing that the relationship was a fiduciary one … it must be shown that that trust was given, that that confidence was reposed, in a context which was capable of attracting, and did attract, a duty of loyalty. … Put shortly, if trust and confidence in another is to be relevant, it must relate to a reasonable expectation of loyalty.[54]

To argue that the parties reposed 'mutual trust and confidence', Finn J went on to explain, was unhelpful because it presupposed the answer to the real issue: whether (and if so in respect of what matters) each of the parties was entitled to

[51] Finn, *Fiduciary Obligations* (n 15) para 706 (footnotes omitted), quoting *Committee on Children's Television Inc v General Foods Corp* 673 P 2d 660 (Cal 1983) 675.

[52] Heydon, Leeming and Turner, *Meagher, Gummow & Lehane's Equity* (n 39) 153.

[53] *Gibson Motorsport Merchandise Pty Ltd v Forbes* [2006] FCAFC 44, (2006) 149 FCR 569.

[54] ibid [12] (citations omitted).

expect loyalty from the others. As to the resolution of that issue on the facts of the case, Finn J said:

> Whatever may have been the courses open to be taken by the parties in defining their relationship given the business opportunity identified … that in fact taken and pursued was not one in which they established, or agreed to, mutual rights and obligations (or joint interests). The relationships they actually sought to establish in exploiting the business opportunity were ones based on severally owned assets, individual contracts and distinct business structures which served the several interests of the contractors. They may well have reposed a trust and confidence in each other reflecting an expectation that they could bring to an acceptable finalisation the various arrangements they had in contemplation. But that trust and confidence, if it was there, was not directed to the subordination of self interest to joint interest. There was nothing fiduciary about it.[55]

In *Gibson* the parties had not entered into a contract. The existence of a contract gives rise to another level of complexity. The observations of Mason J in *Hospital Products* are instructive. Perhaps ironically, given that he was in dissent in holding that the contractual relationship in that case resulted in a distributor being constituted a fiduciary in respect of the Australian product goodwill of a foreign manufacturer, Mason J identified the central impediment to the recognition of a fiduciary relationship in many contractual settings:

> In these situations it is the contractual foundation which is all important because it is the contract that regulates the basic rights and liabilities of the parties. The fiduciary relationship, if it is to exist at all, must accommodate itself to the terms of the contract so that it is consistent with, and conforms to, them. The fiduciary relationship cannot be superimposed upon the contract in such a way as to alter the operation which the contract was intended to have according to its true construction.[56]

This was unanimously endorsed in *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd,*[57] where the High Court refused to hold that a memorandum of understanding between a property developer and a sporting club was fiduciary in nature. French CJ, Gummow, Hayne, Heydon and Kiefel JJ prefaced this finding by endorsing[58] two further points which had been made by John Lehane in the immediate aftermath of *Hospital Products*.[59] One was that although the criterion of acting 'for or on behalf of' (or 'in the interests of') another could be used to explain most if not all of the cases in which a fiduciary relationship had traditionally been held to exist, this formula had traditionally been 'understood in a reasonably strict sense' and needed to continue to be so understood lest it become 'circular'.[60]

[55] ibid [13].

[56] *Hospital Products* (n 10) 97.

[57] *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* [2010] HCA 19, (2010) 241 CLR 1 [91].

[58] ibid [88]–[90].

[59] JRF Lehane, 'Fiduciaries in a Commercial Context' in PD Finn (ed), *Essays in Equity* (North Ryde (NSW), Law Book Co, 1985) ch 5.

[60] ibid 101.

The other, made after emphasising that any distinction between commercial transactions and non-commercial transactions 'must be a red herring', was that:

> [T]he reason why, in commercial contexts, transactions outside the traditional categories do not give rise to fiduciary duties is that most such transactions do not, as a matter of fact, satisfy the criteria (whatever precisely they are) which lead courts to characterise a relationship between private parties as fiduciary.[61]

Both of those points are illustrated by the circumstances considered by the Full Court of the Federal Court in *News Ltd*.[62] There football clubs contractually committed to participate in the New South Wales Rugby League (NRL) for a period of five years were held not to be in a fiduciary relationship with the NRL. Their relationship, it was held, was wholly contractual. Features which led the Full Court to conclude that no fiduciary relationship existed were: (i) the NRL was incorporated and the clubs were not members of the incorporated body;[63] (ii) the board of the NRL was the 'major decision-making body' and, while the clubs were consulted on significant issues and participated in a 'general committee' of the NRL that conferred on them at least the possibility of exerting substantial control, in practice the board was able to make decisions independently of the interests of the clubs;[64] (iii) the individual clubs also acted in their own interests in commercial matters, separately from the NRL;[65] (iv) notwithstanding the five-year commitment, the rules of the NRL allowed the clubs to withdraw from the NRL by not applying for admission (which was done annually);[66] (v) the parties cooperated in some ways, but operated independently and in competition with one another in a number of important respects;[67] and (vi) while the NRL distributed some of its profits to the clubs by discretionary 'administration grants', the clubs 'had no entitlement to receive the whole or a fixed proportion of the net revenue derived by' the NRL.[68]

A more recent illustration, notable because it has attracted criticism from Paul Finn, is the decision of the Court of Appeal of the Supreme Court of New South Wales in *Streetscape Projects (Australia) Pty Ltd v City of Sydney*.[69] The City of Sydney had information (intellectual property and know-how) which it had acquired in the period leading up to the 2000 Olympic Games relating to the manufacture for erection in streets and other public places of multipurpose poles known as 'Smartpoles'. Following a public tender process and a period of negotiation, the City entered into a licence agreement with Streetscape under which

[61] ibid 104.
[62] *News Ltd* (n 50).
[63] *News Ltd* (n 50) 542.
[64] ibid 545, distinguishing *United Dominions Corporation Ltd* (n 37).
[65] *News Ltd* (n 50) 545.
[66] ibid 546–47.
[67] ibid 547–48.
[68] ibid 548.
[69] *Streetscape Projects (Australia) Pty Ltd v City of Sydney* [2013] NSWCA 2, (2013) 85 NSWLR 196.

Streetscape was licensed to manufacture and sell Smartpoles in Australia as well as in New Zealand and Spain. The primary judge found the resultant relationship to be fiduciary on the basis that Streetscape was provided with the information for the purposes circumscribed by the licence agreement in circumstances where the City was unable to supervise the manner in which the information was used so as to ensure compliance. The primary judge also held that Streetscape's breaches of the licence agreement, by using the information to manufacture and sell Smartpoles in the Middle East, constituted a breach of fiduciary duty. This rendered Streetscape and its knowingly concerned sole director liable to account for the profits gained. The Court of Appeal disagreed, finding that the comprehensive terms of the licence agreement between the parties left no room for Streetscape to be characterised as the custodian of information to be used in a manner which subordinated its own interests to those of the City. The interests of the parties in respect of the licenced information were several, and were precisely and exhaustively defined by the terms of their contract.

The several natures of the interests created and protected under the contractual arrangement so found by the Court of Appeal in *Streetscape* can perhaps be contrasted with the contractual arrangement which the Privy Council held to give rise to a fiduciary relationship in the much earlier case of *Reid-Newfoundland Co v Anglo-American Telegraph Co Ltd*.[70] There a telegraph company had in 1888 acquired under a contract with a railway company the exclusive right to erect along the railway company's rights-of-way telegraph lines to be used for the telegraph company's own business of supplying telegraph services to the public. The telegraph company also contracted to erect a 'special wire' of which the railway company was to have exclusive use subject to its agreement 'not to pass or transmit any commercial messages over the said special wire, except for the benefit and account of the telegraph company'.[71] The Privy Council held that the effect of the contract was that each time the railway company's successor in title used the special wire to transmit a commercial message, it came under a fiduciary obligation 'to keep an account of the profits accruing from such use of the wire, and to set those profits aside as moneys belonging' to the telegraph company.[72]

Paul Finn's criticism of *Streetscape* lies in what he regards as the failure of the Court of Appeal to address the question of whether Streetscape was a fiduciary 'in consequence of the limited, the circumscribed, use it could properly make of' the information which it obtained from the City under the agreement.[73] A question of that nature could be asked of the position of anyone who has been granted a limited contractual licence to exploit the (tangible or intangible) property of another. That it has not been asked highlights the 'reasonably strict sense' in which

[70] *Reid-Newfoundland Co v Anglo-American Telegraph Co Ltd* [1912] AC 555 (PC).
[71] ibid 558.
[72] ibid 559.
[73] Finn (n 15) paras 823, 792–93.

the notion of a fiduciary being a person expected to act 'in the interests of' another has been understood.

Contractual labels alone have been found to carry little weight. Of the expression 'joint venture', for example, Mason, Brennan and Deane JJ in *United Dominions Corporation Ltd v Brian Pty Ltd* consciously departed from Cardozo CJ's view of 'joint adventurers' in *Meinhard*.[74] Their Honours stated that:

> One would need a more confined and precise notion of what constitutes a 'joint venture' than that which the term bears as a matter of ordinary language before it could be said by way of general proposition that the relationship between joint venturers is necessarily a fiduciary one … The most that can be said is that whether or not the relationship between joint venturers is fiduciary will depend upon the form which the particular joint venture takes and upon the content of the obligations which the parties to it have undertaken.[75]

The relationship contractually labelled a 'joint venture' was in that case found to be a fiduciary relationship on the basis that, both after and for some time before a formal agreement was entered into between the participants, each of the participants (Mason, Brennan and Deane JJ here using language drawn from Dixon J in *Birtchnell*[76]) was 'associated for … a common end' and the relationship between them was 'based … upon a mutual confidence' that they would 'engage in (the) particular … activity or transaction for the joint advantage only'.[77] Contrasting in result but not in principle was *Australian Oil & Gas Corporation Ltd v Bridge Oil Ltd*,[78] in which the New South Wales Court of Appeal refused to recognise fiduciary obligations in the context of a resources joint venture, finding that the arrangement had been 'entered into between parties who negotiated at arms length [*sic*] and defined their respective financial rights and obligations carefully'.[79] 'If the Court were to strain to superimpose fiduciary notions in a case such as this', the Court of Appeal opined, 'it would defeat, rather than give effect to, the legitimate expectations of commercial people'.[80] To similar effect, in *Friend v Brooker*, it was held that equity did not impose fiduciary duties between parties to what was characterised as 'a deliberate commercial decision to adopt a corporate structure in which they would owe duties, but to the corporation and as directors'.[81]

On the other hand, consistently with what was said by Deane J in *Chan* and by Mason J in *Hospital Products*, express contractual exclusions of fiduciary

[74] See *United Dominions Corp Ltd* (n 37); *Meinhard* (n 4). *cf Chirnside v Fay* [2006] NZSC 68, [2007] 1 NZLR 433 [14], [74]–[75].

[75] *United Dominions Corp Ltd* (n 37) 10–11.

[76] *Birtchnell* (n 6).

[77] ibid 12–13.

[78] *Australian Oil & Gas Corporation Ltd v Bridge Oil Ltd* (unreported, NSWCA, Gleeson CJ, Kirby P and Clarke JA, 12 April 1989).

[79] ibid 21.

[80] ibid 21.

[81] *Friend v Brooker* [2009] HCA 21, (2009) 239 CLR 129 [86] (French CJ, Gummow, Hayne and Bell JJ), Heydon J agreeing at [92].

obligations have generally been found to be effective.[82] One illustration, notable again because it has attracted criticism from Paul Finn, is the decision of Jacobson J in *Australian Securities and Investments Commission v Citigroup Global Markets Australia Pty Ltd (No 4)*.[83] A letter of retainer by which Citigroup was engaged by Toll to advise on a proposed takeover was expressed in terms that the engagement was 'as an independent contractor and not in any other capacity including as a fiduciary'. Jacobson J held the express exclusion in the letter to be effective to prevent such a fiduciary relationship from arising. Paul Finn's criticism of the decision is to the effect that Jacobson J approached the question of the existence of a fiduciary relationship as a matter of construction rather than as a matter of characterisation: the state of affairs which the letter acknowledged was that Citigroup was retained as Toll's adviser, meaning that within the scope of the retainer Citigroup was contracted to perform a function which required it to act solely in the interests of Toll. That state of affairs alone was sufficient to result in Citigroup coming under fiduciary obligations to Toll, and nothing in the letter changed the character of the function Citigroup was contracted to perform: the mere contractual description of Citigroup as 'not a fiduciary' did not recast the function which Citigroup was retained to perform in a way which included new incidents or authorisations that took the relationship outside the fiduciary paradigm; rather the letter misdescribed that relationship.[84]

Without descending into the merits of the outcome in *Citigroup*, the premise of Paul Finn's criticism must surely be correct: whether a relationship is fiduciary is a question of attributing a legal character to the relationship which has been formed in fact. Contracting parties do not alter the legal character of a relationship they have formed or a transaction into which they have entered merely by giving that relationship or transaction some different contractual label: a negative label ought in principle to be no more effective than a positive label. That said, a contractual description can sometimes be used as a shorthand description of the incidents of the relationship or transaction into which contracting parties have in fact entered. The contractual description of Citigroup as 'not a fiduciary' could have been interpreted as expressing an agreement that Citigroup remained free to benefit from the relationship without seeking the further consent of Toll and that Citigroup was at liberty to place itself in a position where its contractual duty to advise Toll conflicted with its own commercial interests.[85] On this approach, in the absence of some basis in law or in equity for holding that the agreement was not binding or that it was capable of avoidance by Citigroup, it is strongly arguable that the contractual description could have binding effect. This would reflect a contractual

[82] See generally Leeming, 'The Scope of Fiduciary Obligations' (n 41) 12–13, 19–21.

[83] *Australian Securities and Investments Commission v Citigroup Global Markets Australia Pty Ltd (No 4)* [2007] FCA 963, (2007) 160 FCR 35.

[84] Finn, *Fiduciary Obligations* (n 15) paras 805–19.

[85] *cf New Zealand Netherlands Society 'Oranje' Inc v Kuys* [1973] 1 WLR 1126 (PC); *Kelly v Cooper* [1993] AC 205 (PC).

tailoring of the incidents of the relationship with the effect of removing the basis for fiduciary obligations.

The issue joined between the parties in *Citigroup* and tendered for the determination of Jacobson J was whether, in the context in which Toll and Citigroup dealt with each other, the contractual description could and should be so read. There was no suggestion that a fiduciary relationship arose independently of the letter of retainer. Nor was there any suggestion that the factual matrix, or the object or purpose, of the letter of retainer bore on its proper construction.

IV. Concluding Reflections

Paul Finn has recently contrasted the 'untilled field' of fiduciary law which he first surveyed more than 40 years ago with the 'large and noisy development site' that it has become.[86] Dyson Heydon has given a recent diagnosis of the fiduciary as 'the sick man of equity'.[87] Those comments are reflections of jurists whose long association and close familiarity with the subject allows them more readily than others to see the blemishes which inevitably come with maturity.

The fiduciary case law remains untidy. The result in many an individual case might be contested. But so it is in many fields of law, and so it has always been. The principles of common law and of equity have shown themselves capable of adapting to the changing commercial relationships of the late twentieth and early twenty-first centuries, much as they did in the nineteenth century. The future is not bleak.

There has emerged in contemporary Australian law something that can fairly be described as a functional and functioning fiduciary principle. Mixing the metaphors of others with a personal dash of optimism, the fiduciary in Australia might be lean and confined in his duties, but he has marked out his designated patch, and in working it he has not lost his vigour.

[86] Finn (n 15) para 756.
[87] JD Heydon, 'Modern Fiduciary Liability: The Sick Man of Equity?' (2014) 20 *Trusts & Trustees* 1006.