

Two forms of the fiduciary relationship

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Chapter I: Introduction

This dissertation focuses on the question of when a fiduciary relationship may arise. Notwithstanding the importance of fiduciaries in many aspects of modern life, there is no settled test for their identification in novel circumstances. The fiduciary relationship, it is said, “defies definition”.¹ Discerning what constitutes a fiduciary relationship is “one of the great unfinished tasks of modern legal scholarship”,² the “holy grail” of fiduciary jurisprudence,³ and a “notoriously intractable problem”⁴ that “continue[s] to be a blot on our law”.⁵

It is with no small measure of trepidation that this dissertation attempts to bring a degree of clarity to fiduciary identification. Given the concept’s interminable perplexity, this investigation is both absolutely necessary and ill-advised. Many courts and commentators have tried and failed to define the fiduciary relationship, and there is no *a priori* reason to suppose this time will be any different. Despite the odds and the real prospect of failure, provisioning an answer to this question is imperative for the principled development of the fiduciary duty as a distinctive head of obligation in private law.

This dissertation argues that, for the purposes of fiduciary identification, the fiduciary relationship is best conceived as having a dual character. The best way to identify a fiduciary is to delineate these two aspects and thereby maintain a dichotomy between ‘narrow’ and ‘wide’ notions of the fiduciary relationship. The narrow notion (‘the first form’) identifies fiduciary loyalty as a type of property of the beneficiary, ascertained by reference to a formal definition of fiduciary power as *derivative*, *rightful*, and *discretionary*.

The wide notion (‘the second form’) is rooted in equity (rather than proprietary right) and, in contrast with the first, is identified by reference to the beneficiary’s vulnerability, engendered either by reason of *power held* or *trust reposed*. This second form performs a distinctively subsidiary, gap-filling and creative function when the limits of the first form are reached. The courts largely face issues arising in this second category, but by bringing

¹ *Breen v Williams* (1996) 186 CLR 71 (HCA) at 106.

² Matthew Harding “Trust and Fiduciary Law” (2013) 33 OJLS 81 at 85.

³ DWM Waters “Banks, Fiduciary Obligations and Unconscionable Transactions” 65 CanBar Rev 37 at 56.

⁴ Ernest J Weinrib “The Fiduciary Obligation” (1975) 25 UTLJ 1 at 5.

⁵ Peter Birks “Equity in the Modern Law: An Exercise in Taxonomy” (1996) 26 UW Austl L Rev 1 at 19.

clarity to the first it is possible to provide improved (but not exhaustive) guidance for when a fiduciary relationship may arise in a borderline case.

Chapter II reviews the fiduciary principle generally and examines the current (unsatisfactory) approaches to fiduciary identification. Chapter III introduces, explains, and justifies the two-form understanding of the fiduciary relationship, and assesses its utility against a variety of hypothetical and case examples. In doing so it extrapolates outwards to consider some of the other perennial issues of fiduciary law, such as whether fiduciary duties are assumed or imposed. This dissertation then concludes in chapter IV with an anticipatory response to possible objections to the two-form approach.

Ultimately, it is hoped that grounding the fiduciary relationship in a two-form paradigm may facilitate the development of a principled normative basis for finding the fiduciary relationship, and in doing so help clear some of the “conceptual fog” that has beset the doctrine for the last half-century.⁶

⁶ Robert Flannigan “The Boundaries of Fiduciary Accountability” [2004] NZLRev 215 at 215.

Chapter II: The fiduciary principle

A: Introduction

Since Paul Finn’s seminal work on the topic,⁷ the fiduciary principle has found application to a wide range of relationships in private and public law. Yet this dispersal, perhaps in accordance with the principle’s historically equitable orientation,⁸ has been effectuated by analogical reasoning rather than through elaboration of a principled basis for determining liability.⁹ In doing so courts in the Commonwealth have expressed reluctance to articulate any clear underlying concept of the fiduciary relationship.¹⁰ One consequence of this “legal paraleipsis”¹¹ is that the fiduciary principle is often perceived as a “magic formula”, invoked by litigants hopeful for the potent remedies that attend to breach of fiduciary duty.¹²

This chapter introduces the fiduciary principle. It first describes the fiduciary relationship, the duty of loyalty, and the consequences for breach. Once that backdrop is established, it moves on to focus on the two main approaches taken in New Zealand to determining whether a fiduciary relationship exists: first, reasoning by analogy, and second, reference to a set of key characteristics to determine a legitimate entitlement to loyalty. This approach is then assessed to show that, although workable, the two main approaches are unsatisfactory because they tell us little about the normative framework that justifies a finding of a fiduciary relationship. This point is made in order to set the scene before an alternative two-form approach to identifying the fiduciary relationship is introduced, explained and justified in chapter III.

⁷ PD Finn *Fiduciary Obligations* (Law Book Co, Sydney, 1977).

⁸ Joshua Getzler “Rumford Market and the Genesis of Fiduciary Obligations” in Peter Birks and Alan Rodger of Earlsferry (eds) *Mapping the Law* (Oxford University Press, Oxford, New York, 2006) 577 at 581.

⁹ Fiduciary duties are often considered “equitable extensions of trustee duties”: *Swindle v Harrison* [1997] 4 All ER 705 (CA) at 734, cited in Matthew Conaglen *Fiduciary loyalty* (Hart Publishing, Oxford, UK, 2011) at 15. This has provided the means by which the trust concept has expanded into analogous, “quasi-trust” territory: LS Sealy “Fiduciary Relationships” (1962) 20 CLJ 69 at 71.

¹⁰ *Maclean v Arklow Investments Ltd* [1998] 3 NZLR 680 (CA) at 691; *Frame v Smith* [1987] 2 SCR 99 at 135 per Wilson J.

¹¹ JR Maurice Gautreau “Demystifying the Fiduciary Mystique” (1989) 68 CanBar Rev 1 at 2.

¹² PJ Millett “Equity’s place in the law of commerce” (1998) 114 LQR 214 at 217; *Royal Brunei Airlines v Tan* [1995] 3 All ER 97 (UK PC) at 99 per Lord Nicholls of Birkenhead; see generally Laura Hoyano “The Flight to the Fiduciary Haven” in Peter Birks (ed) *Privacy and Loyalty* (Oxford University Press, Oxford, 1997).

B: The fiduciary relationship

Broadly understood, the fiduciary relationship is a relationship of trust and confidence in which one person (the ‘beneficiary’ or ‘principal’)¹³ is entitled to rely on another (the ‘fiduciary’).¹⁴ The distinguishing obligation of the fiduciary relationship is the obligation of loyalty:¹⁵

The principal is entitled to the single-minded loyalty of his fiduciary. This liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal.

The proscriptive rules against the making of a personal profit and entering into a position of conflict are “at the core of the classical fiduciary obligation”.¹⁶ The exact contours of the two rules and their interrelationship are not the concern of this paper.¹⁷ Neither is the question of whether fiduciary obligations are exclusively proscriptive or are also prescriptive in nature.¹⁸ For the purposes of this dissertation it is sufficient to say that since the decision of the House of Lords in *Boardman v Phipps* the prophylactic rules have

¹³ Hoyano notes that the lack of a consistent correlative term is indicative of the uncertainty as to the nature of the fiduciary relationship: above n 12, at 179.

¹⁴ *Chimside v Fay* [2007] NZSC 68, [2007] 1 NZLR 433 at [80].

¹⁵ *Mothew v Bristol & West Building Society* [1998] Ch 1 at 18 per Lord Millett; cited in *Stevens v Premium Real Estate Ltd* [2009] NZSC 15, [2009] 2 NZLR 384 at [67] per Blanchard J. See also *Arklow Investments Ltd v Maclean* [2000] 2 NZLR 1 (PC) at 5–6 per Henry J. Lord Millett’s approach is now “very well accepted” throughout the Commonwealth: Conaglen, above n 9, at 102.

¹⁶ Getzler, above n 8, at 581; Robert Cooter and Bradley J Freedman “The Fiduciary Relationship: Its Economic Character and Legal Consequences” (1991) 66 NYULRev 1045 at 1054. There have been alternative proposals for the core fiduciary duty. There is strong support in North America and elsewhere that the fundamental fiduciary duty is to act in the interests of the beneficiary: *Norberg v Wynrib* [1992] 2 SCR 226 at 272; *Gladstone v Attorney General* 2005 SCC 21, [2005] 1 SCR 325 at 335–336; Peter Birks “The Content of Fiduciary Obligation” (2000) 34 Isr L Rev 3 at 36–37. This understanding was rejected in *Breen v Williams*, above n 1, at 137–138 on the basis that it is not a function peculiar to fiduciaries. Similarly, in line with the North American approach, Lionel Smith has argued that the core fiduciary duty is to act with the “right motive”: “The Motive, Not the Deed” in Joshua Getzler (ed) *Rationalizing Property, Equity and Trusts* (LexisNexis UK, London, 2003) 53 at 103. This understanding of the fiduciary obligation is problematic for the same reason: Conaglen, above n 9, at 103–104; it also does not square with the traditional position that motive is irrelevant to fiduciary liability: *Regal (Hastings) Ltd v Gulliver* [1942] 1 All ER 378 (HL) at 386.

¹⁷ Compare, for example, Finn, above n 7, at ch 21 with Charles Harpum “Fiduciary Obligations and Fiduciary Powers - Where Are We Going?” in Peter Birks (ed) *Privacy and Loyalty* (Oxford University Press, Oxford 1997) 145 at 146.

¹⁸ The current approach seems to be that fiduciary duties are exclusively proscriptive: *Chimside*, above n 14, at [80] per Tipping J. However, compare the approach taken in *Day v Mead* [1987] 2 NZLR 443 (CA) at 458; (decided before *Mothew*, above n 15); see generally Smith, above n 16, at 61–63; and Darryn Jensen “Prescription and Proscription in Fiduciary Obligations” (2010) 21 KLJ 333.

been “fundamental” to any statement of the fiduciary relationship.¹⁹ One consequence of their prominence is that fiduciary loyalty is defined negatively, i.e. by reference to fiduciary *dis*loyalty, which, in accordance with the proscriptive rules, “consists in being conflicted where one [is] obliged not to be”.²⁰

Typical remedies for breach of fiduciary duty include account of profits, equitable compensation, rescission, and constructive trust. Liability for breach is strictly enforced.²¹ In order to obtain an account of profits, the beneficiary is not required to prove that he or she suffered any harm; breach alone is sufficient.²² Subject to the provision of an equitable allowance, this fastidious protection of the fiduciary’s loyalty extends to circumstances where the breach was in good faith or where the beneficiary in fact benefited from the fiduciary’s wrongdoing.²³

The liability of persons acting in a fiduciary capacity is limited by the important caveat that not all obligations that arise in a relationship are of a fiduciary nature.²⁴ This means that not all breaches of duty by a fiduciary are breaches of his or her fiduciary duty.²⁵ Furthermore, it is critical to keep in mind Fletcher Moulton LJ’s caution that “[t]he nature of the fiduciary relation must be such that it justifies the interference”.²⁶ In this sense, fiduciary loyalty is context-sensitive and its application varies according to the particular details of the relationship at hand.²⁷ This is reflected in the diversity of contexts in which a fiduciary relationship may arise,²⁸ a fact that somewhat explains the difficulty

¹⁹ *Boardman v Phipps* [1967] 2 AC 46 (HL) at 123; cited with approval in *New Zealand Netherlands Society “Oranje” Inc v Kuys* [1973] 2 NZLR 163 (PC) at 166.

²⁰ Paul B Miller “Justifying Fiduciary Remedies” (2013) 63 UTLJ (forthcoming) at 57; see also Parker Hood “What is So Special about Being a Fiduciary” (2000) 4 EdinLR 308 at 312: “[the] fiduciary obligation is a negative one, stating what the fiduciary should not do... A fiduciary is, thus, acting in his principal’s interests by not acting against them”.

²¹ *Kuys*, above n 19, at 166.

²² *LAC Minerals Ltd v International Corona Resources Ltd* [1989] 2 SCR 574 at 663 per La Forest J, citing *Keech v Sandford* (1726) 2 Eq Cas Abr 741, 25 ER 223 (Ch).

²³ As was the case in *Boardman*, above n 19.

²⁴ *Kuys*, above n 19, at 166; *Mothew*, above n 15, at 16; *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664 (CA) at 680; *Chirnside*, above n 14, at [72] per Tipping J and at [17] per Elias CJ.

²⁵ *S v Attorney General* [2003] 3 NZLR 450 (CA) at [77]; cited in Conaglen, above n 9, at 36.

²⁶ *Re Coomber* [1911] 1 Ch 723 (CA) at 729. This is because reference to “fiduciary rhetoric” without due regard to the applicability of the high standard of care demanded of fiduciaries is liable to result in unprincipled imposition of fiduciary obligations: Rosemary Teele “The Search for the Fiduciary Principle: A Rescue Operation” (1996) 24 ABLR 110 at 125.

²⁷ *Frame v Smith*, above n 10, at 135.

²⁸ *Re Coomber*, above n 26, at 728–729; *Boardman*, above n 19, at 123 per Lord Upjohn, cited with approval in *Kuys*, above n 19, at 166.

of providing a comprehensive and unified theory of fiduciary identification.²⁹

Before moving on to discuss the approaches taken to finding a fiduciary relationship, it is important to clarify why it is that we look for a fiduciary relationship at all. There is a substantial amount of commentary that dismisses the search for a fiduciary relationship as a fool's errand. Paul Finn, for example, has argued that "a fiduciary is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to fiduciary obligations that he is a fiduciary".³⁰ Since "it is the obligation and duty which makes the obligor a fiduciary",³¹ the primary issue is identification of an enforceable fiduciary duty. On this approach, the "label 'fiduciary' is a unnecessary expression of a conclusion"³² that a fiduciary duty exists, and it is therefore "meaningless to talk of fiduciary relationships as such".³³

The problem with this methodology is that it begs the question of why a person is subject to a fiduciary obligation in the first place.³⁴ The fiduciary relationship matters because justification matters.³⁵ Since duties are, for the most part, correlative with rights,³⁶ they do not exist independently of the relationship in which they subsist.³⁷ Rather, as Finn himself notes in a later article, a fiduciary duty is derived and justified by the parties' relationship.³⁸ Determination of the relationship's nature as fiduciary is therefore

²⁹ Tamar Frankel "Fiduciary Law" (1983) 71 CLR 795 at 795.

³⁰ Finn, above n 7, at 2, cited in Millett, above n 12, at 218.

³¹ *Arklow*, above n 15, at 6 per Henry J.

³² James Edelman "The Role of Status in the Law of Obligations: Common Callings, Implied Terms and Lessons for Fiduciary Duties" (paper presented to the Conference on the philosophical foundations of fiduciary law, DePaul University, 19 July 2013) at 18.

³³ Finn, above n 7, at 1. For an application of this theory in the context of the fiduciary liability of mechanics (discussed in further detail in chapter III) see Robert Flannigan "Commercial Fiduciary Obligation" (1997) 36 *Alta L Rev* 905 at 911.

³⁴ "Definitions of the fiduciary relationship which turn on the duty of loyalty ultimately are circular, and provide no guidance on which a fiduciary obligation should be attached to a relationship between the parties": Hoyano, above n 12, at 182.

³⁵ "[P]rivate law is a justificatory enterprise. The relationship between the parties is not merely an inert datum of positive law, but an expression of – or at least an attempt to express – justified terms of interaction": Ernest J Weinrib *The Idea of Private Law* (Harvard University Press, Cambridge (Mass), 1995) at 32.

³⁶ John William Salmond and Glanville Llewellyn Williams *Salmond on Jurisprudence* (11th ed, Sweet & Maxwell, London, 1957) at 264.

³⁷ "[F]iduciary duties do not exist at large; they are confined to specific relationships between particular parties": *Alberta v Elder Advocates of Alberta Society* 2011 SCC 24, [2011] 2 SCR 261 at [33]; "the duty of loyalty is not a duty in the air...": *Strother v 3464920* 2007 SCC 24, [2007] 2 SCR 177 at [135].

³⁸ "The critical matter in the end is the role that the alleged fiduciary has, or should be taken to have, in the relationship": Paul Finn "The Fiduciary Principle" in T G Youdan (ed) *Equity fiduciaries and trusts* (Carswell, Toronto, 1989) at 46.

conceptually prior to determination of the fiduciary duties actually owed.³⁹ Fletcher Moulton LJ's quotation above is pertinent here. It implies correctly that the nature and scope of the fiduciary duty is commensurate with the nature and scope of the fiduciary relationship, and this is because the former is derived and justified by the latter.

This chapter now turns to the question of what constitutes a fiduciary relationship and what distinguishes it from other heads of obligation in private law. It does so by describing attempts by academics and Commonwealth courts to define or classify the fiduciary relationship. It begins with a brief note on the nature and goal of classification in private law.

1. Taxonomy and private law

In brief, taxonomy is the science of classification. It is the means by which a concept is rendered intelligible. Since “the basic aim of legal scholarship is to understand the law better”,⁴⁰ classification is important to legal scholarship because it is the “sort of thought that helps lawyers focus on the substance of legal concepts”.⁴¹ Although it has been argued that “[i]t is a grave mistake to suppose the law can manage without [classification]”,⁴² the utility of the private law taxonomic project remains nothing short of controversial.⁴³

A defense of taxonomy as useful is important for this dissertation because it has been claimed that equity (and, by corollary, the fiduciary principle) is not accountable to the same rigorous standards of coherency, justification, and fit as its common law counterpart.⁴⁴ Former Justice Edward Thomas, for example, has argued that even if we

³⁹ “It is the nature of the relationship... that gives rise to the fiduciary duty”: *Guerin v Canada* [1984] 2 SCR 335 at 384 per Dickson J.

⁴⁰ SA Smith “Taking Law Seriously” (2000) 50 UTLJ 241 at 249.

⁴¹ Conaglen, above n 9, at 29. This is because “[l]egal thought is, in essence, the process of categorization”: Kenneth J Vandeveld “The New Property of the Nineteenth Century: The Development of the Modern Concept of Property” (1980) 29 Buff L Rev 325 at 327.

⁴² Birks, above n 16, at 13.

⁴³ “[S]ingle-minded search for precision in private law tends to be self-defeating as new terminology is devised, and concepts and subconcepts are multiplied and then further refined, in an attempt to accommodate awkward cases”: Stephen Waddams *Dimensions of Private Law* (Cambridge University Press, Cambridge, 2003) at 231. For skepticism in the context of the fiduciary obligation, see John Glover “Wittgenstein and the Existence of Fiduciary Relationships: Notes Towards a New Methodology” (1995) 18 UNSWLJ 443.

⁴⁴ Anthony Mason “The Place of Equity and Equitable Remedies in the Contemporary Common Law World” (1994) 110 LQR 238 at 239.

could define the fiduciary principle, we should not do so, because without this flexibility the principle would “lose much of its utility”.⁴⁵ If this assertion held true, it would render moot the underlying aim of this dissertation, since there would be no purpose in furthering the principled development of the fiduciary relationship if to do so would cut against the grain of equity or otherwise thwart the usefulness of the principle.

There are three responses to this argument. First, equity is no longer a merely discretionary jurisdiction.⁴⁶ As Darryn Jensen explains, “modern equity is committed to the values of universalisability, integrity, and corrective justice in the same way as the common law”.⁴⁷ The fiduciary principle therefore ought to be accountable to the same standards applied to other heads of obligation in private law.⁴⁸ Second, in respect to the fiduciary relationship, “[d]eriving a suitable method of ascertainability need not mandate the creation of rigid and absolute categories”.⁴⁹ Ascertainment of the principles underlying fiduciary identification does not by proxy stunt the development of the principle nor does it unduly limit judicial analysis or discretion. It is rather an essential and incontrovertible method for developing the law.⁵⁰ Third, as the article that directly precedes Thomas’s in the *New Zealand Law Journal* makes clear,⁵¹ an ill-defined and misunderstood fiduciary principle is problematic for the development of the common law of obligations as a whole.⁵²

⁴⁵ EW Thomas “An Affirmation of the Fiduciary Principle” [1996] NZLJ 405 at 405; the same argument was made twenty years prior by Sir Eric Sachs in *Lloyds Bank Ltd v Bundy* [1975] QB 326 (CA) at 341: “it is neither feasible nor desirable to attempt closely to define the relationship, or its characteristics, or the demarcation line showing the exact transition point where a relationship that does not entail that duty passes into one that does”. See also Henry E Smith “Why Fiduciary Law is Equitable” in Paul B Miller and Andrew Gold (eds) *The Philosophical Foundations of Fiduciary Law* (Oxford University Press, Oxford) (forthcoming) at 4–5.

⁴⁶ “It is not enough for a party to cry ‘equity’ and expect to be compensated. One must identify the relevant principle of equity on which a claim can be properly founded”: *Attorney-General v Equiticorp Industries Group Ltd (In Statutory Management)* [1996] 1 NZLR 528 (CA) at 537 per McKay J, cited in Charles Rickett “Cry ‘equity’ - it works!” [2013] NZLJ 25 at 25.

⁴⁷ Darryn Jensen “The Problem of Classification in Private Law” (2007) 31 MULR 516 at 531.

⁴⁸ “The concept of fiduciary duty is not an invitation to engage in ‘results oriented’ reasoning. It is a principled analysis. At its core is the obligation of one party to act for the benefit of another...”: *Gladstone*, above n 16, at 335–336 per Major J, cited in *Paki v Attorney General* [2009] 1 NZLR 72 (HC) at [140]. For an argument against a wide conception of equity as the foundation of the fiduciary principle, see Conaglen, above n 9, at 110–112.

⁴⁹ Leonard Ian Rotman *Fiduciary law* (Thomson Carswell, Toronto, 2005) at 69.

⁵⁰ “Gaining knowledge of a subject is largely a matter of learning how to classify the subject and its constituent elements... [c]lassifying a particular decision... is a claim about the meaning of the decision, as well as about how the decision should be applied in the future.”: Smith, above n 40, at 243–244.

⁵¹ Sir John Balcombe “Fiduciary Relationships: Litigator’s Dream or Nightmare?” [1996] NZLJ 402. The writer answers the question posed by the title of his article in the “negative”, implying it is a nightmare, at 404.

⁵² “[T]here is an obvious hazard of ‘fiduciary’ becoming either a chameleon or an ‘accordion term’. Definition, howsoever imperfect, has its place”: Finn, above n 38, at 26. The issue is discussed in greater depth in Hoyano, above n 12, at 170–174; see also Birks, above n 16, at 12–13.

On this basis it is submitted there is “unfinished business”⁵³ in this area of law and as such it is valuable to strive towards a “clear picture of the place of fiduciary obligations in the map of all obligations”.⁵⁴ This is subject to the important qualification that “the point of mapping the law is not to deny the law’s complexity and dynamism... [i]t is a means of managing complexity and enabling the dissemination of the key features of the thing which is being mapped”.⁵⁵ With that limitation in mind, this chapter now turns to an overview of the methods (or, in other words, the taxonomies) that courts have used to render intelligible the fiduciary principle.

2. The status-fact distinction

The aims of this part and the part that follows it are to introduce the status-fact distinction, describe its importance, and explain why the distinction and reasoning by analogy which it facilitates is not particularly helpful in determining the question of when a fiduciary relationship may arise.

The status-fact distinction is the distinction between those relationships that automatically attract fiduciary duties by dint of their status as an established fiduciary relationship and those which are found to have a fiduciary element on the facts of the case. The first – the category of relationships that are said to be inherently fiduciary – contains the vast majority of fiduciary relationships, including those between solicitor and client, trustee and beneficiary, and principal and agent.⁵⁶

The list of relationships that are categorised as inherently fiduciary is not closed.⁵⁷ If a relationship is not in the inherent category it may still attract fiduciary duties if, on the facts of the case, the relationship is analogous to an inherent category⁵⁸ or if there

⁵³James Gordley “The Common Law in the Twentieth Century: Some Unfinished Business” (2000) 88 Cal L Rev 1815 at 1820.

⁵⁴Birks, above n 16, at 12.

⁵⁵Jensen, above n 47, at 538. In this sense the taxonomic project is distinguishable from reductivist reasoning in law, in which the proposed simplifications are liable to “become distortions muddying any purported insights that the theory might offer”: Brian Bix “Reductionism and Explanation in Legal Theory” in Timothy Endicott, Joshua Getzler and Edwin Peel (eds) *Properties of Law: Essays in Honour of Jim Harris* (Oxford University Press, Oxford, New York) 43 at 50.

⁵⁶*Chimside*, above n 14, at [73] per Tipping J.

⁵⁷*Hospital Products Ltd v United States Surgical Corporation* [1984] 156 CLR 41 at 68 per Gibbs J; *Guerin*, above n 39, at 384–5 per Justice Dickson.

⁵⁸*Liggett v Kensington* [1993] 1 NZLR 257 (CA) at 281–282 per Gault J; *Chimside*, above n 14, at [14].

otherwise arises trust and confidence between the parties that entitles one party to expect the loyalty of the other.⁵⁹

The status-fact taxonomy has been incredibly important to the development of the fiduciary principle. It is often cited as the primary division in fiduciary law.⁶⁰ The distinction gives certainty to the core of inherently fiduciary relationships. Since fact-based fiduciary relationships are often found by analogy or reference to the inherent category, this certainty of the core is complemented by a discretionary element to the penumbra. In this way, the status-fact distinction thereby promotes the simultaneous and contradictory demands for flexibility and rigidity in fiduciary law.⁶¹

Despite these laudable features, the utility of the status-fact distinction is contingent on the existence of a sufficiently clear normative basis to the fiduciary principle. This is because of two reasons. First, the fact that a relationship is classified as inherently fiduciary is not conclusive.⁶² In “exceptional” cases, fiduciary duties may not arise.⁶³ Secondly, because the list of relationships classified as inherently fiduciary by law is not closed, the list may change in the future. Since the “extension of fiduciary obligations to new ‘categories’ of relationship presupposes the existence of an underlying principle which governs the imposition of fiduciary obligations”,⁶⁴ if the principle on which courts decide cases is not clear, then it will be difficult to distinguish justified developments from arbitrary ones. If the inherent category has in fact developed without a clear principle in mind, then it is difficult to see why the status of a relationship as inherently fiduciary without more justifies a presumption of fiduciary loyalty.⁶⁵

⁵⁹ Tipping J in *Chirnside*, above n 14, at [83].

⁶⁰ Paul B Miller “Justifying Fiduciary Duties” (2013) 58 McGill LJ 969 at 1010.

⁶¹ Andrew Butler, “Fiduciary Law” in Andrew S Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) at [1427]; *Chirnside*, above n 14, at [134]–[136] per Tipping J.

⁶² “It is sometimes said that the nature of fiduciary relationships is both established and exhausted by the standard categories... I do not agree. It is the nature of the relationship, not the specific category of actor involved that gives rise to the fiduciary duty”: *Guerin*, above n 39, at 384.

⁶³ “[T]he nature of the relationship may be such that, notwithstanding that it is usually a fiduciary relationship, in exceptional cases it is not.”: *LAC Minerals*, above n 22, at 597. Shepherd in *The law of fiduciaries* (Carswell, Toronto, 1981) provides an example of an exceptional case as a director “whose powers have been entirely taken away by a unanimous shareholders’ agreement”. In such a case, Shepherd notes at 21 that the director “is probably not a fiduciary”. See also *Gautreau*, above n 11, at 8.

⁶⁴ *Frame v Smith*, above n 10, at 134 per Wilson J.

⁶⁵ It is arguable that the decline of status as an authoritative determination of a relationship’s character is consistent with Sir Henry Maine’s famous generalisation that progressive societies move from status to contract: *Ancient Law* (9th ed, Spottiswoode & Co, London, 1883) at 168–170. Interestingly, the most prominent proponent of the ‘undertaking’ conception of the fiduciary relationship, James Edelman, has recently advocated a limited return to status as a factor in construing the fiduciary undertaking: above n 32, at 15–18.

This problem is compounded by the important point made above that the nature and scope of the fiduciary duty that is derived from a fiduciary relationship is context specific. As the Privy Council made emphatically clear in *Arklow Investments*, “[i]t is not the label which defines the duty”.⁶⁶ It is dangerous to plaster the fiduciary sticker to a relationship and then presume that all duties that exist between the parties are fiduciary in nature, when in fact these duties may be contractual or tortious.⁶⁷ Therefore even if a relationship is classified in a particular way, that tells us little about the nature and scope of the fiduciary duty without regard to the normative basis of the fiduciary principle as well as the interaction between the fiduciary duty and other private law heads of obligation that may also govern the relationship.⁶⁸ In other words, the status-fact distinction is useful, but that usefulness is largely dependent on the existence of a clear normative basis for determining whether a particular relationship is fiduciary or not, and the distinction does not by itself provide this normative basis.⁶⁹

This chapter now turns to discuss the two main methods of finding the fiduciary relationship. These two methods act in conjunction with the status-fact distinction above, because the methods are used to identify a fiduciary relationship when the relationship in question is not already classified as inherently fiduciary. The general thrust of this part is that each of the two methods – reasoning from analogy, and reasoning from a set of key characteristics – are workable, but are ultimately unsatisfactory because they tell us little about the normative basis on which fiduciary identification is made.

C: Reasoning from analogy

The primary method of reasoning employed to determine the existence of a fiduciary relationship is reasoning from analogy. This method of reasoning is facilitated by the status-fact distinction because the relationships in the established categories have

⁶⁶ *Arklow*, above n 15, at 6 per Henry J.

⁶⁷ See, for example, Matthew Harding “Two Fiduciary Fallacies” (2007) 2 *Journal of Equity* 1.

⁶⁸ “A person... may be in a fiduciary position quoad a part of his activities and not quoad other parts: each transaction or group of transactions must be looked at”: *Kiys*, above n 19, at 166 per Lord Wilberforce; “[t]he existence and scope of fiduciary obligations are not to be determined by placing the instant case into a preconceived category and then invoking the duties thought to attach to that category; they must be tailored to the particular case after a meticulous examination of its own facts”: *Cook v Evatt (No 2)* [1992] 1 NZLR 676 (HC) at 685 per Fisher J.

⁶⁹ *Beach Petroleum v Kennedy* [1999] 48 NSWLR 1 (NSWCA) at [188].

functioned as “prototypes”⁷⁰ that form an “analogical core”⁷¹ from which judicial reasoning on the topic has flourished. The argument in this part is not that reasoning from analogy results in wrong decisions, or that it is improper *per se*: it clearly has a valid and important place in the judicial arsenal and is essential for the development of the Common Law. Rather, reasoning by analogy is unhelpful because it does not tell us enough about the normative basis on which fiduciary identification is made.⁷²

This is illustrated in the reasoning of Elias CJ in *Chirnside v Fay*.⁷³ In *Chirnside*, two property developers embarked on a venture to purchase and develop a commercial property in Dunedin. Mr Fay provided financial resources and the skills to secure an anchor tenant and Mr Chirnside was trusted to negotiate the purchase of the site and lease the site to the secured tenant. The parties made no attempt to formalise their relationship. After a period of time it became clear that Chirnside had excluded Fay from the venture and had proceeded to finish the project for his sole benefit. Because a joint venture was not, at the time, considered an inherently fiduciary relationship in New Zealand,⁷⁴ the question was whether on the facts a fiduciary relationship arose between Chirnside and Fay that prevented Chirnside from appropriating the joint venture.⁷⁵

The Supreme Court found that such a relationship did arise. However, the members of the Court differed on the reasons for that conclusion. Tipping J, writing on behalf of himself and Blanchard J, found a fiduciary relationship on the basis of a legitimate entitlement derived from the characteristics of the parties’ relationship.⁷⁶ His approach is the focus of the next section of this chapter (II.D). Elias CJ, in contrast, came to the same result on the basis of an analogy with partnership. In her view, “the venture to acquire

⁷⁰ Frankel, above n 29, at 804.

⁷¹ John Glover “Identification of Fiduciaries” in Peter Birks (ed) *Privacy and Loyalty* (Oxford University Press, Oxford, 1997) 269 at 270.

⁷² For critique of analogous reasoning in the context of the fiduciary obligation, see, e.g., Shepherd, above n 63, at 5–10; Frankel, above n 29, at 804–808.

⁷³ *Chirnside*, above n 14, at [14]–[15].

⁷⁴ Elias CJ at [14] suggests that joint ventures are inherently fiduciary, but recent commentary and case law does not support that proposition: Jane Knowler and Charles Rickett “The Fiduciary Duties of Joint Venture Parties - When do They Arise and What do They Comprise?” (2011) 42 VUWLR 117.

⁷⁵ The facts in *Chirnside*, above n 14, are eerily similar to those facing Cardozo J in *Meinhard v Salmon*, 164 NE 545 (NY). In that case two parties entered into a joint venture to run a hotel; Meinhard provided finances, Salmon was in charge of managing the hotel and maintaining the lease. When the lease was nearing expiry Salmon transferred the lease to a company he owned and controlled and Meinhard sued for breach of fiduciary duty. Elias CJ cited Cardozo CJ’s famous dictum at [14] (discussed further in chapter III) but did not refer to the facts of the case.

⁷⁶ *Chirnside*, above n 14, at [80] per Tipping J.

and develop the [commercial property] was indistinguishable from a single transaction partnership between Mr Fay and Mr Chirnside”.⁷⁷

The difficulty with Elias CJ’s approach is that it does not tell us *why* the fact that the venture was indistinguishable from a partnership justifies fiduciary liability. It also does not clearly articulate the similarities and differences between partnership and joint venture relationships. At two points, Elias CJ seems to suggest that all joint ventures ought to be inherently fiduciary.⁷⁸ However, at another, she qualifies this by saying a joint venture only ought to be considered inherently fiduciary when profits are realized by the venture itself and subsequently distributed, rather than taken separately and directly by the venture’s participants. The reason why Elias CJ determined that joint venture relationships are inherently fiduciary is therefore unclear due to the nature of reasoning by analogy, which does not directly examine the justification for liability.⁷⁹

This lack of clarity does not help explain why relationships similar to joint ventures, such as that between franchisor and franchisee,⁸⁰ are also not inherently fiduciary.⁸¹ Because Elias CJ’s methodology does not make clear the normative basis of her decision, it is not a helpful tool for identifying what is necessary or distinct about the fiduciary relationship. Her judgment therefore does not do as much as it could to facilitate the principled development of the law regarding when a fiduciary duty may arise between parties to a joint venture.⁸²

This chapter now moves on to consider the second common approach to finding the fiduciary relationship, employed in *Chirnside* by Tipping J. This second methodology looks to the nature of the fiduciary relationship itself, but like the analogical approach it does not make clear the

⁷⁷ At [14].

⁷⁸ At [1] and [14].

⁷⁹ This issue is reflected in the dicta of La Forest J in *LAC Minerals*, above n 22, at 644: “[i]n specific circumstances and in specific relationships, courts have no difficulty in imposing fiduciary obligations, but at a more fundamental level, the principle on which that obligation is based is unclear”.

⁸⁰ *Barrie v Nature Discoveries Ltd* [2012] NZHC 2209.

⁸¹ Note, however, the widely cited but seldom followed argument by Harold Brown that fiduciary obligations should apply between parties to franchising arrangements: “Franchising - A Fiduciary Relationship” (1970) 49 *Tex L Rev* 650.

⁸² It could be argued that the pursuit for principle is outside the judicial function: Allan Beever “The Law’s Function and the Judicial Function” (2003) 20 *NZULR* 299. However, it is clear that the judicial function is not so easily delineated from the academic. As Lord Goff writing extra judicially observed, “[t]he search for principle is a task which judge and jurist share together”: “The Search for Principle” in William Swadling and Gareth Jones (eds) *The search for principle: essays in honour of Lord Goff of Chieveley* (Oxford University Press, New York, 1999) 313 at 329.

normative basis on which decisions are made. It therefore does not clarify what is necessary or distinct about the fiduciary relationship, and, as a result, does not provide an adequate means for identifying fiduciary relationships in novel scenarios.

D: Reasoning from key characteristics

The key characteristic approach looks for an entitlement to loyalty, derived from the existence of a set of key indicia. As Paul Finn puts it, one must show “that one party is entitled to expect the other will act his interests in and for the purposes of the relationship. Ascendancy, influence, vulnerability, trust, confidence or dependence doubtless will be of importance... [b]ut they will be important only to the extent that they evidence a relationship suggesting that entitlement”.⁸³

Finn’s analysis differs subtly in content from the dominant approach taken in New Zealand, in which a fiduciary relationship is said to arise when “one party is entitled to repose and does repose trust and confidence in the other”.⁸⁴ The approach favoured in *Chirnside* differs from Finn’s analysis because it privileges the concept of trust and confidence, elevating it to the defining feature of the fiduciary relationship, whereas Finn’s analysis considers it as a mere evidential factor in determining the larger question of whether one party can expect fiduciary loyalty from another. Despite this difference, as Harrison J in *Paki v Attorney General* noted, the two formulations are very similar, if not largely synonymous, because an entitlement to trust will inevitably warrant fiduciary loyalty only when that trust entitles the beneficiary to that standard of devotion.⁸⁵

The rest of this chapter introduces the key characteristics, or indicia, that are typically used to identify a legitimate entitlement to loyalty. The characteristics considered here are trust, undertaking, vulnerability, and power.⁸⁶ There are two reasons why it is helpful

⁸³ Finn, above n 38, at 46. For similar assertions, see, for example, *Hodgkinson v Simms* [1994] 3 SCR 337 at 409 per La Forest J; *Canadian National Railway Co v McKercher LLP* 2013 SCC 39 at [37]; *Grimaldi v Chameleon Mining NL (No 2)* [2012] FCAFC 6, (2012) 200 FCR 296 (au) at [177].

⁸⁴ *Chirnside*, above n 14, at [85] per Tipping J. See also *Paper Reclaim Ltd v Aotearoa International Ltd* [2007] NZSC 26, [2007] 3 NZLR 169 at [31] per Blanchard J; *Estate Realties Ltd v Wignall* [1991] 3 NZLR 492 (HC) at 492 per Tipping J; *Day v Mead*, above n 18, at 458. The test was sidestepped in *Saunders v Houghton* [2009] NZCA 610, [2010] 3 NZLR 331, with only a passing reference at [97].

⁸⁵ *Paki (HC)*, above n 48, at [134].

⁸⁶ AJ Oakley *Constructive Trusts* (3rd ed, Sweet & Maxwell, London, 1997) at 90–98; Glover, above n 71. More characteristics have been identified but have received relatively less acceptance in the Commonwealth and the United States. These include discretion, confidence, reliance, inequality, and dependence: Miller, above n 60, at

to outline these characteristics. First, awareness of what characterises a fiduciary relationship is valuable background material. In the next chapter, it is argued that, once clarified, two of the characteristics – power and vulnerability – are the most important for the purposes of fiduciary identification. Second, the process shows that all the key characteristics identified are without clarification too broad (or too inclusive) to be the defining feature of every fiduciary relationship.⁸⁷ In other words, each characteristic suffers from the key problem of overdetermination.⁸⁸ The key characteristic approach is therefore “not particularly illuminating”, for at most it offers only an approximation of when a fiduciary relationship may arise.⁸⁹

1. Trust

The first core characteristic is *trust*.⁹⁰ Contrary to the self-interested dealing that is expected – if not encouraged – in other areas of private law, fiduciary relationships are typically marked by strong interpersonal trust between the beneficiary and the fiduciary.⁹¹ As Tipping J observed, trust is the “primary meaning” of the term fiduciary and “[t]he cases demonstrate that a fiduciary relationship will arise where one party is reasonably entitled to repose and does repose trust and confidence in the other”.⁹²

The importance of trust as a defining characteristic of the fiduciary relationship was demonstrated in *Chirnside*. In that case, the fact that the parties had not formalised their

1011. These characteristics all blossom from the “incredibly slippery” Latin root for fiduciary, *fides*, which is variously translatable as “shades of honour, honesty, trust, trustworthiness, faith, and faithfulness”: Birks, above n 16, at 8; citing David Johnston *The Roman law of trusts* (Oxford University Press, Oxford, 1988).

⁸⁷ Harding, above n 2, at 85.

⁸⁸ At 85.

⁸⁹ Conaglen, above n 9, at 260. According to Conaglen, this is because it “states little more than that fiduciary duties arise whenever it is appropriate for them to apply” at 260. Despite this statement, Conaglen ends his analysis by affirming the necessity of a legitimate expectation approach at 268.

⁹⁰ The term “trust” in this context refers to the philosophical concept of trusting another, rather than to the formal trust instrument: see, e.g., Matthew Harding “Manifesting Trust” (2009) 29 OJLS 245. The term “trust” must also be distinguished from “confidence”. Traditionally the two terms were synonymous but developments in both fields, particularly the development of the tort of breach of confidence, has since precluded that equivocation: see, e.g., *Coleman v Myers* [1977] 2 NZLR 225 (CA) at 275–276; *Bundy*, above n 45, at 341; *Paper Reclaim*, above n 84, at [32]. See also Conaglen, above n 9, at 241–244, arguing that breach of confidence is conceptually distinct from breach of fiduciary duty.

⁹¹ “The fiduciary relationship has trust, not self-interest, at its core”: *Norberg*, above n 16, at 274 per McLachlin J; *Day v Mead*, above n 18, at 458: “[t]he foundation of the obligation lies in the trust or confidence reposed by one and accepted by the other...”. See generally Leonard I Rotman “Fiduciary Doctrine: A Concept in Need of Understanding” (1995) 34 *Alta L Rev* 821 at 841–842; and Harding, above n 2.

⁹² *Estate Realities*, above n 84, at 492 per Tipping J, cited in *Chirnside*, above n 14, at [77]; see also Finn, above n 7, at 33.

joint venture was, in Tipping J's opinion,⁹³ indicative of mutual trust and confidence between them, this trust providing Mr Fay with a legitimate entitlement that Mr Chirnside would exercise his power for the benefit of the joint venture.⁹⁴

Despite the clear connection between trust and fiduciary relationships, as well as the weight of authority asserting its significance, trust should not be considered the defining characteristic of the fiduciary relationship for two main reasons. First, trust is neither necessary nor sufficient for finding a fiduciary relationship.⁹⁵ A fiduciary relationship may exist where no actual trust is involved,⁹⁶ or where the trust has in the course of the relationship turned sour.⁹⁷ Likewise, the existence of interpersonal trust between the parties does not inevitably entail a fiduciary obligation of loyalty, but rather is a common characteristic of many relationships in private law.⁹⁸ It is therefore problematic to identify fiduciary relationships by reference to trust because the concept is too broad to be its defining characteristic.

This definitional problem most likely derives from the second difficulty: the uncertain philosophical roots of trust. Shepherd has argued that it is foolhardy to think we are capable of "neatly tagging and labeling the various facets" of trust relevant to fiduciary liability.⁹⁹ The term, by itself, "simply seems inapt" to function as a legal standard.¹⁰⁰ It is unclear, for example, what the relationship is between *trust* and its correlative *trustworthiness*, the degree to which a person's trust must be reasonable, and the basis on which that determination is made.¹⁰¹ This imprecision is reflected in Tipping's test for finding the fiduciary relationship in *Chirnside*. The test asks whether one person has a *legitimate entitlement* to trust another, giving rise to an expectation of loyalty. In other words,

⁹³ Tipping's approach can be contrasted with that of the House of Lords in *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 WLR 1752. In that case, the fact that the parties had not formalised their agreement was indicative of nothing but folly on the part of the respondent, at 74.

⁹⁴ *Chirnside*, above n 14, at [80] per Tipping J.

⁹⁵ Andrew S Burrows *English Private Law* (2nd ed, Oxford University Press, Oxford, 2009) at 1303; *Hospital Products*, above n 57, at 69 per Gibbs J; and Harding, above n 2, at 82–83.

⁹⁶ "The fact that a beneficiary has subjectively no trust at all in the judgment of the person whom the settlor has installed as trustee does not in any way relieve the trustee of the high standard that equity imposes": Weinrib, above n 4, at 5.

⁹⁷ Edelman, above n 32, at 5.

⁹⁸ "It is patent that people go around trusting others all the time, without necessarily creating a fiduciary relationship as a result": JC Shepherd "Towards a Unified Concept of Fiduciary Relationships" (1981) 97 LQR 51 at 59. See also Shepherd, above n 63, at v; and D Gordon Smith "The Critical Resource Theory of Fiduciary Duty" (2002) 55 Vand L Rev 1399 at 1418.

⁹⁹ Shepherd, above n 63, at vi.

¹⁰⁰ Smith, above n 98, at 1418.

¹⁰¹ Miller, above n 60, at 996–999.

it is a certain type of trust that is relevant to the fiduciary equation, but it is not clear on the face of it what that type of trust is.

2. Undertaking

The second common characteristic of a fiduciary relationship is an *undertaking*. A fiduciary relationship will often arise when one person undertakes to act in the interests of another.¹⁰² An undertaking is commonly understood as the “pivotal element and *sine qua non* of all fiduciary relationships”.¹⁰³ Its necessity is gospel in Australia,¹⁰⁴ England,¹⁰⁵ and Canada,¹⁰⁶ but has so far not been recognised in New Zealand.¹⁰⁷

The argument that fiduciary obligations must be undertaken in order to arise was made in *Chirnside*. In that case, counsel for Mr Chirnside argued that because Mr Chirnside had not expressly undertaken to act in the interests of Mr Fay no fiduciary obligation arose between the two.¹⁰⁸ This argument tapped into the influential literature which claims that fiduciary duties are merely default contractual terms.¹⁰⁹ It was rejected by Tipping J on the basis that fiduciary duties could be both assumed and imposed, and so the existence of an express undertaking to act in the interests of another was not necessary.¹¹⁰ Therefore, in New Zealand at least, the existence of an undertaking is not a defining characteristic of the fiduciary relationship.

Tipping J’s analysis hints at a more fundamental problem with identifying fiduciary

¹⁰² The indicum was famously stated by Austin Scott in “The Fiduciary Principle” (1949) 37 CLR 539 at 540.

¹⁰³ Glover, above n 71, at 272; see also *Hospital Products*, above n 57, at 96–97 per Mason J; *Norberg*, above n 16, at [98] per McLachlin J. Compare *Frame v Smith*, above n 10, at 136 per Wilson J.

¹⁰⁴ *Grimaldi*, above n 83, at [177]; *Hospital Products*, above n 57, at 96–97; see generally James Edelman “The Importance of the Fiduciary Undertaking” (paper presented to the Conference on fiduciary law, University of New South Wales, 22 March 2013); and Glover, above n 71, at 272.

¹⁰⁵ *White v Jones* [1995] 2 AC 206 (HL) at 271; *Mothew*, above n 15, at 18.

¹⁰⁶ “[I]t is clearly settled that the undertaking itself is fundamental to the existence of an ad hoc fiduciary relationship”: *Galambos v Perez* 2009 SCC 48, [2009] 3 SCR 247 at [66]; affirmed in *Alberta v Elder Advocates*, above n 37, at [30]; and *Canadian National Railway*, above n 83.

¹⁰⁷ *Chirnside*, above n 14, at [82] per Tipping J, and *Liggett*, above n 58, at 281 per Gault J. Compare *Arklow*, above n 15, at 6; *Cook v Evatt*, above n 68, at 685; Finn, above n 38, at 54. Also compare, in the context of public law, *Paki (HC)*, above n 48, at [116].

¹⁰⁸ *Chirnside*, above n 14, at [81].

¹⁰⁹ *Chirnside*, above n 14, at [82]. See, for example, John H Langbein “The Contractarian Basis of the Law of Trusts” (1995) 105 Yale LJ 625 at 655. The argument is made in the context of fiduciary duties in Frank H Easterbrook and Daniel R Fischel “Contract and Fiduciary Duty” (1993) 36 J L & Econ 425.

¹¹⁰ *Chirnside*, above n 14, at [82]–[87]. See generally Antony Holmes “De Facto Commercial Relationships: Still Dancing at Arm’s Length” (2009) 15 Auckland UL Rev 80 at 82–88.

relationships with reference to an ‘undertaking’. The problem, as Australian judge and jurist BH McPherson puts it, is that the term is used to refer to “implied or inferred, as well as an express, undertaking”.¹¹¹ This means that “[i]f the courts consider that someone *ought* to be treated as a fiduciary... they will say he has “undertaken” [to act]”.¹¹² His point is that the concept of an “undertaking” is not helpful for distinguishing between ‘assumed’ fiduciary duties and ‘imposed’ fiduciary duties because the term is ambiguous and tends to elide the two together. In doing so, it robs the term of any substantive meaning, because the term can be used to describe any fiduciary relationship, thereby telling us little about what justifies fiduciary loyalty.

The problem runs deeper. Not only can this ambiguous conception of ‘undertaking’ describe all fiduciary relationships, it can describe most forms of contractual or tortious liability in private law.¹¹³ In this sense the term is too broad to be helpful in identifying a fiduciary relationship, because there are many relationships in private law where one person ‘undertakes’ to act in the interests of another where a fiduciary duty of loyalty does not arise.¹¹⁴ One example is bailment, another is employment. Given this, the undertaking characteristic tells us little about what is distinctive about the fiduciary relationship, and does not make clear what is so special about a fiduciary undertaking that justifies proscriptive fiduciary loyalty where other undertakings in private law are generally prescriptive and do not attract the same level of strict liability.¹¹⁵

Indeed, Tipping J in *Chirnside* is correct that an undertaking is “no more than a frequent manifestation” of a circumstance that gives rise to a fiduciary relationship.¹¹⁶ In this sense, an ‘undertaking’ is not really a characteristic of the fiduciary relationship at all. Asserting that fiduciary relationships are undertaken is as helpful as stating that they often arise when one person has control of property properly belonging to another or because one

¹¹¹ B H McPherson “Fiduciaries: Who Are They?” (1998) 72 ALJ 288 at 289.

¹¹² At 289.

¹¹³ “It is true that fiduciary law requires B to act in A’s interests, but so do contracts”: Anthony Duggan “Contracts, Fiduciaries, and the Primacy of the Deal” in Elise Bant and Matthew Harding (eds) *Exploring private law* (Cambridge University Press, Cambridge, 2010) 275 at 278; see also Conaglen, above n 9, at 246–247. It may also be under inclusive. La Forest J in *M v M* [1992] 3 SCR 3 at 6 provided an obiter suggestion that “fiduciary obligations are imposed in some situations even in the absence of any unilateral undertaking by the fiduciary”. However, it is unclear whether that statement still carries weight in Canada: Edelman, above n 104, at 8; citing *Galambos v Perez*, above n 106.

¹¹⁴ As Edelman explains, “[n]ot every undertaking is a fiduciary undertaking. The existence of an undertaking does not tell us which duties are fiduciary”: above n 104, at 16.

¹¹⁵ Jensen, above n 18, at 337–341.

¹¹⁶ *Chirnside*, above n 14, at [85].

person entrusts another with a job to be performed.¹¹⁷ Fiduciary relationships often involve undertakings, jobs, and property, but that acknowledgment tells us little about the *type* of undertakings, jobs and property that justify fiduciary loyalty.

3. Vulnerability

The third characteristic is *vulnerability*.¹¹⁸ This characteristic has received widespread recognition in New Zealand¹¹⁹ and throughout the Commonwealth.¹²⁰ This characteristic is undoubtedly “an important, indeed cardinal, feature of the fiduciary relationship”,¹²¹ and for this reason it is the subject of further analysis in the next chapter. At this stage, it will suffice to note that without further clarification the concept of vulnerability is “too broad” to be the fiduciary relationship’s defining characteristic.¹²² This point is made clear in *Saunders v Houghton*.¹²³ In *Saunders*, investors had bought into Feltex Ltd following a share issue only to see the share price plummet within two years. The investors sued the signatories of the prospectus and investment statement (i.e. the directors of Feltex) for a variety of wrongs, including breach of fiduciary duty.¹²⁴ The question facing the Court of Appeal was whether this claim should be struck out as having no tenable basis in law.

It was argued by the investors that a relationship of trust and confidence arose between the prospective shareholders and the signatories, meaning that on the facts of the case there was a fiduciary relationship between the parties that precluded the signatories from

¹¹⁷ It is possible (but not particularly helpful) to classify the fiduciary relationship according to its application to jobs, property, undertakings, etc. See, for example, Sealy’s pioneering four-part classification in above n 9; LS Sealy “Some Principles of Fiduciary Obligation” (1963) 21 CLJ 119. See also the earlier argument of Asquith LJ in *Reading v R* [1949] 2 KB 232 at 236, cited in *Watson v Dolmark Industries Ltd* [1992] 2 NZLR 311 (CA) at 315 per Cooke P. Compare Smith, above n 98, who substitutes the term “property” for the more inclusive but somewhat vague term “critical resource” at 1444.

¹¹⁸ More generally, terms such as reliance, imbalance of power, and unfair advantage are used in a similar fashion. See, for example, *Body Corporate 396711 v Sentinel Management Ltd* [2012] 1957 NZHC at [189]–[191] per Woolford J.

¹¹⁹ *Liggett*, above n 58, at 281–282 per Gault J; *Saunders*, above n 84, at [98] per Baragwanath J; and *Cook v Evatt*, above n 68, at 706 per Fisher J.

¹²⁰ *Hospital Products*, above n 57, at 142 per Dawson J; *Frame v Smith*, above n 10, at 137 per Wilson J and *LAC Minerals*, above n 22, at 606–607 per Sopinka J.

¹²¹ *Watson*, above n 117, at 315 per Cooke P.

¹²² “[T]o assert that the protection of the vulnerable is the role of fiduciary law puts the matter too broadly”: *Galambos v Perez*, above n 106, at [67], affirmed in *Alberta v Elder Advocates*, above n 37, at [28]. See also M Conaglen and R Hollyman “Fiduciary relationships in commercial settings: some thoughts on recent New Zealand cases (Part I)” [1996] NZLJ 13 at 15.

¹²³ *Saunders*, above n 84.

¹²⁴ At [48]–[60].

making any form of misleading statements in the prospectus and investment statements.¹²⁵ At [98] the Court confirmed the ubiquity of vulnerability to the fiduciary relationship, rejecting the argument by La Forest J in *LAC Minerals* that the characteristic is not essential.¹²⁶ However, the Court qualified this recognition further on in its judgment, in order to justify striking out the investor's claim:¹²⁷

The next phase, the float, was of course between the company and the public. There is a vulnerability by reasons of a knowledge imbalance. But the public were not vulnerable *in the relevant sense* by reason of a special relationship...

The Court did not clarify what it meant by a “special relationship” or of vulnerability “*in the relevant sense*” except by saying that a fiduciary relationship will arise where there has been some form of betrayal of the trust and confidence between fiduciary and beneficiary, which it did not find to exist on the facts of the case.¹²⁸ The important point here is that the Court specifically affirmed the importance of vulnerability, while at the same time acknowledging that it is only some specific undefined type of vulnerability derived from a “special relationship” that is relevant to fiduciary identification.¹²⁹ In other words, the decision exemplifies the fact that the concept of vulnerability is too broad to be useful in identifying a fiduciary relationship, because there is vulnerability inherent in many commercial and non-commercial transactions which does not attract fiduciary liability.¹³⁰

This problem is made worse by the fact that vulnerability is the distinguishing feature of many other doctrines and principles in private law, such as duress, unconscionable bargain, and undue influence. It is sometimes said vulnerability is the “golden thread”¹³¹ that unites these related claims together, but it is unclear how the vulnerability relevant to

¹²⁵ At [95].

¹²⁶ *LAC Minerals*, above n 22, at 662 per La Forest J. See also *Hodgkinson*, above n 83, at 405.

¹²⁷ *Saunders*, above n 84, at [104] (emphasis in the original).

¹²⁸ At [100]. The Court of Appeal's reasoning on this point can be criticised for its circularity. It seems odd to determine the existence of a fiduciary relationship by reference to whether a fiduciary duty has been breached.

¹²⁹ Compare with the phrase “special opportunity” (*Hospital Products*, above n 57, at 97) and “peculiarly vulnerable” (*Frame v Smith*, above n 10, at 136).

¹³⁰ In *Liggett*, above n 58, at 290 McKay J noted that vulnerability in the sense of relying on the honesty of another “is true in any commercial situation in which one person parts with his money without immediate delivery of goods or their specific identification”. See also *Hodgkinson*, above n 83, at 405 per La Forest J.

¹³¹ “Vulnerability is common to many relationships in which the law will intervene to protect one of the parties. It is, in fact, the 'golden thread' that unites such related causes of action as breach of fiduciary duty, undue influence, unconscionability and negligent misrepresentation”: *Hodgkinson*, above n 83, at 405–406 per La Forest J.

fiduciary relationships is specific to fiduciaries. This ambiguity poses a challenge for placing vulnerability at the core of the fiduciary principle and it is one of the issues canvassed in the next chapter once the two paradigm forms are introduced.

4. Power

The fourth characteristic is *power*. A fiduciary relationship will often arise when one person has a power or some form of discretion over the interests of another.¹³² The characteristic has a strong pedigree in case law and commentary, particularly in Canada, where the requirement is consecrated in the following widely-cited and approved “rough and ready guide” proposed by Wilson J in *Frame v Smith*:¹³³

1. The fiduciary has scope for the exercise of some discretion or power.
2. The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary’s legal or practical interests.
3. The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

Wilson J’s formulation of the fiduciary relationship has received some judicial recognition in New Zealand,¹³⁴ although it has been criticised by others for its tendency to promote an unduly rigid formula for fiduciary identification.¹³⁵ In line with the other characteristics described, it may also be criticised for being too broad.¹³⁶ There many relationships in private and public law that involve a discretionary power over the interests of another that are not classified as fiduciary.¹³⁷

¹³² See, for example, *Hospital Products*, above n 57, at 96–97; Weinrib, above n 4, at 7; Deborah A DeMott “Beyond Metaphor: An Analysis of Fiduciary Obligation” (1988) 37 Duke LJ 879 at 901; Shepherd, above n 98, at 68–69; and Sidney M Wolinsky and Janet Econome “Seduction in Wonderland: The Need for a Seller’s Fiduciary Duty Toward Children” (1977) 4 Hastings Const LQ 249 at 266.

¹³³ *Frame v Smith*, above n 10, at 136, applied in, for example, *M v M*, above n 113; *LAC Minerals*, above n 22, at 648; and *Hodgkinson*, above n 83, at 408–409. Wilson J’s test was recently significantly revised by the Canadian Supreme Court in *Alberta v Elder Advocates*, above n 37, at [29]–[36]. Despite this revision, the test remains flawed: Robert Flannigan “A Revised Canadian Test for Fact-Based Fiduciary Accountability” (2011) 127 LQR 505.

¹³⁴ *DHL International Ltd v Richmond Ltd* [1993] 3 NZLR 10 (CA) at 22 per Richardson J. The concept of power generally has also received some judicial support: *Sentinel Management*, above n 118, at [191]; and *Mackenzie District Council v Electricity Corporation of New Zealand* [1992] 3 NZLR 41 (nz CA) at 51–52.

¹³⁵ Conaglen and Hollyman, above n 122, at 14; citing Lord Nicholls of Birkenhead in *Royal Brunei*, above n 12, at 103.

¹³⁶ Glover, above n 71, at 274–275; Glover, above n 43, at 461–463; and Conaglen, above n 9, at 255–256.

¹³⁷ “[I]t is obviously not always the case that a person with a power has an attached duty of loyalty”: Shepherd, above n 98, at 71. See also Conaglen, above n 9, at 255–256.

For example, the relationship between an employer and a prospective employee is one characterised by discretionary power. This is because the employer can choose to give or not give the prospective employee a job. However, it is clear the employer does not owe a duty of loyalty to that person.¹³⁸ Another example is the relationship between an accountant instructed by a company's board of directors and a shareholder.¹³⁹ To be useful as a touchstone of the fiduciary relationship, the type of power that justifies fiduciary loyalty must be delineated. As with the vulnerability characteristic above, the concept of power is the subject of further analysis in the next chapter.

E: Conclusions

This chapter has canvassed the status-fact distinction and the two main methods of identifying the fiduciary relationship. While the status-fact distinction is an important aspect of the fiduciary terrain, it provides little guidance for what is necessary or distinct about a fiduciary relationship. The same applies to reasoning by analogy, which – while valid – does not typically make clear the normative basis on which analogies are made.

Reasoning from key characteristics is also unsatisfactory. Cobbled together, the four key characteristics – trust, undertaking, vulnerability and power – can be used to approximate in a somewhat haphazard manner when a fiduciary relationship may arise. However, this technique does not clarify the normative basis on which those decisions are made because it does not provide us with a means of evaluating the relative nature, scope and applicability of each characteristic. Nor does this technique adequately delineate the fiduciary relationship from other heads of obligation in private law that are also founded on a form of legitimate entitlement¹⁴⁰ or otherwise contain characteristics of trust, undertaking, vulnerability and power. In short, the key characteristic approach fudges the issue of what justifies fiduciary loyalty and does not clarify the inherent nature of the

¹³⁸ Shepherd, above n 98, at 70–71.

¹³⁹ *Slavich v Hughes* [2012] NZHC 3317 at [29]–[36].

¹⁴⁰ *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 (HL). the similarity between the *Hedley Byrne* principle and the legitimate entitlement conception of the fiduciary relationship was noted in *Burns v Kelly Peters & Associates Ltd* [1987] 41 DLR (4th) 577 (BCCA) at 600, cited in Gautreau, above n 11, at 14. See also Hoyano, above n 12, at 190.

fiduciary relationship.¹⁴¹

This disappointment in the current methodology is not for want of a better approach. Since Sir Anthony Mason's famous pronouncement that the fiduciary relationship is a "concept in search of a principle",¹⁴² many attempts have been made to bring "intellectual respectability" to the area,¹⁴³ yet none of the key characteristics above have received universal acceptance as the touchstone of fiduciary identification.¹⁴⁴ There is no shortage of comments in the literature that remark on this difficulty of definition.¹⁴⁵

The next chapter introduces the two form paradigm as an alternative means by which to identify the fiduciary relationship. It is argued that this approach is preferable to reasoning by analogy and the key characteristic approach because it identifies the two justifications for fiduciary loyalty and integrates these justifications independently into the two most promising characteristics of the fiduciary relationship: power and vulnerability. The resulting dichotomy between the two forms functions to shed light on some of the more puzzling inconsistencies that plague the fiduciary principle, and offers an improved method for identifying the fiduciary relationship in novel circumstances.

¹⁴¹ Some have been more critical of an approach based on legitimate expectations. Shepherd, above n 98, for example, calls the test "hopelessly vague" at 59. Flannigan considers it "seriously problematic" for the way it confers "uncontrolled discretion" on courts in determining whether a fiduciary relationship has arisen: above n 6, at 249 and 252 respectively.

¹⁴² AF Mason "Themes and Prospects" in Paul Finn (ed) *Essays in Equity* (Law Book Co, Sydney, 1985) 242 at 246.

¹⁴³ Steve Hedley "Is Private Law Meaningless?" (2011) 64 CLP 89 at 113. Many theories of the fiduciary relationship have been proposed. The only thing that unites them all is their inability to agree with each other over anything but the most basic doctrines of fiduciary law, and even these attract controversy: Paul B Miller "A Theory of Fiduciary Liability" (2011) 56 McGill LJ 235 at 237. See, e.g., James Edelman "Four Fiduciary Puzzles" in Matthew Harding and Elise Bant (eds) *Exploring Private Law* (Cambridge University Press, Cambridge, 2010) 298; Leonard Ian Rotman "Fiduciary Law's Holy Grail: Reconciling Theory and Practice in Fiduciary Jurisprudence" (2011) 91 BU L Rev 921; Larry E Ribstein "Fencing Fiduciary Duties" (2011) 91 BU L Rev 899; and Robert Flannigan "The Fiduciary Obligation" (1989) 9 OJLS 285.

¹⁴⁴ "[T]he quest for a precise definition which identifies the characteristics of the fiduciary relationship, and other relationships which attract equitable relief, continues without evident sign of success": Mason, above n 44, at 246; "[T]he fiduciary amoeba has continued to expand its nebulous contours to encompass previously unchartered areas": Teele, above n 26, at 110; Finn, above n 38, at 26; Flannigan, above n 143, at 321; *Liggett*, above n 58, at 281; and *Elders Pastoral Ltd v Bank of New Zealand* [1989] 2 NZLR 180 (CA) at 192.

¹⁴⁵ Rotman notes that the fiduciary principle has been variously called "aberrant", "amorphous", "elusive", "ill-defined", "vague", "peripatetic", and "trust-like": above n 49, at 1–2 (citations in text omitted). See also Birks, above n 5, at 18; *LAC Minerals*, above n 22, at 643–644; DeMott, above n 132, at 879; Teele, above n 26, at 112.

Chapter III: Two forms of the fiduciary relationship

A: Introduction

For the purposes of fiduciary identification the fiduciary relationship is best conceived as having a dual character. This chapter explains the fiduciary relationship's dual character and justifies a two-form approach for its identification. This is done in two parts. The first form and its concept of fiduciary power is the focus of part B, and the second form and its concept of fiduciary vulnerability is the subject of part C.

1. Two paradigm forms

Thirty years ago, John Shepherd argued that “[f]iduciary relationships are children of the forced marriage of agency law and trust law, being respectively common law and equity ideas”.¹⁴⁶ To adapt Maitland's turn of phrase, it is entirely conceivable that the historic separation of the courts of equity and the common law continues to rule fiduciary law from the grave.¹⁴⁷ This dissertation takes seriously the proposition that the difficulty in deducing a “single, all-embracing definition”¹⁴⁸ of the fiduciary relationship originates in no small degree from the principle's divided roots.¹⁴⁹

The argument here is that, in accordance with its parentage, the fiduciary relationship is best conceived as having a dual character that is constituted by two ‘forms’. The first and paramount form is formal by reason of its justification and in line with its focus on its concept of power, labeled here ‘fiduciary power’. In part B, it is argued that fiduciary power is best understood as *derivative*, *rightful*, and *discretionary*. The second form – defined by reference to the more amorphous concept of vulnerability – is adjuvant to the first form and performs a supplementary and interventionary role when the limits of the first form are reached.

¹⁴⁶ Shepherd, above n 98, at 51.

¹⁴⁷ “The forms of action we have buried, but they still rule us from their graves”: Frederic William Maitland *The Forms of Action at Common Law* (University of Cambridge, Cambridge, 1909) at I.

¹⁴⁸ Millett, above n 12, at 219.

¹⁴⁹ The distinction between agency and trust is discussed by Langbein, above n 109, at 647–649; and Tamar Frankel *Fiduciary law* (Oxford University Press, Oxford, 2010) at 3–6.

This two-form conception is theoretically and practically beneficial. It is valuable theoretically because it identifies a conceptual framework from which it is possible to contextualise the inconsistencies in fiduciary law within the larger debate about the proper role of law in mediating relationships between private parties. It is also practically useful, for this division suggests a two stage methodology for identifying a “legitimate entitlement” to fiduciary loyalty.¹⁵⁰ Since power and vulnerability are the defining characteristics of the two forms respectively, it is argued that the best way to identify a fiduciary relationship is to ask, first, whether there exists a ‘fiduciary power’ that justifies the duty of loyalty, and second, whether there is ‘fiduciary vulnerability’¹⁵¹ that may affirm, deny, or superimpose the same.

B: Fiduciary power

1. Introduction

Fiduciary power is often called the “unifying thread”¹⁵² or “hallmark”¹⁵³ of fiduciary relationships, but the nature of this power is uncertain.¹⁵⁴ The aim of this part is to clarify the notion of fiduciary power. The argument is that it is possible to formally understand fiduciary power as a property belonging to the beneficiary. A fiduciary relationship will arise and may be identified when the power held by the fiduciary is *derivative*, *rightful*, and *discretionary*. This analysis follows (but departs from) the work of Paul Miller, who has provided a philosophical account of the fiduciary principle formally understood.¹⁵⁵ Miller’s theory is noteworthy because it provides a formal analysis of the fiduciary principle. Although Miller is not the first to attempt such a feat,¹⁵⁶ his theory is perhaps the most “sophisticated” to date.¹⁵⁷ The key difference between Miller’s account and the

¹⁵⁰ *Arklow*, above n 15, at 4, cited with approval in *Chimside*, above n 14, at [85].

¹⁵¹ The term “fiduciary vulnerability” was coined by Conaglen and Hollyman, above n 122. The idea, of course, does not refer to the fiduciary’s vulnerability. Rather, the term is used to label the type of vulnerability peculiar to fiduciary relationships.

¹⁵² Calvin Massey “American Fiduciary Duty in an Age of Narcissism” (1990) 54 *Sask L Rev* 101 at 101.

¹⁵³ *Guerin*, above n 39, at 387.

¹⁵⁴ “While what is sufficient to constitute power in the hands of the fiduciary may be controversial in some cases, the requirement for the existence of such power in the fiduciary’s hands is not”: *Galambos v Perez*, above n 106, at [84] per Cromwell J (per curiam).

¹⁵⁵ Miller, above n 60; Miller, above n 20; and Miller, above n 143.

¹⁵⁶ See, for example, Shepherd, above n 98 and Weinrib, above n 4.

¹⁵⁷ Hanoach Dagan and Sharon Hannes “Managing Our Money: The Law of Financial Fiduciaries as a Private Law Institution” in Paul Miller and Andrew Gold (eds) *The Philosophical Foundations of Fiduciary Law* (Oxford University Press, Oxford) (forthcoming) at 7.

definition of fiduciary power provided here is that Miller (in effect) claims to have found the “elusive fiduciary principle”.¹⁵⁸ Yet there are significant limitations to his analysis that necessitate the existence of a supplementary form of the fiduciary relationship of the type described in part C of this chapter.

This part first describes Miller’s theory of the fiduciary relationship. It then critiques it, tweaks it, and applies an amended version of his theory to a variety of hypothetical and case examples in order to explicate the nature of the three aspects of fiduciary power that are necessary give rise to an entitlement to fiduciary loyalty.

2. A formal theory of the fiduciary relationship

Miller argues that the fiduciary relationship may be formally understood by reference to its “most basic” constitutive element: fiduciary power (or, in his words, fiduciary “authority”).¹⁵⁹ On this approach, fiduciary power is *derivative* from and *relational* to the capacities of a specific individual or group.¹⁶⁰ Fiduciary power enables a fiduciary to “exercise legal capacities that, being derived from another person, would ordinarily be the beneficiary’s or benefactor’s alone to exercise”.¹⁶¹ These capacities provide the fiduciary with the *discretion* to make decisions affecting the significant practical interests of the beneficiary.¹⁶² In this sense, fiduciary power can be considered a form of substitution of legal personality¹⁶³ that is limited by the circumscribed nature of fiduciary power as over the particular practical interests of the beneficiary.¹⁶⁴

¹⁵⁸ Harding, above n 2, at 85.

¹⁵⁹ Miller, above n 60, at 1012.

¹⁶⁰ At 1013.

¹⁶¹ At 1016.

¹⁶² At 1014.

¹⁶³ The substitutionary character of fiduciary relationships has been noted before, but these analyses do not tie it to the proprietary character of fiduciary loyalty, but rather offer instrumental justifications in their stead. For example, Massey, above n 152, at 101–102, observes that “[f]iduciaries serve as a substitute for their beneficiaries... [i]n order to reap the perceived benefits of substituted judgment, power must be conferred. But with the power comes the possibility of self-dealing or neglect. Law’s resolution of this dilemma is the fiduciary obligation”. Similarly, Getzler, above n 8, argues at 581 that “[a] dialectic is at work: the fiduciary can only serve the beneficiary if armed with extensive powers, and the beneficiary can only hold the fiduciary to account of the fiduciary is hemmed in by potent duties and remedies”. Both of these comments reflect Weinrib’s much-cited statement, above n 4, at 4, that “[t]he [fiduciary] holds a mandate which cannot be circumscribed within narrow termini... The fiduciary obligation is the law’s blunt tool for the control of this discretion”. See also Frankel, above n 29, at 808. The fiduciary is also said to have a ‘representational’ character, as noticed by Scott, above n 102; Finn, above n 7; and Sealy, above n 9.

¹⁶⁴ Miller, above n 60, at 1017–1018. Compare Shepherd’s “transfer of encumbered power” theory: above n 63, at 96–110.

The substitution of legal personality provides the juridical justification¹⁶⁵ for fiduciary loyalty:¹⁶⁶

Fiduciary power, being an extension of the legal personality of the person from whose capacity it is derived, is thus properly understood as a means – i.e., a way of effectuating one’s purposes – belonging rightfully to the beneficiary.

Since fiduciary power is a capacity “belonging rightfully” to the beneficiary, fiduciary duties act to “secure the exclusivity” of the beneficiary’s claim to fiduciary power. The beneficiary, in other words, has a “quasi-proprietary” claim to the capacities that constitute fiduciary power, and this claim gives rise to fiduciary loyalty.¹⁶⁷ The “single-minded[ness]”¹⁶⁸ of fiduciary loyalty functions to ensure that fiduciary power is exercised in a way consistent with the beneficiary’s exclusive claim and with the original purpose of delegation of power to the fiduciary – namely, in order to further the beneficiary’s interests.¹⁶⁹ On this basis Miller claims that the exceptional remedies attendant on breach of fiduciary duty are consistent with formal corrective justice.¹⁷⁰

3. Problems with the formal theory

This section deals with some of the more pressing problems with the formal theory, but some of the finer details must wait until practical application of the theory is made. The most striking characteristic of the formal theory – and the basis of its limitations – is its heavily reliance on property metaphor. The idea that fiduciary power exclusively and rightfully ‘belongs’ to the beneficiary is deeply evocative of the Blackstonian conception of

¹⁶⁵ Juridical (or formal) justification understands legal phenomena from the perspective of its “intelligibility within an internally coherent normative ensemble”: Weinrib, above n 35, at 25. In the context of the fiduciary principle, this analysis “articulates reasons for the imposition of fiduciary duties derived exclusively from the juridical [i.e. formal] character of fiduciary liability”: Miller, above n 60, at 1007.

¹⁶⁶ Miller, above n 60, at 1020.

¹⁶⁷ Miller, above n 20, at 30.

¹⁶⁸ *Mothev*, above n 15, at 18. Millett LJ prefers the term fidelity to loyalty, but due to their imprecision (noted by, for example, Birks, above n 16, at 12) they can be considered largely equivalent for the purposes of this dissertation.

¹⁶⁹ Miller, above n 20, at 54. In this sense it is arguable that Miller successfully links the purposive and performative functions of fiduciary law: Beever, above n 82, at 299.

¹⁷⁰ Miller, above n 20, at 70.

private property as being the sole domain of its owner.¹⁷¹ Although Miller disavows a literal equation of fiduciary power to property,¹⁷² the analogy is often used.¹⁷³ It is said, for example, that the action for breach of fiduciary duty has “deep parallels” with the tort of conversion of goods.¹⁷⁴

This proprietary element is potentially problematic from a number of perspectives. First, it is contrary to the traditional (perhaps historic)¹⁷⁵ conception of equity as being more concerned with conscience rather than the strict legal rights. This objection is not addressed by Miller. However, if we accept (as this dissertation does) that this strand of the fiduciary principle is best understood as having its historical source in the common law of agency,¹⁷⁶ then the argument from equity tends to fall on the wayside.

Second, Miller’s theory runs precariously close to equating power and property together. There is a “fundamental”¹⁷⁷ distinction between power and property, and equating the two is widely considered a conceptual *faux pas*.¹⁷⁸ Furthermore, insistence on property metaphor implies the existence of a beneficiary to whom fiduciary power is correlative and in whom the power belongs.¹⁷⁹ This is not a problem for the majority of exigible fiduciary relationships. However, difficulties arise as to how formal justification can explain the fiduciary obligations of trustees to discretionary beneficiaries or the beneficiaries of a charitable or purpose trust.¹⁸⁰ In this way criticism of Miller’s theory parallels the critique of the proprietary theory of trusts.¹⁸¹

¹⁷¹ William Blackstone *Commentaries on the Laws of England* (Clarendon Press, Oxford, 1765-1769) at 2, as observed by Dagan and Haines, above n 157, at 10.

¹⁷² Miller, above n 20, at 41.

¹⁷³ As noted by Dagan and Haines, above n 157, at 10.

¹⁷⁴ Miller, above n 20, at 63.

¹⁷⁵ See part II.B.1 above.

¹⁷⁶ Detailed discussion of the historical source of the fiduciary obligation is beyond the scope of this paper. For a summary, see Frankel, above n 149, at 79–100; Getzler, above n 8; and Tara Helfman “Land Ownership and the Origins of Fiduciary Duty” (2006) 41 *Real Prop, Probate & Trust J* 651.

¹⁷⁷ Geraint W Thomas *Thomas on Powers* (2nd ed, Oxford University Press, Oxford, 2012) at 2.

¹⁷⁸ Jessica Palmer “Equity and Trusts” [2012] *NZLRev* 141 at 147–151.

¹⁷⁹ This is problematic from a juridical perspective because “[t]he breach of fiduciary duty must be with respect to the right that the plaintiff sues to protect”: Eleonore F Lecocq “Correlative Fiduciary Liability” (LLM, University of Toronto, 2011) at 51.

¹⁸⁰ However, it *does* explain why fiduciary liability was denied in *Saunders*, above n 84, at [101], on the basis that a duty owed to the “entire investing public” would be “unduly wide”.

¹⁸¹ Andrew S Butler “The Trust Concept, Classification and Interpretation” in *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) 43 at 51; see generally Jessica Palmer “Theories of the Trust and What They Might Mean for Beneficiary Rights to Information” [2010] *NZLRev* 541.

Third, to the extent that the formal theory relies on a Blackstonian conception of the beneficiary's "sole and despotic dominion",¹⁸² it is open to criticism of that conception of property.¹⁸³ Blackstone's picture of absolute dominion has never squared with the actual practice of Anglo-American property law, and is best understood as an "extreme or ideal type rather than reality".¹⁸⁴ Conceptualising the fiduciary obligation as solely correlated to absolutist proprietary right leaves much to be desired and seems to fall for the "temptation of elegance" that Lord Goff warns against.¹⁸⁵

It is hard, for example, to square the beneficiary's exclusive entitlement to fiduciary loyalty with the phenomena of fiduciary allowances, since an allowance functions to cut against the beneficiary's 'proprietary' claim.¹⁸⁶ Similarly, the "exclusivity axiom"¹⁸⁷ has difficulty explaining how a trustee can owe fiduciary duties to multiple different beneficiaries of the same trust, when each beneficiary is unable to exclude the others from access to the fiduciary's power.

Fourth, as Dagan and Hanes argue, classifying fiduciary power as quasi-property tends to "[lump] together" diverse interests, thereby elevating them all to the level of strict legal rights.¹⁸⁸ Arguably the focus for determining the degree of devotion required should be determined by reference to the *magnitude* or *effect* of the power, rather than its *source* in the capacities of another.¹⁸⁹ The perceived problem is that emphasis on proprietary right may give rise to the 'tyranny of the beneficiary', who in claiming a proprietary entitlement to fiduciary loyalty may inflate the degree of devotion that his or her circumstances should

¹⁸² Blackstone, above n 171, at 2.

¹⁸³ Dagan and Hanes, above n 157, at 10.

¹⁸⁴ Carol M Rose "Canons of Property Talk, or, Blackstone's Anxiety" (1998) 108 Yale LJ 601 at 604. There has been a resurgence in recent years of attempts to define property by reference to the "differentiating feature" of exclusivity: Thomas W Merrill and Henry E Smith "The Morality of Property" (2007) 28 Wm & Mary L Rev 1849 at 1850. See, e.g., JE Penner *The Idea of Property in Law* (Clarendon Press, Oxford, 1997) at 68–104; and Thomas W Merrill "Property and the Right to Exclude" (1998) 77 Neb L Rev 730 at 730. This resurgence was noted in Hanoch Dagan *Property* (Oxford University Press, Oxford, 2011) at 37. It has been the subject of immense criticism, and the point remains moot: Rose, at 603.

¹⁸⁵ Goff, above n 82, at 318.

¹⁸⁶ Matthew Harding has most recently justified fiduciary allowances on the basis of just deserts: Matthew Harding "Justifying Fiduciary Allowances" in Andrew Robertson and Tang Hang Wu (eds) *The Goals of Private Law* (Hart Publishing, Oxford, 2009) 341. This approach (and the nature of fiduciary allowances generally) is not without its difficulties: Jessica Palmer "The Availability of Allowances in Equity: Rewarding the Bad Guy" (2004) 21 NZULR 146. The weak normative basis on which fiduciary allowances are justified perhaps detracts from the strength of this argument against the formal theory on this point.

¹⁸⁷ The term is coined in Rose, above n 184.

¹⁸⁸ Dagan and Hanes, above n 157, at 10.

¹⁸⁹ See, for example, Conaglen and Hollyman, above n 122.

demand.¹⁹⁰

Miller attempts to sidestep this problem by arguing that fiduciary power only arises over “significant” interests, and as such *de minimis* situations are avoided.¹⁹¹ This argument is not convincing, because it is difficult to see how this limitation is inferred from the formal justification for fiduciary loyalty as giving rise to proprietary right. Trespass, for example, is actionable whether or not the property owner has any “significant” interest in the right to exclude. It is actually unhelpful, because there are many occasions where a fiduciary relationship may arise where the fiduciary’s power is over not particularly ‘significant’ practical interests. Fiduciary obligations, for example, attached to the compromised sergeant in *Attorney-General v Goddard* who used information obtained by reason of his position for pecuniary gain even though the sergeant could hardly have affected the interests of the Attorney-General in any significant sense.¹⁹²

A fifth and final possible criticism is that since Miller defines fiduciary power as being constituted by *legal* capacities then his theory can only explain powers that are over *legal* interests. The issue is discussed by Wilson J in *Frame v Smith*. She notes, correctly, that fiduciary power may arise over legal and practical interests, and gives the example of a director of a company who has the power to alter the company’s practical interest in its reputation by reason of his or her action.¹⁹³

To the extent that fiduciary power may arise over legal and practical interests, the argument goes, so is the formal theory incomplete. This argument overlooks the key point, discussed above, that the beneficiary’s proprietary entitlement to fiduciary loyalty is justified by the *source* of the fiduciary power in the capacities of another rather than by the interests it is over. Fiduciary power, in other words, may need to be derived from legal capacities for it to arise, but there is no conceptual necessity for that power to also impact on ‘legal’ interests before it may attract fiduciary obligation.

¹⁹⁰ This point is discussed further and exemplified in the text accompanying n 233 below.

¹⁹¹ Miller, above n 60, at 1011. This issue is discussed further in the text accompanying n 234 below.

¹⁹² *Attorney-General v Goddard* (1929) 98 LJKB 743. This example is used by Glover, above n 43, at 462, in order to discredit an approach of fiduciary identification based on the core characteristic of fiduciary power. By eliminating the necessity to limit fiduciary powers to those over significant practical interests, this dissertation answers Glover’s critique.

¹⁹³ *Frame v Smith*, above n 10, at 136–137.

The important point to gather from this discussion is that there are significant objections to a proprietary conception of fiduciary power that are left unexplained by Miller. In order to prove useful, the formal theory must be in some way supplemented by an alternative conception of the fiduciary relationship that is capable of looking beyond its limits. Furthermore, the formal theory as supplied by Miller must be refined: first, in line with proprietary right, there is no conceptual necessity that fiduciary power is over ‘significant’ practical interests, and second, as will be explained, the *rightful* character of fiduciary power deserves more attention than is provided by Miller. It is in fact critical for understanding the boundaries of fiduciary liability and the fiduciary relationship’s interaction with contract.

The next three sections each focus on one of the distinguishing characteristics of fiduciary power, each of which is necessary to instigate the fiduciary relationship formally understood.¹⁹⁴ The idea, in effect, is to bring Miller’s argument down from the realm of philosophy, and in doing so improve on it.¹⁹⁵ The first section looks more closely at the *derivative nature* of fiduciary power, the second at its *rightful character*, and the third at its *discretionary nature*. As will quickly be evident, in doing so each section takes hypothetical conjecture seriously as a practical means of determining the limits of fiduciary liability.

4. Fiduciary power as *derivative, rightful and discretionary*

a. The *derivative nature* of fiduciary power: *why are judges not fiduciaries?*

Fiduciary relationships are said to only arise between parties in “close proximity” to each other, but the basis on which this determination is made is unclear.¹⁹⁶ The argument here is that two parties will be neighbours in the fiduciary sense when one party’s power is derived from the other or, more obliquely, derived from a third party and devoted to

¹⁹⁴ In other words, constitute the causative event that begets the fiduciary relationship, as understood in the Birksian sense. For a helpful summary of Birks’ classificatory scheme, see Mitchell McInnes “Taxonomic Lessons for the Supreme Court of Canada” in Charles Rickett and Grantham Ross (eds) *Structure and Justification in Private Law* (Hart Publishing, Oxford, 2008) 77 at 80–83.

¹⁹⁵ As Shepherd put it (in the context of explaining why focus on fiduciary power was edifying), “we are looking for a theory that can be used in practice, not a theory that satisfies our philosophical appetites alone”: above n 98, at 71.

¹⁹⁶ *Saunders*, above n 84, at [97].

their ends. In line with Lord Atkin's seminal judgment in *Donoghue v Stevenson*,¹⁹⁷ perhaps this element is best conceived as fiduciary law's own 'proximity principle'.

Fiduciary power is derivative because it is constituted by capacities properly belonging to another. Although Miller focuses on *direct* derivation of power from a beneficiary (for example, a lawyer with expressly given authority to sign on behalf of a client), as he recognises it is clear that power *indirectly* derived from a third party and expressly devoted to the beneficiary may nonetheless also give rise to a legitimate entitlement to fiduciary loyalty (for example, a trustee's power derived from a trust deed or from the settlor of the trust).¹⁹⁸ Arguably, this concession means that it is wrong to focus on derivation as such; the better approach for the purposes of fiduciary identification is to focus squarely on whether the power is devoted to the beneficiary's ends.

There are problems with subsuming direct and indirect derivation of power within a more wide category of 'devotion'. First, if the fiduciary's power is derived directly from a beneficiary's capacities, then the beneficiary's proprietary claim to fiduciary loyalty exists whether or not there is a 'devotion' by the fiduciary. In fact, since these capacities rightfully belong to the beneficiary, there is nothing salient for the fiduciary to 'devote'. The fiduciary may 'devote' his time and energy, but so does the zealous employee, contractor, or bailee. Understood formally, a mere undertaking of responsibility – no matter the degree of professed commitment – does not in itself justify fiduciary loyalty if it does not involve the exercise of capacities rightfully belonging to the beneficiary.¹⁹⁹

Second, focus on a wide concept of devotion – like an 'undertaking' – tends to elide together express or implied devotions with the question of whether one party *ought to devote* that power to the beneficiary. Conflating the two therefore unhelpfully mutates the issue into a broad question of legitimate expectations. This third category – whether the fiduciary's power ought to be devoted – is essentially the question asked in the borderline or toss-up cases. For example, in *Norberg v Wynrib*, the Supreme Court of Canada was more or less asked to decide whether a physician's power over a patient ought to be

¹⁹⁷ *Donoghue v Stevenson* [1932] All ER 1 (HL).

¹⁹⁸ Miller, above n 60, at 1020.

¹⁹⁹ The limited critique of the undertaking characteristic and the contractarian position here alludes to the problem with placing the characteristic at the core of the fiduciary principle. An undertaking functions as a useful proxy for the derivation of power, because *most* 'fiduciary' undertakings involve derivation. The fundamental problem, however, is that not *all* do.

devoted to that patient.²⁰⁰ This question – analysed in greater detail in part C – raises issues beyond that directly explained by pre-existing proprietary entitlement and are only tangentially helpful in determining the ‘core’ of fiduciary relationships. As such, for the present moment this question must be carefully bracketed away from the category of devotions formally understood.

Third, as exemplified below, derivation of power is essential to the beneficiary’s property-like claim. If the capacities that constitute a person’s power are not derived from anyone else then that person has the sole right to determine how those powers are exercised. Arguably a person may ‘devote’ their capacities to another. Yet this is precisely what happens in a typical employment or contractual scenario; as discussed above, there is nothing special about these ‘devotions’ that go to justify fiduciary loyalty. Since these relationships involve no substitution of legal capacity, they are best regulated by more conventional heads of obligation in private law such as contract and tort.

In order to substantiate this argument, we turn to a hypothetical. The derivative nature of fiduciary power implies that fiduciary relationships will not arise where the power held by the alleged fiduciary is neither derived from the beneficiary nor devoted to their ends. Consider, for instance, the power wielded by an employer over a prospective employee (briefly examined in chapter II). This power exists because the employer can give or not give the prospective employee a job. Yet the employer is not beholden to the prospective employee to exercise that power in his or her best interest. It would be absurd to say that an employer owes a duty of loyalty to a prospective employee. Similarly, a judge (or a jury)²⁰¹ has power over the practical interests²⁰¹ of a person who comes in front of the Court for sentencing, but the existence of that power does not logically entail that the judge owes a duty of loyalty to that person.

There are three main reasons why the discretionary powers held by the employer and judge are not fiduciary in character. The first can be quickly put aside, although it merits

²⁰⁰ *Norberg*, above n 16. It is arguable that the crux of the case revolved around the doctor’s influence rather than proprietary right (an issue discussed further in the text accompanying n 275 below).

²⁰¹ As recently advocated by Ethan J Leib, Michael Serota and David L Ponet “Fiduciary Principles and the Jury” (2014) 54 *Wm& Mary L Rev* (forthcoming). The application of fiduciary duties in public law is a topic beyond the scope of this paper. For a summary of their application in Canada, see Evan Fox-Decent *Sovereignty’s promise* (Oxford University Press, Oxford, 2011).

attention given that it is occasionally invoked.²⁰² On this first account, a fiduciary relationship ought not to exist in these circumstances because it would place the alleged fiduciary in an irreconcilable conflict between his or her workplace duties and the duty to the proposed beneficiary. This response is unhelpful, because it works back from the conclusion to the initial premise, and begs the question of why there is no fiduciary relationship in the first place.

The second response is more promising. Arguably, a fiduciary relationship does not arise because policy demands that judges and employers should not be held accountable to the people who are affected by their decisions. This approach is explicitly instrumental, in the sense that fiduciary liability is denied in order to protect judicial and commercial discretion, and on the basis that appropriate safeguards in the form of procedural and substantive limitations to their power are already in place. This type of analysis is considered further in part C.

The third response is provided by the formal theory. Since the power of the employer or the judge is not derived from the alleged beneficiary, it cannot properly be considered a means rightfully belonging to them.²⁰³ Since the capacities that constitute the judge's and employer's power is not properly understood as belonging to the alleged beneficiary, the beneficiary is in no position to demand fiduciary loyalty from them.

The derivative nature of fiduciary power also provides a means of explaining why courts may deny fiduciary liability. As mentioned above, borderline cases sometimes ask whether a power ought to be devoted to a beneficiary. The formal theory does not explain why power ought to be devoted, but it does suggest why it should be *denied*. In *Saunders v Houghton*, for example, the Court of Appeal basically faced the question of whether a director's power to create an investment statement ought to be devoted to the investing public, safeguarded by a duty of loyalty owed to them.²⁰⁴ The court denied the director's fiduciary liability, referring only to circular arguments of the first kind²⁰⁵ and to

²⁰² *Saunders*, above n 84.

²⁰³ *Miller*, above n 60, at 1021.

²⁰⁴ *Saunders*, above n 84.

²⁰⁵ At [100], defining the existence of a fiduciary duty by asking whether there was a "stabbing when his or her guard was down".

instrumental arguments of the second kind.²⁰⁶

Yet the Court could have made the third kind of argument. The investor's claim could have been struck out on the basis that the director's power to issue an investment statement was not a fiduciary power. The power the directors had to issue a prospectus statement was not derived from the legal capacity of the investing public. Therefore, as a matter of pre-existing proprietary right, it could not be said that the director's power belonged to them.²⁰⁷

Fiduciary power's derivative element also explains why mere power imbalances are not typically considered sufficient to give rise to fiduciary loyalty.²⁰⁸ Since the ability to influence another is a power derived from one's own capacities, it is an attribute that does not – as a matter of pre-existing right – belong to any other person.

These conclusions – made here in relation to employers, directors, and power imbalances generally – are of course not concrete: as will be discussed further in part C, the *prima facie* denial of the alleged beneficiary's claim by reason of an absence of pre-existing proprietary right is subject to possible revision by analysis of the beneficiary's vulnerability. Having canvassed fiduciary power's derivative nature, the next section considers its rightful character.

b. The *rightful character* of fiduciary power: *why are thieves not fiduciaries?*

Fiduciary power is rightful in character because fiduciary loyalty only functions to curb *rightfully held* and *rightfully exercised* powers.²⁰⁹ As will be explained, this is a necessary consequence of formal justification. However, its recognition seriously curbs the applicability of the formal theory in relation to powers concurrently controlled by contract, an issue discussed further in chapter IV.

This feature of fiduciary power implies that power which is wrongfully derived or not

²⁰⁶ As discussed in the text accompanying n 271 below.

²⁰⁷ Miller, above n 60, at 1020.

²⁰⁸ Weinrib, above n 4, at 5; and *Galambos v Perez*, above n 106.

²⁰⁹ Rightfully exercised *but for* the existence of the fiduciary obligation that controls it.

rightfully exercised is incapable of giving rise to a fiduciary relationship.²¹⁰ Take, for example, the nature of the relationship between a thief in possession of a stolen painting and the painting's true owner. The purloiner of fine artwork certainly has a significant practical power over the true owner, in the sense she may – at least in theory – deal with the property as she pleases. However, despite the existence of this discretionary power, derived as it is from control of property belonging to another, thieves do not traditionally owe fiduciary obligations to the people from whom they steal.²¹¹ The puzzle is how to explain why this is the case.

There are two conventional responses to this problem, neither of which are particularly satisfying. First, arguably the fact that a true owner does not trust the thief is sufficient reason to negate fiduciary liability. However, as noted in chapter II, trust is neither necessary nor sufficient to give rise to a fiduciary relationship. It is therefore a rather weak reason for rejecting the true owner's claim.

The second argument comes from policy. Arguably, a fiduciary relationship does not arise because the relationship between the thief and the true owner is sufficiently dealt with by the law of property and criminal law. The problem with this argument is that the pendulum of policy does not universally swing towards holding thieves to the limited liability provided by property and criminal law. It is entirely plausible that policy arguments may support finding thieves liable for breach of fiduciary duty in order to deter behavior and to make available a wider range of remedies to the true owner. This is, in fact, an argument that has been advanced in order to label thieves as constructive trustees.²¹²

The third response is more promising, and is provided the nature of fiduciary power. Fiduciary obligations only attach to rightfully held powers because of the nature of the fiduciary relationship, understood formally as expressing “justified terms of interaction”.²¹³ Since the thief holds his power over the true owner in a way inconsistent

²¹⁰ It should be noted that in this context “rightful” is defined broadly. It is entirely plausible, for example, for a fiduciary to be fraudulently occupying his or her position. Yet this does not mean that fiduciary obligations never arose in the course of his work. Rather, so long as the power wielded by the fiduciary was possessed with the assent of the beneficiary, the power is rightfully held in the necessary sense.

²¹¹ John Tarrant “The Theft Principle in Private Law” (2006) 80 ALJ 531 at 531.

²¹² *Westdeutsche Landesbank v Islington LBC* [1996] 2 AC 669 (HL) at 716C.

²¹³ Weinrib, above n 35, at 32.

with the true owner's claim, that power is not rightfully held. The thief, in other words, does not exercise capacities belonging to the true owner; her power is constituted by nothing more than bare possession. There is therefore nothing substantive on which a fiduciary obligation may "bite".²¹⁴

The rightful character of fiduciary power is important, because it sheds light the role of the fiduciary duty in respect to other heads of obligation in private law. If a person's power is not rightfully held by reason of diktat of private or public decree, then fiduciary obligation – formally understood – falls by the wayside. Yet if power is rightfully held, is derivative, and is – as explained below – discretionary in character, then fiduciary duty is the proper mechanism by which the power's exercise is controlled. In this way fiduciary obligation – formally understood²¹⁵ – begins where the rest of private law ends.

c. The *discretionary nature* of fiduciary power: *why are mechanics and tradesmen not fiduciaries?*

Fiduciary power is discretionary in nature because fiduciary obligation functions to control discretion rather than brute power.²¹⁶ The nature of fiduciary power necessary to give rise to a fiduciary relationship has been a perennial issue for those who posit that power is its key characteristic.²¹⁷ The problem, in a nutshell, is that it is very difficult to specify a degree of power which is controlled by fiduciary obligation that does not by implication vastly expand the potential liability of persons traditionally not held to the strict fiduciary standard of loyalty. The solution offered here is two-pronged: first, fiduciary obligation responds to *discretion*, rather than the magnitude of interests a power is over, and second, in line with the discussion so far, only discretions that are rightfully derived and whose exercise is authorised are capable of giving rise to a proprietary right to fiduciary obligation.

Consider Robert Flannigan's argument that "[e]ven a child sent to the store with a dollar

²¹⁴ Weinrib, above n 4, at 7. Of course, the position is different where there is a pre-existing fiduciary relationship between the thief and the true owner, as was effectively the case in *Chirnside*, above n 14.

²¹⁵ The relationship of the fiduciary obligation with the rest of private law is far from clear-cut, an issue discussed in relation to contract in chapter IV below.

²¹⁶ A possible exception offered by Getzler, in line with the agency / trust split advocated for in this dissertation, is of "[b]are trusts of limited duration for a specific purpose": above n 8, at 581.

²¹⁷ Weinrib, above n 4, at 5.

to purchase a newspaper has, in strict conceptual terms, a fiduciary obligation to return with the spare change”.²¹⁸ Flannigan’s argument stems from his idea that “[t]he traditional function of fiduciary responsibility [is] to control opportunism by those who had undertaken to serve the interests of others”.²¹⁹ The liability of a child sent to the store is the mere logical conclusion of his functionalist perspective of fiduciary liability as responding to the possibility of opportunism.

The formal theory, defined in relation to fiduciary power, does not rely on external perceptions of absurdity in order to reject the child’s fiduciary liability. Since the child has strict instructions to go to the store and purchase a newspaper,²²⁰ she makes no determination that would ordinarily be made by the purchaser. As there is no discretion to the matter, there is no substitution of legal personality, and therefore “nothing on which the fiduciary obligation [can] bite”.²²¹

Arguably, the child does have a form of ‘discretionary’ power over the interests of the purchaser. This is because she may either decide to buy something else or take advantage of the opportunity presented and exercise ‘discretion’ to appropriate the money for her own ends. This argument is discussed further in part C, but it may be dismissed for the present moment for the reasons articulated in the previous section. While the child *rightfully holds* power over the purchaser by reason of her possession of the purchaser’s purse, the power may only be exercised for the specific and authorised purpose of purchasing the newspaper. The ‘discretionary’ power of the child, in other words, is not substantively different from the thief’s ‘discretionary power’: in each case, the parties

²¹⁸ Flannigan, above n 33, 909.

²¹⁹ At 921. In this respect Flannigan differs from the majority of commentators who conceive of the fiduciary duty as having an instrumentalist function. A run-of-the-mill instrumentalist would hold that the position of the child does not entail fiduciary loyalty because the degree of vulnerability necessary to impose fiduciary obligations is not present. Flannigan, in contrast, follows his instrumental justification to its logical conclusion.

²²⁰ This argument assumes for the present moment that the child has been sent to purchase a *particular* newspaper rather than having the discretion to choose between a variety of options.

²²¹ Weinrib, above n 4, at 7. The same is equally true if the discretion given is so wide that there is “nothing on which the fiduciary obligation can bite”. The most striking example is that of a debtor-creditor relationship. As Frankel, above n 149, notes at 234, “[a] debtor may use loaned property as it pleases”. Since the discretion conferred to the debtor from the creditor is absolute the fiduciary obligation cannot control its exercise. In comparison to (but not necessarily inconsistent with) the analysis offered here, Flannigan would consider the debtor’s position as an “open access regime” which entails no constraint on the debtor’s right to “self-regard”: above n 6, at 37.

have no (or very little)²²² authorised discretion, and therefore they are not making determinations ordinarily made by the alleged beneficiary. Rather than fiduciary obligation, their respective liabilities are found in contract and tort.

The discretionary nature of fiduciary power sheds some light on a possible reason why mechanics and tradesmen do not hold fiduciary obligations to their clients. The issue has been discussed frequently.²²³ Despite the existence of trust, undertaking, vulnerability and imbalance of power between mechanic and client, no clear reason for their non-fiduciary status has yet to emerge.²²⁴ Clearly mechanics sit on the borderline of fiduciary liability, and so any endeavour to justify their non-liability (as is attempted here by application of fiduciary power) will expose the limitations of the justification applied.

The formal theory focuses on the power that mechanics wield, of which there are two types: first, mechanics typically provide advice to their clients regarding repairs, and second, mechanics have control of property belonging to their client, and therefore may – at least in theory – do with it as they please. In regard to the first power – the provision of advice – it is possible to say that this is not fiduciary in character for the reasons articulated in part 4.a. Since this power is derived from the mechanic’s own influence and skill, it cannot constitute a fiduciary power because it does not involve the exercise of capacities rightfully belonging to the alleged beneficiary. In other words, because the car owner is wholly entitled to disregard the mechanic’s advice and take an alternative course of action,²²⁵ there has been no substitution of capacities, and therefore the liability of the mechanic for negligent or misleading advice is determined solely by contractual and tortious obligation as well as statutory controls.

²²² The thief, arguably, may exercise the rightful discretion as to whether to return the stolen painting directly to the true owner or to the police. In each scenario, however, the discretion is a *privilege* rather than a *power*, because each action is consistent with the proprietary rights of the true owner.

²²³ See, for example, Robert Flannigan “Fiduciary Mechanics” (2008) 14 CLELJ 25 (arguing for the fiduciary liability of mechanics); Conaglen, above n 9, at 254 (dismissing Flannigan’s argument and arguing for the traditional position of no liability); and Robert Flannigan “Access or Expectation: The Test for Fiduciary Accountability” (2010) 89 CanBar Rev 1 at fn 66 (responding to Conaglen’s critique). See also MA Rodwin “Strains in the Fiduciary Metaphor: Divided Physician Loyalties and Obligations in a Changing Health Care System” (1995) 21 AmJL& Med 241 at fn 24; and Gautreau, above n 11, at 16.

²²⁴ The most common justification for this follows the key characteristic approach summarised in chapter II and is best summarised by Gautreau, above n 11, at 16: “[w]e do not think of the mechanic, the gardener or the errand boy as fiduciaries because the interest being served is very narrow, the scope of the power and the extent of the vulnerability is very limited with the result that the “common law” remedy of compensatory damages will suffice and the need to resort to fiduciary considerations and remedies is not present”.

²²⁵ “Where a party retains the power and ability to make his or her own decisions, the other person may be under a duty of care not to misrepresent the true state of affairs or face liability in tort or negligence. But he or she is not under a duty of loyalty...”: *Hodgkinson*, above n 83, at 219 per Sopinka and McLachlin JJ.

Arguably the second power is also not fiduciary in character. This is because the power to cause harm to the car is typically curtailed by express or implied terms of contract.²²⁶ This means any ‘discretion’ the mechanic has to cause serious harm to the car is similar to the thief’s discretion to sell a stolen painting: it is an unauthorised action, and therefore outside the ambit of her given authority. On this basis the mechanic’s liability is found not in the realm of fiduciary obligation but elsewhere in private law.

5. Conclusion: the limits to formal justification

There are two main problems with identifying the fiduciary relationship by sole reference to the formal theory, both of which provide the impetus for an alternative approach of the type described in part C. These problems have been implied by the analysis so far, but it may prove useful to provide an overview. First, since fiduciary power is derivative, rightful, and discretionary, it necessarily excludes powers lacking one or more of those characteristics.

For example, because fiduciary power is derivative and discretionary, mere power imbalances between fiduciary and beneficiary are by themselves incapable of giving rise to fiduciary obligation.²²⁷ More broadly, since the formal theory is incapable of explaining anything beyond its own terms, it provides little direction in borderline cases where the alleged fiduciary’s power is not quite fiduciary in the formal sense.

Second, since power is classified as fiduciary by reference to the capacities that constitute it, it may arise regardless of whether the interests it protects are significant or not. This means that fiduciary obligation attaches to *any* degree of authorised and derived discretion, and is therefore liable to be too broad.²²⁸ It is limited only in the sense that if a

²²⁶ “[T]he answer seems to be that it is possible to control the car mechanic’s action through specific, easily contracted duties to perform a set task with a set measure of diligence. There is a bounded task around which parties can contract, not merely in theory, but in practice too: performance of the task can be assessed relatively easily, and consequently it is practicable *ex ante* to stipulate (or to have the law imply) specific constraints on the parties’ conduct”: Richard C Nolan “The Legal Control of Directors’ Conflicts of Interest in the United Kingdom: Non-Executive Directors Following the Higgs Report” (2005) 6 *Theoretical Inq L* 413 at 422, cited in Conaglen, above n 9, at 265.

²²⁷ As was decided in *Galambos v Perez*, above n 106.

²²⁸ As Shepherd, above n 98, explains at 68 in a slightly different context, “it should be noted that, on a strictly theoretical level, the [discretionary element] is not necessary. The nature of any power is such that there is a

person has little authorised discretion as to how a power is to be exercised, then the fiduciary obligation is correspondingly limited in scope.²²⁹

The next section attempts to address the limits and excesses of the formal theory by proposing a second form of the fiduciary relationship. In doing so, it does not supplant it, nor does it offer a magic remedy that is the panacea to all fiduciary ills; rather, the second form curbs the formal theory's excesses, pushes beyond its limits, and provides direction in borderline cases.

C: Fiduciary vulnerability

1. Introduction

As discussed in part B it is clear that a theory of the fiduciary relationship based on a formal conception of fiduciary power must be supplemented by a more accommodating second form, labeled here *fiduciary vulnerability*. The argument here is that fiduciary vulnerability occupies a “gap-filling” measure when the limits of formal justification are reached.²³⁰ In this way the second form of the fiduciary relationship serves a supplementary and interventionary role when the answer supplied by the formal theory is deemed inadequate in protecting the beneficiary from harm.²³¹

The formal theory will prove inadequate and in need of addendum in two broad (and regularly occurring) cases. In the first case, the alleged beneficiary's vulnerability demands protection by fiduciary obligation in spite of the legal framework that would normally govern the parties' relationship, and typically because of “the inability of the law to otherwise protect” the beneficiary from harm.²³² In this case, the formal definition

discretion in the person holding it, that is greater or lesser depending on the circumstances. That discretion is not something separate, but is merely descriptive of the extent of the power itself”.

²²⁹ Scott, above n 102, at 541. This limitation provides the reason for Fletcher Moulton LJ's caution (quoted in the text accompanying n 26 above) that “[t]he nature of the fiduciary relation must be such that it justifies the interference”: *Re Coomber*, above n 26, at 729.

²³⁰ The idea that “[f]iduciary obligations perform a gap-filling function” has been suggested before, but not in conjunction to a formal theory of the fiduciary relationship: Duggan, above n 113, at 279. See also DR Klinck “The Rise of the ‘Remedial’ Fiduciary Relationship: A Comment on *International Corona Resources Ltd v Lac Minerals Ltd*” (1988) 33 McGill LJ 600 at fn 9.

²³¹ This is in line with the traditional conception of the role of equity: Frederic William Maitland *Equity* (Cambridge University Press, 2011) at 19.

²³² Hoyano, above n 12, at 188.

of fiduciary power – understood as derivative, rightful and discretionary – proves itself too narrow.

The second case relates to the formal theory’s insistence on the proprietary character of fiduciary loyalty. If the beneficiary’s strict proprietary entitlement to fiduciary loyalty does not accord with a perception of what the beneficiary should be in fact entitled to, then lack of sufficient vulnerability may function to deny liability. This is effectively what happens in *de minimis* scenarios, such as the child sent to the store to pick up a newspaper, or a mechanic given discretion as to the repair of a car. In these cases “the common law remedy of compensatory damages will suffice”.²³³ The critical issue for both of these avenues is the degree (or lack thereof) of vulnerability necessary to intervene and supplant the answer provided by the formal theory.²³⁴

This part first looks to instrumental justifications for fiduciary loyalty. It then defends a subsidiary conception of fiduciary vulnerability as based on instrumental justification. Finally, it assesses the degree of vulnerability required to impose fiduciary obligation when the formal theory denies liability.

2. The instrumental justifications for fiduciary loyalty

Instrumental analyses understand private law as promoting a goal (or goals) that are independent of the strict “bipolar”²³⁵ character of legal relationships.²³⁶ In the context of the fiduciary principle, “the starting point is necessarily the social function of fiduciary responsibility. The proper contours of regulation are determined by the nature of that function”.²³⁷

There are two dominant instrumental theories. The first – the ‘higher morality thesis’²³⁸ –

²³³ Gautreau, above n 11, at 16. Assuming, of course, that the child in fact exercises a fiduciary power.

²³⁴ “The difficulty lies in determining what measure of confidence and trust are sufficient to give rise to a fiduciary obligation...”: *Hodgkinson*, above n 83, at 217 per McLachin and Sopinka JJ.

²³⁵ Peter Cane “Corrective Justice and Correlativity in Private Law” (1996) 16 OJLS 471 at 472.

²³⁶ Weinrib, above n 35, at xi. There are many forms of instrumentalism in legal discourse: Robert S Summers *Instrumentalism and American legal theory* (Cornell University Press, Ithaca, NY, 1982). The forms applied in the context of the fiduciary relationship are generally “direct” in the sense they explain fiduciary loyalty “directly on the basis of the stipulated independent end”: Miller, above n 60, at 994.

²³⁷ Flannigan, above n 6, at 215–216.

²³⁸ Duggan, above n 113, at 275.

asserts that fiduciaries, by reason of their special position, are held to a “higher standard”²³⁹ than the “morals of the market place”.²⁴⁰ This theory claims that the fiduciary principle is a distinctively moral doctrine that protects trust reposed and vulnerability engendered by reason of that trust.

The second theory – the ‘public interest thesis’²⁴¹ – views the “sanctimonious tones of zeal and righteousness”²⁴² associated with the higher morality thesis as “more ornamental than substantive”.²⁴³ It adopts a sweeping analysis in which fiduciary loyalty is demanded on “bare grounds of public policy” in order to “maintain the integrity and the utility” of socially valuable relationships.²⁴⁴ Since “[f]iduciary law is attuned to human nature”,²⁴⁵ the strict fiduciary obligation functions as a prophylactic “safety valve”²⁴⁶ employed to dissuade the “bad man”²⁴⁷ from opportunistic action.

The literature on how these justifications are said to rationalise the fiduciary principle is immense.²⁴⁸ The issue directly on point for this dissertation is how these justifications are crystallised down into a particular characteristic of the fiduciary relationship which may be identified. The fiduciary obligation – instrumentally understood – is said to either control power,²⁴⁹ safeguard trust,²⁵⁰ or protect vulnerability.²⁵¹ Given the explanatory power as well as the limits of the formal theory, there is room for an alternative and subsidiary conception of the fiduciary relationship that is justified by instrumental concern. However, it is not immediately obvious *which* form of instrumental justification

²³⁹ Shepherd, above n 98, at 56.

²⁴⁰ “[A] trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior”: *Meinhard v Salmon*, above n 75, at 546 per Cardozo CJ.

²⁴¹ Duggan, above n 113, at 275.

²⁴² Marleen A O’Connor “How Should We Talk about Fiduciary Duty – Directors’ Conflict-of-Interest Transactions and the ALI’s Principles of Corporate Governance” (1992) 61 *Geo Wash L Rev* 954 at 965, cited in Rotman, above n 49, at 260–261.

²⁴³ Robert W Hillman “Closely-Held Firms and the Common Law of Fiduciary Duty: What Explains the Enduring Qualities of a Punctilio” (2005) 41 *Tulsa L Rev* 441 at 448.

²⁴⁴ Finn, above n 38, at 46 and 27 respectively; see also Rotman, above n 49, at 759.

²⁴⁵ “[F]iduciary relationships are the foundation of people’s reliance and trust on which social systems are built. Fiduciary law is attuned to human nature. When human nature can undermine beneficial social relationships and systems the law must interfere”: Frankel, above n 149, at 78.

²⁴⁶ Smith, above n 45, at 1.

²⁴⁷ Oliver Wendall Holmes “The Path of the Law” (1996) 110 *Harv L Rev* 991 at 992.

²⁴⁸ For a comprehensive survey, see Paul B Miller “Essays Toward A Theory of Fiduciary Law” (PhD, University of Toronto, 2008) at 18–36.

²⁴⁹ Gautreau, above n 11, at 5.

²⁵⁰ Frankel, above n 29, at 829–830.

²⁵¹ Conaglen and Hollyman, above n 122, at 15.

should be employed and in *what* characteristic this justification should be crystallised.

In regard to the proper form of instrumental justification, it is clear that the notion that fiduciaries are “held to something stricter than the morals of the market place”²⁵² is more descriptive of the “appropriate level of conduct” of fiduciaries than indicative of the principle’s supposed function of stipulating morality.²⁵³ While promotion of good virtue may be an incidental result of fiduciary obligation, a broad conception of the social value of fiduciary relationships is necessary in order to justify the strict fiduciary obligation that applies regardless of the fiduciary’s *bona fides*.²⁵⁴

The correct characteristic in which to ground an alternative instrumental conception of the fiduciary relationship is more controversial. There is very little consensus on whether fiduciary obligation functions as a “blunt tool”²⁵⁵ to control power or whether it serves to safeguard trust reposed.²⁵⁶ The problem with focusing on either of these characteristics is that it necessarily excludes the other. Since the argument here is that a subsidiary, instrumental form of the fiduciary relationship should exist to serve a “broad”²⁵⁷ and distinctively equitable gap-filling function when the limits of the formal theory are reached, it would be odd to confine the avenue for instrumental justification to either undue power or abuse of trust, and by definition exclude recourse to the other. Given this quandary, the better approach is to ground the alternative instrumental conception in the characteristic of vulnerability. In order to explain why this is the case, this part turns to consider the nature of fiduciary vulnerability.

3. The nature of fiduciary vulnerability

Much intellectual effort has been expended in attempting to identify a specific type of

²⁵² *Meinhard v Salmon*, above n 75, at 546.

²⁵³ Rotman, above n 49, at 261.

²⁵⁴ “It is an inflexible rule of a Court of Equity that a person in a fiduciary position... is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict. It does not appear to me that this rule, as has been said, is founded upon principles of morality. I regard it as based on the consideration that, human nature being what it is, there is a danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those to whom he was bound to protect”: *Bray v Ford* [1896] AC 44 (HL) at 51. See also Rotman, above n 49, at 260–261; and Conaglen, above n 9, at 113.

²⁵⁵ Weinrib, above n 4, at 4.

²⁵⁶ Harding, above n 2.

²⁵⁷ *Frame v Smith*, above n 10, at 147.

vulnerability that is “peculiarly” fiduciary in character.²⁵⁸ The fundamental problem is that the search for distinctively fiduciary vulnerability is inherently self-defeating, because it inevitably raises the question of *why* a beneficiary is vulnerable to the fiduciary.²⁵⁹ If vulnerability is understood by reference to “the position of the parties that *results from* the relationship”,²⁶⁰ then one is ultimately led to identify what instigates the vulnerability in the first place.

As alluded to above, there are two broad theories that explain the beneficiary’s vulnerability. The first theory is that the beneficiary’s vulnerability is the “direct function”²⁶¹ or “natural result”²⁶² of the fiduciary’s power. The second theory is that the beneficiary’s vulnerability is generated by the trust reposed in the fiduciary and the “influence which naturally grows out of that confidence”.²⁶³ Vulnerability – understood as that arising directly from the parties’ relationship – is therefore best conceived as resulting from *either* the existence of power held by the fiduciary *or* by trust reposed in him or her.

The fact that vulnerability may arise because of power held and trust engendered is important, because it implies (contrary to Miller’s analysis) that the beneficiary’s vulnerability does not “simply reflect” fiduciary power formally understood.²⁶⁴ Take the example of the mechanic. Trust that is reposed in the mechanic to exercise her power in accordance with her client’s interests – and the vulnerability engendered by reason of that trust – may arise whether the mechanic’s power is distinctively ‘fiduciary’ or not. In this critical sense the vulnerability characteristic pushes beyond the limits of the formal theory.

²⁵⁸ *Frame v Smith*, at 136. Attempts to delineate the nature of fiduciary vulnerability have been made (see, for example, Conaglen and Hollyman, above n 122). However none of these analyses have received widespread acceptance (as discussed in the text accompanying n 118 above).

²⁵⁹ For example, Conaglen and Hollyman effectively define their conception of “fiduciary vulnerability” by reference to power held: above n 122, at 16. So too do Wolinsky and Econome, above n 132, at 251. Compare with Rotman, above n 143, arguing that fiduciary obligations arise in response to vulnerability resulting from relationships characterised by high levels of trust and confidence.

²⁶⁰ *Galambos v Perez*, above n 106, at [68] (emphasis in original); in this statement the Supreme Court of Canada echoed the words of Weinrib, above n 4, at 6.

²⁶¹ “The [specification] of a relative weakness in the reliant party... is also not really necessary... the unequal relationship is a direct function of the power of one over the other”: Shepherd, above n 98, at 69.

²⁶² “In other words, the vulnerability is the natural result of the reliance by the principal on the undertaking given by the fiduciary. It is nothing more than a description of the victim’s situation when the fiduciary can affect his lawful interests by exercising his position of power”: Gautreau, above n 11, at 5. The same point is made by Rotman, above n 49, at 277.

²⁶³ *Tale v Williamson* (1866) LR 2 ChApp 55 (CA) at 61 per Lord Chelmsford LC, cited in *Bundy*, above n 45, at 338 per Lord Denning MR.

²⁶⁴ Miller, above n 60, at 1014–1015.

The flexible nature of vulnerability – defined as resulting from power held and trust reposed – provides the reason why vulnerability is the appropriate characteristic in which to ground an instrumental and subsidiary form of fiduciary identification. Since vulnerability is indicative of both power abused and trust reposed, it is the hallmark by which to identify an interest that may or may not demand protection in accordance with the public good. The public interest implications that attach to the vulnerability in question (and the scope of vulnerability thereby required) will necessarily differ depending on whether vulnerability derives from power held or trust reposed.²⁶⁵

4. The scope of fiduciary vulnerability

a. *Abuse of power*

The majority of fiduciary relationships, especially those in a commercial setting, involve the abuse of power by one party that is close to being but is not quite a formal fiduciary power. There are two typical types of borderline cases. The first (as discussed below in relation to *Saunders v Houghton*) is where one party has a discretionary and rightful power over another, which is neither derived from them nor expressly devoted to their ends. The question then arises over whether that party *ought* to devote his or her power to the other. The second type, discussed in relation to mechanics in part B and with respect to *Chirnside v Fay* below, is where one party has a discretionary and derivative power over another that is rightfully held, but the exercise of that power is not rightful for reasons other than fiduciary obligation.

These two cases are usually answered in terms of legitimate expectations, but given the analysis so far it is possible to stipulate the test in less amorphous terms. Since the formal theory concerned the identification of pre-existing proprietary right to fiduciary loyalty, it is arguable that imposing fiduciary obligations by reason of an abuse of power is effectively the creation of a new quasi-proprietary right to loyalty vested in the

²⁶⁵ It is arguable that this differential treatment is founded on the different interests the right to loyalty protects (or are justified by). As Rainbolt puts it, “[s]ometimes [rights] are justified on autonomy grounds while in other cases they are justified on the basis of individual welfare”: George W Rainbolt *The Concept of Rights* (Springer, Dordrecht, 2006) at 115.

beneficiary.²⁶⁶ Instrumental justification, in other words, bleeds into formal analysis, and ‘imposed’ fiduciary obligations mutate into those ‘assumed’.

This quasi-proprietary character of the court’s determination implies that the beneficiary’s vulnerability should be relevant in a narrow sense, i.e. only when there is a “grave inadequacy” to the formal theory of the fiduciary relationship.²⁶⁷ As Laura Hoyano puts it:²⁶⁸

“[T]here are two necessary and distinct components of the vulnerability which will trigger imposition of a fiduciary duty: *the personal inability of the beneficiary to protect his or her own interests, and the inability of the law otherwise to protect those interests*”

In other words, this strand of the second form of the fiduciary relationship demands “total dependence on the fiduciary by the beneficiary” as the degree of vulnerability required.²⁶⁹ If the beneficiary either had the practical means to protect herself (such as contract) or has an alternative legal route available (such as statute), then fiduciary obligations should not – as a general rule – be applied beyond the confines of the formal theory. This is because there should be a marked reluctance to fashion new quasi-proprietary rights when there is no noticeable fracture in the presently existing legal framework for addressing abuses of the power in question.²⁷⁰

In relation to the first type, the court in *Saunders v Houghton* was ultimately correct that “[t]here was no reason of principle or policy to justify extension” of fiduciary liability on the facts of the case.²⁷¹ The statutory framework governing the relationship between the directors and the investing public as specified in the Fair Trading Act 1986 and Securities Act 1978 implicitly ousted the addition of common law obligation, and in combination with criminal liability, the legislative scheme provided a viable means to protect against

²⁶⁶ Given this dichotomy between pre-existing and created proprietary right it is conceivable that the relationship between the first form and the second form is comparable to that between institutional and remedial constructive trusts: Jessica Palmer “Attempting Clarification of Constructive Trusts” (2010) 24 NZULR 113.

²⁶⁷ *Frame v Smith*, above n 10, at 136.

²⁶⁸ Hoyano, above n 12, at 188 (emphasis in original), citing Wilson J in *Frame v Smith*, above n 10, at 137: “[t]his vulnerability arises from the inability of the beneficiary (despite his or her best efforts) to prevent the injurious exercise of the power or discretion combined with the grave inadequacy or absence of other legal or practical remedies to redress the wrongful exercise of the discretion or power”.

²⁶⁹ Hoyano, above n 12, at 198. Compare “special vulnerability” (*Hospital Products*, above n 57, at 432 per Gibbs J); and “peculiarly vulnerable” (*Frame v Smith*, above n 10, at 136).

²⁷⁰ *Hospital Products*, above n 57, at 70.

²⁷¹ *Saunders*, above n 84, at [107].

the more egregious abuses of the director's power. On this basis – even if fiduciary duty was the correct head of obligation to plead²⁷² – there was no compelling need to protect the investor's interests by devotion of the director's power and recognition of a proprietary claim for their benefit.

The opposite conclusion was reached in *Chirnside v Fay*. Mr Chirnside had a discretionary, derivative, and rightfully held power over Mr Fay by reason of his control, but in accordance with the terms of the recognised joint venture Chirnside was disbarred from exercising that power to appropriate the venture for his benefit. The discretion, in other words, was *prima facie* controlled by typical compensatory remedies attendant on breach of the joint venture.

The question was whether Chirnside could be concurrently liable for breach of fiduciary obligation. Perhaps the difference in result between *Saunders* and *Chirnside* is that the latter involved power directly derived from the other (i.e. the parties were 'proximate' to each other) and therefore there was room on the "commercial dance floor" for the parties' fates to entwine.²⁷³ Unlike the remedies against a wayward mechanic, it is arguable that because of Fay's total dependence on Chirnside's good faith, the sum of money involved, and the perceived need to redistribute the profits of the venture, there was a "grave inadequacy" in the existing compensation-based framework governing the liabilities of quasi-partnership joint venturers.²⁷⁴

b. *Abuse of trust and influence*

Fiduciary law – in accordance with its equitable origin – also responds to abuses of trust and influence held over the vulnerable.²⁷⁵ This is perhaps the type of fiduciary relationship imposed in *Coleman v Myers*, in which the managing director of a small privately held company persuaded the minority shareholders to sell out their shares to him for a favourable price, only to use his power of distribution to subsequently recoup

²⁷² The issuing of misleading investment statements is probably better understood as an act of negligence rather than a breach of fiduciary loyalty understood in the proscriptive sense: *Saunders*, above n 84, at [106].

²⁷³ Holmes, above n 110, at 111.

²⁷⁴ *Frame v Smith*, above n 10, at 136.

²⁷⁵ Patrick Parkinson "Fiduciary Obligations" in Patrick Parkinson (ed) *The Principles of Equity* (2nd ed, Law Book Co, 2003) 339 at [1001].

the entire cost of the buy-out for his own benefit.²⁷⁶

Given the somewhat ahistorical and agent-centered conception of the fiduciary relationship provided so far, this category proves very difficult – if not impossible – to subsume within a coherent picture of fiduciary obligation as responding to power held.²⁷⁷ Cases of influence necessarily implicate some degree of power, but this power typically “describes the relationship’s result”,²⁷⁸ and as such, it may well be a distortion of reality if these cases were justified as having their foundation in power rather than in the causative element of influence.²⁷⁹

This dissertation does not advocate the lobotomy of the fiduciary principle from its deep equitable roots, as some commentators have suggested.²⁸⁰ There is a temptation to reconceptualise the fiduciary principle as an abuse of power doctrine, but that refinement inevitably glosses over the messy reality of fiduciary law.²⁸¹ Yet perhaps the line of inquiry that identifies a fiduciary by reference to influence exercised can and should be kept conceptually discrete from identification by reference to power held. It is all too easy to conflate the two under the umbrella of ‘trust and confidence’, thereby losing sight of the distinct justifications that animate both.

This is particularly important given the position of the ‘fiduciary relationship of influence’ within the golden thread of equitable intervention. Considering its strong association with unconscionability, perhaps the obligations that attach to these relationships are best understood on an equitable continuum that extends from good faith to proscriptive fiduciary loyalty, and then to outright prescriptive devotion.²⁸² The crystallisation of the

²⁷⁶ *Coleman v Myers*, above n 90.

²⁷⁷ Millett, above n 12, at 219. Lord Millett is often credited with formulating a tripartite conception of the fiduciary relationship in this article (a critique of which is beyond the scope of this paper). See, for example, Palmer, above n 186, at 166. However, that division was suggested three years earlier in a book written by John Glover (and cited by Millett on an unrelated point): *Commercial equity* (Butterworths, Sydney, 1995) at 6–10.

²⁷⁸ Glover, above n 43, at 463.

²⁷⁹ It may not be even strictly necessary. Derivation of power as an indicium of proximity is superfluous to relationships of influence in which the parties are by definition in close proximity to each other.

²⁸⁰ “[T]he various strands of history which make up the present-day law of fiduciaries... still have a powerful and often detrimental influence on our understanding of the fiduciary relationship... it may be necessary to throw off these ties, even to the extent of rejecting rules and theories that have stood for hundreds of years, if we are to rationalise the law of fiduciaries”: Shepherd, above n 63, at 20.

²⁸¹ Echoing the words of Goff, above n 82, at 318.

²⁸² This is suggested by Conaglen and Hollyman, above n 122, at 16–17. The distinction between good faith and fiduciary obligation is discussed in Sarah FitzGibbon “Fiduciary Relationships Are Not Contracts” (1999) 82 *MarqLRev* 303 at 342–325.

fiduciary obligation in *Mothew* as a negative one²⁸³ is the appropriate response to discretion held, but it is not necessarily the case that the same will apply to every single fiduciary relationship founded on influence.

Therefore while focus on proprietary right is liable to “level up”²⁸⁴ a beneficiary’s claim, the same may occur by unthinking imposition of strict fiduciary loyalty when the appropriate standard (and therefore, the applicable remedy) sits someplace else on the continuum of desired conduct.²⁸⁵ Since the actual duty imposed fluctuates with the facts,²⁸⁶ this strand of the fiduciary relationship should therefore be kept in conceptual quarantine from cases better conceived as involving the recognition or creation of a proprietary right to fiduciary loyalty. So long as a clear conceptual barricade is maintained there is no pressing need to amputate this strand of fiduciary obligation from the umbrella term of fiduciary relationships broadly conceived.

5. Conclusion

Parties often entreat to equity for protection in the ‘safe haven’ of fiduciary obligation, but the nature and scope of vulnerability which justifies recognition of that plea is often left indistinct.²⁸⁷ This chapter has attempted to provide a workable vision of fiduciary vulnerability that works in tandem with a core concept of fiduciary power. Courts are typically involved in the ‘trenches’ of the second category, but by providing a degree of clarity to fiduciary power, it has been possible to provide clearer and more coherent advice for when vulnerability should justify fiduciary loyalty.

Its success is inevitably limited: fiduciary identification has never been a simple task, and no theory is capable of rationalising all of fiduciary law’s foibles. The next chapter briefly considers some of these peculiarities through the focal lens of the two-forms, and then finishes with a preliminary response to some of the objections to a two-form approach.

²⁸³ *Mothew*, above n 15, at 18.

²⁸⁴ Dagan and Hannes, above n 157, at 7.

²⁸⁵ “What vulnerability theories cannot do is explain the generous, zeal-requiring, benefit-conferring aspects of the fiduciary relationship...”: FitzGibbon, above n 282, at 326.

²⁸⁶ The point is made by implication in Richard Nolan and Matthew Conaglen “Good faith: what does it mean for fiduciaries, and what does it tell us about them?” in Elise Bant and Matthew Harding (eds) *Exploring Private Law* (Cambridge University Press, Cambridge, 2010) 319 at 342.

²⁸⁷ Hoyano, above n 12, at 170.

Chapter IV: Relating fiduciary power and fiduciary vulnerability

A. The benefits of a two-form approach

The relationship between fiduciary power and fiduciary vulnerability is valuable because it aids understanding of some of the more puzzling aspects of fiduciary liability. Given that the focus of this dissertation so far has been in setting up the dichotomy between the two forms, these comments will be necessarily succinct.

First, the ongoing debate about whether vulnerability is a necessary element of the fiduciary relationship²⁸⁸ can be rendered intelligible by application of the two forms. Vulnerability is not necessary to identify a fiduciary power formally understood, but it is generally required for the courts to identify new fiduciary powers or to impose equitable obligations on those who wield influence over others. In this sense vulnerability is both “cardinal” to future development and superfluous to pre-existing proprietary right.

Second, the issue of the proper role of fiduciary obligations in commercial transactions is not as simple as a black-and-white battle between equity and contract. It is sometimes said (in line with a conception of the fiduciary relationship founded on influence) that fiduciary obligation responds to unequal power regimes, rather than between parties of equal autonomy.²⁸⁹ Yet to the extent that the first form of the fiduciary relationship has its anchorage in common law and proprietary right, recognition of fiduciary obligation is not at equitable odds with the parties contractual bargain, so long as that obligation merely functions to control a derived, discretionary and rightful power. To label the issue as one between equity and contract is an over simplification that does not properly attend to the fiduciary relationship’s dualistic character.²⁹⁰

Third, the interaction of the two forms sheds light on the deep and irreconcilable tension between contract and fiduciary obligation. It is sometimes said that fiduciary obligations

²⁸⁸ Comments to the effect that it is essential include *Watson*, above n 117, at 315; *Frame v Smith*, above n 10, at 136; and *LAC Minerals*, above n 22, at 606 per Sopinka J. Comments to the contrary include *Hospital Products*, above n 57, at 69 per Gibbs J; and *LAC Minerals*, above n 22, at 662 per La Forest J.

²⁸⁹ *Norberg*, above n 16, at 272 per McLauchlin J.

²⁹⁰ As Holmes, above n 110, argues at 110-111, “[e]quity’s protection must be given carefully; only to those select relationships that deserve to be protected against such self-interest. But if the nature of the relationship requires such protection, the parties’ commercial sophistication or experience does not absolve that need...”

are mere contractual terms that are implied into the parties' bargain.²⁹¹ Yet since fiduciary power is discretionary and open-ended, it is typically couched in terms that contract cannot explain.²⁹² This is evident in the negative definition of fiduciary loyalty. However, if the degree of discretion is relatively small (such as a mechanic authorised to spend up to \$5000 on labour and materials), then in spite of the beneficiary's proprietary entitlement the discretion *is* capable of being controlled by contractual term. Conversely, if the degree of discretion is relatively large but it is *prima facie* curbed by implied contractual term (such as the situation in *Chirnside*), then fiduciary obligation may be – if necessary to protect vulnerability – superimposed on the parties' bargain when the contract provides an inadequate means of controlling the wrongdoer's discretion.

This dissertation has advocated a narrow and supplementary conception of fiduciary vulnerability in line with the beneficiary's proprietary entitlement, but that analysis does not necessarily entail the vast expansion of fiduciary liability to mechanic-like situations: in these scenarios, contract typically suffices in making the client whole. From a remedial perspective, there is no pressing contemporary need for the Courts to enforce the client's proprietary entitlement to the mechanic's loyalty. Yet that determination may change if contract were to falter as an effective means of mediating the parties' relationship.

B. Objections to the two-form approach

The analysis provided is in some respects an ensemble of the most convincing theory so far provided by courts and commentators on when a fiduciary relationship may arise. Yet in wedding together power-based theoretical insights with instrumental analyses grounded in vulnerability it naturally raises the ire of both camps. It is beyond the scope of this dissertation to respond to each and every criticism made from incompatible theory (such as the pervasive argument from contract, touched upon above)²⁹³ but it is appropriate to preempt some of the direct objections to a two-form analysis.

First, it is arguable that the two-form analysis is excessively convoluted. This analysis is

²⁹¹ Easterbrook and Fischel, above n 109, at 426.

²⁹² Tamar Frankel, "Fiduciary Duties as Default Rules" (1995) 74 Or.L. Rev. 1209 at 1215-1217.

²⁹³ For criticism, see, e.g, FitzGibbon, above n 282; Frankel, above n 292; and Miller, above n 248, at 38–92.

admittedly complex, but “the law has to reflect life in all its untidy complexity”,²⁹⁴ and the two-form paradigm makes no apologies for the sometimes unfathomable complexity of fiduciary law.²⁹⁵ While it is entirely possible to subsume the two-form analysis within a broad “tautology” of legitimate expectations,²⁹⁶ as our Supreme Court has done, that test tells us little about the normative basis of fiduciary identification and is unconstructive because it avoids offering any theory that may be subjected to the anvil of argument.²⁹⁷

The second, related, complaint is that the analysis provided ultimately gives little guidance to future decision-making. Yet this dissertation has not claimed to offer an end-all solution to the problem of fiduciary identification. The Canadian experience²⁹⁸ has shown that reasoning from borderline cases is unhelpful for fathoming the nature of the fiduciary relationship formally understood, and the reason why this is the case is because borderline cases necessarily raise issues beyond the formal theory’s terms. Because the issues pertaining to the core differ from those raised in the penumbra, this analysis is intensely practical by its reconciliation of the two within a singular functioning framework.²⁹⁹

The third objection is that the division of labour between fiduciary power and vulnerability is artificial and ultimately pathological. The obvious response is that any “rule superstructure” is in essence artificial.³⁰⁰ Fiduciary law is certainly no Blackstonian “seamless web” and it may well “prefer policy over coherence”,³⁰¹ but that concession should not warrant full scale retreat into a “post-Wittgensteinian world” of unstable meaning.³⁰² As Paul Finn puts it, “[d]efinition, howsoever imperfect, has its place”.³⁰³

²⁹⁴ Goff, above n 82, at 318.

²⁹⁵ “To suppose... that the law can be reduced to something resembling a neat set of mathematical propositions is unrealistic. A human institution... will never possess a perfect rationality”: Smith, above n 40, at 245.

²⁹⁶ Holmes, above n 110, at 87.

²⁹⁷ A phrase attributed to the Honourable Justice Sir John Laws: Conaglen and Hollyman, above n 122, at 13. In this limited sense Goff’s powerful argument that “pragmatism must be the watchword” (above n 82, at 318) needs qualification. Pragmatic decision-making is liable to be capricious and patently unpragmatic if there is little agreement on the terms on which a ‘pragmatic’ decision is made.

²⁹⁸ The Supreme Court of Canada’s readiness to tackle the issue of fiduciary identification and its failure to produce any determinative declaration is infamous: see, for example, Hoyano, above n 12, at 169; and Miller, above n 143, at 237–238.

²⁹⁹ “We have too little theory in the law rather than too much... Theory is the most important part of the dogma of law... It is not to be feared as unpractical, for, to the competent, it simply means going to the bottom of the subject”: Holmes, above n 247, at 1007–1008.

³⁰⁰ Shepherd, above n 63, at vi.

³⁰¹ McInnes, above n 194, at 87.

³⁰² “It is a grave mistake to suppose that the law can manage without [classification]. Without it there is no stability. It will be objected in a post-Wittgensteinian world that stability is artificial, but the law has to have

Chapter V: Conclusion

This dissertation has focused on the question of when a fiduciary relationship may arise. Chapter II assessed the two predominant approaches to fiduciary identification – first, reasoning by analogy, and second, reasoning from key characteristics – and found both to be unsatisfactory. It was argued that each methodology is not particularly useful as each provides little guidance as to what is necessary or distinct about a fiduciary relationship, and in doing so each methodology does not make clear the normative basis on which fiduciary identification is made.

In chapter III it was argued that, for the purposes of fiduciary identification, the fiduciary relationship is best conceived as having a dual character. This division is necessarily artificial, but it proves useful because it structures the inquiry of fiduciary identification into two discrete stages: first, identification of a fiduciary power that justifies fiduciary loyalty, and second, identification of fiduciary vulnerability that may affirm, deny, or superimpose the same.

Fiduciary power was identified as a type of property of the beneficiary and defined formally as *derivative*, *rightful*, and *discretionary*. The concept provides a solid (albeit slim) core from which it is possible to affix a narrow conception of fiduciary liability. While not practically engaged in borderline cases, the formal theory provides guidance by conceiving fiduciary identification as a problem of when it is appropriate to expand or contract the beneficiary's proprietary entitlement to fiduciary loyalty.

The beneficiary's vulnerability – as encapsulated in the second form – provides the key to determining when the beneficiary's proprietary entitlement should expand or contract. It was argued that fiduciary relationships justified by reference to vulnerability were responding to either the power held by the fiduciary or the trust reposed in him or her.

In the former case, and in line with the beneficiary's proprietary entitlement to fiduciary loyalty, it was argued that a high degree of vulnerability was necessary to expand

artificial stability. Without it people cannot know where they stand and like cases cannot be decided alike": Birks, above n 16, at 13.

³⁰³ Finn, above n 38, at 26.

fiduciary liability. The same considerations do not, however, apply to fiduciary relationships from influence, since these relationships are best considered conceptually distinct from issues of proprietary right. Similarly, proprietary right may fall by the wayside if contract provides an adequate means of controlling power held and of making the beneficiary whole.

Chapter IV proceeded to consider some insights consequent on the analysis provided and to offer a preemptive rebuttal to possible objections to a two-form approach. Ultimately, it is argued that the fiduciary principle is complex, but not irreducibly so. Principled identification of fiduciary relationships by reason of two-form syllogistic analysis is not a fantasy. It is a realisable goal that is thoroughly worth striving towards.

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