Fiduciaries in Modern Commerce

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Introduction

The Federal Court of Australia has established itself as a forum for the resolution of many of the country's major commercial disputes. The Court's history since 1976 has overlapped with the development of fiduciary law as the spearhead of equity's incursion into the area of commerce.[1] This incursion raises a fundamental tension: trade and commerce is generally premised on the legitimacy of the (honest) pursuit of self-interest, whereas fiduciary law is premised on self-abnegation.[2] In a commercial setting, the task is to find the boundary which equity recognises between these two premises.[3] This is not a straightforward task.

A further tension may arise in the practical application of fiduciary law in a commercial setting. On the one hand, there is recognition of the commercial community's calls for certainty,[4] respect for freedom of contract and party autonomy,[5] and an efficient and reliable system of dispute resolution which affords the procedural flexibility necessary to ensure a speedy final resolution at a reasonable and predictable cost.[6] On the other hand, in a fiduciary dispute much depends upon a close examination of the circumstances in the application of principles which, in some important respects, remain unsettled. The cautious and elaborate resolution of such a dispute may thus seem a world away from the cut and thrust of commerce and the risks and rapid fluctuations of the marketplace.[7]

In this seminar, I seek to trace the development of some key aspects of fiduciary law over the life of the Court, to identify some significant areas of controversy that remain, to outline the contours of the debate in those areas, and in the course of doing so to reflect upon where equity's boundary now lies in the commercial world.

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[1] Sir Anthony Mason, "The Place of Equity and Equitable Remedies in the Contemporary Common Law World" (1994) 110 LQR 238 at 245.
[2] PA Keane, "The 2009 WA Lee Lecture: The Conscience of Equity" (2010) 84 ALJ 92 at 98-99.
[3] *Hopcraft v Close Brothers Ltd* [2026] AC 877 at [83].
[4] Lord Mansfield was famously astute to the importance of certainty in the rules governing mercantile transactions: *Vallejo v Wheeler* (1774) 1 Cowp 143 at 153; 98 ER 1012 at 1017.
[5] Being amongst the attributes of our commercial law which have contributed to economic activity and development in a manner conducive to the public good: Lord Hodge, "The Rule of Law, the Courts and the British Economy" (Guildhall Lecture, 4 October 2022) at 1-2, 9-10.
[6] This has been a key goal of commercial courts since the establishment of the Commercial Court in England in the aftermath of the *Judicature Act* reforms.
[7] Compare LS Sealy, *Company Law and Commercial Reality* (Sweet & Maxwell, 1984) at 37.

1976: the beginning (for present purposes)

The *Federal Court of Australia Act 1976* (Cth) commenced on 9 December 1976. I take this as my starting point, if only to keep the topic within manageable limits.

At this time, Dr Paul Finn's seminal work on *Fiduciary Obligations* was in transition from prize winning thesis (having been awarded the Yorke Prize in 1975) to influential publication (ultimately being published in 1977[8]).

Also at this time, Mr Alan Blackman (of *Hospital Products*[9] fame) was toiling – seemingly honestly – as a dealer for United States Surgical Corporation in the New York area. He had not yet set foot in Australia or hatched his plan to steal USSC's Australian business – a plan which would in due course lead to litigation on an epic scale and ultimately to the judgment of Mason J in the High Court which has been so influential in this field.

In 1976, could we have known that Dr Finn would go on to accept an appointment to the Federal Court? And to be a member of a Full Court (with Justices Stone and Perram) which would deliver what is perhaps the most complete and important intermediate appellate court judgment to date on fiduciary law and equitable remedies? I am speaking of course of *Grimaldi v Chameleon Mining NL (No 2)*.[10] The continuing significance of this decision is underscored by the fact that, just last year, it was cited in judgments of the Supreme Court of the United Kingdom[11] and the High Court of Australia.[12] It seems inconceivable that fiduciary law could have developed as it has without Finn's contribution, first as a scholar and later as a judge. I will say something further about *Grimaldi*, and its recent sequel,[13] a little later.

Some early cases

Early in the life of the Court, in *Allen v Townsend*[14], a question arose as to the validity of a resolution passed by members of a committee of management of an organization established under industrial legislation. A majority of the Full Court held that "members of the committee of management of an organization … owe a fiduciary duty to members of the organization" because they are "to be compared with directors of incorporated bodies being companies incorporated under legislation such as the companies Acts …"[15]. The process of reasoning closely resembled that which had earlier been applied in the recognition of fiduciary obligations on the part of company directors, who were regarded as sufficiently analogous to trustees to be subjected to trustee-like duties. Chief Justice Gageler has described that process as follows:[16]

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[8] PD Finn, *Fiduciary Obligations* (Law Book Co, 1977).
[9] *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41.
[10] (2012) 200 FCR 296.
[11] *Hopcraft v Close Brothers Ltd* [2026] AC 877 at [107].
[12] *Naaman v Jaken Properties Australia Pty Ltd* (2025) 281 CLR 635 at [74] (in the dissenting judgment of Gordon, Edelman and Steward JJ).
[13] *Commonwealth of Australia v Kupang Resources Pty Ltd* [2026] NSWCA 161.
[14] (1977) 16 ALR 301.
[15] (1977) 16 ALR 301 at 349-350 (Evatt and Northrop JJ).
[16] SJ Gageler, "Expansion of the Fiduciary Paradigm into Commercial Relationships: The Australian Experience", in Devonshire and Havelock (eds), *The Impact of Equity and Restitution in Commerce* (Hart Publishing, 2018), Ch 8, at 166.

> "Persons in what were considered sufficiently 'trust-like' commercial relationships came in that way to be subjected to 'trust-like' duties which, for want of a better word, came by common acceptance to be labelled 'fiduciary'. A relationship would warrant that label, it came to be said with a circularity borne of reasoning solely by analogy, if the relationship was one in respect of which a 'wrong' would result in the same remedy against a 'wrongdoer' as a beneficiary would have against a trustee."

Another aspect of *Allen v Townsend* which catches the modern eye is the apparent ease with which the "fiduciary duty" of the members of the committee was described in prescriptive terms. By reference to leading authorities on the exercise of powers by company directors such as *Mills v Mills*[17] and *Howard Smith Ltd v Ampol Petroleum Ltd*,[18] the majority stated that the "State Executive is required by law to exercise the powers conferred upon it bona fide for the purposes for which they were conferred."[19]

To similar effect is the statement of Deane J when sitting as a member of the Full Court of the Federal Court in *Federal Commissioner of Taxation v Lutovi Investments Pty Ltd*:[20]

> "The directors of a company are not, in the performance of their functions as such, properly concerned to pursue their own independent purposes or interests. It is their fiduciary duty to decide where *the company's* interests lie and how *the company's* interests are to be served in relation to any matter which arises for their consideration and to pursue those interests as they see them. When there is a conflict of interest and a director is not precluded from acting, he is obliged to subordinate his personal interests to those of the company."

With statements like these, one could be forgiven for thinking that there was nothing remarkable in the notion that a director's fiduciary duties included prescriptive duties to act bona fide in the interests of the company and for proper purposes.

Who is a fiduciary in a commercial setting?

Even now, some 50 years on, there is no generally agreed and unexceptionable definition of who is a fiduciary or when a fiduciary relationship will arise.[21] We have, however, moved well past reasoning solely by analogy. From the time of the High Court's decision in *Hospital Products Ltd v United States Surgical Corporation*[22] at least one "critical feature" has been squarely and consistently in focus – the fiduciary undertaking of loyalty. Before turning to that topic, let me say something briefly about the facts in *Hospital Products* and the remarkable course of the litigation.

The case had many twists and turns over about four years in the courts. In the New South Wales Supreme Court, USSC succeeded at first instance, but on the basis of a somewhat limited fiduciary relationship and remedy. It enlarged its success in the New South Wales Court of

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[17] (1938) 60 CLR 150.
[18] [1974] AC 821.
[19] (1977) 16 ALR 301 at 348.
[20] (1978) 20 ALR 157 at 176-177. An appeal to the High Court was allowed, but that is immaterial to the point presently under discussion.
[21] *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296 at [177].
[22] (1984) 156 CLR 41.

Appeal, obtaining ample relief by way of constructive trust. However, USSC would ultimately fail in its fiduciary case in a 4:1 majority decision in the High Court. How did all of this unfold?

I have already mentioned Mr Blackman, whose conduct was at the heart of the case. He had been USSC's dealer in New York from 1973. USSC had designed a novel surgical stapling device known as "Autosuture" which it manufactured and marketed in the United States and other countries.

From 1976, USSC's distributor in Australia was a company known as Downs Surgical. In 1978, Mr Blackman visited Australia and learned that USSC's products were not the subject of registered patents there. He then hatched and implemented a dishonest plan to replace Downs Surgical as USSC's Australian distributor, and ultimately to appropriate for his own benefit the market in Australia that would otherwise have been available to USSC.

In 1979, Mr Blackman and then one of his companies became USSC's exclusive distributor in Australia. Although an over-simplification, I will refer to Mr Blackman's companies as Hospital Products without distinguishing between them. Mr Blackman leveraged his good relationship with USSC executives in order to obtain the distributorship.

In the meantime, Mr Blackman's solicitors had applied for registration in Australia of the trademark "Autosuture", an engineering consultant engaged by Mr Blackman had worked out how to manufacture the device by a process of reverse-engineering USSC's products, and Mr Blackman had applied for an Australian patent, having lodged a specification largely copied from the specifications of USSC's United States patents.

Hospital Products then commenced manufacturing and selling its own products in Australia. This was done in a manner which was intended to, and did in fact, mislead existing customers for USSC products into believing that the Hospital Products labelled products were being manufactured in Australia by arrangement with USSC. Once it was well up and running on its own account, Hospital Products terminated the distributorship agreement on 25 December 1979 and USSC accepted the termination on 10 January 1980.

For a time, Hospital Products encountered difficulties in its manufacturing process. To get through this period, it acquired quite large quantities of product from USSC by subterfuge, so that USSC was not aware of the identity of the true purchaser, and proceeded to repackage and sell the products under its own label.

Mr Blackman's dishonest scheme was successfully executed and concealed from USSC until about February 1980 when USSC received information which caused it to suspect that he was "up to no good".

After an investigation, USSC commenced proceedings against Hospital Products and Mr Blackman in New York in July 1980.

In August 1980, USSC commenced proceedings in the Federal Court of Australia against Hospital Products, Mr Blackman and others. However, the litigious foray in this Court did not

last, as the defendants brought a challenge in the High Court of Australia, which held that the Federal Court lacked jurisdiction to entertain the whole of the proceedings.[23]

From November 1980, Hospital Products commenced marketing its products in the United States through a wholly owned subsidiary and withdrew from the Australian market.

In June 1982, USSC commenced proceedings in the Supreme Court of New South Wales against Hospital Products, Mr Blackman and others. The claims included a claim for damages for breach of the distributorship agreement, and a claim for breach of fiduciary duty seeking enforcement of a constructive trust over, inter alia, the assets of the Hospital Products business.

The distributorship agreement had not been reduced to a formal, executed contract. It was partly written and partly oral. One of its express terms was that the distributor would devote its best efforts to distributing USSC's products and building up the market for them in Australia. However, the distributor was not an agent of USSC. Rather, the distributor purchased USSC's products for resale to customers.

Was the distributor a fiduciary?

The trial judge (McLelland J), all three members of the New South Wales Court of Appeal (Moffit P, Hope and Samuels JJA) and one member of the High Court (Mason J) answered the question in the affirmative (albeit that there was variance between them as to the scope of the relationship, and as to the relief available to USSC).

Four members of the High Court (Gibbs CJ, Wilson, Deane and Dawson JJ) – in separate judgments – answered the question in the negative.

This might not seem a promising starting point for a distillation of principle. Writing in 1985, John Lehane suggested that the High Court's decision did not noticeably advance the search for the principle on which the cases in this area of fiduciary obligation rest.[24] Considering the matter now, the influence of Mason J's dissenting judgment within Australia and indeed throughout the common law world is undoubted.

At this stage, I wish to focus on two matters: first, the fiduciary undertaking of loyalty which I have mentioned; and, secondly, the differing approaches to the intervention of equity in a commercial setting.

The fiduciary undertaking of loyalty

As is well known, Mason J identified the "critical feature" of fiduciary relationships as being "that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense".[25]

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[23] *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd; United States Surgical Corp v Hospital Products International Pty Ltd* (1981) 148 CLR 487.
[24] JRF Lehane, "Fiduciaries in a Commercial Context" in Finn (ed), *Essays in Equity* (Law Book Co, 1985), 95 at 102.
[25] (1984) 156 CLR 41 at 96-97.

However, Mason J was not alone in regarding the fiduciary undertaking as significant.

At first instance, McLelland J stated:[26]

> "In what circumstances will a court recognize the existence of a fiduciary duty for the purpose?[27] There are two matters of importance here. First, the paradigm of the fiduciary relationship is the trust. A trust imposes obligations relating to property vested in the trustee, but an analogy is recognized in the position of a person who is obliged, or undertakes, to act in relation to a particular matter in the interests of another (to whom, for convenience I will hereinafter refer as the beneficiary) and is entrusted with the power to affect those interests in a legal or practical sense. The second matter is that the reason for the principle is to be found in the special opportunities which a trustee (or a person in an analogous position) has to abuse that position and the special difficulties which proof of such abuse would present in situations where there was a conflict or possible conflict between interest and duty. In other words the special degree of vulnerability of those whose interests are entrusted to the power of another, to abuse of that power, justifies a special protective rule."

In a joint judgment, the members of the Court of Appeal stated:[28]

> "… the principle which we should apply is that a fiduciary relationship exists where the facts of the case in hand establish that in a particular matter a person has undertaken to act in the interest of another and not in his own. This "representative" element is essential and it is from the fiduciary's undertaking to subordinate his interest that the beneficiary's expectation, or his trust and confidence, that the fiduciary will act accordingly arises."

In the High Court, Gibbs CJ (with whom Wilson J substantially agreed) referred to "the opinion expressed by Dr Finn in his comprehensive work on *Fiduciary Obligations* (1977), p 201, that for the purposes of the conflict rule, a fiduciary is 'simply someone who undertakes to act for or on behalf of another in some particular matter or matters'".[29] This was not the first time that Finn's work had been cited in a High Court judgment.[30] However, Gibbs CJ was not prepared to accept Finn's opinion without some qualification.[31] The Chief Justice went on to say that:[32]

> "The test suggested by the Court of Appeal in the present case seems to me not inappropriate in the circumstances, although it must be remembered that any test can only be stated in the most general terms and that all the facts and circumstances must be carefully examined to see whether a fiduciary relationship exists."

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[26] *United States Surgical Corporation v Hospital Products International Pty Ltd* [1982] 2 NSWLR 766 at 810-811.
[27] The purpose being that identified by McLelland J at 809, *viz.* the application of the equitable obligation of a fiduciary "not to profit from a position of trust, or, as it is sometimes relevant to put it, not to allow a conflict to arise between duty and interest".
[28] *United States Surgical Corporation v Hospital Products International Pty Ltd* [1983] 2 NSWLR 157 at 208.
[29] (1984) 156 CLR 41.
[30] See *Chan v Zacharia* (1984) 154 CLR 178 at 200.
[31] (1984) 156 CLR 41 at 72.
[32] (1984) 156 CLR 41 at 72.

The qualification thus appears to have been that the undertaking must go further than merely acting for or on behalf of another; it must extend to acting in the interests of the other rather than in the fiduciary's own interests.[33]

Gibbs CJ did not think that the test suggested by the Court of Appeal had been met, as Hospital Products "did not undertake, whether by representation or contractual provision, to act solely in the interests of USSC and not in its own interests".[34]

Accordingly, despite the differing conclusions reached by the judges, one can see a growing coalescence around the notion of the fiduciary undertaking as a central consideration.

Later cases authoritatively confirmed the central role played by the undertaking or agreement referred to by Mason J.[35] In *Grimaldi v Chameleon Mining NL (No 2)*[36] it was put this way:[37]

> "… a person will be in a fiduciary relationship with another when and insofar as that person has undertaken to perform such a function for, or has assumed such a responsibility to, another as would thereby reasonably entitle that other to expect that he or she will act in that other's interest to the exclusion of his or her own or a third party's interest …"

The undertaking or assumption of responsibility need not be contractual. In the traditional categories, the undertaking "is inherent in the position" of trustee, partner, director, etc.[38] Outside the traditional categories, the undertaking "may be found in the facts of the particular case".[39]

Where the question turns upon a contractual stipulation, difficult questions can arise. As Lehane observed:[40]

> "… when is a contractual stipulation inserted for the benefit of one party (even if offered by the other party) an undertaking to act for or on behalf of that party and therefore to act, in relation to the contract, solely in the interests of that party? When does an offer to enter into a contract proposed by one party as a deal which will benefit the other (as well as himself) become such an undertaking by the former to the latter?"

Unless the stipulation upon its proper construction is such as to give rise to an entitlement to expect that one party will act in the interests of the other (or their joint interests) to the exclusion

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[33] This was perhaps implicit in Finn's opinion, but would be explicitly reflected in his later statements in, e.g., PD Finn, *Fiduciary Reflections* (2014) 88 ALJ 127; republished as Ch 26 in PD Finn, *Fiduciary Obligations: 40th Anniversary Republication with Additional Essays* (Federation Press, 2016) at [791].
[34] (1984) 156 CLR 41 at 72.
[35] See, e.g., *News Ltd v Australian Rugby Football League Limited* (1996) 64 FCR 410 at 540-541; *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165 at [70]-[71]; *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1 at [86]-[88].
[36] (2012) 200 FCR 296 at [177].
[37] In language deployed in *Naaman v Jaken Properties Australia Pty Ltd* (2025) 281 CLR 635 at [71] (in the dissenting judgment of Gordon, Edelman and Steward JJ).
[38] *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1 at [88].
[39] *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1 at [88].
[40] JRF Lehane, "Fiduciaries in a Commercial Context" in Finn (ed), *Essays in Equity* (Law Book Co, 1985), 95 at 100, in a passage approved in *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1 at [89].

of his or her own interests in relation to an identified aspect of the relationship,[41] the stipulation will not be capable of founding a fiduciary duty.

Justice Edelman, writing extra-judicially, has argued that a voluntary undertaking is a necessary condition of a fiduciary duty.[42] In *Naaman v Jaken Properties Australia Pty Ltd*[43] Justice Edelman was party to a minority judgment (with Justices Gordon and Steward) in which reference was made to "the *need* for the relationship to be one that includes an undertaking that gives rise to an expectation that one party (the fiduciary) will act in the best interests of the other".[44] As a matter of authority, this proposition is difficult to deny. The statements in the Australian cases to which reference has been made[45] appear to leave little, if any, room for the possibility that fiduciary obligations may be imposed or recognised in the absence of an undertaking or assumption of responsibility. A like conclusion has been expressed by the Supreme Court of Canada[46] and more recently by the Supreme Court of the United Kingdom[47] where it was held that:[48]

> "There must be the assumption of responsibility by the fiduciary to act exclusively on behalf of the other in the conduct of the other's affairs. This can arise where the fiduciary has expressly undertaken to exclude his or her own interest and those of third parties when so acting. That is what loyalty means and requires in this context. It can also arise where the objectively assessed circumstances enable equity to identify such an undertaking in the acts of the fiduciary."

A more controversial argument advanced by Justice Edelman in his extra-judicial writings is that fiduciary obligations are not *imposed* by equity in consequence of the fiduciary having undertaken to act in the interests of another to the exclusion of his or her own interests; rather fiduciary duties actually "arise … by construction of the scope of voluntary undertakings"[49]; they "*are* terms expressed or implied in voluntary undertakings"[50]; they "are simply duties which are expressed or implied into voluntary undertakings"[51]. I will come back to this shortly when I address the nature, scope and content of fiduciary duties.

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[41] PD Finn, *Fiduciary Reflections* (2014) 88 ALJ 127; republished as Ch 26 in PD Finn, *Fiduciary Obligations: 40th Anniversary Republication with Additional Essays* (Federation Press, 2016) at [791], citing *News Ltd v Australian Rugby Football League Limited* (1996) 64 FCR 410 at 538-541.
[42] JJ Edelman, "When do Fiduciary Duties Arise?" (2010) 126 LQR 302 at 310-313; JJ Edelman, "The Importance of the Fiduciary Undertaking" (2013) 7 J Eq 128 at 129-130, 140.
[43] (2025) 281 CLR 635.
[44] (2025) 281 CLR 635 at [76] (italics added).
[45] See, e.g., *News Ltd v Australian Rugby Football League Limited* (1996) 64 FCR 410 at 540-541; *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165 at [70]-[71]; *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1 at [86]-[88].
[46] *Galambos v Perez* [2009] 3 SCC 247 at [66]-[80].
[47] *Hopcraft v Close Brothers Ltd* [2026] AC 877 at [83]-[100].
[48] [2026] AC 877 at [100].
[49] JJ Edelman, "When do Fiduciary Duties Arise?" (2010) 126 LQR 302 at 302.
[50] JJ Edelman, "When do Fiduciary Duties Arise?" (2010) 126 LQR 302 at 326 (italics in original).
[51] JJ Edelman, "The Fiduciary Self Dealing Rule" in Glister and Ridge (eds), *Fault Lines in Equity* (Hart Publishing, 2012), Ch 5, at 107; JJ Edelman, "Four Fiduciary Puzzles" in Bant and Harding (eds), *Exploring Private Law* (CUP, 2010), Ch 13, at 298.

Equity's intervention in a commercial setting

One explanation for the differing conclusions reached by the majority in the High Court in *Hospital Products* on the one hand, and Mason J on the other, may lie in the approach taken to equity's intervention in a commercial setting.

Gibbs CJ noted that "the fact that the arrangement between the parties was of a purely commercial kind and that they had dealt at arm's length and on an equal footing has consistently been regarded by this Court as important, if not decisive, in indicating that no fiduciary duty arose".[52] Later, the Chief Justice identified this as one of the "insuperable obstacle[s]" to acceptance of a fiduciary relationship.[53]

In their separate judgments, Wilson and Dawson JJ also emphasised this point.[54] Wilson J put it this way:[55]

> "… the courts have often expressed a cautionary note against the extension of equitable principles into the domain of commercial relationships, so as 'not to strain [them] beyond [their] due and proper limits', to use the words of Lord Selborne L.C. in *Barnes v Addy*. In *New Zealand and Australian Land Co. v. Watson* the Court of Appeal held that the defendants, who had effected sales of wheat consigned by the plaintiffs for sale, did not stand in any fiduciary character towards the plaintiffs so as to entitle the latter to follow the proceeds of their property in the defendant's hands. Bramwell L.J. said:
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> > 'Now I do not desire to find fault with the various intricacies and doctrines connected with trusts, but I should be very sorry to see them introduced into commercial transactions and an agent in a commercial sense turned into a trustee with all the troubles that attend that relation. I think there is no ground for holding that these defendants have any fiduciary character towards the plaintiffs.'
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> These observations remain as pertinent today as they were one hundred years ago …"

Mason J, on the other hand, did not see this as an insuperable obstacle. He stated:[56]

> "There has been an understandable reluctance to subject commercial transactions to the equitable doctrine of constructive trust and constructive notice. But it is altogether too simplistic, if not superficial, to suggest that commercial transactions stand outside the fiduciary regime as though in some way commercial transactions do not lend themselves to the creation of a relationship in which one person comes under an obligation to act in the interests of another. The fact that in the great majority of commercial transactions the parties stand at arm's length does not enable us to make a generalization that is universally true in relation to every commercial transaction. In truth, every such transaction must be examined on its merits with a view to ascertaining whether it manifests the characteristics of a fiduciary relationship.
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> The disadvantages of introducing equitable doctrine into the field of commerce, which may be less formidable than they were, now that the techniques of commerce are far more sophisticated, must be balanced against the need in appropriate cases to do justice by making available relief in specie

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[52] (1984) 156 CLR 41 at 70.
[53] (1984) 156 CLR 41 at 72.
[54] (1984) 156 CLR 41 at 118-119 (Wilson J) and 149-150 (Dawson J).
[55] (1984) 156 CLR 41 at 118-119.
[56] (1984) 156 CLR 41 at 99-100.

> through the constructive trust, the fiduciary relationship being a means to that end. If, in order to make relief in specie available in appropriate cases it is necessary to allow equitable doctrine to penetrate commercial transactions, then so be it: see, e.g., *Barclays Bank Ltd. v. Quistclose Investments Ltd* and *Swiss Bank Corporation v. Lloyds Bank Ltd*. A preferable approach to an artificial narrowing of the fiduciary relationship - the gateway to relief in specie - is to define and delimit more precisely the circumstances in which the remedy by way of constructive trust will be granted."

The first paragraph presents no real difficulty insofar as it suggests that there is no universal rule immunising all commercial transactions against fiduciary doctrine, and that each transaction must be examined on its merits. Whilst it is true that the imposition or recognition of fiduciary obligations within arm's length commercial transactions is exceptional, the reason is not because they are "commercial". Rather, as Lehane put it:[57]

> "… the reason why, in commercial contexts, transactions outside the traditional categories do not give rise to fiduciary duties is that most such transactions do not satisfy the criteria (whatever precisely they are) which lead courts to characterise a relationship between private parties as fiduciary. It is because they do not satisfy the criteria, not because they are commercial, that such transactions do not usually carry with them fiduciary duties and the remedies flowing from a breach of such duties."

The second paragraph may be more controversial if it is being suggested that the desirability of making proprietary relief available by way of remedial constructive trust should drive and shape the approach to the anterior question as to the existence of a fiduciary relationship. Any suggestion to that effect cannot stand in the face of more recent High Court authority.

Most recently, the majority in *Naaman v Jaken Properties Australia Pty Ltd* stated:[58]

> "This Court in *Maguire v Makaronis* cautioned against a tendency "too readily to classify as fiduciary in nature relationships which might better be seen as purely contractual or as giving rise to tortious liability". The caution points to a wider concern about maintaining the integrity of legal and equitable institutions. Having regard to the onerousness of the responsibility that a fiduciary relationship entails, a fiduciary relationship should not lightly be imposed upon commercial parties who stand at arm's length in respect of interests that are protected by other institutions of the common law or of equity. In particular, a fiduciary relationship should not be superimposed on another legal or equitable relationship merely to overcome perceived shortcomings in the nature or extent of the remedies available to enforce or protect other applicable institutions of the common law or of equity."

The last sentence reinforces the proposition that the remedial tail should not wag the doctrinal dog.[59] This is not simply because the actors are "commercial parties who stand at arm's length". Instead, as revealed in the earlier part of this passage, it is founded on a more fundamental "concern about maintaining the integrity of legal and equitable institutions".

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[57] JRF Lehane, "Fiduciaries in a Commercial Context" in Finn (ed), *Essays in Equity* (Law Book Co, 1985), 95 at 104, in a passage approved in *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1 at [90].
[58] (2025) 281 CLR 635 at [33] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ).
[59] Compare PA Keane, "The 2009 WA Lee Lecture: The Conscience of Equity" (2010) 84 ALJ 92 at 98.

The nature, scope and content of fiduciary duties

Before Breen v Williams

As I observed earlier when discussing two early decisions of the Full Court of the Federal Court, not so long ago there did not seem to be anything remarkable in the notion that a director's fiduciary duties included prescriptive duties to act bona fide in the interests of the company and for proper purposes.

This notion accorded with Finn's analysis in *Fiduciary Obligations*. Part I of that work was entitled "Fiduciary Offices and the Fiduciary's Duty to Act Honestly in What he Alone Considers to be the Interests of his Beneficiaries".[60] Within that part, Finn stated:[61]

> "Traditionally, Equity has taken to supervising the activities of persons who, in some particular matter, have undertaken to act for, or in the interests of, another. The predominant thrust of this supervision has been to prevent such persons from misusing their position to their own advantage. But in the case of one class of fiduciary this supervision is differently directed and is more extensive. That class is that of the fiduciary office holder."

After explaining that such office holders derive their powers from sources other than private agreements, such as trust deeds or statutes, and include members such as trustees and directors, Finn went on to say that because of their autonomy and freedom within their discretions:[62]

> "… Equity has intervened and not simply to prevent self-interested action. It has imposed a general obligation on the fiduciary controlling the manner in which he deals with and exercises his discretions. He is positively required in his decision making to act honestly in what he alone considers to be the interests of those for whose benefit his position exists – his beneficiaries."

Finn thus regarded this positive obligation as one that was (i) imposed by equity; and (ii) properly characterised as a fiduciary obligation. This is reinforced later in Chapter 3 – entitled "The Fiduciary Obligation" – in which Finn stated:

> "In formulating and commenting on the fiduciary obligation the courts have spoken only in large and general terms. But what is clear is that they have in fact imposed a general obligation on fiduciaries – an obligation to act "in the interests of" or "for the benefit of" their beneficiaries – and that this obligation sets the ring to the fiduciary's freedom of action in his office."

Indeed, even outside of Finn's "fiduciary office holder" category, decisions of high authority after *Hospital Products* appeared, at least on the surface, to support the notion that fiduciary duties could extend to positive obligations. The High Court's decision in *Daly v Sydney Stock Exchange Ltd*[63] is an example. A firm of stockbrokers undertook to advise Dr Daly on matters of investment. Dr Daly relied on the advice, which was to lend money to the firm pending a change in market conditions. As it turned out the firm was in a precarious financial position

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[60] PD Finn, *Fiduciary Obligations: 40th Ann iversary Republication with Additional Essays* (Federation Press, 2016) at 7.
[61] PD Finn, *Fiduciary Obligations: 40th Anniversary Republication with Additional Essays* (Federation Press, 2016) at 8, [11].
[62] PD Finn, *Fiduciary Obligations: 40th Anniversary Republication with Additional Essays* (Federation Press, 2016) at 8, [11].
[63] (1986) 157 CLR 371.

and was unable to repay the loan. It was unanimously held that the firm was in a fiduciary relationship with Dr Daly and had breached its fiduciary duty.

Gibbs CJ (with whom Wilson and Dawson JJ agreed) described the broker's duty as "a duty to disclose to Dr Daly the information in its possession which would have revealed that the transaction was likely to be a most disadvantageous one from his point of view".[64] The Chief Justice also referred to the fiduciary relation being "such as to place on the broker an obligation to make to the client a full and accurate disclosure of the broker's own interest in the transaction."[65]

To similar effect, Brennan J (with whom Wilson J also agreed) stated that the fiduciary investment adviser's duty "is to furnish the client with all the relevant knowledge which the adviser possesses, concealing nothing that might reasonably be regarded as relevant to the making of the investment decision …, to give the best advice the adviser could give if he did not have but a third party did have a financial interest in the investment offered, to reveal fully the adviser's interest, and to obtain for the client the best terms which the client would obtain from a third party if the adviser were to exercise due diligence on behalf of his client in such a transaction."[66] Brennan J held that the broker "obtained the loans from Dr Daly without performing the fiduciary duty which equity imposes on borrowers in their position".[67]

Accordingly, all judges appeared to describe the fiduciary duty in prescriptive terms, and Brennan J (with the agreement of Wilson J) stated explicitly that the "fiduciary duty" is one "which equity imposes".[68]

"The Fiduciary Principle" (1989) – Finn's re-appraisal

Before coming to *Breen v Williams*[69], it is important to notice a significant re-appraisal undertaken by Finn in an essay published in Canada in 1989[70] – some 12 years after publication of *Fiduciary Obligations*. This essay reflected what Finn would describe[71] as "a change of mind", the catalyst for which was Deane J's judgment in *Chan v Zacharia*[72].

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[64] (1986) 160 CLR 371 at 377.
[65] (1986) 160 CLR 317 at 377.
[66] (1986) 160 CLR 371 at 385.
[67] (1986) 160 CLR 371 at 386.
[68] Some have sought to reinterpret Brennan J's reasons, reading them as though his description of the duties was referable to contractual duties: see, e.g., *Aequitas Ltd v Sparad No 100 Ltd* (2001) 19 ACLC 1006 at [283]-[287] (Austin J); *GI Globeinvestment Ltd v XY ERS UK Limited* [2026] EWCA Civ 1248 at [38]-[42] (Newey LJ, with whom Asplin and Popplewell LJJ agreed).
[69] (1996) 186 CLR 71.
[70] PD Finn, "The Fiduciary Principle" in Youdan (ed), *Equity, Fiduciaries and Trusts* (Carswell, 1989); republished as Ch 25 in PD Finn, *Fiduciary Obligations: 40th Anniversary Republication with Additional Essays* (Federation Press, 2016).
[71] PD Finn, *Fiduciary Reflections* (2014) 88 ALJ 127; republished as Ch 26 in PD Finn, *Fiduciary Obligations: 40th Anniversary Republication with Additional Essays* (Federation Press, 2016) at [772].
[72] (1984) 154 CLR 178.

In *Chan v Zacharia*, Deane J stated that:[73]

> "… variations between more precise formulations of the principle governing the liability to account are largely the result of the fact that what is conveniently regarded as the one "fundamental rule" embodies two themes. The first is that which appropriates for the benefit of the person to whom the fiduciary duty is owed any benefit or gain obtained or received by the fiduciary in circumstances where there existed a conflict of personal interest and fiduciary duty or a significant possibility of such conflict: the objective is to preclude the fiduciary from being swayed by considerations of personal interest. The second is that which requires the fiduciary to account for any benefit or gain obtained or received by reason of or by use of his fiduciary position or of opportunity or knowledge resulting from it: the objective is to preclude the fiduciary from actually misusing his position for his personal advantage. Notwithstanding authoritative statements to the effect that the "use of fiduciary position" doctrine is but an illustration or part of a wider "conflict of interest and duty" doctrine …, the two themes, while overlapping, are distinct. Neither theme fully comprehends the other and a formulation of the principle by reference to one only of them will be incomplete. Stated comprehensively in terms of the liability to account, the principle of equity is that a person who is under a fiduciary obligation must account to the person to whom the obligation is owed for any benefit or gain (i) which has been obtained or received in circumstances where a conflict or significant possibility of conflict existed between his fiduciary duty and his personal interest in the pursuit or possible receipt of such a benefit or gain; or (ii) which was obtained or received by use or by reason of his fiduciary position or of opportunity or knowledge resulting from it. Any such benefit or gain is held by the fiduciary as constructive trustee …".

Finn's re-appraisal involved acceptance of a "limitation of the fiduciary principle to the modest role of exacting loyalty".[74] It was said to originate "in public policy: in a view of desired social behaviour for the end this achieves. To maintain the integrity and the utility of those relationships in which the (or a) role of one party is perceived to be the service of the interests of the other, it insists upon a fine loyalty in that service. The fiduciary is not to use his position or the power it gives him to serve an interest other than the beneficiary's, be that his own or a third party's".[75]

Having translated the principle into two "overlapping proscriptions" reflecting the two themes identified by Deane J in *Chan v Zacharia* (one concerning "itself with misuse of the fiduciary position: the other with conflicts of duty and interest or conflicts of duty and duty arising in or in virtue of that position")[76], Finn went on to say (footnotes inserted):

> "Loyalty is thus exacted, often in a draconian way. But save in one very distinctive class of case involving "fiduciary powers" [Fn 163 See PD Finn, Fiduciary Obligations (1977), Part I. This subject is beyond the scope of this chapter], no more than loyalty is exacted. This warrants emphasis.

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[73] (1984) 154 CLR 178 at 198-199.
[74] PD Finn, "The Fiduciary Principle" in Youdan (ed), *Equity, Fiduciaries and Trusts* (Carswell, 1989); republished as Ch 25 in PD Finn, *Fiduciary Obligations: 40th Anniversary Republication with Additional Essays* (Federation Press, 2016) at [705].
[75] PD Finn, "The Fiduciary Principle" in Youdan (ed), *Equity, Fiduciaries and Trusts* (Carswell, 1989); republished as Ch 25 in PD Finn, *Fiduciary Obligations: 40th Anniversary Republication with Additional Essays* (Federation Press, 2016) at [701].
[76] PD Finn, "The Fiduciary Principle" in Youdan (ed), *Equity, Fiduciaries and Trusts* (Carswell, 1989); republished as Ch 25 in PD Finn, *Fiduciary Obligations: 40th Anniversary Republication with Additional Essays* (Federation Press, 2016) at [701].

> It is not the case that the pure negligence of a lawyer, an agent's excess of authority, a partner's breach of the partnership contract or a trustee's improvident investment is, as such, a breach of fiduciary duty … If no issue of disloyalty is involved, such matters will be actionable through those primary bodies of law which constitute or govern the ordinary incidents of the relationship in question – negligence, breach of contract, or breach of trust. What is being rejected here is the proposition that the fiduciary principle is a prescriptive one in what it exacts [Fn 164 The writer excepts "fiduciary powers" from this: see the preceding note] …
>
> A further consequence flows from the rejection of a prescriptive view of the fiduciary principle. It is not [Fn 168 Save in "fiduciary power" cases …], of itself, an independent source of positive obligations which go beyond the exaction of loyalty in relationships."

As Professor Dame Sarah Worthington has observed by reference to this re-appraisal:[77]

> "At this point in 1989 it seemed we were now all walking a common track, one where clear markers had been set out, and one which remains distinctly recognisable today."

Those markers pointed to what would soon become the dominant position: that fiduciary obligations are proscriptive only. However, it is notable that Finn excluded from his re-appraisal the whole of his earlier analysis of fiduciary powers in Part I of *Fiduciary Obligations*. Thus Finn was not retreating from his earlier description of the fiduciary obligations attending the exercise of those powers – a description couched in prescriptive terms. This is perhaps not surprising. Deane J's analysis in *Chan v Zacharia*, which prompted the re-appraisal, was concerned with the principle governing the liability to account, not with fiduciary powers. And, as we have seen, Deane J had himself previously described the fiduciary duties of directors in prescriptive terms.[78]

Breen v Williams (1996)

The question in *Breen v Williams*[79] was whether a doctor owes an obligation to a patient entitling the patient to inspect or obtain his or her medical records. Despite the narrowness of the question, the case has produced broad consequences.

In a key passage, Gaudron and McHugh JJ stated:[80]

> "In this country, fiduciary obligations arise because a person has come under an obligation to act in another's interests. As a result, equity imposes on the fiduciary proscriptive obligations – not to obtain any unauthorised benefit from the relationship and not to be in a position of conflict. If those obligations are breached, the fiduciary must account for any profits and make good any losses arising from the breach. But the law of this country does not otherwise impose positive legal duties on the fiduciary to act in the interests of the person to whom the duty is owed."

This passage was later approved by McHugh, Gummow, Hayne and Callinan JJ in *Pilmer v Duke Group Ltd (in liq)*,[81] with their Honours adding:

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[77] S Worthington, "Fiduciaries: Following Finn", in Bonyhady (ed), *Finn's Law: An Australian Justice* (Federation Press, 2016), Ch 2, at 47.
[78] *Federal Commissioner of Taxation v Lutovi Investments Pty Ltd* (1978) 20 ALR 157 at 176-177.
[79] (1996) 186 CLR 71.
[80] (1996) 186 CLR 71 at 113.
[81] (2001) 207 CLR 165 at [74].

> "… fiduciary obligations are proscriptive rather than prescriptive in nature; there is not imposed upon fiduciaries some quasi-tortious duty to act solely in the best interests of their principals."

This is now the dominant position in Australia,[82] having been expressed at the highest level and in language which does not appear to admit of exceptions. Equity thus imposes obligations, but only of a proscriptive kind. We should not overlook Finn's influence in this development. In *Breen v Williams*, Finn's *The Fiduciary Principle* was deployed in argument by both sides, and was cited in the judgment of Dawson and Toohey JJ,[83] the judgment of Gaudron and McHugh JJ[84], and the judgment of Gummow J.[85]

The proscriptive no conflict obligation – potential and actual conflicts

Finn's influence may also be seen in another aspect of the no conflict obligation, concerning the progression from potential conflicts of duty and duty to actual conflicts of duty and duty, and the role of informed consent at the different points on this scale.

In passages recently cited with approval in a majority judgment in the High Court in *Farrugia v R*,[86] Finn had stated:[87]

> "To ensure a loyalty which is undivided the courts have prohibited a fiduciary from serving "two masters" at the same time in the same matter or transaction unless he has first obtained the consent of both "masters" to his so acting …
>
> And even if informed consents are obtained, they will not absolve the fiduciary from liability to one master if he cannot properly discharge his duties to him because of conflicting duties owed to the other …
>
> Even if all the beneficiaries have consented to the double employment in the same matter, the fiduciary may still find, in performing his separate employments, that an actual conflict arises between duties owed in each … The … predicament which it is the ultimate object of the rule to prevent occurring [is] a conflict arising because the proper discharge of one duty assumed necessitates breach of another."

Farrugia v R[88] concerned a barrister who represented two co-accused where one of the co-accused later suggested that the barrister had a conflict by reason of the diverging interests of his two clients. The majority, drawing on Finn's work, explained the relevant principles this way:[89]

> "The proscriptive obligation is breached where a barrister acts or continues to act, without informed consent, in circumstances where there is a 'conflict or a real or substantial possibility of a conflict'.

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[82] *Friend v Brooker* (2009) 239 CLR 129 at [84]; *Gibson Motorsport Merchandise Pty Ltd v Forbes* (2006) 149 FCR 569 at [12] (Finn J).
[83] (1996) 186 CLR 71 at 93, 95.
[84] (1996) 186 CLR 71 at 113.
[85] (1996) 186 CLR 71 at 126.
[86] (2026) 100 ALJR 1060 at [43] (Gageler CJ, Gordon, Steward, Gleeson and Beech-Jones JJ). See also Jagot J at [136].
[87] PD Finn, *Fiduciary Obligations: 40th Anniversary Republication with Additional Essays* (Federation Press, 2016) at [580], [583].
[88] (2026) 100 ALJR 1060.
[89] (2026) 100 ALJR 1060 at [42]-[43] (Gageler CJ, Gordon, Steward, Gleeson and Beech-Jones JJ).

> The question of whether there is such a conflict is assessed objectively by reference to the facts and circumstances of the particular case …
>
> In some circumstances, the informed consent of the client to a conflict between a barrister's duty and interest, or between multiple duties owed by the barrister, may negate what would otherwise be a breach of the proscriptive obligation. What constitutes informed consent is a question of fact that must be assessed in all the circumstances of the particular case. Informed consent has been described as extending to disclosure of all "material circumstances" including of knowledge that there is or may be a conflict and any limitation that the competing duty imposes on the performance of the barrister's duty to the client. However, there are some conflicts that are so pronounced that counsel must cease to act irrespective of whether the client's consent has been obtained. In such cases, the proper discharge of one duty necessitates a breach of another.

In other words, not all conflicts are the same, and not all conflicts will be negated by informed consent. In particular, informed consent will not negate a conflict of duty and duty where it is "so pronounced" that "proper discharge of one duty necessitates a breach of another".

Justice Edelman, who was in dissent in the result, described the scale as one progressing from apparent conflicts, to potential conflicts, to actual conflicts,[90] holding that apparent conflicts are not proscribed, whereas there may be "(i) an obligation upon a person not to place themself in a position of potential conflict of duty and duty; and (ii) an obligation upon a person not to act in a position of actual conflict of duty and duty".[91] His Honour then quoted an observation that "[g]enerally, conflicts of [duty] are easier to tolerate when they are 'potential' rather than 'actual'".[92] These are important insights. They may assist in explaining the principles stated by the majority in the terms I have quoted above, which accord with what Sir Peter Millett had earlier described as the "actual conflict rule":[93]

> "… the fiduciary must take care not to find himself in a position where there is an *actual* conflict of duty so that he cannot fulfil his obligations to one principal without failing in his obligations to the other … If he does, he may have no alternative but to cease to act for at least one and preferably both. The fact that he cannot fulfil his obligations to one principal without being in breach of his obligations to the other will not absolve him from liability."

Have any prescriptive fiduciary duties survived?

Despite the unqualified language used in the authorities referred to earlier, there is intermediate appellate court authority which either holds, or leaves open the possibility, that at least some prescriptive fiduciary duties are owed by those exercising fiduciary powers.

There is, of course, the majority holding in the Western Australian Court of Appeal in *Westpac Banking Corporation v Bell Group Ltd (in liq) (No 3)*.[94] The essential point was made by Drummond AJA:[95]

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[90] (2026) 100 ALJR 1060 at [71]
[91] (2026) 100 ALJR 1060 at [81].
[92] (2026) 100 ALJR 1060 at [81].
[93] *Bristol and West Building Society Limited v Mothew* [1998] Ch 1 at 19 (italics in original).
[94] (2012) 44 WAR 1.
[95] (2012) 44 WAR 1 at [1978]. See also Lee AJA at [921]-[922], [931]-[932].

> "… until the High Court declares the law to be otherwise, long established authority requires the duties of company directors to act bona fide in the interests of the company and to exercise their powers for proper purposes to be accepted as fiduciary ones even though they may require the directors to take positive action."

More recently, a Full Court of the Federal Court stated:[96]

> "It has long been accepted that company directors owe a fiduciary duty to exercise their powers bona fide in the interests of the company as a whole …
>
> Although the High Court has stated that fiduciary duties are *proscriptive* rather than *prescriptive* in nature …, it has not suggested that the earlier authorities of the High Court referred to above are no longer the law and we do not take the High Court to be suggesting this …"

More recently again, the New South Wales Court of Appeal has identified the possibility of the continuing application of earlier High Court authorities which have accepted that fiduciaries have some positive obligations, including those stating that "company directors owe a fiduciary duty to exercise their powers bona fide in the interests of the company as a whole".[97]

This point has not yet been addressed by the High Court. As Justice Owens has recounted, it got tantalizingly close in the *Bell* litigation – the matter settled after special leave had been granted, and after the exchange of written submissions on the appeal,[98] but before the hearing of the appeal.[99]

The topic is to be the subject of a separate seminar as part of this seminar series. I will say no more about it, save to make two points.

First, we are here concerned with what the Full Court in *Grimaldi v Chameleon Mining NL (No 2)* described as a second and discrete part of fiduciary law, which serves a different function and is concerned with "judicial review of the exercise of powers, duties and discretions given to a fiduciary to be exercised in the interests of another ("the beneficiary") where the beneficiary does not have the right to dictate or to veto how the power, discretion, etc is exercised by the fiduciary. Here the law channels and directs how 'fiduciary discretions' are exercised."[100] It may be that, as Professor Dame Sarah Worthington has suggested, this will be seen as but an instance of a more general notion of judicial review for fraud on a power rather than as a true sub-set of fiduciary law.[101]

Secondly, in *Naaman v Jaken Properties Australia Pty Ltd*, the majority noted that it was unnecessary for them "to examine the usefulness of attaching the label of 'fiduciary obligation'

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[96] *BCI Finances Pty Ltd (in liq) v Binetter* (2018) 362 ALR 597 at [596]-[598] (Allsop CJ, Moshinsky and Colvin JJ).
[97] *Xiao v BCEG International (Australia) Pty Ltd* (2023) 111 NSWLR 132 at [112]-[114] (Gleeson JA, with whom Mitchelmore JA and Griffiths AJA agreed). Gleeson JA also raised the possibility of continuing recognition of prescriptive fiduciary duties being owed by company promoters.
[98] The illuminating written submissions, which remain available on the High Court website, are a valuable resource.
[99] NJ Owens, "Equitable Obligations and the Point at Which They Become Fiduciary" (Paper delivered at the 12th Appellate Judges' Conference, Perth, 27 March 2026) at pages 9-15.
[100] (2012) 200 FCR 296 at [174].
[101] S Worthington, "Fiduciaries: Following Finn", in Bonyhady (ed), *Finn's Law: An Australian Justice* (Federation Press, 2016), Ch 2, at 54-55.

to obligations other than 'proscriptive obligations' concerning conflicts of interest and unauthorised profits."[102] For plaintiffs, such as those in the *Bell* litigation, attaching the label "fiduciary obligation" would certainly be useful *if and to the extent that* it provides a pathway to equitable relief against third parties that might not otherwise be available pursuant to *Barnes v Addy*[103], or related equitable rules.[104]

Another proposition which may perhaps remain arguable is that the duty of a fiduciary to exercise due care and skill can properly be regarded as a fiduciary duty. Again, I will not address this issue in any detail here, save to make three brief points.

First, there is a substantial body of authority against the proposition.[105] The substantive point is that: (i) not all duties of fiduciaries are fiduciary duties; and (ii) the duty to exercise care and skill has its source in a particular characteristic of, for example, the trust or contract of retainer, rather than in a particular characteristic of fiduciary obligations.[106]

Secondly, despite this, the proposition still has impressive, and tightly reasoned, support in some quarters.[107]

Thirdly, if the High Court ultimately resolves the fiduciary powers issue discussed above in a way that breaks down the strict proscriptive/prescriptive dichotomy, then the argument in favour of the proposition may enjoy enhanced prospects. If the true touchstone is a broader conception of loyalty, then the question posed by Professor Joshua Getzler may be brought into sharp focus:[108]

> "How can a fiduciary trustee be said to be loyal to his beneficiary if he takes no care for the running of the trust?"

Assumed or imposed?

Let me return to Justice Edelman's argument as to the significance of the fiduciary undertaking of loyalty, going as it does to the heart of the question as to the nature, scope and content of fiduciary obligations.

The argument takes as its starting point the *need* for a fiduciary undertaking, it being a necessary condition of a fiduciary duty. As I have said, this proposition is difficult to deny.

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[102] (2025) 281 CLR 635 at [31] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ).
[103] (1874) LR 9 Ch App 244.
[104] E.g., procuring or inducing a breach of fiduciary duty, as to which see *Pittmore Pty Ltd v Chan* (2020) 104 NSWLR 62.
[105] E.g., *Permanent Building Society Pty Ltd v Wheeler* (1994) 11 WAR 187 at 235-237, 239; *Bristol and West Building Society v Mothew* [1998] Ch 1 at 16-17, amongst many others.
[106] *Breen v Williams* (1996) 186 CLR 71 at 137 (Gummow J).
[107] E.g., J Getzler, "Duty of Care" in Birks and Pretto (eds), *Breach of Trust* (Hart Publishing, 2002); J Getzler, "Am I my Beneficiary's Keeper? Fusion and Loss-Based Fiduciary Remedies" in Degeling and Edelman (eds), *Equity in Commercial Law* (Lawbook Co, 2005), Ch 10, at 263-265; JD Heydon, "Are the Duties of Company Directors to Exercise Care and Skill Fiduciary?" in Degeling and Edelman (eds), *Equity in Commercial Law* (Lawbook Co, 2005), Ch 9; JD Heydon, "Modern Fiduciary Liability: The Sick Man of Equity?" (2014) 20 *Trusts & Trustees* 1006.
[108] J Geztler, "Equitable Compensation and the Regulation of Fiduciary Relationships" in Birks and Rose (eds) *Restitution and Equity: Vol 1, Resulting Trusts and Equitable Compensation* (Mansfield Press, 2000) at 255.

The next step is where the controversy arises. Justice Edelman denies that the undertaking is the foundation upon which equity *imposes* fiduciary obligations, whether in pursuit of a policy of nullifying temptation[109] or otherwise. Instead, his Honour's approach is that equity *recognises* only those obligations that have been assumed by the fiduciary, and that this is to be determined as a matter of construction of the express or implied terms of the undertaking.

At the risk of oversimplification, the argument proceeds as follows: (i) fiduciary duties arise in the same manner as any consensual duty[110]; (ii) it is therefore necessary to show that the duties commonly recognised as fiduciary are expressed or implied into voluntary undertakings by the standard principles of construction and implication[111]; (iii) the fiduciary analysis is the same as that which leads to the implication of a term between employer and employee that the employee will serve the employer loyally and not act contrary to the employer's interests, which necessarily entails "a duty upon the fiduciary not to put himself in a position where his self-interest might conflict with his duty to his principal, and an obligation not to put himself in a position in which his duty to his principal might conflict with duties he owes to other parties"[112]; (iv) the no-profit rule will be expressed or implied in the voluntary undertaking in the same way, recognising that the scope of the no-profit duty will depend on the circumstances of the undertaking in every case[113]; and (v) this process focuses on determining the objectively manifested intention of the party or parties, which may include having regard to evidence of surrounding circumstances, of previous dealings, or of existing custom.[114]

As I apprehend it, this approach accepts the constraint that fiduciary obligations must be proscriptive, but otherwise accommodates the moulding of the obligations depending upon the circumstances of the case. They are not necessarily confined to the no-conflict and no-profit obligations. The express or implied terms of the undertaking may include differently formulated proscriptive obligations.

Justice Edelman's approach has not – at least as yet – been accepted by a majority in the High Court. We can, however, see aspects of his Honour's approach reflected in two recent minority judgments.

The most recent is his Honour's judgment in *Farrugia v R*.[115] Under the heading, "The sources and types of conflict obligations owed to a client", his Honour distinguished between two types of obligations: the first being "obligations that are assumed by a principal, and recognised in equity";[116] the second being "those imposed by law, independent of an assumption of responsibility undertaken by the principal".[117] Only the former were within the province of the general law in the sense of equity or fiduciary law, and would be determined by the scope of

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[109] JJ Edelman, "The Importance of the Fiduciary Undertaking" (2013) 7 J Eq 128 at 135.
[110] JJ Edelman, "When do Fiduciary Duties Arise?" (2010) 126 LQR 302 at 316.
[111] JJ Edelman, "When do Fiduciary Duties Arise?" (2010) 126 LQR 302 at 316.
[112] JJ Edelman, "When do Fiduciary Duties Arise?" (2010) 126 LQR 302 at 318-319.
[113] JJ Edelman, "When do Fiduciary Duties Arise?" (2010) 126 LQR 302 at 319-320.
[114] JJ Edelman, "When do Fiduciary Duties Arise?" (2010) 126 LQR 302 at 313-316.
[115] (2026) 100 ALJR 1060.
[116] (2026) 100 ALJR 1060 at [83].
[117] (2026) 100 ALJR 1060 at [84].

the undertaking.[118] The latter were not within the province of equity or fiduciary law, and would be determined by the terms of the independent source, e.g., the terms of the applicable legislation.[119]

The approach taken in the earlier minority judgment in *Naaman v Jaken Properties Australia Pty Ltd*[120] is also interesting. The case concerned whether a successor trustee owes a fiduciary obligation to a former trustee in respect of a former trustee's entitlement to indemnification out of, or commensurate beneficial interest in, trust assets. The majority held that the successor trustee was not in a fiduciary relationship with the former trustee and therefore did not owe the former trustee any fiduciary obligation. The minority, comprising Justices Gordon, Edelman and Steward, held to the contrary.

The minority reasoning relevantly proceeded as follows: (i) the former trustee had an existing right of exoneration out of the trust property which gave rise to equitable proprietary rights in relation to the trust estate[121]; (ii) the successor trustee was bound to prioritise that right over the claims of the beneficiaries of the trust[122]; (iii) the successor trustee assumed a responsibility to the former trustee by accepting appointment to replace the former trustee as trustee of the trust and receiving trust property, in circumstances in which it was objectively apparent that the former trustee had a right of exoneration out of trust assets for expenses and liabilities properly incurred[123]; (iv) in those circumstances, the former trustee was entitled to expect that the successor trustee would act in its interests as well as those of the beneficiaries of the trust, to the exclusion of its own as the successor trustee or a third party's interest[124]; (v) the successor trustee was therefore in a fiduciary relationship with the former trustee[125]; (vi) the successor trustee owed a proscriptive and limited obligation to the former trustee, best described as an obligation not to deal with the trust estate so as intentionally to destroy, diminish or jeopardise the former trustee's entitlement to be indemnified from the trust estate[126]; and (vi) it was open to describe the duty in this way because the relevant judgments in *Breen v Williams* "did not suggest, and should not be taken as suggesting, that the proscriptive fiduciary obligations of a fiduciary were limited to the proscriptive duties not to obtain an unauthorised benefit from the relationship and not to put themselves in a position of actual or potential conflict"[127].

If this reasoning is integrated fully into the framework of Justice Edelman's extra-judicial argument, the successor trustee gave a voluntary undertaking (assumed a responsibility) by the act of accepting appointment in the circumstances, and the limited proscriptive fiduciary obligation was a term of that voluntary undertaking implied in the circumstances.

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[118] (2026) 100 ALJR 1082 at [87]-[90].
[119] (2026) 100 ALJR 1082 at [91]-[93].
[120] (2025) 281 CLR 635.
[121] (2025) 281 CLR 635 at [92].
[122] (2025) 281 CLR 635 at [92].
[123] (2025) 281 CLR 635 at [96].
[124] (2025) 281 CLR 635 at [96]
[125] (2025) 281 CLR 635 at [94].
[126] (2025) 281 CLR 635 at [98]-[99].
[127] (2025) 281 CLR 635 at [100].

Justice Edelman's argument has been the subject of a lively debate with other brilliant thinkers in the field. Professor Matthew Conaglen does not agree.[128] Nor does Professor Lionel Smith.[129]

Conaglen's view is that fiduciary duties are best conceived of, not as duties expressed or implied into voluntary undertakings, but rather as duties which arise in order to protect against the risk of breach of other, non-fiduciary duties.[130] In his view, the reason why fiduciary doctrine prohibits the taking of unauthorised profits and acting with conflicts between duty and interest (and also between duties owed to multiple principals) is that such conflicts and profits generate temptations for the fiduciary which are inconsistent with the proper performance of the non-fiduciary duties that the fiduciary has undertaken to perform. Fiduciary doctrine thus enhances the likelihood of proper performance of the non-fiduciary duties by seeking to remove temptations which are inconsistent with that performance.[131]

Smith's view is different again. He considers that fiduciary duties arise from a need to ensure subjective loyalty in the sense that the fiduciary must act and be seen to act with a proper motive.[132] He gives several reasons for his view that Justice Edelman's account is not persuasive, including that it does not account for the distinct nature of the fiduciary relationship.

Justice Edelman has engaged directly, and in detail, with these alternative theses.[133] It is fair to say his Honour has not raised the white flag.

All of this is compulsory and compelling reading for anyone truly interested in the subject. There is a sophisticated debate playing out amongst brilliant thinkers, and aspects of it are starting to be reflected in the courts. It would be presumptuous of me to attempt to adjudicate in this clash of the titans. The outcome cannot be predicted with any certainty. The orthodoxy of today[134] may not be the orthodoxy of tomorrow. Fiduciary law has evolved, and that evolution will likely continue. This may be an indicator of unsettled principle. However, to the extent that the evolution has brought the fiduciary undertaking to the fore, it may be thought to have enhanced commercial certainty rather than to have detracted from it. I will come back to this.

Having eschewed the crystal ball, let me say something about the orthodoxy of today.

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[128] M Conaglen "Fiduciary Duties and Voluntary Undertakings" (2013) 7 J Eq 105; and see also M Conaglen, *Fiduciary Loyalty* (Hart Publishing, 2010).
[129] L Smith, "Prescriptive Fiduciary Duties" (2018) UQLJ 261, esp at 270-272; and see also L Smith, "The Motive, Not the Deed" in J Getzler (ed), *Rationalising Property, Equity and Trusts: Essays in Honour of Edward Burn* (OUP, 2003), Ch 4.
[130] M Conaglen "Fiduciary Duties and Voluntary Undertakings" (2013) 7 J Eq 105 at 105.
[131] M Conaglen "Fiduciary Duties and Voluntary Undertakings" (2013) 7 J Eq 105 at 108; M Conaglen, *Fiduciary Loyalty* (Hart Publishing, 2010), Ch 4.
[132] L Smith, "The Motive, Not the Deed" in J Getzler (ed), *Rationalising Property, Equity and Trusts: Essays in Honour of Edward Burn* (OUP, 2003), Ch 4.
[133] JJ Edelman, "The Importance of the Fiduciary Undertaking" (2013) 7 J Eq 128 at 135.
[134] SJ Gageler, "Expansion of the Fiduciary Paradigm into Commercial Relationships: The Australian Experience", in Devonshire and Havelock (eds), *The Impact of Equity and Restitution in Commerce* (Hart Publishing, 2018), Ch 8, at 172-173.

First, the present state of authority is to the effect that equity does *impose* fiduciary obligations in pursuit of a policy of nullifying temptation.

I have already referred to the key passage in the judgment of Gaudron and McHugh JJ in *Breen v Williams*[135], which was later approved by McHugh, Gummow, Hayne and Callinan JJ in *Pilmer v Duke Group Ltd (in liq)*.[136] That passage included the following unambiguous statement:

> "… equity imposes on the fiduciary proscriptive obligations – not to obtain any unauthorised benefit from the relationship and not to be in a position of conflict."

Further, there are statements in important judgments which explain equity's imposition of such obligations on the footing that it guards against the danger of the fiduciary being swayed by self-interest.

In *Breen v Williams*[137], Gaudron and McHugh JJ quoted with approval the following statement of Lord Herschell in *Bray v Ford*[138]:

> "It is an inflexible rule of a Court of Equity that a person in a fiduciary position, such as the respondent's, 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 is, as has been said, founded upon principles of morality. I regard it rather as based on the consideration that, human nature being what it is, there is danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect. It has, therefore, been deemed expedient to lay down this positive rule."

Gaudron and McHugh JJ added[139]:

> "The law of fiduciary duty rests not so much on morality or conscience as on the acceptance of the implications of the biblical injunction that "[n]o man can serve two masters". Duty and self- interest, like God and Mammon, make inconsistent calls on the faithful. Equity solves the problem in a practical way by insisting that fiduciaries give undivided loyalty to the persons whom they serve."

In his important judgment in *Chan v Zacharia*[140], Deane J explained that the objective of the no conflict rule is "to preclude the fiduciary from being swayed by considerations of personal interest".[141] In *Warman International Ltd v Dwyer*, a unanimous High Court quoted this passage in support of the proposition that[142]:

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[135] (1996) 186 CLR 71 at 113.
[136] (2001) 207 CLR 165 at [74].
[137] (1996) 186 CLR 71 at 108.
[138] *Bray v Ford* [1896] AC 44 at 51-52.
[139] (1996) 186 CLR 71 at 108. See also *Beach Petroleum NL v Abbot Tout Russell Kennedy* (1999) 48 NSWLR 1 at [196]-[200].
[140] (1984) 154 CLR 178 at 198-199.
[141] See also *Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society Ltd* (2018) 265 CLR 1 at [68] (Gageler J); *Howard v Federal Commissioner of Taxation* (2014) 253 CLR 83 at [108] (Gageler J).
[142] (1995) 182 CLR 544 at 557-558 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ).

> "The objectives which the rule seeks to achieve are to preclude the fiduciary from being swayed by considerations of personal interest and from accordingly misusing the fiduciary position for personal advantage."

In *Harris v Digital Pulse Pty Ltd*, Heydon JA put it this way[143]:

> "… the substantive rules of equity in relation to fiduciaries protect the principals of fiduciaries by nullifying temptation … [T]hey deter fiduciaries from drifting into a position of conflict or worse."

Secondly, these judicial statements are in accord with the perspectives offered by both Finn and more recently Conaglen.[144] This does not guarantee their continued survival in the High Court, but it certainly means that those seeking to maintain the current orthodoxy will have scholarly ammunition to deploy.

Thirdly, I expect there will be debate about the proposition advanced by the minority in *Naaman v Jaken Properties Australia Pty Ltd*[145] that the relevant judgments in *Breen v Williams* "did not suggest, and should not be taken as suggesting, that the proscriptive fiduciary obligations of a fiduciary were limited to the proscriptive duties not to obtain an unauthorised benefit from the relationship and not to put themselves in a position of actual or potential conflict"[146]. Some judges seem to have read the judgments as determining that "the no-conflict and no-profit rules encompass the whole content of fiduciary obligations"[147].

Fourthly, if the the no-conflict and no-profit rules do "encompass the whole content of fiduciary obligations"[148], then there may be a difficulty with the notion of a fiduciary obligation described in different, more detailed terms derived from separate equitable doctrine. Consider the limited proscriptive obligation identified by the minority in *Naaman v Jaken Properties Australia Pty Ltd*[149] – an obligation not to deal with the trust estate so as intentionally to destroy, diminish or jeopardise the former trustee's entitlement to be indemnified from the trust estate.[150] The difficulty would have to be addressed in the alternative way suggested by their Honours:[151]

> "… as a particular expression of a fiduciary's general duty not to put themselves in a position of actual or potential conflict between their own interests and their undertaken duty to the former trustee, where their personal interest arises from whatever might motivate intentionally defeating the interest of the former trustee in the trust property."

My final observation on this topic concerns a possible consequence of acceptance of Justice Edelman's approach. Would that give an opening to those wishing to break down the strict

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[143] (2003) 56 NSWLR 298 at [406].
[144] As Chief Justice Gageler noted by reference to Lord Herschell's statement in *Bray v Ford*: see SJ Gageler, "Expansion of the Fiduciary Paradigm into Commercial Relationships: The Australian Experience", in Devonshire and Havelock (eds), *The Impact of Equity and Restitution in Commerce* (Hart Publishing, 2018), Ch 8, at 173.
[145] (2025) 281 CLR 635.
[146] (2025) 281 CLR 635 at [100].
[147] *P&V Industries Pty Ltd v Porto* (2006) 14 VR 1 at [23].
[148] *P&V Industries Pty Ltd v Porto* (2006) 14 VR 1 at [23].
[149] (2025) 281 CLR 635.
[150] (2025) 281 CLR 635 at [98]-[99].
[151] (2025) 281 CLR 635 at [100].

proscriptive/prescriptive dichotomy? If the content of fiduciary obligations is simply the objectively manifested intention of the fiduciary, why would it not be open to a fiduciary to undertake to serve the principal loyally by performing a positive act, and for this to count as a voluntarily assumed fiduciary obligation?

The influence of contract

In another famous passage from *Hospital Products*, Mason J stated:[152]

> "That contractual and fiduciary relationships may co-exist between the same parties has never been doubted. Indeed, the existence of a basic contractual relationship has in many situations provided a foundation for the erection of a fiduciary relationship. In these situations it is the contractual foundation which is all important because it is the contract that regulates the basic rights and liabilities of the parties. The fiduciary relationship, if it is to exist at all, must accommodate itself to the terms of the contract so that it is consistent with, and conforms to, them. The fiduciary relationship cannot be superimposed upon the contract in such a way as to alter the operation which the contract was intended to have according to its true construction."

If there is a contract between the parties regulating their relationship, the terms of that contract will obviously require consideration when addressing questions as to whether the relationship is fiduciary, as to the scope of any fiduciary obligations, and as to whether the fiduciary has been authorised to engage in, or exempted from liability for, conduct that would otherwise amount to a breach of duty. But will the contract be determinative of such matters? The answer would appear to be ordinarily yes, but not always.[153]

A commonly cited instance of the influence of contract is *Australian Securities and Investments Commission v Citigroup Global Markets Australia Pty Ltd (No 4)*.[154] Citigroup was retained by a company (Toll) pursuing a hostile takeover. The circumstances of the relationship between Citigroup and Toll had indicia which would have been indicators of a fiduciary relationship, save that the retainer letter provided that Citigroup was "engaged as an independent contractor and not in any other capacity including as a fiduciary". Despite the functions Citigroup had otherwise undertaken to perform, Jacobson J held that the express exclusion in the letter was sufficient to prevent a fiduciary relationship from arising.

The decision was criticised by Finn on grounds including that the question was one of characterisation of the relationship, not mere labels, and that a proper analysis of that question should have led to the conclusion that Citigroup was a fiduciary.[155] The premise of this criticism (*viz.* that the question is one of characterisation, not mere labels) has support.[156] But

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[152] (1984) 156 CLR 41 at 97, in a passage cited with approval many times, including by a unanimous High Court in *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1 at [91].
[153] A valuable examination of aspects of this topic can be found in MJ Leeming, "The scope of fiduciary obligations: How the contract informs, but does not determine, the scope of fiduciary obligations" (2009) 3 J Eq 181.
[154] (2007) 160 FCR 35.
[155] PD Finn, *Fiduciary Reflections* (2014) 88 ALJ 127; republished as Ch 26 in PD Finn, *Fiduciary Obligations: 40th Anniversary Republication with Additional Essays* (Federation Press, 2016) at [806]-[819].
[156] SJ Gageler, "Expansion of the Fiduciary Paradigm into Commercial Relationships: The Australian Experience", in Devonshire and Havelock (eds), *The Impact of Equity and Restitution in Commerce* (Hart

even accepting this, the case illustrates that it is within the power of commercial parties to frame their contract in such a way as to negative the existence of a fiduciary relationship. It may take more than the application of a negative label. It may require specification of a liberty to pursue one's own interests either generally or in particular respects. But it may be done.

Another way in which commercial parties may control their fate is by specifying in their contract the content of their obligations in such detail as to leave no room for fiduciary obligations. *Noranda Australia Limited v Lachlan Resources NL*[157] is a striking illustration. The parties had stated in a general provision of a joint venture agreement that the parties "shall at all times act in relation to the joint venture in a bona fide manner to the intent that the relationship of the parties shall be fiduciary in nature". A question arose as to whether the parties owed fiduciary obligations in the context of provisions governing the assignment of interests in the joint venture. Those provisions were detailed. Bryson J held that the scope of the parties' fiduciary obligations did not extend to this aspect of the agreement:[158]

> "… it would not be right to impose on the parties fiduciary obligations wider or different to those which in careful terms they imposed on themselves."

Conclusion

Some of the major fiduciary cases that have influenced our law have left the parties uncertain as to the principles that would govern their fate, and indeed as to their ultimate fate, for many years. In *Hospital Products*, the litigation took place over about four years in the courts. The trial lasted 81 days, the appeal to the Court of Appeal was heard over 18 days and the appeal to the High Court was heard over 7 days[159]. The *Bell* litigation was indescribably long. And *Grimaldi* has been "a long saga of litigation spanning almost 20 years"[160]. I mentioned that there had been a recent sequel. It involved the Commonwealth of Australia being held liable for knowing receipt as a result of it receiving part of the proceeds of Mr Grimaldi's breaches of fiduciary duty in satisfaction of a tax liability[161]. Fiduciary cases often impact not only the principal and alleged fiduciary, but also third parties alleged to have accessorial liability. And they can have long tails.

But are today's fiduciary principles an inevitable cause of protracted delay? Are they making incursions into areas where commercial parties might reasonably expect to have freedom to pursue self-interest? On these questions, commercial parties have cause for optimism.

One reason for this is the respect we see for party autonomy in modern Australian fiduciary law, including by its emphasis on the role of the fiduciary undertaking and by the significant scope accorded to parties to control their fate by the terms of their contract. The considerations

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Publishing, 2018), Ch 8, at 180; JD Heydon, MJ Leeming, PG Turner, *Meagher, Gummow & Lehane's Equity: Doctrines & Remedies* (LexisNexis Butterworths, 2015) at 146.

[157] (1988) 14 NSWLR 1.

[158] (1988) 14 NSWLR 1 at 17.

[159] As noted in RP Austin, "Commerce and Equity – Fiduciary Duty and Constructive Trust" (1986) 6 OJLS 444 at 444.

[160] *Commonwealth of Australia v Kupang Resources Pty Ltd* [2026] NSWCA 161 at [1].

[161] *Commonwealth of Australia v Kupang Resources Pty Ltd* [2026] NSWCA 161.

taken into account for the purposes of resolving fiduciary questions increasingly resemble the considerations taken into account for the purposes of resolving questions of contract formation and construction. Commercial parties are familiar with the process. Equity is not to blame. There is force in Professor Matthew Harding's suggestion that "the cause of uncertainty in such circumstances is not the operation of equity; it is rather, the objective nature of contractual interpretation"[162].

However, this is not to suggest that equity should give up the field entirely. Almost three decades ago, Sir Peter Millett said that "there has never been a greater need to impose on those who engage in commerce the high standards of conduct which equity demands".[163] This echoes what was said by Harlan F Stone in the wake of the Great Depression:[164]

> "… when the history of the financial era which has just drawn to a close comes to be written, most of its mistakes and major faults will be ascribed to the failure to observe the fiduciary principle, the precept as old as holy writ, that 'a man cannot serve two masters'. … No thinking man can believe that an economy built upon a business foundation can permanently endure without some loyalty to that principle."

More recently, in the wake of the Global Financial Crisis, Professor Getzler mounted a powerful argument that fiduciary law had declined in a manner that allowed classical fiduciary duties to be attenuated by implicit or explicit agreements which gave intermediaries too much unmonitored power over beneficiaries, allowing incompetent or predatory performance; and that restoring fiduciary law to full efficacy would go some way to preventing the kinds of agent irresponsibility that fuelled the crisis.[165]

I doubt that this is the last time we will hear such calls. However, I do not expect that they will lead to any radical redrawing of equity's boundary in the commercial world in the near term.

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[162] M Harding, "Equity and the Value of Certainty in Commercial Life", Devonshire and Havelock (eds), *The Impact of Equity and Restitution in Commerce* (Hart Publishing, 2019), Ch 7.
[163] PJ Millett, "Equity's Place in the Law of Commerce" (1998) 114 LQR 214 at 216.
[164] HF Stone, "The Public Influence of the Bar" (1934) 48 Harv L Rev 1 at 8-9.
[165] J Geztler, "Financial Crisis and the Decline of Fiduciary Law" in N Morris and D Vines (eds), *Capital Failure: Rebuilding Trust in Financial Services* (OUP, 2014), Ch 9.