THE BASIS AND BOUNDARIES OF EMPLOYEE FIDUCIARY DUTIES IN SOUTH AFRICAN COMMON LAW

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ABSTRACT

The nature and potential application of the common-law fiduciary doctrine, and of the distinctive nature of the duties to which it gives rise, is seldom appreciated or analysed in South African law. This is particularly evident in the law of employment, where the courts' references to the 'fiduciary' nature of employment and the 'fiduciary duties' of employees have often been ambiguous, confused and unprincipled. In addition, there is almost no reference to employee fiduciary duties in the general literature on South African labour and employment law and, even where these duties are (briefly) mentioned, they are not acknowledged as being in any way separate or distinct from the employee's other duties to the employer. This contrasts noticeably with other Commonwealth jurisdictions, where fiduciary duties form the basis of increasing numbers of cases, and are well-established and extensively debated aspects of the general jurisprudence, both generally and in relation to employees.

This thesis critically explores and advances certain propositions about the general theoretical nature of the South African common-law fiduciary concept and the principles that govern the incidence, nature, purpose, scope and operation of fiduciary duties, with comparative reference to the positions in English and Canadian law.

The first six chapters provide a critical analysis of those general propositions and principles. They also locate them and the debates that surround them within their broader legal and theoretical context. Chapter 7 considers their application to relationships of employment in order to determine the basis and boundaries of the fiduciary duties of employees (as 'ordinary' employee and in certain other established 'fiduciary' capacities commonly associated with employment) in terms of South African common law. In particular, the chapter considers when those duties will arise, their scope of application, what they require of the employee, and how they differ from other employee duties.

Chapter 8 considers the broader issues of whether all relationships of employment are inherently and necessarily ‘fiduciary’ ones and whether they ought generally to be classified as a class of ‘fiduciary relationship’.

The final chapter critiques the current position in South African law on these matters. It also suggests a set of fiduciary principles and propositions for the future application and development of fiduciary duties, both generally and in relation to employment, that are theoretically sound, clear, coherent and, where appropriate, consistent with contemporary jurisprudence in other comparable jurisdictions

METHODOLOGY

This is a theoretical dissertation and research was conducted using published materials. These include the following:

Primary materials

Domestic and foreign government materials: statutes; regulations; policy documents; reports of investigations; reported cases.

Secondary materials

Books, journal articles and published papers in the fields of law and Equity.

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CHAPTER 1

INTRODUCTION

1. INTRODUCTION

1.1 THE GENERAL NATURE OF 'FIDUCIARY' RELATIONSHIPS AND DUTIES

Fiduciary duties are duties that require one party to a relationship ('the fiduciary') to refrain from acting other than in the sole interests of another party to that relationship ('the beneficiary').[1] They are thus essentially duties of uncompromised or 'undivided loyalty'[2] that are designed to protect the beneficiary against self-interested and opportunistic behaviour, by prohibiting the fiduciary from acting in anyone else's interests.

In South Africa and other jurisdictions with English law roots, these duties have traditionally been associated with certain types or classes of relationships that have become established as 'fiduciary relationships'. The first kind of relationship recognised as such by the English Courts of Chancery was that between a trustee and trust beneficiaries.[3] Subsequently, other types of relationships have also been categorised as 'fiduciary' ones. These differ slightly from one jurisdiction to another, but in most include, for example, the relationship between company directors and officers and their

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[1] Or, in some exceptional circumstances, from acting other than in their joint or mutual interests.

[2] *Allied Business and Financial Consultants Ltd Sub Nom O'Donnell v Shanahan, Re* [2009] EWCA Civ 751; *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch).

[3] L Sealy 'Fiduciary Relationships' (1962) *Cambridge LJ* 69 71.

companies,[4] agents and their principals, partners,[5] and promoters and the companies they promote.[6]

The extension of the fiduciary classification to those additional classes of relationships beyond the original trustee–beneficiary 'paradigm' fiduciary relationship has generally been explained on the basis that they are sufficiently analogous to the trustee–beneficiary relationship to justify fiduciary categorisation. In most cases there has however been little, if any, explanation of the particular criteria or features of the trust relationship on which those analogies were drawn or why any particular features give rise to fiduciary duties.[7] With a few notable exceptions within the last 12 years, this traditional and largely unexplained association of fiduciary duties with a limited number of 'established' categories of 'fiduciary relationships' continues to prevail in South African law.

1.2 THE GROWTH IN FIDUCIARY-BASED CASES

The list of categories of 'fiduciary relationships' has however never been a closed one,[8] and the courts have always stressed their ability to recognise other relationships (either collectively 'by type' or individually on an *ad hoc* basis) as giving rise to fiduciary duties in appropriate circumstances. During the past few decades, there has been a dramatic increase in most other Commonwealth jurisdictions in both the number of cases and the kinds of relationships in which the courts have recognised other relationships as giving rise to fiduciary duties.

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[4] *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168.

[5] *Meinhard v Salmon* 164 NE 545 (NY 1928).

[6] *Wimbledon Lodge (Pty) Ltd v Gore NO and Others* [2003] 2 All SA 179 (SCA) [17].

[7] D Waters 'Bankers' Fiduciary Obligations and Unconscionable Transactions' 1986 *Canadian Bar Review* 37 55.

[8] *Phillips v Fieldstone Africa (Pty) Ltd* 2004 (3) SA 465 (SCA) 23.

This is particularly evident in Canada and Australia, and to a slightly lesser extent in England, where they have been hundreds of reported cases in which claimants have alleged breaches of fiduciary duty in a broadening range of individual relationships.[9] As a result of this growth in fiduciary-based litigation and the extensive academic commentary and debate it has stimulated, there has been 'an unprecedented expansion and development of fiduciary law'[10] and jurisprudence in almost all Anglo-American jurisdictions, and a significant growth in 'the extent to which fiduciary relationships are being asserted and sometimes established in commercial relations which are outside the traditional fiduciary categories'.[11] These have included, for example, particular individual relationships between financial advisors and their clients,[12] relationships arising out of franchise[13] and distribution[14] agreements, relationships between joint venturers,[15] relationships between financial consultants and their clients,[16] and relationships between employees and their employers.[17]

This growth in fiduciary-based cases can probably be explained in terms of a number of inter-related factors.

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[9] R Austin 'The Corporate Fiduciary: *Standard Investments Ltd v Canadian Bank of Commerce*' (1986–1987) *Canadian Business LJ* 96 100; Sir Peter Millett 'Equity's Place in the Law of Commerce' (1988) *LQR* 214.

[10] T Frankel 'Fiduciary Law' 1983 *California Law Review* 795–6.

[11] Austin 'The Corporate Fiduciary: *Standard Investments Ltd v Canadian Bank of Commerce*' 100.

[12] For example, in *Aequitas v AEFC* (2001) 19 ACLC 1006 1026–7.

[13] E Weinrib 'The Fiduciary Obligation' (1975) 25 *University of Toronto LJ* 1 .

[14] *Hospital Products v United States Surgical Corp* (1984) 55 ALR 417 (HCA), (1984) 156 CLR 41 (HCA).

[15] *Fraser Edmiston Pty Ltd v AGT (Qld) Pty Ltd* [1988] 2 Qd R 1 (SC); *International Corona Resources Ltd v Lac Minerals* (1987) 62 OR (2d) 1 (CA).

[16] *Volvo (Southern Africa) (Pty) Ltd v Yssel* [2009] 4 All SA 497 (SCA).

[17] *University of Nottingham v Fishel* [2000] ICR 1462; *Phillips v Fieldstone Africa (Pty) Ltd and Another* [2004] 1 All SA 150 (SCA); 2004 (3) SA 465 (SCA).

Relatively recent global recessions and financial collapses have generated large numbers of claims by investors against corporate managers, professional advisors and financial intermediaries. The kinds of relationships involved in these cases often fall within, or are conceptually sufficiently similar to, the 'established' categories of fiduciary relationships to make an allegation of breach of fiduciary duty a seemingly viable basis for a claim. There are also other reasons related to the distinctive nature of fiduciary duties and their remedies that make claims for breach of fiduciary duty particularly attractive to potential claimants.

Fiduciary duties are also structurally and functionally different from other kinds of duties. They have a protective or regulatory philosophy and methodology and a remedial regime that perform differently to those of contractual and other legal duties.[18] Those unique features relate to both the kind of behaviour they protect against and the kind of protection they provide. With regard to the behaviour regulated, fiduciary duties protect against self-interested and opportunistic behaviour within various relationships. These forms of behaviour and the risks associated with them are increasingly prevalent and do not always give rise to a claim in contract or delict (tort). And even where a contractual or delictual (tortious) claim is available, it will not provide exactly the same kind of recourse or redress as one based on breach of fiduciary duty.

Fiduciary duties are also essentially and primarily proscriptive or 'negative' in their operation.[19] They prohibit the fiduciary from acting in particular ways, but do not positively require him or her to act in

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[18] *Bristol & West Building Society v Mothew* [1998] Ch1; *Re Goldcorp Exchange* [1994] 3 WLR 199 216; *University of Nottingham v Fishel* [2000] ICR 1462 1492–3.

[19] *Pilmer v Duke Group Ltd* [2001] HCA 31 [74], [127]; *Australian Securities and Investments Commission v Citigroup Global Markets Australia Pty Ltd (No 4)* [2007] FCA 963 [290]; *Bell Group Ltd v Westpac Banking Corp (No 9)* [2008] WASC 239 [4539]–[4544]; *Breen v Williams* (1996) 186 CLR 71 95, 113, 137–8.

any particular way, or even to act at all.[20] In effect, they tell fiduciaries what they must not to do, rather than what they must,[21] thereby defining the prohibited rather than the required or permissible behaviour. Moreover, they define that prohibited behaviour broadly as including not only behaviour that actually harms the beneficiary, but also behaviour that carries a 'reasonable and sensible' risk of doing so.[22] By addressing and guarding against not only actual harm but also the risk of potential harm, they operate prophylactically and, in that respect, provide a wider form of protective coverage than other kinds of duties.

Breach of fiduciary duty also gives rise to unique and relatively 'user-friendly' remedies. Where a fiduciary commits a breach of duty involving a transaction with a third party who, at the time of the transaction, was or reasonably ought to have been aware of the fiduciary's breach of duty, the beneficiary has a right to require rescission of the transaction,[23] in which event the fiduciary must make restitution of everything received under that transaction.[24] If the third party was unaware of the fiduciary's breach, or restitution is impractical or otherwise inequitable, the beneficiary has a claim for restitutionary damages as a substitute for rescission.[25] A fiduciary who makes any unauthorised personal gain by virtue of a breach is

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[20] *Attorney-General v Blake* [1998] Ch 439 (CA) 455; *Breen v Williams* [1996] 186 CLR 71 113.

[21] *Attorney-General v Blake* [1998] Ch 439 (CA) 455.

[22] *Boardman v Phipps* [1967] 2 AC 46 124; *Industrial Development Consultants Ltd v Cooley* [1972] 2 All ER 162 172; *Jenkins v Enterprise Gold Mines NL* (1991) 6 ACSR 539 SC (NSW) 551; *Bhullar v Bhullar* [2003] 2 BCLC 241 [30]. The degree of risk was described in *Hospital Corporation Ltd v United States Surgical Corp* (1984) 156 CLR 41 103 as 'a real or substantial possibility'.

[23] *Logicrose Ltd v Southend United Football Club* [1988] 1 WLR 1256 (ChD) 1261; *Hogg v Cramphorn* [1967] 1 Ch 254 269; *Guinness plc v Saunders* [1990] 1 All ER 652 (HL) 664–5; *Rolled Steel Products (Holdings) Ltd v British Steel Corp* [1986] Ch 246 (CA).

[24] *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218 1278; *Guinness plc v Saunders* [1990] 1 All ER 652 (HL) 665, 697–8; *Cowan de Groot Properties Ltd v Eagle Trust plc* [1992] 4 All ER 700 (ChD) 762.

[25] *McKenzie v McDonald* [1927] VLR 134 (SC) 146; *Mahoney v Purnell* [1996] 3 All ER 61 (QBD); R Nolan 'A Fiduciary Duty to Disclose?' (1997) 113 *LQR* 220 222.

liable to account to the beneficiary for that gain.[26] On a strict application of fiduciary principles, honesty is no defence,[27] and there is no need to prove any form of fault, carelessness or *mens rea* such as intent or bad faith on the part of the fiduciary, or to prove that the beneficiary suffered any loss or damage.[28]

Where however the beneficiary has suffered loss that is causally linked to the breach, he or she can elect to either strip the fiduciary of his or her unauthorised gain, or claim compensatory damages[29] in the amount necessary to place the beneficiary in the position in which he or she would have been had there been no breach. This strict nature of the fiduciary's liability eases the claimant's evidentiary burden significantly and renders it easier to gather sufficient evidence for a successful claim in circumstances where (as is often the case) evidentiary material is within the fiduciary's exclusive control.[30] All that the claimant-beneficiary has to prove, on the ordinary civil

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[26] *Daraydan Holdings Ltd v Solland International Ltd* [2004] EWHC 622 (Ch) [51]; *Imperial Mercantile Credit Association v Coleman* (1873) LR 6 HL 189; *Cohen v Directors of Rand Collieries Ltd* 1906 TS 197 201–2; *Guinness plc v Saunders* [1990] 1 All ER 652 (HL) 664, 697; *Phillips v Fieldstone Africa (Pty) Ltd* [2004] 1 All SA 150 (SCA) [30]–[31]; *Regal (Hastings) Ltd v Gulliver* [1942] 1 All ER 378 386; *Woolworths v Kelly* (1991) 4 ACSR (CA(NSW)) 431 447.

[27] *Daraydan Holdings Ltd v Solland International Ltd* [2004] EWHC 622 (Ch) [51]; *Imperial Mercantile Credit Association v Coleman* (1873) LR 6 HL 189; *Cohen v Directors of Rand Collieries Ltd* 1906 TS 197 201–2; *Guinness plc v Saunders* [1990] 1 All ER 652 (HL) 664, 697.

[28] *Regal (Hastings) Ltd v Gulliver* [1942] 1 All ER 378 386, 392; *Woolworths v Kelly* (1991) 4 ACSR (CA(NSW)) 431 447; *Transvaal Cold Storage Co Ltd v Palmer* 1904 TS 4 15, 16, 21. In the South African employment context, however, the application of these strict liability principles may be qualified or tempered with reference to the equitable principles that underpin South African labour law. Breach of fiduciary duty would also generally constitute misconduct that is sufficiently serious to justify dismissal. Where the employee is not dismissed, recovery of his or her profits by way of deductions from his or her salary would be subject to the provisions of s 34 of the Basic Conditions of Employment Act 75 of 1997.

[29] *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1981 (2) SA 173 (T) 197, 200–1; *Du Plessis v Phelps* 1995 (4) SA 165 (C) 171; *Warman International v Dwyer* (1995) 182 CLR 544 559; *Take Ltd v BSM Marketing Ltd* [2007] EWHC 2031 (QB), confirmed on appeal: [2009] EWCA Civ 45; *Swindle v Harrison* [1997] 4 All ER 705 (CA) 722.

[30] M Conaglen *Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary Duties* (2010)

standard of a balance of probabilities, is that the fiduciary made an unauthorised gain or 'profit' in breach of his or her fiduciary duty.

In any event and whatever the reasons for it, the expansion in fiduciary law and theory in other Commonwealth jurisdictions appears to be ongoing and current conditions suggest that it is likely to continue to do so for the foreseeable future.[31] As discussed below, there are suggestions of the start of similar developments in South African law.

1.3 ONGOING UNCERTAINTY AND DIVISION REGARDING FIDUCIARY PRINCIPLES

Despite its long history and growing prominence, the fiduciary concept and its constituent principles are still largely unsettled and unclear. There are a number of issues regarding the nature and application of fiduciary duties that have yet to be resolved, and both courts and commentators in other Commonwealth jurisdictions are continuing to contest and adopt divergent (and often changing) positions on some fundamental matters. In particular, there is no generally accepted, clear or coherent theoretical framework of principles for identifying when fiduciary duties exist, how they function, how they differ from other duties, the remedies to which they give rise, and their location and application within the broader legal context. As a result, there is continuing confusion and uncertainty in relation to many aspects of the incidence, nature, form and operation of fiduciary accountability.[32]

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[31] As Conaglen points out in M Conaglen *Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary Duties* (2010) 3 there is, for example, a particularly strong prospect of a repeated prevalence of fiduciary-based claims against professional advisors and intermediaries.

[32] Resulting in, for example, the often-quoted description of a 'fiduciary relationship' as 'a concept in search of a principle': Sir Anthony Mason 'Themes and Prospects' (1st Equity Seminar) chapter 12 in P Finn (ed) *Essays in Equity* (1985) 242–51 246.

1.4 THE CURRENT POSITION IN SOUTH AFRICAN LAW

The fiduciary doctrine in South Africa is significantly less developed and less prominent than in other Commonwealth jurisdictions.

In South African law, fiduciary duties are still almost exclusively associated with a limited number of ‘established’ categories of relationships and it is only within the last few years, and then only in a few cases, that the courts have considered their application outside of those categories. Even in relation to the established categories, there have been far fewer reported fiduciary-related judgments than the very large numbers that have been reported in other jurisdictions such as England, Canada and Australia. There has also been very little judicial and almost no academic analysis of fiduciary duties. That which has been produced is almost entirely confined to the application of fiduciary duties within the traditional categories of fiduciary relationships and to what those duties substantively require within particular factual scenarios. There has, however, not been any acknowledgement or analysis of a more general fiduciary concept, its theoretical basis and boundaries, and governing principles. Although there are a few relatively recent cases in which the South African courts have been required to consider fiduciary principles outside of the established fiduciary relationships and in more general terms, their judgments have not (yet) produced a comprehensive and coherent framework of fiduciary principles. As a result, South African fiduciary law and theory is largely undeveloped and lacking in both an articulated framework of clear fiduciary principles and any recognition of a contemporary fiduciary concept that functions as a uniform, independent and over-arching source of distinct duties and accountability that applies beyond traditional fiduciary categorisations.

This lack of examination and appreciation of fiduciary principles has resulted in general confusion and a lack of awareness of the

nature and application of fiduciary duties. This is clearly evident in South African labour and employment law. Although the South African courts have tended to describe the employment relationship as a 'fiduciary' one and referred to an employee's 'fiduciary duties', their analysis and application of those duties has, in most cases, been ambiguous, unclear or unprincipled.[33] There is also very little reference to fiduciary duties in the general literature on South African labour and employment law and, even where they are mentioned, they are often conflated or otherwise confused with the employee's other duties.

Although South African fiduciary jurisprudence has not grown nearly as much as this jurisprudence has in other Commonwealth jurisdictions, there are indications that things are beginning to change. Since 2000 there have been five reported cases (including two decisions by the South African Supreme Court of Appeal) that have raised issues of whether particular relationships outside the existing 'established' fiduciary categories gave rise to fiduciary duties and the principles to be applied in making that determination.[34] While this may not seem like many cases, they constitute a noteworthy development, given the absence of any other previously reported cases on these issues.

However, the attention being given to fiduciary accountability in other jurisdictions, the general economic climate, and increasing globalisation are all likely to result in increasing reference to it in many jurisdictions, including South Africa. Given the extent of employee bribery, corruption and other forms of self-interested and opportunistic misconduct by employees, such growth is particularly likely in South African labour and employment law.

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[33] These cases are discussed in chapter 6 of this thesis.

[34] These are *Phillips v Fieldstone Africa (Pty) Ltd* 2004 (3) SA 465 (SCA); *Sibex Construction (SA) (Pty) Ltd v Injectaseal CC* [1988] 4 All SA 190 (T); *Kempton Park/Tembisa Metropolitan Substructure v Kelder* 2000 (2) SA 980 (SCA); *Silent Pond Investments CC v Woolworths (Pty) Ltd* [2007] JOL 2008 (D); *Volvo (Southern Africa) (Pty) Ltd v Yssel* [2009] 4 All SA 497 (SCA).

This, together with the continuing uncertainty and debate on fundamental fiduciary issues, calls for the determination of a clear set of theoretically sound, rational and consistent fiduciary principles. This is of more than doctrinal importance. Within the employment context, there are circumstances in which fiduciary duties will apply to employees 'automatically' by operation of law. Alternatively, they may be contractually agreed upon, varied or excluded by the parties. And, where the duties apply, they create exacting obligations that, if breached, result in strict liability. These features have substantive implications for the relative positions of the employer and employee within the employment relationship, and tactical significance for employers wishing to take action against employees who have acted improperly. The principles governing those duties therefore need to be as certain and predictable as possible so that those to whom they apply, and those in whose favour they operate, can be aware of their legal positions and conduct themselves accordingly. And, with increasingly inter-connected global commercial activity (from which fiduciary duties are likely to arise), it is desirable that, where appropriate, those principles be consistent with those in comparable and inter-connected jurisdictions.

2. THESIS AIMS, SUBJECT MATTER AND ANALYSIS

2.1 THE AIMS OF THE THESIS

The primary aim of this thesis is to respond to the need for clarity and certainty in South African law on the common-law principles that govern fiduciary duties both generally and more specifically in relation to employees. It will do so by identifying and formulating a set of general principles and propositions relating to the incidence, nature, purpose and operation of fiduciary duties, by way of critical and comparative analysis of the existing position in South Africa and leading case law and commentary in English and Canadian law. It will also argue in this regard that these principles and propositions are 'generic' in the sense that they apply equally to all relationships

(including employment), regardless of whether they fall within or outside of any of the established classes of fiduciary relationships.

English law has been selected for comparative reference because of its strong influence on the South African law on fiduciary duties. There are a number of reasons for selecting Canadian law for further comparative purposes. One is that the proliferation of reported Canadian cases on fiduciary accountability (both within and outside of the traditional, 'established' categories of fiduciary relationships) makes it a particularly rich source from which to draw. Another reason is that although Canadian law derived its fiduciary doctrine from English law, the shifting positions that the Canadian courts have taken on various fiduciary principles differ from those of the English courts. These contrasts reflect different theoretical positions and are particularly useful for analytical purposes. In addition, Canadian sources have persuasive authority before the South African courts and have been referred to by them in a number of leading fiduciary cases, including the South African Supreme Court of Appeal's recent judgments in *Fieldstone*[35] and *Volvo (Southern Africa) (Pty) Ltd v Yssel*[36] on the application of fiduciary duties outside the 'established' fiduciary categories.

The thesis will conclude by suggesting certain principles for the proper application and future development of South African law relating to common-law employee fiduciary duties that are theoretically sound, coherent, clear and appropriately consistent with contemporary English and Canadian jurisprudence.

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[35] *Phillips v Fieldstone Africa (Pty) Ltd* 2004 (3) SA 465 (SCA).

[36] *Volvo (Southern Africa) (Pty) Ltd* [2009] 4 All SA 497 (SCA), where the court referred to and applied the leading Canadian case of *Hodgkinson v Simms* 1995 117 DLR (3d) 371.

2.2 THE SUBJECT MATTER AND SCOPE OF THE ANALYSIS

One of the central propositions advanced by this thesis is that the contemporary common-law fiduciary concept comprises a number of general principles that govern the incidence, purpose, nature, scope and operation of fiduciary duties in all relationships and circumstances. In order to ascertain the basis and boundaries of employee fiduciary duties, it is therefore necessary to first identify those general fiduciary principles by resolving a number of general issues relating to the general common-law fiduciary concept. This in turn requires the asking and answering of some fundamental questions of principle of fiduciary law and theory.

These general fiduciary issues are addressed in chapters 2, 3, 4 and 5. Chapter 2 locates the fiduciary concept within the legal and theoretical frameworks in South African, English and Canadian law. It also provides a comparative overview of the history, status and development of fiduciary accountability in each of those jurisdictions. This overview highlights some basic principles relating to the purpose and to the normative and inherently flexible nature of fiduciary duties which (as I argue in later chapters) ought to be taken into account when considering the criteria or prerequisites for their incidence and operation. It also explains the ways in which the South African legal system and the location and status of fiduciary principles within it differ from the positions in English and Canadian law, and the implications of those differences. This provides the legal and theoretical basis for the more detailed analysis of the incidence, nature, scope and operation of fiduciary duties in later chapters.

In chapter 3 I discuss the nature, purpose, scope, operation and distinguishing features of fiduciary duties. I begin by considering how ‘fiduciary duties’ should be defined, which duties can properly be included in that definition, and the basis on which they are distinguishable from other duties that may attach to a fiduciary, either as fiduciary or in some other capacity. This is significant because

fiduciary duties give rise to unique and distinctive kinds of obligations and remedies which, in turn, have unique protective or regulatory implications. I argue in this regard in favour of the view that the defining features of truly 'fiduciary duties' are that they are both applicable to all fiduciaries and unique or exclusive to them, and they apply to them in their capacity as, and by virtue of the fact that they are, fiduciaries.[37] Although the fiduciary capacity attracts a number of different duties, only two of them indisputably fulfil these definitional criteria. One is the 'no-conflict' duty, which requires the fiduciary to avoid all conflicts – and all reasonably likely conflicts – between their own interests and duties to others and the interests of and duties that they owe to the beneficiary. The other is the 'no-profit' duty, which prohibits the fiduciary from deriving any unauthorised gain through or by virtue of his or her fiduciary position. However, although these two duties attach to all fiduciaries, their scope and shape vary as between different fiduciaries.[38] This is because they are superimposed on the particular underlying relationship between the fiduciary and the beneficiary. When they are superimposed on that underlying relationship, they are also moulded or shaped to fit it.[39] I argue in this regard that the criteria that govern that 'shaping' of the scope of fiduciary duties are the same as those that govern fiduciary accountability generally and which would have given rise to its existence within the particular relationship concerned.

Another issue of debate in this context is whether fiduciary duties are exclusively proscriptive or 'negative' in their functioning or whether they also operate prescriptively. I briefly consider the different positions that have been taken in the case law and by

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[37] R Nolan 'Controlling Fiduciary Power' (2009) 68(2) *Cambridge LJ* 293.

[38] *Bristol & West Building Society v Mothew* [1988] Ch 1 18.

[39] *University of Nottingham v Fishel* [2000] ICR 1462 1491–2; *Hospital Products v United States Surgical Corp* (1984) 156 CLR 41 97; *New Zealand Netherlands Society 'Oranje' Inc v Kuys* [1973] 1 WLR 1126 1130; *Ross River and Another v Cambridge City Football Club* [2007] EWHC 2115 (Ch) [197]; *Kelly v Cooper* [1993] AC 205 215; *Phillips v Fieldstone Africa (Pty) Ltd* [2004] 1 All SA 150 (SCA) 163; *Helmet Integrated Systems Ltd v Tunnard* [2006] EWCA Civ 1735 [37]–[39].

commentators, and conclude that they are primarily and 'directly' proscriptive but may also have an indirect 'positive' effect in their application. I also consider the protective purpose of fiduciary duties and remedies and the ways in which their structure and functioning seek to fulfil that purpose. The rest of the chapter provides a general discussion of the distinctions between fiduciary duties (properly defined) and remedies, and other kinds of non-fiduciary duties and remedies.

Chapter 4 considers some general issues of theory, principle and analysis relating to the determination of the principles that govern the incidence and other aspects of fiduciary duties. I begin with a critique of the ‘trust analogy’ as a basis for those determinations. I then provide a critical evaluation of some other dominant analytical approaches and theoretical models that have been employed in attempts to determine and explain various aspects of the incidence and operation of fiduciary duties. I also highlight the various theoretical, analytical and substantive difficulties associated with the traditional ‘categorisation’ approach of classifying certain types of relationships as ‘fiduciary’ ones on a class-wide basis, and the related drawing of distinctions between so-called fiduciary relationships ‘per se’ or ‘in law’ and ones ‘in fact’. I conclude the chapter by suggesting a set of requirements that the criteria for determining the incidence of fiduciary duties and related matters would have to fulfil in order for them to be principled, theoretically sound and analytically useful. One of my main arguments in this regard is that a rational and coherent theory of fiduciary accountability requires that the criteria for the existence of that accountability be logically linked to, and reflective of, how it functions and its underlying purpose. A complete understanding of fiduciary duties requires reference to why fiduciary duties and remedies apply, what they seek to achieve, how they operate in order to give effect to their underlying purpose and rationale, and, ultimately, why we impose them. For that reason, I favour the incorporation of a holistic, normative and ‘purposive’ or instrumentalist theoretical model that

explains the incidence, as well as the structure, features and functioning, of fiduciary duties and remedies from the perspective of their underlying aims and rationale.

Chapter 5 focuses on the central and controversial issue of the criteria that govern the incidence of fiduciary duties. In this chapter I critically consider, with comparative reference to leading case law and academic debate, the difficult issues of when and in what circumstances fiduciary accountability exists, and the requirements that need to be fulfilled in order for it to exist. These are the most contentious and unsettled aspects of fiduciary law and there are significant differences between the criteria that have been formulated, applied and articulated by the courts in the three jurisdictions under consideration.

I begin my discussion with a consideration of the debate on whether there is a single or 'unified' incidence criterion that is able to identify and explain all relationships in which fiduciary duties exist, and to distinguish them from other relationships where no such duties apply. I then provide a critical analysis of the traditional and more recent individual criteria and combinations of criteria that have featured most prominently in the cases on the incidence of fiduciary duties. Given the extensive volume of case law and academic commentary on this issue, the analysis is limited to leading cases that best reflect the positions that the English, Canadian and South African courts have adopted and, in the case of academic commentary, to those contributions that have either been referred to by the courts or that are particularly persuasive or analytically useful.

Drawing on Finn's 'reasonable expectation' criterion,[40] I conclude that the most persuasive and principled explanation of when (and why) fiduciary accountability applies is the existence of a justified expectation that the fiduciary will not act other than with undivided

[40] P Finn 'The Fiduciary Principle' in T Youdan (ed) *Equity, Fiduciaries and Trusts* (1989) 1 54.

loyalty to the protection or furtherance of the beneficiary's interests, and only the beneficiary's interests.

I propose that the first prerequisite for the existence of such an expectation is, as Flannigan argues, that one party must have some power or ability to affect the legal or practical interests of another.[41] I do however reject Flannigan's contention that the existence of such access, coupled with a limitation that it be used only in the beneficiary's interests, is in itself sufficient to found or explain fiduciary accountability. Rather, I suggest that accountability only arises, and is only justified by, the existence of such access in circumstances in which there are sufficient, appropriate individual incidence criteria or circumstantial factors to give rise to a justified expectation that the holder of the access will not use it to act other than in the sole interests of the other party. On the circumstances necessary for such an expectation to exist, I argue that the position will depend on an objective application of various considerations (which, depending on the circumstances may include all or any of the 'traditional' or more recent individual or collective incidence criteria and such additional criteria as the court may deem appropriate) to the particular facts of the relationship concerned. I suggest therefore that the justified expectation criterion 'captures' and assimilates a number of individual incidence criteria that, depending on the circumstances, might include trust, confidence, reliance, vulnerability, and so on. As such, it operates as a 'composite' product or cumulative result of the existence of an appropriate combination of other individual 'primary' criteria. I also argue that the function of the expectation criterion is however not confined to capturing the existence of primary incidence criteria. It also provides the analytical focal point and filter for the assessment of those primary incidence criteria and when they suffice to give rise to fiduciary accountability. Furthermore, where the expectation criterion is present, it rationalises

[41] R Flannigan 'The Boundaries of Fiduciary Accountability' (2004) 83 *The Canadian Bar Review* 35.

and explains *why* fiduciary duties exist. Given this acceptance of justified expectation as the determining and distinguishing feature of a 'fiduciary relationship' and the policy-based considerations that are incorporated in it, the thesis' ultimate argument is for an approach to fiduciary accountability that is inherently normative.

Chapter 6 provides a detailed and critical analysis of certain leading cases that best reflect the positions adopted by the higher Canadian, English and South African courts on the issue of incidence criteria and other general fiduciary principles.

In chapter 7 I apply the general fiduciary principles and propositions relating to the incidence, nature, scope and operation of fiduciary duties discussed and advanced in the previous chapters to employees in their relationships with their employers, again with critical comparative reference to leading English and Canadian case law and commentary. I consider here the circumstances in which employees will attract duties in the 'established' fiduciary capacities of director, officer or agent, and in their capacity as 'ordinary employees' of their employer, as well as the different kinds of duties they may attract in those different capacities. (For the purposes of this thesis, I use the term 'ordinary employee' to refer to any person who would be presumed to be an employee in terms of s 200A of the South African Labour Relations Act,[42] including those who would otherwise be excluded in terms of any other section of that Act.) With regard to the fiduciary accountability of 'ordinary employees' I support Stafford and Ritchie's argument that caution needs to be exercised in looking to the general principles of company law relating to directors' duties and extrapolating and applying them to ordinary employees.[43] I also argue that, in principle and in appropriate circumstances, any employee with any job description and at any

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[42] Labour Relations Act 66 of 1995.
[43] A Stafford and S Ritchie *Fiduciary Duties: Directors and Employees* (2008) 67 [2.186].

level may be subject to fiduciary duties, and that there is no merit in the Canadian approach of confining the potential application of those duties to ‘senior’ or ‘key’ employees.

Chapter 8 addresses the issue of whether all relationships of employment generally are inherently or necessarily ‘fiduciary’ ones, and the related issue of whether all employment relationships should be classified on a class-wide basis as a category of ‘fiduciary relationship’. Although I dismiss the class-wide categorisation of certain kinds of relationships as fiduciary ones as theoretically unsound and of limited (if any) analytical utility or substantive import, I also acknowledge that it is an established approach and, for that reason, I consider it ‘on its own terms’. I begin by addressing the difficulty that the term ‘fiduciary relationship’ has no defined meaning when used in relation to categorisation. In order to provide a basis for analysis, I explore some potential meanings and make some suggestions regarding the criteria or features of ‘fiduciary relationships’ for the purposes of the categorisation debate. I then apply those criteria to ordinary relationships of employment generally and conclude that, for various reasons, employment should not be treated as a category of fiduciary relationship.

In the final chapter I draw together all of the principles and propositions advanced in the earlier chapters and confirm my suggestions about the principles that govern the incidence, nature, purpose and operation of fiduciary duties in terms of South African common law, both generally and, more particularly, in relation to employees.

2.3 EXCLUSIONS FROM THE SCOPE OF ANALYSIS

Due to fundamental differences of principle between South African, English and Canadian law in relation to remedies, and due to the fact that South African law does not recognise many of the equitable remedies (such as equitable compensation and constructive trust liability) that are recognised in English and

Canadian law, I do not consider those equitable remedies or the debates about whether they are available for breaches of fiduciary duty. These exclusions do not however affect the determination of the issues that do fall within the ambit of the thesis.

In the chapters dealing with the fiduciary accountability of employees, the analysis is limited to the position of individual employees. It does not address the fiduciary duties of employers or any other persons within the employment context. Although I consider the issue of when employees will be subject to fiduciary duties as directors, officers or agents of a corporate employer, I do not discuss the position of those who may attract fiduciary duties by virtue of any other kind of relationship, position or contract with their employers that may independently give rise to fiduciary duties.

The analysis is also confined to the 'default' and generic fiduciary duties that attach to ordinary employees as an automatic consequence of the terms of their employment relationship with their employers. The thesis does not consider whether, how or to what extent those duties or the liability that ordinarily flows from their breach might be excluded, waived, modified, qualified or otherwise varied by the parties[44] (other than by agreeing to the particular terms of the employment contract in question, which will, as chapter 3 explains, 'shape' the application of those duties).

Finally, all of the principles considered in the thesis are discussed in general terms and are only considered in relation to specific factual circumstances or scenarios where useful or necessary for illustrative purposes.

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[44] For a call for greater restrictions on the power to exonerate such breaches within the context of company directors in English law, see S Worthington 'Corporate Governance: Remedying and Ratifying Directors' Breaches' (2000) 116 *LQR* 638. For a discussion of the power of a corporation to waive its directors' duty to avoid specified corporate opportunities under s 122(17) of the Delaware General Corporations Law, see J Mance 'Forecasting the Future: An Assessment of the New Delaware General Corporations Law, Section 122(17)' (2001) 1 *J of Corporate Law Studies* 449.

2.4 TERMINOLOGY

Much of the literature on fiduciary law and theory refers to 'fiduciary relationships'. For the reasons given in chapter 4, the term is a misleading one.

Provided the appropriate criteria for its incidence are fulfilled, fiduciary accountability can exist in any kind of relationship and it has already been recognised as doing so in a wide variety of individual relationships outside of the traditional categories of 'fiduciary relationships'. Those relationships are very diverse in nature and do not have sufficiently homogenous essential features or *essentialia* to be grouped together and distinguished as particular kinds or classes of relationship in the same way as, for example, relationships of partnership, sale or lease can each be classified as distinct and specific 'types' of relationships. The term 'fiduciary relationship' therefore has no generic meaning and cannot be used to describe any particular kind or type of relationship. As such, it can only be properly used to refer to 'a relationship that gives rise to some fiduciary duties on the part of one or more of the parties'. Unless otherwise indicated, it is only in that sense that the term is used in this thesis.

For the reasons advanced in chapter 3 on the definition, nature and distinguishing features of fiduciary duties, I use the term 'fiduciary duty' to refer to only the 'no-conflict' and 'no-profit' duties of loyalty. Where my intention is to also include other duties that may apply to a fiduciary (whether as fiduciary or in some other non-fiduciary capacity), I use more general phrases such as 'the fiduciary's duties', 'the duties of the fiduciary', 'the duties that attach to the fiduciary' and similar variations thereof.

3. THESIS PROPOSITIONS AND ARGUMENTS

The final chapter of the thesis summarises the principles and propositions discussed and advanced in the first eight chapters, and

concludes by suggesting that the following principles be used to determine the basis and boundaries of South African common-law fiduciary duties, generally and in relation to employees specifically:

1. The principles that govern the incidence, nature, scope, purpose and operation of fiduciary duties are the same, regardless of the nature of the relationship within which fiduciary duties exist. The classification of relationships as 'fiduciary' ones on a class-wide basis and the drawing of a distinction between so-called fiduciary relationships 'in law' or 'per se' and fiduciary relationships 'in fact' has no merit and ought to be rejected in favour of an approach that directly applies the same set of general fiduciary principles to all relationships in which fiduciary accountability is alleged, including relationships of employment.

2. The defining and distinctive feature of relationships within which fiduciary duties exist and the criterion that best determines, rationalises and explains the incidence, nature, scope, purpose and operation of those duties is a 'justified expectation of loyalty' that one party to a relationship (the fiduciary) will not act other than solely in the interests of another party (the beneficiary) and to the exclusion of all other interests and duties[45] in relation to all or some aspect of their relationship. This concept is substantially the same as that the 'justified reliance' variation that was introduced and applied by the South African Supreme Court of Appeal in *Volvo*.[46]

This criterion will be present where the fiduciary has some power or ability to affect the legal or practical interests of the beneficiary and there is, due to the existence of an appropriate combination of circumstantial factors and incidence criteria, a justified expectation that he or she will use that power or ability

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[45] A Scott 'The Fiduciary Principle' (1949) 37 *California Law Review* 539 540; *Hodgkinson v Simms* (1995) 117 DLR (4th) 161 176–7, quoted with approval in *Volvo (Southern Africa) (Pty) Ltd v Yssel* [2009] 4 All SA 497 (SCA).

[46] *Volvo (Southern Africa) (Pty) Ltd* [2009] 4 All SA 497 (SCA).

solely in the interests of the beneficiary and will not abuse it by acting self-interestedly or opportunistically or to further any purpose or interest outside of the beneficiary's interests.

3. Not all duties that attach to a fiduciary in his or her fiduciary capacity are 'fiduciary duties'. The only duties that can properly be defined as 'fiduciary' ones are those that are both exclusive and common to all fiduciaries and that apply to them because they are fiduciaries. The only two duties that meet those definitional criteria are the 'no-conflict' and 'no-profit' duties, which are essentially duties of uncompromised or 'undivided loyalty',[47] self-abnegation and self-denial.

4. Fiduciary duties exist within some underlying relationship between the fiduciary and the beneficiary. They can however only attach to those aspects of the underlying relationship that have a fiduciary character. The existence and scope of those 'fiduciary' aspects are determined by the same criteria and, ultimately, by the same justified expectation of undivided loyalty requirement that determines the incidence and scope of fiduciary duties generally.

5. The truly fiduciary no-conflict and no-profit duties are structurally, functionally and remedially distinguishable from other kinds of legal duties in the following respects:

5.1 they are primarily proscriptive in nature;

5.2 they are subsidiary, secondary duties that support and encourage the proper fulfilment of the fiduciary's primary, prescriptive duty to act in the interests of the beneficiary and, possibly, also the fiduciary's duty to act in good faith;

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[47] *Allied Business and Financial Consultants Ltd Sub Nom O'Donnell v Shanahan, Re* [2009] EWCA Civ 751; *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch); *Bristol & West Building Society v Mothew* [1988] Ch 1 18; *University of Nottingham v Fishel* [2000] ICR 1462 1490; *Item Software v Fassihi* [2005] 2 BCLC 91.

5.3 they operate prophylactically to prevent actual harm and to reduce the risk of harm to the beneficiary's interests; and

5.4 they are the only duties that, if breached, give rise to the exclusively fiduciary profit-stripping remedy of a claim for the fiduciary's unauthorised gains.

6. These features of proscription, subsidiarity and prophylaxis are also factors relevant to the determination of whether there is a justified expectation of loyalty that gives rise to fiduciary duties within the relationship concerned and, if so, the scope of those duties.

7. Employees who fall within any of the established categories of fiduciaries will owe their employers fiduciary duties in that capacity. The categories most relevant to employees are those of 'company director or officer' or 'agent'. Where an employee falls within any such category, the latter constitutes a distinct and independent source of fiduciary duties from those that attach to the employee as ordinary employee (although those duties will be governed by the same general principles that govern fiduciary duties in all other circumstances).

8. There are also circumstances in which employees will attract fiduciary duties in the capacity of 'ordinary' employee. This will be the case where there is any aspect of the employment relationship that gives rise to a justified expectation that the employee will act with undivided loyalty, and solely and exclusively in the employer's interests. Such an expectation is most likely to exist where the employee has control over the employer's assets and/or a significant degree of discretion or autonomy in relation to any aspect of the employer's interests, undertakings or affairs. While these criteria may in principle be fulfilled in relation to any employee, regardless of job description, title or level of employment, they are more likely to be present in the case of senior and managerial employees. This does not

however necessitate or justify the Canadian approach of confining the potential application of fiduciary duties to such ‘senior’ or ‘key’ employees.

9. Although in principle and in appropriate circumstances, any given relationship of employment can give rise to fiduciary duties, all relationships of employment generally should not be categorised as a class of ‘fiduciary relationship’.

CHAPTER 2

THE FIDUCIARY DOCTRINE IN CONTEXT

1. INTRODUCTION

This chapter provides an overview of the history, development, status and role of the fiduciary doctrine in the English, Canadian and South African legal systems. The chapter also discusses the ways in which South African law differs from English and Canadian law, and the effect of those differences on the application of certain English and Canadian principles of fiduciary accountability in South African common law, both generally and also more specifically in relation to employees.

There are a number of reasons for providing this overview. The historical background reveals the close links between the three legal systems, and the similarities in their fiduciary principles. It also explains the influence of English and Canadian law on the development of the fiduciary doctrine in South Africa and thus their comparative relevance and value in the analysis of South African common-law fiduciary accountability. In addition, the overview serves to highlight some of the essential features and purposes of fiduciary accountability.

The overview also reveals however that, despite the historical similarities, the fiduciary concept is significantly less developed and less prominent in South African law than it is in both English and Canadian law. I argue that this is attributable to differences in the structure of the South African legal system and the location and status of ‘equitable principles’ within it, but that there are no obstacles in principle to an acceptance of the more general and wide-ranging application of fiduciary accountability evident in English

and Canadian law, or to the adoption of any of the principles and propositions suggested in this thesis.

The chapter also considers some distinguishing aspects of the South African labour and employment law statutory regulatory framework and their effect on jurisdiction over fiduciary-based claims against employees.

[1] Together, these contextual aspects provide the necessary historical and theoretical basis for the more detailed analysis of the principles that govern the incidence, nature, purpose and operation of fiduciary duties in later chapters.

2. THE HISTORY, DEVELOPMENT, STATUS AND ROLE OF THE FIDUCIARY DOCTRINE

2.1 THE DOCTRINE IN ENGLISH AND CANADIAN LAW

2.1.1 The history and development of the doctrine in English and Canadian law

(a) English law

For the purposes of this thesis it is not necessary to consider the historical origins and development of the fiduciary doctrine in English and Canadian law in any detail. There are however some aspects thereof that can be usefully referred to in order to highlight certain points about the nature and purpose of fiduciary duties.

In English law, the fiduciary doctrine developed out of a collection of principles laid down by the English Chancery Courts. Prior to the establishment of those courts, the general or 'common' law of England was administered by ordinary 'courts of law'. However, the common-law rules, because of their rigidity and the indiscriminate, mechanistic application thereof by the courts, coupled with various

[1] In addition to the differences discussed in this chapter, the remedies available for breach of fiduciary duty in South African law differ from those available in English and Canadian law. Those differences are dealt with in chapter 3.

structural and procedural obstacles, failed to produce just outcomes in all cases, particularly those where the circumstances were unusual.[2] This led to the establishment of a 'Chancery' jurisdiction[3] to operate separately alongside the courts of law; this allowed for an alternative form of 'equitable' decision-making based on considerations of justice, fairness and 'conscience', and prevented 'unconscionable injustices'[4] by 'mitigat[ing] the severity' and 'abat[ing] the rigour' of the common law.[5]

Exercising their equitable jurisdiction, these 'courts of conscience' recognised three particular types of relationships of trust and confidence that were particularly susceptible to 'unconscionable' conduct on the part of one of the parties and that gave rise to the need to protect the other party or parties through the imposition of an obligation on the former not to abuse the trust or confidence placed in him or her. That obligation later developed into the two – more specific – 'no-conflict' and 'no-profit' fiduciary duties.

The three relationships that were recognised as being ones that required protection against unconscionable abuse were relationships of undue influence in which one party is in a position of influence over another, relationships in which one party is in receipt of information imparted in confidence by the other, and relationships of 'trust and confidence'. The latter implies a narrower sense of relationships, in which one party places some form of trust or confidence in another that gives rise to an obligation on the latter not to abuse that trust or confidence.

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[2] J Baker *An Introduction to English Legal History* 2 ed (1979) 86–9; J McGhee *Snell's Equity* 31 ed (2005) 4–7.

[3] This was originally exercised by the monarch's Lord Chancellor before being transferred to a more structured and sophisticated set of Chancery Courts in the mid-fourteenth century: Baker *An Introduction to English Legal History* 86–9; McGhee *Snell's Equity* 6–7.

[4] *Nocton v Ashburton* [1914] AC 932 952, 954.

[5] McGhee *Snell's Equity* 4–5; D Waters 'Bankers' Fiduciary Obligations and Unconscionable Transactions' (1986) 65 C*anadian Bar Review* 39 43–4.

The first category is of little significance in relation to employees. Although employees may, by virtue of access to their employer's trade secrets and confidential information, frequently fall into the second category, the 'direct' or 'original' source of the fiduciary obligations that arise is the receipt of information. The relationship of employment itself is thus 'only incidental to the existence of those obligations'.[6] The third category is significant in relation to employees and is the one that generally forms the basis of any fiduciary duties they may bear.

(b) Canadian law

The Canadian legal system has strong historical links with English law, and the history of both Equity generally and the fiduciary doctrine in Canada closely parallels the history of English law.[7]

With some variations in dates and judicial structures, by the end of the nineteenth century, the courts in the various Canadian provinces (apart from Quebec) had been given equitable jurisdiction that was substantially the same as that enjoyed first by the English Lord High Chancellor and subsequently by the English Chancery Courts.[8]

As courts of equity, the Canadian courts generally recognised and applied most aspects of English Equity, including the fiduciary doctrine, and continued to be strongly influenced by the decisions of the English Chancery Courts in developing it. The judgments of the Canadian courts have diverged from those of the English courts only in the last few decades, with the increase in the recognition of

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[6] *University of Nottingham v Fishel* [2000] ICR 1462 [1489].

[7] A more detailed history of Equity in Ontario, Canada is discussed in E Brown 'Equitable Jurisdiction and the Court of Chancery in Upper Canada' (1983) 21 *Osgoode Hall LJ* 275.

[8] In some Canadian provinces, such as Ontario, this equitable jurisdiction was given to a separately created Court of Chancery, while in others the common-law courts of law were granted both law and equity jurisdictions, which were then administered separately as two distinct and independent jurisdictions: L Rotman 'The Fusion of Law and Equity: A Canadian Perspective' (available at http://ssrn.com/abstract=1846694) 7 fn 24.

individual ‘fact-based’ fiduciary relationships outside the traditional categories of fiduciary relationships and the resulting need to articulate the criteria for and other principles that govern fiduciary accountability.

2.1.2 The status and role of the doctrine as part of Equity in English and Canadian law

In English and Canadian law, the fiduciary doctrine, together with various other doctrines, maxims, protections and remedies recognised by the Chancery Courts,[9] forms part of a source of jurisprudence referred to as ‘Equity’.

Historically, these doctrines, maxims, protections and remedies were developed separately from, but alongside, the law, and served to supplement the rules of law laid down by the general courts of law.[10] They were thus not an isolated or self-sufficient system. At every point ‘[E]quity presupposed the existence of common law',[11] and 'built itself’ around the common law.[12]

Equity’s primary purpose was to operate as a ‘gloss’ to ‘supplement’ and ‘correct’ the law by providing protections and remedies where the law alone failed to produce a substantively just

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[9] McGhee *Snell's Equity* 7–8. The maxims are: Equity will not suffer a wrong to be without a remedy; Equity follows the law; where there is equal Equity, the law shall prevail; where the Equities are equal, the first in time shall prevail; he who seeks Equity must do Equity; he who comes into Equity must come with clean hands; delay defeats Equities; Equity is equality; Equity looks to the intent rather than the form; Equity looks on that as done which ought to be done; Equity imputes an intention to fulfil an obligation; and Equity acts *in personam*. The doctrines are conversion, reconversion, election, performance and satisfaction. The protections operate against various forms of unconscionable or improper use of a position of power and take the form of the fiduciary concept and the concept of 'equitable fraud' (which includes undue influence, abuse of confidence and unconscionable bargains): McGhee *Snell's Equity* 93–142, 145–306.

[10] McGhee *Snell's Equity* 4–20; R Meagher, W Gummow and J Lehane *Equity Doctrines and Remedies* (1992) 66–70, 344–9; Waters 'Bankers’ Fiduciary Obligations and Unconscionable Transactions' 44–5.

[11] Brunyate (ed) *Maitland's Equity* 2 ed (1936) 19.

[12] Barbour *Oxford Studies in Legal History* 73.

result.[13] Unlike rules of law, which were based on more rigid and 'formal' notions of justice, Equity was seen as 'no part of law, but a moral virtue, which qualifies, moderates, and reforms the rigour, hardness, and edge of the law, and … a universal truth'[14] that was based on a more substantive form of justice that was perceived as being not only necessary and corrective, but also transcendent,[15] 'higher'[16] and 'more morally-inclined'.[17]

Although Equity and the common law are now administered by a single set of courts in both England[18] and Canada, and despite assertions that Equity is becoming 'fused with' or increasingly acquiring the same 'rigidity' as rules of law,[19] it is still regarded as a conceptually distinct source of jurisprudence.

This historical development, location and status within the English and Canadian legal systems highlight and explain some significant

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[13] McGhee *Snell's Equity* 4–20; Meagher, Gummow and Lehane *Equity Doctrines and Remedies* 3.

[14] Per Sir Nathan Wright LK in *Lord Dudley and Ward v Lady Dudley* (1705) Prec Ch 241 244, as quoted in McGhee *Snell's Equity* 4.

[15] Baker *An Introduction to English Legal History* 90.

[16] S Milsom *Historical Foundations of the Common Law* 2 ed (1980) 88–91.

[17] Waters 'Bankers' Fiduciary Obligations and Unconscionable Transactions' 45; Baker *An Introduction to English Legal History* 89–95.

[18] In England, the Chancery Courts continued to exist as separate courts and to administer Equity separately, until the Judicature Acts of 1873 and 1875 amalgamated them with the superior common-law courts into a single Supreme Court with concurrent jurisdiction over both law and Equity with effect from 1875 (McGhee *Snell's Equity* 1–12; Baker *An Introduction to English Legal History* 97–9). The Supreme Court of Judicature Acts 1873 and 1875 were subsequently repealed and replaced by the Supreme Court of Judicature (Consolidation) Act 1925, which was in turn repealed and replaced by the Supreme Court Act 1981. As a result, the superior courts now consist of a Court of Appeal and three Supreme Court Divisions.

[19] This 'fusion debate' continues in England as well as in Australia and Canada. See, for example, Meagher, Gummow and Lehane *Equity Doctrines and Remedies* 46–60, 66–70; Rotman 'The Fusion of Law and Equity'; D Laycock 'The Triumph of Equity' (1993) *Law and Contemporary Problems* 71; L Smith 'Unravelling Proprietary Restitution' (2004) 40 *CBLJ* 317; M Tilbury 'Fallacy or Furphy? Fusion in a Judicature World' (2003) 26 *University of New South Wales LJ* 357.

aspects of Equity generally and, more pertinently for present purposes, the fiduciary doctrine.

(a) The issue of flexibility

The first aspect is that Equity was developed to allow for greater flexibility in the administration of justice than was permitted by ‘hard’ rules of law. As such, it was designed not only to do something that the law did not do, but also to do it in a different way. This flexibility, which constitutes both the core nature of and the rationale for Equity, suggests that in drawing the difficult balance between certainty and flexibility in determining contemporary fiduciary principles (particularly in relation to issues such as the incidence of fiduciary accountability) we should perhaps be prepared to err a little more in favour of flexibility.

(b) The issue of normativity

It is also significant that the primary reason for the development of Equity and its essential function are to prevent and redress ‘unconscionable’ behaviour. The latter (also referred to as ‘equitable fraud’) was defined as including any behaviour that was against the dictates of conscience, that 'fell short of deceit, but imported breach of a duty to which equity had attached its sanction', or any 'breach of the sort of obligation which is enforced by a court of conscience'.[20] It 'came to embrace all activity that was unconscionable; where property had been obtained through abuse of power or opportunity' and 'became something of an umbrella for a range of activities which, if they resulted in gain, equity would not allow to go without remedy'.[21] Equity’s primary concern therefore is with the moral acceptability of different kinds of behaviour. Its most basic aim has always been, and continues to be, the prevention of particular forms of behaviour that are assessed by the courts with reference to dominant public mores to be contrary to what is regarded as morally

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[20] Per Viscount Haldane LC in *Nocton v Ashburton* [1914] AC 932 (HL) [953]–[954].
[21] Waters 'Bankers’ Fiduciary Obligations and Unconscionable Transactions' 37.

acceptable and desirable within both the particular circumstantial, factual matrix[22] and the broader legal system concerned.

Equity, and by logical extension the fiduciary doctrine, is thus policy-based and *inherently normative* in nature. It is 'an instrument of public policy' that originates self-evidently in public policy: in a view of desired social behaviour for the end this achieves.[23]

One of the propositions that this thesis seeks to advance is that this inherent normativity is one of the fiduciary doctrine's most essential and significant features and should be reflected in the criteria for the existence of fiduciary duties, the way in which they are applied, and their future development. It also provides support for the development of the role of policy into the proposition (that I argue for in this thesis) that justified expectations of loyalty are the ultimate determinant of the incidence of fiduciary accountability, while simultaneously calling into question other suggestions that such incidence is to be determined on a purely objective assessment of the existence of certain factual circumstances.[24]

(c) The issue of prominence

By virtue of its operation as a 'gloss upon' the common law, Equity in both English and Canadian law co-exists alongside the common law and, consequently, presents itself as an alternative potential source of duties and remedies in all areas of those legal systems. As a result, there is a general awareness of the 'ever-present' existence of Equity (including the fiduciary doctrine) across all branches and categories of law. It is this that probably accounts for the greater

[22] The kinds of considerations that are relevant to the existence of fiduciary duties and the role of normative considerations in that determination are debated in depth in chapter 3 of this thesis.

[23] P Finn 'The Fiduciary Principle' in T Youdan (ed) *Equity, Fiduciaries and Trusts* (1989) 126–7. The importance of public policy considerations is also referred to by Glover, who says that 'policy supplies the direction in which fiduciary analogies are formed. Social purposes external to the system are served.' (J Glover 'The Identification of Fiduciaries' in P Birks (ed) *Privacy and Loyalty* (1997) 27.)

[24] Again these are considered in depth in chapter 5, but the primary example is Flannigan's 'limited access' thesis, which argues that fiduciary accountability exists whenever one party has 'limited access' in relation to the interests of another.

receptivity to its application (especially in individual relationships outside of the conventional, ‘established’ categories) and for the greater prominence that fiduciary-related issues have in mainstream English and Canadian legal discourse than they do in South African discourse.

2.2 THE DOCTRINE IN SOUTH AFRICAN LAW

2.2.1 The history and development of the doctrine in South African law

The South African courts have generally identified Roman law’s prohibition on a tutor buying the property of his or her ward (and also, by analogy, curators, agents and other persons who transacted the business of others)[25] as the original source of the fiduciary doctrine.[26]

These Roman-law prohibitions on self-dealing and unauthorised profits by tutors and others in similar positions were however limited to particular, defined circumstances and were not as fully developed as the ‘modern’ fiduciary doctrine and its no-conflict and no-profit duties. Although the essence of the fiduciary relationship may arise from and correspond with the self-dealing and unauthorised gains prohibitions in Roman (and later Roman-Dutch) law, as Innes CJ said

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[25] *Digest* 18.1.34.7 *Tutor rem pupilli emere non potest:* Idemque *prorrigendum est ad simila, id est, curatores, procuratores, et qui negotia aliena gerunt.* (A tutor cannot buy a thing belonging to his ward; this rule extends to other persons with similar responsibilities, that is, curators, procurators, and those who conduct another's affairs.)

[26] Cases in which the South African courts have referred to Roman law as the source of the South African fiduciary doctrine include *Transvaal Cold Storage Co Ltd v Palmer* 1904 TS 4 19–20; *Olifants Tin 'B' Syndicate v De Jager* 1912 TPD 305 315; *Osry v Hirsch, Loubser & Co Ltd* 1922 CPD 531; *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 177–8; *Sackville West v Nourse* 1925 AD 516 533–4; *Fey and Whiteford v Serfontein* 1993 (2) SA 605 (A) 612. Also J du Plessis 'Direkteure se Vertrouenspligte en die Grondslag van Aanspreeklikheid vir Verbreking Daarvan' (1993) 50 *Tydskrif vir Heedendagse Romainse-Hollandse Reg* 11. According to J Fourie in 'Vertrouenspligte en Intrakorporatiewe Verhoudings' (1985) 10 *TRW* 119 122–3: 'Alhoewel hoofregter Innes na geen gesag verwys het nie, is die skrywer met respek van mening dat hierdie 'n absolute korrekte benadering is ten opsigte van die vertrouensverhouding. Die konsep van vertrouenspligte in 'n vertrouensverhouding is volgens die skrywer se mening 'n universele regsbeginsel en "must of necessity form part of very civilized system of jurisprudence", per Innes CJ in *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 178’.

in *Robinson*, it also 'must of necessity form part of every civilised system of jurisprudence'.[27] It is also clear that much of the content of the modern fiduciary doctrine was developed later.[28] Many of these developments were based on extensions and refinements that the English courts made to the doctrine to suit 'modern conditions',[29]

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[27] *Phillips v Fieldstone Africa (Pty) Ltd and Another* [2004] 1 All SA 150 (SCA) [30]; *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 177–8. Also De Villiers JP in *Olifants Tin 'B' Syndicate v De Jager* 1912 TPD 305 315: '[t]hese are universal principles, common to all modern systems of jurisprudence'.

[28] In *Transvaal Cold Storage Co Ltd v Palmer* 1904 TS 4 19–20, for example, Innes CJ said: 'The modern idea of an agent ... was not known to Roman law, though that law fully recognised the position of one who transacted business for another, and dealt in some detail with his rights and liabilities... . [T]he Roman-Dutch writers ... applied the same principles to agents properly so-called (as the modern doctrine of agency gradually developed). … But the modern agent plays a far more important part in commercial matters than did the mandatory or institor; and the courts of England and America have developed the doctrine of the civil law, and examined the duties which an agent owes to his principal far more thoroughly than was possible at an earlier time, when business operations were neither so numerous nor so complicated.' And, in *African Claim and Land Co Ltd v WJ Langermann* 1905 TS 494 504–5, Innes CJ said: 'the duties and liabilities of an agent to his principal have been full investigated by the English courts, upon principles recognised and approved by our law', and in *Coolair Ventilator Co (SA) Pty Ltd v Liebenberg* 1967 (1) SA 686 (W) 689–90 Marais J referred to the fiduciary-related duties of employees as originating in English law, and later in US law. Cf the judgment of Innes CJ in *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 177–8 in which he appears to have viewed the Roman-law prohibitions on self-dealing and unauthorised gains as a broader principle that was generally applicable to any person who administered the affairs of another and, therefore, as evidencing a general fiduciary doctrine in Roman law. This also appears to have been accepted by the courts in *Hargreaves v Andrews* 1915 AD 519 522; *Transvaal Cold Storage Co Ltd v Palmer* 1904 TS 4; *Osry v Hirsch, Loubser & Co Ltd* 1922 CPD 531 and *Sackville West v Nourse* 1925 AD 516 533–4.

[29] *Phillips v Fieldstone Africa (Pty) Ltd and Another* [2004] 1 All SA 150 (SCA) [30], approving the same conclusion in *Transvaal Cold Storage Co Ltd v Palmer* 1904 TS 4 19–20, 34–5. For reference to English law see, for example, *Transvaal Cold Storage Co Ltd v Palmer* 1904 TS 4 19–20; *African Claim and Land Co Ltd v WJ Langermann* 1905 TS 494 504–5; *Mallison v Tanner* 1947 (4) SA 681 (T); *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 177–8; *Coolair Ventilator Co (SA) Pty Ltd v Liebenberg* 1967 (1) SA 686 (W) 689–90. For an overview of the origins of South African fiduciary law and the influence of English law on its development, see J Gibson, C Visser, J Pretorius, R Sharrock and M van Jaarsveld *Gibson: South African Mercantile and Company Law* 8 ed (2003) 1–3; *Smuts v Booyens Markplaas (Edms) Bpk en 'n ander* 2001 (4) SA 15 (SCA); *R v Goseb* 1956 (2) SA 696 (SWA) 598; *Ex Parte De Winnaar* 1959 (1) SA 837 (N) 839.

lthough the South African courts have also relied on US sources[30] and (recently more heavily) on Canadian case law.[31]

The influence of English law is clearly evident in all the categories of 'fiduciary relationships' that have become established in South African law and particularly in South African company law where, up until relatively recently, the principles governing the fiduciary duties of directors have been almost identical to those in English law. It is also clearly evident in employment law, where the courts have credited English law as the source of the South African principles governing the fiduciary duties of employees.[32]

Despite this strong historical (and continuing) reliance by the South African courts on both English and Canadian law in recognising, applying and developing fiduciary accountability in South African law, there are some differences between South African fiduciary principles and those in English and Canadian law. These are largely attributable to the different structure of the South African legal system and the location and status of 'equitable' principles within it, as well as to the Roman-Dutch law influence on much of South African common law. As will be explained in more detail below, although these differences are notable they are not directly relevant

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[30] For reference to American case law see, for example, *Matabele Syndicate v Lippert* (1897) 4 OR 372 385; *Olifants Tin 'B' Syndicate v de Jager* 1912 TPD 305; *Goldberg v Trimble and Bennett* 1905 TS 255 273.

[31] In its most recent two judgments in *Phillips v Fieldstone Africa (Pty) Ltd and Another* [2004] 1 All SA 150 (SCA) and *Volvo (Southern Africa) (Pty) Ltd v Yssel* [2009] 4 All SA 497 (SCA), the Supreme Court of Appeal relied heavily on the Canadian cases of *Frame v Smith* [1987] 2 SCR 99 (SCC) and *Hodgkinson v Simms* 1995 117 DLR (3d) 371.

[32] In *Coolair Ventilator Co (SA) Pty Ltd v Liebenberg* 1967 (1) SA 686 (W) 689–90 Marais J said: 'Writers on Roman Dutch law appear to have given scant attention to this branch' of the fiduciary doctrine's application to the relationship between employer and employee. The Romans, employing mostly slaves and pieceworkers and not wage earners, had little occasion to develop the principle of *locatio conductio operarum*. Roman-Dutch authorities seem to have added nothing to the learning on the subject which could be of assistance in the present enquiry ... . The development of the concept of good faith in an employee's dealings with his employer took place in English, and later in American law. It was adopted in South Africa in *Jones v East Rand Extension Gold Mining Co Ltd* 1903 TH 325, where it was held no less than in the case of partners, a fiduciary relationship exists disentitling the servant to make a profit out of information which the principal could have used to advantage but which the servant used for his own benefit.'

to the particular fiduciary principles discussed in this thesis or to any of the propositions it advances. They do not, therefore, present any reason in principle why those propositions should not be accepted in South African law.

2.2.2 The status and role of the fiduciary doctrine in South African law

South African law does not recognise 'Equity' as something conceptually separate from the law,[33] and the South African courts 'have never applied equitable, as distinct from legal principles'.[34] Although they have often emphasised that they 'are always desirous to administer equity',[35] 'equity' in this context does not refer to a separate source of jurisprudence that can be applied as an alternative to the law. Rather, 'equity' in South African law means general *legal* principles of fairness. The 'administration of equity' therefore concerns the content of principles of *law* and the application of those principles in a way that is fair and impartial. There is thus no South African equivalent of 'Equity' in the modern English and Canadian sense of a separate source of duties, protections or remedies that co-exists alongside the law and can be drawn upon to supplement and correct the law so as to produce a more equitable and just result.

The South African courts do however have the discretion to recognise equitable principles as part of South African law, provided that they do not conflict with Roman-Dutch law or any statutory

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[33] Per Innes CJ in *Kent v Transvaalsche Bank* 1907 TS 765 774: 'The Court has again and again had the occasion to point out that it does not administer a system of equity, as distinct from a system of law'; per Kotze JA in *Weinerlein v Goch Buildings Ltd* 1925 AD 282 295: '[E]quity is not something that is distinct from and opposed to the law.'

[34] Per Broome J in *Cassimjee v Cassimjee* 1947 (3) SA 701 (N) 705; *Montres Rolex SA v Kleynhans* 1985 (1) 55 (C) 66.

[35] For example, Innes CJ in *Kent v Transvaalsche Bank* 1907 TS 765 774.

provision.[36] Where equitable principles are expressly recognised in this way they become integrated into the South African common law and acquire the status of rules of positive law.[37] Exercising their discretion in this regard, the courts have recognised a large number and variety of principles of equity, including many relating to fiduciary duties as part of South African law. This occurs in a relatively fragmented and ad hoc way and is limited to principles that are raised in the individual cases that come before the courts. Apart from a few recent exceptions, most of the fiduciary cases have concerned the traditional categories of 'fiduciary relationships' inherited from English law (which became established as 'fiduciary' ones relatively early in South African legal history), and have focused on the application of fiduciary duties to particular factual circumstances within those traditional categories rather than matters of general principle. As a result there is an almost complete absence of awareness in mainstream legal discourse of the doctrine's potential application outside of those traditional classes of 'fiduciary relationship' and an almost complete absence of any published academic consideration of the broader fiduciary doctrine in its more generally applicable sense, or of any of its theoretical aspects. Consequently, fiduciary law and theory in South Africa has a far 'lower profile', has produced far less case law (both within and outside of relationships that fall outside the traditional fiduciary

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[36] In *Lazarus and Jackson v Wessels, Oliver and The Coronation Freehold Estates, Town and Mines Ltd* 1903 TS 449 509, Innes CJ said: 'This Court cannot grant equitable relief, if by so doing it would be contrary to a well-founded principle of Roman-Dutch law or to some statutory provision' and in *Kent v Transvaalsche Bank* 1907 TS 765 774: 'Using the word "equity" in its broad sense, we are always desirous to administer equity; but we can only do so in accordance with the principles of the Roman-Dutch law. If we cannot do so in accordance with those principles, we cannot do so at all.' In *Mills & Sons v Benjamin Bros* (1876) Buch 115 121, De Villiers CJ said: 'this Court is a Court of Equity only so far as it is consistent with the principles of Roman-Dutch law'.

[37] Per Kotze JA in *Weinerlein v Goch Buildings Ltd* 1925 AD 282 295. Where there are further principles that are logical corollaries of equitable principles that have been expressly recognised, they would arguably also form part of South African law by necessary implication.

categories), and has generated none of the controversy and debate that it has in both English and Canadian law.[38]

In addition, the fiduciary principles that have been recognised by the South African courts are not identical to those in English and Canadian law. There are certain English and Canadian principles that the South African courts have not recognised as forming part of South African law, either because they have not yet been raised before them, or because those principles conflict with South African common-law principles or legislation.

There are however not many such differences and, where they do exist, they are largely concerned with the specific application of fiduciary principles to particular sets of circumstances (mainly relating to sales and purchases by fiduciaries).[39] The general fiduciary principles that have been recognised as being part of South African law are however substantially the same as those in English and Canadian law.[40] There is however a notable absence in South African law of English and Canadian 'equitable' remedies, such as tracing and constructive trust liability, as well as a number of other differences between those equitable remedies and the South African remedies for breach of fiduciary duty. And, as is discussed later in this chapter, there are circumstances in which certain features of

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[38] This has always been the case in South African law, which is illustrated, for example, in the court's statement in the early case of *Evans & Jones v Johnston* 1904 TH 238 245 that: 'the doctrine is well settled [in South Africa] ... but it is acted upon in courts of Equity to a much larger extent'.

[39] For example, *Louw v Hofmeyer (*1869) 2 Buch 290 (in Roman-Dutch law sales by executors to their co-executor(s) are permitted, but they are not allowed in English law); *Osry v Hirsch* 1922 CPD 531 559 and *Baxter v Beningfield* (1883) 4 NLR 148 156 (in Roman-Dutch law an administrator is permitted to purchase at public auction but he is not permitted to do so in English law).

[40] *Transvaal Cold Storage Co Ltd v Palmer* 1904 TS 4 19–20; *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 177–8. In *African Claim and Land Co Ltd v WJ Langermann* 1905 TS 494 504-505 Innes CJ said: 'the duties and liabilities of an agent to his principal have been fully investigated by the English courts, upon principles recognised and approved by our courts'; in *Coolair Ventilator Co (SA) Pty Ltd v Liebenberg* 1967 (1) SA 686 (W) 689–90 Marais J said that the duties of an employee, particularly the duty of good faith, were largely developed in English, and later in American law and were adopted into South African law

South African labour and employment law may affect the enforcement of certain common-law fiduciary remedies against employees. None of these differences of principle is however directly relevant to the aspects of the fiduciary doctrine that fall within the scope of analysis of this thesis, and none of them precludes the recognition in South African law of any of the principles and propositions it advances.

As already mentioned, more extensive differences concern the degrees of prominence and utilisation of the doctrine in South African law. These are largely due to the absence of a separately recognised and 'ever-present' concept of 'Equity' in the English and Canadian sense, and the way in which equitable principles become part of South African law.

3. DISTINCTIVE FEATURES OF SOUTH AFRICAN LABOUR AND EMPLOYMENT LAW

3.1 JUDICIAL STRUCTURES AND JURISDICTION

In South Africa, the 'ordinary' civil courts[41] have general jurisdiction over all civil cases. The Labour Relations Act 66 of 1995 ('the LRA') however established a set of separate, specialised labour courts and tribunals, comprising the Council for Conciliation, Mediation and Arbitration ('the CCMA'), the Labour Court and the Labour Appeal Court ('the LAC') (hereafter collectively 'the labour courts') with jurisdiction to determine certain employment and labour-related disputes.

In terms of s 157(1) of the LRA,[42] these labour courts have exclusive jurisdiction over various matters, including alleged unfair

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[41] These courts consist of the magistrates' courts, the High Court, the Supreme Court of Appeal and, in constitutional matters, the Constitutional Court.

[42] Section 157(1) and (2) provides that:
'157. Jurisdiction of Labour Court
(1) Subject to the Constitution and section 173, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters

dismissals, unfair labour practices and unfair discrimination.[43] According to the Constitutional Court judgment in *Gcaba v Minister for Safety and Security and Others*[44] they also have exclusive jurisdiction over any alleged contravention of a fundamental right or freedom arising out of any statutory provision in the LRA or the Basic Conditions of Employment Act 75 of 1997 ('the BCEA'). In terms of s 157(2), they have concurrent jurisdiction with the High Court over all other cases involving alleged violations or breaches of any fundamental right entrenched in the Constitution[45] arising from employment or labour relations, any dispute about the constitutionality of any executive or administrative act by the state in its capacity as an employer, and the application of any law for which the Minister of Labour is responsible.

There has been some uncertainty regarding jurisdiction over other employment-related cases.[46] This now appears to have been settled by the Supreme Court of Appeal in *Makhanya v University of*

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that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court.

(2) The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the Republic of South Africa, 1996, and arising from–

(a) employment and from labour relations;

(b) any dispute over the constitutionally of any executive or administrative act or conduct, or any threatened executive or administrative act or conduct, by the State in its capacity as an employer; and

(c) the application of any law for the administration of which the Minister is responsible.'

[43] Section 191 of the LRA. Other matters that fall within the exclusive jurisdiction of the labour courts include, for example, disputes relating to mutual interests in an essential service (s 74); participation in strike action (s 141); disclosure of information (s 16); organisational rights, unless the trade union has elected to strike under s 65(2) (ss 21 and 22); freedom of association (s 9); closed-shop agreements (s 26(14)); the interpretation of Chapter II's collective bargaining provisions (s 63); and disputes over the interpretation or application of the Employment Equity Act 55 of 1998 (s 49).

[44] *Gcaba v Minister for Safety and Security and Others* [2009] 12 BLLR 1145 (CC).

[45] The Constitution of the Republic of South Africa 108 of 1996.

[46] Basson et al *Essential Labour Law* 356–8, 369; Van Niekerk et al *Law@Work* 448–51.

Zululand:[47] the High Court has general jurisdiction over cases involving common-law 'contractual' rights, including damages for breach of contract, even though the contract may be employment-related,[48] but the Labour Court also has concurrent jurisdiction over those matters.

In addition, s 77(3) of the BCEA confers concurrent jurisdiction on the labour courts and the ordinary civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract. Section 77(4) then provides that any person may rely on a provision in the BCEA to establish that a basic condition of employment constitutes a term of a contract of employment in any proceedings in a civil court or an arbitration held in terms of an agreement.[49]

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[47] *Makhanya v University of Zululand* [2009] 8 BLLR 721 (SCA), [2009] 4 All SA 146 (SCA).

[48] In *Fedlife Assurance Ltd v Wolfaardt* (2001) 22 *ILJ* 2407 (SCA) and *SA Maritime Safety Authority v McKenzie* [2010] 5 BLLR 488 (SCA). See also *Jacot-Guillarmod v Provincial Government, Gauteng* (1999) 20 *ILJ* 1689 (T); *Old Mutual Life Assurance Co SA Ltd v Gumbi* [2007] 8 BLLR 699 (SCA); *Boxer Superstores Mthatha and Another v Mbenya* [2007] 8 BLLR 693 (SCA).

[49] Section 77 of the BCEA reads as follows:

> 'Jurisdiction of Labour Court
> 77. (1) Subject to the Constitution and the jurisdiction of the Labour Appeal Court, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters in terms of this Act, except in respect of an offence specified in sections 43, 44, 46, 48, 90 and 92.
> (2) The Labour Court may review the performance or purported performance of any function provided for in this Actor any actor omission of any person in terms of this Act on any grounds that are permissible in law.
> (3) The Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract.
> (4) Subsection (1) does not prevent any person relying upon a provision of this Act to establish that a basic condition of employment constitutes a term of a contract of employment in any proceedings in a civil court or an arbitration held in terms of an agreement.
> (5) If proceedings concerning any matter contemplated in terms of subsection (1) are instituted in a court that does not have jurisdiction in respect of that matter that court may at any stage during proceedings refer that matter to the Labour Court.'

3.2 JURISDICTION OVER AND DETERMINATION OF EMPLOYMENT-RELATED FIDUCIARY CASES

3.2.1 Fiduciary cases falling within the jurisdiction of the ordinary civil courts

An employer seeking recourse against an employee for breach of fiduciary duty would in most cases institute its claim(s) in an ordinary civil court. Depending on the circumstances, this might include a claim for any unauthorised gains that the employee obtained by virtue of the breach, a claim for damages, and/or a claim for termination of the contract of employment on account of the breach.

In such cases, the court would apply the general common-law principles of fiduciary accountability to the claims for breach of fiduciary duty and relief, and those of the law of contract to the claim for termination of the contract.

In terms of the general common-law principles of fiduciary accountability, breach of fiduciary duty by an employee would entitle the employer to claim any unauthorised gains that the employee obtained by virtue of the breach.[50] As discussed in chapter 3, this common law liability to account for unauthorised gains is strict in nature. Honesty and the absence of any form of fault or *mens rea* on the part of the employee are no defence,[51] and it would not be necessary for the employer to show that it suffered any loss as a result of the employee's breach or gain.[52] In addition, the employer would have a claim for damages as compensation for any

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[50] *Phillips v Fieldstone Africa (Pty) Ltd* [2004] 1 All SA 150 (SCA) [30]–[31]; *Regal (Hastings) Ltd v Gulliver* [1942] 1 All ER 378 386; *Woolworths v Kelly* (1991) 4 ACSR (CA(NSW)) 431 447.

[51] *Daraydan Holdings Ltd v Solland International Ltd* [2004] EWHC 622 (Ch) [51]; *Imperial Mercantile Credit Association v Coleman* (1873) LR 6 HL 189; *Cohen v Directors of Rand Collieries Ltd* 1906 TS 197 201–2; *Guinness plc v Saunders* [1990] 1 All ER 652 (HL) 664 697.

[52] *Regal (Hastings) Ltd v Gulliver* [1942] 1 All ER 378 386, 392; *Woolworths v Kelly* (1991) 4 ACSR (CA(NSW)) 431 447; *Transvaal Cold Storage Co Ltd v Palmer* 1904 TS 4 15, 16, 21.

consequential loss it suffered as a result of the breach.[53] Where the breach involved a transaction with a third party who, at the time of the transaction, was or reasonably ought to have been aware of the employee's breach of fiduciary duty, the employer would be entitled to require rescission of the transaction,[54] in which event the employee would have to make restitution of everything received under it.[55]

In terms of the common-law principles of contract, breach of the contract of employment by the employee entitles the employer to terminate the contract if the breach is of a 'fundamental' or material nature.[56] Relationships of employment are recognised as ones of 'trust and confidence' and the courts generally recognise a breach as 'fundamental' where it results in a breakdown in that trust and confidence.[57] There are a number of cases in which the courts have applied this general principle to breaches of fiduciary duty by employees and have held that such breaches are sufficiently fundamental to justify the employer's termination of the employment contract.[58]

Generally, in applying all of these principles, the court would allow the employer to assert and enforce its full common-law rights and

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[53] *Da Silva v CH Chemicals (Pty) Ltd* 2008 (6) SA 620 (SCA).

[54] *Logicrose Ltd v Southend United Football Club* [1988] 1 WLR 1256 (ChD) 1261; *Hogg v Cramphorn* [1967] 1 Ch 254 269; *Guinness plc v Saunders* [1990] 1 All ER 652 (HL) 664–5; *Rolled Steel Products (Holdings) Ltd v British Steel Corp* [1986] Ch 246 (CA).

[55] *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218 1278; *Guinness plc v Saunders* [1990] 1 All ER 652 (HL) 665 697–8; *Cowan de Groot Properties Ltd v Eagle Trust plc* [1992] 4 All ER 700 (ChD) 762.

[56] *SACWU v Dyasi* [2001] 7 BLLR 731 (LACC); *Fedlife Assurance Ltd v Wolfaardt* (2001) 22 *ILJ* 2407 (SCA).

[57] *Council for Scientific and Industrial Research v Fijen* (1996) 17 *ILJ* 18 (A); *Dube v Nasionale Sweisware (Pty) Ltd* (1998) 19 *ILJ* 1033 (SCA).

[58] *Phillips v Fieldstone Africa (Pty) Ltd* [2004] 1 All SA 150 (SCA); *CyberScene Ltd and Others v i-Kiosk Internet and Information (Pty) Ltd* 2000 (3) SA 806 (C); *Eskom Pension Fund v Greyvenstein and Another* [1998] 2 BALR 192 (IMSSA); *Sappi Novoboard (Pty) Ltd v Bolleurs* (1998) 19 *ILJ* 784 (LAC).

remedies without regard to any particular resulting substantive hardship to the employee, any mitigating circumstances related to the employee's breach of duty, or any other 'extra-legal' considerations of fairness.

3.2.2 Fiduciary cases falling within the jurisdiction of the labour courts

(a) Circumstances in which a fiduciary-based claim would fall within the jurisdiction of the labour courts

There are circumstances in which claims by employers against employees arising out of the latter's alleged breach of fiduciary duty would fall within the jurisdiction of the labour courts. This is most likely to occur where the employer seeks to terminate the contract of employment on the grounds of a breach of fiduciary duty and the employee disputes the employer's right to do so on the basis that it constitutes an unfair dismissal.

Another possibility is where the employee alleges an unfair dismissal (or unfair labour practice or unfair discrimination) in a labour court and the employer institutes a counter-claim for breach of fiduciary duty under either the LRA or the BCEA. A similar situation occurred in the recent LAC case of *Rand Water v Stoop and Others*[59] ('*Rand Water*') except that in that case the employer's counter-claim against the employee's allegation of an unfair dismissal was for damages for breach of contract rather than breach of fiduciary duty.

In *Rand Water* the appellant employer had dismissed the respondent employees for alleged fraud. The respondents argued that their dismissals were both procedurally and substantively unfair. The CCMA failed to resolve those disputes and they were referred to the Labour Court for adjudication. The first respondent then served notice of the referral of his unfair dismissal claim in terms of the LRA on the appellant. In response, the appellant instituted a counter-claim

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[59] *Rand Water v Stoop and Others* [2013] 2 BLLR 162 (LAC).

against the first respondent for damages. Before the second respondent could refer his unfair dismissal dispute to the Labour Court, the appellant instituted a similar claim for damages against him, and the second respondent counter-claimed for unfair dismissal. The appellant's claims against both respondents were based on s 158(1)*(a)*(iv) of the LRA,[60] which allows the Labour Court to 'make any appropriate order, including an award of compensation' in any of the circumstances contemplated in the LRA, and on s 77(3) of the BCEA, which gives the Labour Court 'concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment irrespective of whether any basic condition of employment constitutes a term in that contract.'

The two disputes were consolidated for determination by the Labour Court. The respondents successfully objected to that court's jurisdiction over the appellant's damages claims on the grounds that:

1. The Labour Court has jurisdiction only over claims that arise out of contracts of employment and disputes involving unfair dismissals and unfair labour practices.

2. The appellant's claim for damages was a delictual claim. Delictual claims do not arise out of the contract of employment. Therefore, they fall outside the jurisdiction of the Labour Court and ought to have been pursued in a civil court.

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[60] Section 158(1) provides that:
'158. Powers of Labour Court
(1) The Labour Court may–
(a) make any appropriate order, including
(i) the grant of urgent interim relief;
(ii) an interdict;
(iii) an order directing the performance of any particular act which order, when implemented, will remedy a wrong and give effect to the primary objects of this Act;
(iv) a declaratory order;
(v) an award of compensation in any circumstances contemplated in this Act;
(vi) an award of damages in any circumstances contemplated in this Act; and
(vii) an order for costs'.

3. The Labour Court is a court of equity and has no jurisdiction over illiquid claims such as those for damages.

4. Finally, only employees are entitled to institute claims under the BCEA.

The LAC rejected all of these arguments.

It held that the labour courts have concurrent jurisdiction with the civil courts in terms of both s 77(3) of the BCEA and the general principles laid down by the SCA in the *Makhanya* case to determine any matter that is connected with or arises out of a contract of employment. Claims for damages that arise out of the breach of a contract of employment are claims that arise out the contract of employment and accordingly fall within that jurisdiction. In this case, the delicts on which the appellant's claims were based were committed by the respondents while abusing their positions as employees and while they were acting as employees. The claims were accordingly connected to their employment contracts and were within the court's jurisdiction to determine.

On the nature of its jurisdiction, the court held that the labour courts are courts of both law and equity. As courts of law, they do have jurisdiction to determine damages and other illiquid claims.

Although *Rand Water* and all of the cases in which the labour courts have confirmed their concurrent jurisdiction in relation to claims arising out of contracts of employment have concerned employer claims for either contractual or delictual damages, the position should in principle be the same in relation to claims by employers for damages or unauthorised gains derived by an employee in breach of fiduciary duty. Like claims for contractual and delictual damages, these fiduciary claims are common-law claims that arise out of the contract of employment and would involve

conduct by the employee in his or her capacity as a 'fiduciary-employee'.[61]

Other, less likely, ways in which a fiduciary-related claim might fall within the jurisdiction of the labour courts would include cases where the employer institutes a claim or takes some other action against an employee for breach of fiduciary duty, and the employee alleges that this action constitutes either an unfair labour practice in terms of the LRA or unfair discrimination in terms of the Employment Equity Act 55 of 1998 ('the EEA').

(b) Suggested exceptions in relation to certain 'high-earning' employees

It was proposed that the LRA be amended so as to create an exception to the labour courts' jurisdiction over certain cases involving 'high-earning' employees, which would have affected jurisdiction over cases involving alleged breaches of fiduciary duty by such employees.[62] The suggestion was that dismissals of employees who earned above a specified amount be deemed to have been both procedurally and substantively fair.[63] Those amendments were not

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[61] As discussed in chapter 4, fiduciary duties arise out of some underlying relationship between the fiduciary and the beneficiary. In the case of employees and employers, that underlying relationship is the relationship of employment which, in turn, is usually constituted by and arises out of the contract of employment between them. See, for example, *University of Nottingham v Fishel* [2000] ICR 1462 1491–2; *Hospital Products v United States Surgical Corp* (1984) 156 CLR 41 97; *New Zealand Netherlands Society 'Oranje' Inc v Kuys* [1973] 1 WLR 1126 1130; *Ross River and Another v Cambridge City Football Club* [2007] EWHC 2115 (Ch) [197]; *Kelly v Cooper* [1993] AC 205 215; *Phillips v Fieldstone Africa (Pty) Ltd* [2004] 1 All SA 150 (SCA) 163; *Helmet Integrated Systems Ltd v Tunnard* [2006] EWCA Civ 1735 [37]–[39].

[62] Labour Relations Amendment Bill B16-2012, *Government Gazette* 35212 of 5 April 2012.

[63] If promulgated, the amendments would have excluded the labour courts' jurisdiction to declare the termination of such an employee's employment on the grounds of breach of fiduciary duty to be an unfair dismissal in terms of the LRA, thereby depriving the employee of the right to contest it as such or to claim unfair dismissal relief under the LRA. The proposed amendments did not however appear to exclude the labour courts' jurisdiction over a claim by a high-earning employee for wrongful termination of his or her contract of employment in terms of the common law or a counter-claim by the employer for relief for breach of fiduciary duty. Similarly, they also did not appear to prevent an employer from instituting any

implemented. If they had been, they may have had important implications for fiduciary-based claims in relation to high-earning employees who, as chapters 5 and 6 of this thesis will show, are particularly likely to be subject to fiduciary duties.

3.2.1 The 'equitable jurisdiction' of the South African labour courts

The South African labour courts were established and constituted by the LRA as 'courts of law' and 'courts of equity'.[64] When acting as 'courts of equity' they have an 'equitable jurisdiction' to take account of principles of fairness and other extra-legal considerations that would not be taken into account by a civil court, to depart from legal rules, and to refuse to allow a party to enforce their full common-law rights or remedies where necessary to ensure a fair and equitable outcome.[65] It is therefore necessary to consider the nature and extent of this 'equitable jurisdiction' and how it might affect cases involving the fiduciary accountability of an employee.

3.2.2 The meaning of 'equity' in South African labour law

The concept of 'equity' in South African labour law is not the same as 'Equity' in the English and Canadian law sense. Although it shares the same broad aim of introducing flexibility and fairness to counteract the harsh effects of 'hard' rules of law, South African labour law 'equity' is a more general principle of natural justice that

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other claim for fiduciary relief against a high-earning employee in accordance with the general jurisdictional principles laid down in *Makhanya v University of Zululand* [2009] 8 BLLR 721 (SCA) and *Rand Water v Stoop and Others* [2013] 2 BLLR 162 (LAC).

[64] Sections 151 and 167(1) of the LRA.

[65] The granting of this 'equitable jurisdiction' to the labour courts results from various recommendations made by the Wiehahn Commission, which was appointed by the South African government in 1977 to enquire into and make recommendations on South Africa's existing labour legislation (GN 445 of 1977, *Government Gazette* 5651, 8 July 1997 and GN 594 of 1977, *Government Gazette* 5720, 26 August 1977). The Commission's recommendations included that, in coming to decisions, the Labour Court should be entitled to 'take into account all those extra-legal considerations that have a bearing on the matter before it' and have jurisdiction to 'give any such order as justice and equity may demand in a particular case'. (*The Complete Wiehahn Report* 97–8 para 4.28).

enables the labour courts to have regard to extra-legal considerations and depart from rules of law in the interests of substantive and procedural fairness.

The labour courts' 'equity' jurisdiction is also distinguishable from the civil courts' jurisdiction to apply equitable principles, which is limited to those particular principles that they have or are prepared to recognise as forming part of South African common law in the manner and subject to the provisos described earlier. Where equitable principles are afforded that recognition, they acquire the status of law. Insofar as the civil courts can be described as having an 'equitable' discretion or jurisdiction, such discretion is therefore limited to the way in which *the law* (as opposed to any extra-legal consideration) is applied.

'Labour law equity' was described in *National Automobile and Allied Workers Union v Pretoria Precision Castings (Pty) Ltd*[66] as allowing the court to have regard to, for example, the effect of an unfair labour practice, and to–

> the flexibility inherent in the whole field of proper labour relations; the idea that natural justice avoids or should avoid the trap of strict legalism …; the desire – and in fact purpose of labour relations – that conduct should not produce results that are unreasonable, capricious or harsh'; the public interest in fair treatment; and recognition that 'the dignity of the human being which in turn will promote equitable labour relations.[67]

However, despite broad descriptions such as these and common references to South African labour law being 'based on equity', labour law 'equity' is not a general or overriding principle applicable to all aspects of South African labour law or to all cases that fall within the labour courts' jurisdiction.

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[66] *National Automobile and Allied Workers Union v Pretoria Precision Castings (Pty) Ltd* (1985) 6 *ILJ* 369 (IC).

[67] *National Automobile and Allied Workers Union v Pretoria Precision Castings (Pty) Ltd* (1985) 6 *ILJ* 369 (IC) 378.

This was confirmed by the LAC in *3M SA (Pty) Ltd v SA Commercial Catering and Allied Workers Union and Others*[68] in which the LAC expressly rejected an argument that the labour courts have the power to adjudicate all claims in the light of considerations of fairness.[69] It held in this regard that their description–

> as courts of equity does not add anything to the jurisdiction of these two courts. These two courts are superior courts of law. The only fairness they apply in dealing with matters which come before them is such fairness as they are specifically required to apply in specific sections of the [Labour Relations] Act in respect of specific types of dispute as well as such fairness as every court of law is required to observe in terms of the rules of natural justice. Examples of such sections are ss 185, 187, 188, 191, 193, 194 and 162(1). Save for s 162(1), all of those sections relate to unfair dismissal disputes. Section 162(1) relates to orders of costs and obliges the Labour Court to have regard to the requirements of law and fairness in deciding whether to award costs. In fact the reference in the Act to the Labour Court and this court as courts of equity (in addition to being courts of law) should be repealed because, while it adds nothing, it may cause unwarranted confusion.

3.2.2 The determination of fiduciary claims by the labour courts

It is clear from the above that the labour courts' 'equitable jurisdiction' and discretion to take extra-legal considerations of fairness into account apply only to determinations of unfair dismissals, unfair labour practices and issues of costs. Although not specifically referred to by the court in *3M SA (Pty) Ltd v SA Commercial Catering and Allied Workers Union and Others*, the same equitable jurisdiction should in principle apply to allegations of unfair discrimination in terms of the EEA, the LRA and the Promotion

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[68] *3M SA (Pty) Ltd v SA Commercial Catering and Allied Workers Union and Others* [2001] 5 BLLR 483 (LAC).

[69] *3M SA (Pty) Ltd v SA Commercial Catering and Allied Workers Union and Others* [2001] 5 BLLR 483 (LAC) [17].

of Equality and Prevention of Discrimination Act 4 of 2000 (PEPUDA).

Applying these general principles to cases involving the fiduciary accountability of an employee, that equitable jurisdiction would apply where an employer has terminated an employee's employment for breach of fiduciary duty and the employee contests that termination as an unfair dismissal. Similarly, it should also apply to any other action taken by an employer on the grounds of breach of fiduciary duty that the employee contests as an unfair labour practice or as involving unfair discrimination.

The labour courts do not however have any special 'equitable' jurisdiction or discretion in cases that fall outside these three discrete categories of unfair dismissals, unfair labour practices and unfair discrimination or the issue of costs. The implications of this are that 'labour law equity' cannot operate as an independent source of fiduciary accountability, as a basis for imposing or restricting such accountability, or as a basis for otherwise departing from the common-law fiduciary principles.

3.2.3 Dismissal for breach of fiduciary duty

The cases involving employee fiduciary accountability that are most likely to come before the labour courts for determination are those in which the employer has terminated the employee's services for alleged breach of fiduciary duty and the employee contests the termination as an unfair dismissal. As already mentioned, where this occurs, the determination of the fairness and thus the validity of the termination would fall within the 'equitable' jurisdiction of the court.

Labour law's 'equity' in relation to unfair dismissals is embodied in ss 185 to 187, 188, 191, 192(2), 193 and 194 of the LRA. In terms of these provisions, an employee may not be validly dismissed from his or her employment unless the employer is able to show that the

dismissal was both procedurally and substantively fair in the circumstances.

The LRA itself does not define or explain the requirements for either procedural or substantive fairness. Some guidelines on the requirements for procedural and substantive fairness for dismissals relating to misconduct and incapacity are set out in the Code of Good Practice: Dismissal, Schedule 8 to the LRA[70] ('the Code') which, although not law, has strong persuasive force before the labour courts.

Dismissal for breach of fiduciary duty is not included in the LRA's list of automatically unfair dismissals.[71] Where an employer dismisses an employee for such a breach the onus is on the employer to show that the breach constituted a substantively fair reason for the dismissal.[72] The determination of whether this was the case involves a dual enquiry into whether the facts of the case concerned gave rise to a reason for dismissal and whether the dismissal was a fair penalty. This requires consideration of all the circumstances, including, for example, the gravity of the employee's misconduct or infringement, length of service, disciplinary record and personal circumstances.[73]

The courts have consistently held that any misconduct by an employee that adversely affects the underlying relationship of mutual trust and confidence between an employer and employee and renders the continuation of the employment relationship intolerable or

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[70] Code of Good Practice: Dismissal, Schedule 8 to the LRA.

[71] As set out in s 187 of the LRA.

[72] Section 188(1) of the LRA.

[73] Item 3(5) of the Code of Good Practice: Dismissal, Schedule 8 to the LRA; *JD Group Ltd v De Beer* (1996) 17 *ILJ* 1103 (LAC); *Early Bird Farms (Pty) Ltd v Mlambo* (1997) 5 BLLR 540 (LAC).

that constitutes a material breach of the employment contract[74] is sufficiently serious to justify dismissal,[75] regardless of whether or not the employee benefited from the misconduct or, if he or she did, of the nature and amount of that benefit.[76] Although these general principles have been laid down in cases involving theft or other forms of dishonesty, breach of fiduciary duty, by analogy, is also likely to be recognised as infringing on the underlying relationship of trust and confidence, as rendering the continuation of that relationship intolerable and, thus, as a substantively fair reason for dismissal.[77]

3.2.4 Claims for unauthorised gains and/or damages for breach of fiduciary duty

Other fiduciary-related cases that may come before the labour courts for determination are ones in which an employer claims an employee's unauthorised gains, damages and/or other relief for an employee's breach of fiduciary duty. Although, according to the principles laid down in *Rand Water*,[78] employers may institute such a claim in a labour court as claimant, they would usually do so in a civil court. It is more likely therefore that such claims would only fall to be determined by the labour courts when brought as counter-claims to

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[74] *Schierhout v Minister of Justice* 1926 AD 99; *Johannesburg Stock Exchange v Northern Tvl* (Messina) Copper Exploration Co Ltd 1945 AD 529; *Council for Scientific & Industrial Research v Fijen* (1996) 17 *ILJ* 18 (A).

[75] For example, *Toyota SA Motors (Pty) Ltd v Radebe and Others* (2000) 21 *ILJ* 340 (LAC); *Shoprite Checkers (Pty) Ltd v CCMA and Others* (2008) 29 *ILJ* 2581 (LAC); *Miyambo v CCMA* (2010) 31 *ILJ* 2031 (LAC); *Freshmark (Pty) Ltd v SACCAWU and Others* (2009) 30 *ILJ* 341.

[76] *Sappi Novoboard (Pty) Ltd v Bolleurs* (1998) 19 *ILJ* 784 (LAC), [1998] 5 BLLR 460 (LAC).

[77] Although it appears to incorrectly equate the employee's fiduciary duty to avoid conflicts of interest with the relationship of trust and confidence, a similar view that breach of the no-conflict duty 'will normally warrant dismissal' is expressed in Van Niekerk et al *Law@Work* 266 para 1.2.5.

[78] *Rand Water v Stoop and Others* [2013] 2 BLLR 162 (LAC).

an employee's claim for unfair dismissal (or for an unfair labour practice or unfair discrimination), as occurred in *Rand Water*.[79]

In such cases, the counter-claim would be directly linked to one of the types of claims identified in *3M SA (Pty) Ltd v SA Commercial Catering and Allied Workers Union and Others*[80] as falling within the labour courts' 'equitable' jurisdiction as a 'court of equity'. That raises the question of whether the labour courts, when adjudicating such claims, would exercise their 'equitable' jurisdiction and apply the 'labour law equity's' extra-legal considerations of fairness so as to reduce (or increase or otherwise depart from) the relief that would be granted to the employer by a civil court applying the common-law principles.

There is no reported judgment directly in point. However, according to the LAC's judgment in *Rand Water*[81] (which made reference to claims for both contractual and delictual damages arising out of the employees' breaches of their contracts of employment), the fact that the Labour Court is both a court of law and a court of equity implies–

> that in matters before it, it should apply the appropriate principles. Sometimes it must apply both these principles on an issue: for example when determining whether to grant costs in a matter referred to it, but where the pleadings involve a contractual claim and no reliance is placed on unfair behaviour, principles of law must apply to determine the dispute. In the present case, *the Labour Court would do exactly what the High Court would do in adjudicating the damages claim. The Labour Court, like the High Court, will sit as a Court of law and not as a Court of equity.* Its jurisdiction is concurrent to the jurisdiction of the High Court. (My emphasis.)

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[79] *Rand Water v Stoop and Others* [2013] 2 BLLR 162 (LAC).
[80] *3M SA (Pty) Ltd v SA Commercial Catering and Allied Workers Union and Others* [2001] 5 BLLR 483 (LAC).

[81] *Rand Water v Stoop and Others* [2013] 2 BLLR 162 (LAC) [33].

Although claims for damages and other forms of relief for breach of fiduciary duty are not contractual or delictual claims, they should in principle be treated in the same way. Like contractual and delictual claims for relief they arise out of the common law and, unless inherently linked to an allegation of unfair behaviour on the part of the employer, would require the labour courts to act as courts of law and not ones of equity. If this is correct, the labour courts would apply the same common-law fiduciary principles to employers' claims for fiduciary relief as a civil court would, regardless of whether they are brought by the employer as claimant or by way of a counter-claim as in *Rand Water,*[82] and without reducing or otherwise altering the relief that the employer would receive from a civil court.

3.2.5 The employer's recovery of an amount for breach of fiduciary duty – section 34 of the Basic Conditions of Employment Act

Another statutory provision relevant to the position of an employer seeking redress against an employee who has committed a breach of fiduciary duty (but who has remained in employment) is s 34 of the BCEA.

Section 34(1) prohibits an employer from making any deductions from an employee's remuneration unless the employee agrees in writing to the deduction of a specific debt or the deduction is required or permitted in terms of a law, collective agreement, court order or arbitration award. An employer's right to make deductions as reimbursement for loss or damage caused by the employee is however further qualified by s 34(2), which provides that such a deduction may be made only if the loss or damage occurred in the course of the employee's employment, was due to the fault of the employee,[83] and the employer has followed a fair procedure and

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[82] *Rand Water v Stoop and Others* [2013] 2 BLLR 162 (LAC) [33].

[83] Fault would require *mens rea* in the form of either negligence or intent. Fault is not a requirement for fiduciary relief and it will not necessarily be present (or

given the employee a reasonable opportunity to show why the deduction(s) should not be made. In addition, the total amount(s) deducted cannot exceed the actual amount of the loss or damage or one-quarter of the employee's remuneration in money.

4. CONCLUSIONS

This chapter has explained the historical connections between South African, English and Canadian fiduciary law and thus the comparative relevance and persuasive value of English and Canadian law in an analysis of the general South African common-law principles of fiduciary accountability. It has however also drawn attention to the respects in which those general common-law principles differ from the principles in English and Canadian law and to the circumstances and ways in which the principles of South African labour and employment law might affect their application to employees.

This chapter also suggests that, although the ‘modern’ fiduciary doctrine has evolved and changed since its origins in the English Courts of Chancery, its history does provide a clear reminder that the doctrine is an equitable one. As such, it is inherently normative and intended to favour flexibility over rigidity where necessary to achieve substantive fairness.

Finally, the chapter has emphasised the relatively undeveloped, unacknowledged and under-utilised nature of the fiduciary concept in South African law as compared to both English and Canadian law. It has shown in this regard that this lack of prominence is not due to any impediment in principle to the recognition and greater use of the more generally applicable fiduciary principles of English and Canadian law, but is rather due to the different structure of the South African legal system and the way in which equitable principles are accommodated within it.

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capable of proof) in every breach of fiduciary duty. Where it is not present or cannot be proved, the employer will not be able to make any deduction for damages suffered in consequence of the employee's breach of fiduciary duty.

However, the relatively low profile and undeveloped nature of the concept also means that South African law is free of much of the uncertainty, conflicting positions and general ‘jurisprudential baggage’ that have confused English and Canadian fiduciary law. South African law is therefore uniquely and favourably placed to adopt a set of fiduciary principles that are clear, coherent, principled and theoretically sound. The chapters that follow will critically discuss what those principles should be.

CHAPTER 3

THE NATURE, PURPOSE, OPERATION AND DISTINGUISHING FEATURES OF FIDUCIARY DUTIES

1. INTRODUCTION

Generally, fiduciary duties are duties that apply to persons (fiduciaries) who have some power to affect the assets, affairs or interests of another person (the beneficiary). Their purpose is to protect the beneficiary by ensuring that the fiduciary uses that power only for the exclusive purpose of promoting or maintaining the beneficiary's interests, and does not abuse it by furthering his or her own or any other person's interests. Fiduciary duties are thus essentially duties of 'undivided loyalty',

[1] self-abnegation and self-denial. They are also *sui generis* in nature and are not founded in either contract or delict (tort).[2]

The two core duties of fiduciaries are the no-conflict and the no-profit duties. As will be explained later in this chapter, these are also the only duties that are truly 'fiduciary' ones. These duties are generic in the sense that they attach to all fiduciaries.[3] They apply to all trustees, directors, agents, partners and other fiduciaries, although their scope will vary, depending on the nature of the broader underlying relationship between the fiduciary and the beneficiary concerned.

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[1] *Allied Business and Financial Consultants Ltd Sub Nom O'Donnell v Shanahan, Re* [2009] EWCA; *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch); *Bristol & West Building Society v Mothew* [1988] Ch 1 18; *University of Nottingham v Fishel* [2000] ICR 1462 1490; *Item Software (UK) Ltd v Fassihi* [2004] EWCA Civ 1244, [2005] 2 BCLC 91.

[2] *University of Nottingham v Fishel* [2000] ICR 1462; *Noble Spirit Lts v Wang Shu Yuen* 2013 WL 7494 [16]–[18].

[3] *Phillips v Fieldstone a (Pty) Ltd and Another* [2004] 1 All SA 150 (SCA) 162.

The no-conflict and no-profit duties are also structurally and functionally unique. They have a number of features and a protective or regulatory philosophy, methodology and remedial regime that are distinguishable from those of other kinds of legally recognised duties.[4] They are, in particular, also distinct regarding the kinds of behaviour they regulate, the way in which they regulate behaviour, and the kind of protection they afford to the beneficiary.

This chapter provides a broad and general overview of the nature, purpose, scope, operation and distinctive features of fiduciary duties. It also reveals the continuing judicial inconsistency, uncertainty and debate about various aspects of these duties, including the meaning and definition of 'fiduciary duties', and whether they are exclusively proscriptive or also operate prescriptively. The emphasis is on the unique aspects of fiduciary duties and remedies, how these peculiarly fiduciary features differ from those of other non-fiduciary duties, and the protective or regulatory implications of those distinctions. In addition, the chapter introduces the conceptual and theoretical links between the nature, purpose and operation of fiduciary duties and the criteria that govern their existence and scope in any given relationship.

2. DIFFERENT RELATIONSHIPS, CAPACITIES AND DUTIES

2.1 GENERAL PRINCIPLES

Fiduciary duties exist within 'underlying' relationships between two or more persons. Depending on their nature and the surrounding circumstances, each underlying relationship may give rise to various types of duties. Where the relationship or any part thereof has a fiduciary character it will render one party a fiduciary and will impose certain duties on him or her in that fiduciary capacity. These duties

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[4] *Bristol & West Building Society v Mothew* [1988] Ch 1; *Goldcorp Ltd* [1995] 1 AC 74 (PC) 216; *University of Nottingham v Fishel* [2000] ICR 1462 1492–3.

will apply only in relation to the fiduciary aspects of the underlying relationship. Any aspects of that relationship that do not have any fiduciary character may however subject the same party to other kinds of duties in a non-fiduciary capacity. Where the parties have more than one relationship with each other, one may owe the other a mix of duties in both fiduciary and non-fiduciary capacities in terms of one or more of their underlying relationships, and in relation to all or only certain aspects of them.

Employees owe their employers a number of statutory and common-law (primarily contractual) duties in their capacity as 'ordinary employees'. There are however various circumstances and capacities in which they will also attract fiduciary duties. This will be the case where their position, power, functions or obligations fulfil the criteria for the incidence of fact-based fiduciary accountability.[5] Employees may also attract such duties on the basis that they fall within one of the established categories or types of fiduciary relationships. Most commonly, this occurs where the employee acts as agent for, or is also a director or officer of, a corporate employer. Where that is the case, the employee will owe the employer fiduciary duties in his or her capacity as 'fiduciary-employee' and non-fiduciary duties in his or her capacity as an ordinary employee.

Two of the main propositions on which this thesis is based are that it is necessary to clearly distinguish between different types of duties and the different capacities in which they attach.[6] More specifically, it is necessary to distinguish the non-fiduciary duties that attach to all employees as ordinary, non-fiduciary employee from those that may attach to them in the distinguishable capacity of fiduciary.[7] In

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[5] *University of Nottingham v Fishel* [2000] ICR 1462. The nature and meaning of 'fact-based' fiduciary accountability is discussed in chapter 4. As will be argued in chapters 4 and 8, there is no merit in classifying all relationships of employment generally as a class of fiduciary relationship.

[6] *Public Investment Corporation v Bodigelo* (128/2013) [2013] ZASCA 156 (22 November 2013).

[7] *University of Nottingham v Fishel* [2000] ICR 1462 1493.

addition, within that second category of duties that attach to them in a fiduciary capacity, there is a further distinction between those duties that are truly fiduciary duties and those that are not.[8] It is therefore necessary to consider each of those different kinds of duties and the capacities in which they apply to employees.

2.2 DUTIES THAT ATTACH TO ALL EMPLOYEES AS ORDINARY EMPLOYEES

There are a number of duties that apply to all employees in their capacity as ordinary employees. The majority of these are contractual duties that arise out of the express terms of their contract of employment or are implied into it by statute,[9] the common law, applicable collective bargaining agreements, and established practices and customs.[10] Of these, the most significant for the purposes of this chapter are the common-law implied duties of all ordinary employees to act in good faith[11] and the implied term of mutual trust and confidence.[12]

2.3 DUTIES THAT ATTACH TO EMPLOYEES AS FIDUCIARIES

Where an employee is a 'fiduciary-employee' in relation to any aspect(s) of the employment relationship, acts as the employer's

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[8] *Bristol & West Building Society v Mothew* [1988] Ch 1 17; *Gwembe Valley Development Co Ltd v Koshy (No 3)* [2004] 1 BCLC 154 (CA); *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch); *Lac Minerals v International Corona Resources Ltd* [1990] FSR 441 28; *Attorney-General v Blake* [1998] Ch 439 (CA), [2001] AC 1; *Pilmer and Others v Duke Group Limited (In Liquidation) and Others* [2001] HCA 31; *Breen v Williams* (1994) 35 NSWLR 522.

[9] Primarily the Labour Relations Act 66 of 1995, the Basic Conditions of Employment Act 75 of 1997, the Machinery and Occupational Safety Act 75 of 1997, and the Employment Equity Act 55 of 1998.

[10] *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) 531–2.

[11] *Robb v Green* (1895) 2 QB 1; *Premier Medical & Industrial Equipment (Pty) Ltd v Winkler and Others* [1971] 4 All SA 94 (W), 1971 (3) SA 866 (W) 867; *University of Nottingham v Fishel* [2000] ICR 1462; *Ketteringham v Cape Town City Council* 1933 CPD 316; *Lawrence v I Kuper & Co (Pty) Ltd t/a Kupers - A Member of INVESTEC* (1994) 15 *ILJ* 1140 (IC).

[12] *Council for Scientific & Industrial Research v Fijen* 1996 (2) SA 1 (A), (1996) 17 *ILJ* 18 (A), [1996] 6 BLLR 685 (A).

agent, is a director or officer of a corporate employer, or has any other relationship with the employer that gives rise to fiduciary duties, he or she will be subject to additional fiduciary duties in that distinct, or although possibly related, fiduciary capacity.[13]

(a) The no-conflict and no-profit duties

Two of the duties that attach to the fiduciary capacity are the general no-conflict and no-profit duties.[14] These are also the only two duties that are truly 'fiduciary' ones. They seek to ensure that if and when the fiduciary acts, he or she is not swayed, influenced or compromised by his or her own several interests or by any duty that he or she may owe to another person.

The no-conflict duty requires the fiduciary to avoid all situations in which he or she has any interest or any duty to another person that conflicts with, or is reasonably likely to conflict with, his or her duties to the beneficiary.[15] This general duty also gives rise to a number of more specific sub-duties that require the fiduciary, for example, to refrain from acting for the beneficiary in transactions in which there is such a conflict, to refrain from competing with the beneficiary, and to refrain from taking personal advantage of a corporate opportunity that 'belongs' to a corporate employer. Employees have been found to be in breach of the no-conflict duty where, for example, they have solicited their employer's customers for other businesses in which they have a personal interest,[16] and where they have set up undertakings in competition with their current employer, diverted

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[13] *Public Investment Corporation Ltd v Bodigelo* (128/2013) [2013] ZASCA 156 (22 November 2013) [15]–[16].
[14] For a discussion of the relationship between these two duties, see A Stafford and S Ritchie *Fiduciary Duties: Directors and Employees* (2008) 33–5 paras 2.83-2.87; M Conaglen *Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary Duties* (2010) chapter 5.
[15] *Aberdeen Railway Co v Blaikie Bros* (1854) 1 Maq 461 (HL) 471.
[16] For example, *PMC Holdings v Smith* [2002] EWHC 1575 (QB).

business opportunities to those undertakings, or misused their employer's confidential information.[17]

The no-profit duty prohibits the fiduciary from using his or her position or powers in order to obtain any unauthorised profit for him- or herself or for a third person.[18]

(b) Other duties of fiduciaries

In addition to the no-conflict and no-profit duties, fiduciaries generally have duties to perform their mandate,[19] to exercise reasonable care and skill,[20] and to act in good faith,[21] in the interests of the beneficiary,[22] only for a proper or authorised purpose,[23] and within the limits of their powers.[24] These further duties function together with the no-conflict and no-profit duties to protect the integrity of the fiduciary aspect(s) of the fiduciary's relationship with the beneficiary and to ensure the protection and paramountcy of the beneficiary's interests.

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[17] For example, *Shepherd's Investment v Walters and Others* [2006] EWHC 836 (Ch), [2007] IRLR 127; *Premier Medical & Industrial Equipment (Pty) Ltd v Winkler and Others* [1971] 4 All SA 94 (W), 1971 (3) SA 866 (W). For a case in which an employee was held to have breached the duty by taking personal advantage of a corporate opportunity that 'belonged' to the employer, see *Phillips v Fieldstone a (Pty) Ltd and Another* [2004] 1 All SA 150 (SCA), 2004 (3) SA 465 (SCA).

[18] *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134.

[19] *Bristol & West Building Society v Mothew* [1988] Ch 1 16; *Breen v Williams* 186 CLR 71 37..

[20] *Permanent Building Society v Wheeler* (1994) 14 ACSR 109 237; *Bristol & West Building Society v Mothew* [1988] Ch 1 16; *Breen v Williams* (186 CLR 71 17; *Henderson v Merit Syndicates Ltd* [1995] 2 AC 145 205.

[21] *Bristol & West Building Society v Mothew* [1988] Ch 1 16; *Breen v Williams* (1994) 35 NSWLR 522 18; *Armitage v Nurse* [1998] Ch 241 (CA) 253–4.

[22] *Re Smith & Fawcett Limited* [1942] 1 Ch 304 306; *Howard Smith Ltd v Ampol Petroleum Ltd and Others* [1974] AC 821 834–5; *Regentcrest plc v Cohen* [2001] 2 BCLC 80 (ChD) [120].

[23] *Mills v Mills* (1938) 60 CLR 150 (HC of A) 185; *Howard Smith Ltd v Ampol Petroleum Ltd and Others* [1974] AC 821 834; *Winthrop Investments Ltd* (1975) 2 NSWLR 666 SC (NSW) 688.

[24] *Sellangor United Rubber Estates Ltd v Cradock (3)* [1968] 2 All ER 1073; *Cullerne v London and Suburban General Permanent Building Society* (1890) 25 QUD 485.

(c) The duties of fiduciary director-officer employees

Employees who, in addition to their ordinary employment, are also 'directors' or 'officers' of a corporate employer will, in that capacity and in terms of the general principles of company law, owe their employer a number of duties.[25] Employees who fall within the definition of 'director' or 'prescribed officer' in terms of s 1 of the Companies Act 71 of 2008 ('the 2008 Act') or who are members of a sub-committee of the board of directors will be subject to various general fiduciary and related statutory duties under that Act, in addition to any common-law fiduciary duties they may owe to the company. These duties are discussed further in chapter 7.

(d) The duties of fiduciary agent employees

Employees who act as 'agents' (which are recognised as one of the established categories of fiduciary) of their employer will, in addition to their duties as ordinary employee, owe the employer fiduciary duties in that agency capacity.[26]

This will be the case where the employee is authorised to perform any legal act on behalf of the employer that creates, alters or discharges a legal obligation between the employer and a third person and thus falls within the law of agency's definition of an agent.[27] This is most likely in relation to senior employees and those in managerial positions,[28] although it is in principle possible for employees at all levels to act as 'agents' for their employers.

In addition to the fiduciary no-conflict and no-profit duties, agent-employees will, as agents, owe their employer general agency duties

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[25] *LAWSA* (First re-issue) *Companies* volume 2 paras 116–37.

[26] *Transvaal Cold Storage Co Ltd v Palmer* 1904 TS 4; *Hansen v Martin Hansen Estates* [1996] 7 BLLR 856 (IC).

[27] *Wille's Principles of South African Law* 9 ed (2007) 984; *Totalisator Agency Board OFS v Livanos* 1987 (3) SA 283 (W).

[28] *Shepherd's Investment v Walters and Others* [2006] EWHC 836 (Ch), [2007] IRLR 127; *Canadian Aero Service v O'Malley* 1973 Carswell Ont 236, [1974] SCR 592 371.

to personally perform their mandate, to act in accordance with the principal's instructions, with reasonable care, skill and diligence and in good faith, to render an account to the principal, and to pay any proceeds of the mandate to the principal.[29]

3. THE MEANING OF FIDUCIARY DUTIES

3.1 DISTINGUISHING 'TRULY' FIDUCIARY DUTIES FROM OTHER DUTIES THAT ATTACH TO FIDUCIARIES

There is growing support for the proposition that not all duties that attach to fiduciaries in their fiduciary capacity are fiduciary duties in the true sense and that it is necessary to distinguish those duties that are of a 'truly' fiduciary nature from those which, although they attach to and by virtue of the fiduciary capacity, are not.[30] As Lord Millett said in *Mothew*: 'It is obvious that not every breach of duty by a fiduciary is a breach of fiduciary duty'.[31] However, the issue of which duties are truly fiduciary ones is still somewhat unsettled.

3.2 DEFINITIONAL ISSUES

Truly fiduciary duties can be defined in various ways, depending on the purpose that the definition is intended to serve. If the purpose is to assist in determining the incidence of fiduciary duties, to allow for meaningful analysis of their nature and purpose, and to distinguish them from other kinds of duties, the definition must be confined to those duties that are peculiar to fiduciaries and that are applicable to

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[29] *Wille's Principles of South African Law* 992–3; *Belonje v African Electric Co (Pty) Ltd* 1949 (1) SA 592 (E) 599; *Strydom v Roodewal Management Committee* 1958 (1) SA 272 (O) 273; *Goodgold Jewellry (Pty) Ltd v Brevadau CC* 1992 (4) SA 474 (W).

[30] *Bristol & West Building Society v Mothew* [1988] Ch 1 17; *Gwembe Valley Development Co Ltd v Koshy (No 3)* [2004] 1 BCLC 154 (CA); *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch)..

[31] *Bristol & West Building Society v Mothew* [1988] Ch 1 17.

all of them. In order to fulfil those requirements, the definition must thus be based on criteria of exclusivity and sufficiency.[32]

As Lord Millett put it in his widely-quoted statement in *Mothew*:[33]

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

3.3 TRULY FIDUCIARY DUTIES

(a) General principles and definition

The only two duties that invariably attach to all fiduciaries, and only to them, and that therefore indisputably meet the criteria of exclusivity and sufficiency are the no-conflict and no-profit duties. As such, it is only those duties that are and that can properly be referred to as 'fiduciary duties'[34] that have the distinctive features of fiduciary duties, and that give rise to the peculiarly fiduciary remedies discussed in this chapter.

The other duties that attach to and by virtue of the fiduciary capacity are not fiduciary duties. They apply to a variety of persons in relationships that have no fiduciary character. Although they are logically linked to and form part of the restraints that the fiduciary

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[32] For a detailed consideration of this definitional approach and others, see R Nolan 'Controlling Fiduciary Power' (2009) 68(2) *Cambridge LJ* 293.

[33] *Bristol & West Building Society v Mothew* [1988] Ch 1 17, followed in, for example, *Gwembe Valley Development Co Ltd v Koshy (No 3)* [2004] 1 BCLC 154 (CA); *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch). There is however also authority for different approaches to and variations on the meaning of 'fiduciary' duties. For example, the English Law Commission (Consultation Paper And Report On Fiduciary Duties And Regulatory Rules No. 124, 1995) identified four 'fiduciary duties' – the no-conflict duties, the no-profit duties, an 'undivided loyalty' duty prohibiting any conflict between duty and duties, and a duty not to misuse confidential information.

[34] *Breen v Williams* (1994) 35 NSWLR 522; *Attorney-General v Blake* [1998] Ch 439 (CA), [2001] AC 1; *Pilmer and Others v Duke Group Limited (In Liquidation) and Others* [2001] HCA 31; *Bristol & West Building Society v Mothew* [1988] Ch 1; M Conaglen 'The Extent of Fiduciary Accounting and the Importance of Authorising Mechanisms' (2011) 70(3) *Cambridge LJ* 548.

regime imposes on the fiduciary and are necessary for the achievement of its ultimate aim of ensuring that the fiduciary acts only in the beneficiary's interests, they do not meet the requirement of exclusivity. So, for example, the duty to exercise reasonable care and skill is not a fiduciary duty.[35] Similarly, duties of good faith are not peculiar to fiduciaries and are therefore not fiduciary duties.[36] As such, all further references to 'fiduciary duties' in this thesis are confined to the no-conflict and no-profit duties, unless otherwise indicated.

The failure to appreciate the distinctions between the truly fiduciary no-conflict and no-profit duties and other duties (particularly ones of good faith) has resulted in much confusion in the fiduciary jurisprudence. That confusion is dealt with later in this chapter.

(b) The company law meaning of 'fiduciary duties'

As mentioned earlier, employees of corporate employers who are also 'directors' or 'officers' of their employer company will be fiduciaries in that director or officer capacity and will be subject to all of the general common-law and statutory duties that are imposed on persons in those positions in terms of the general common-law principles of company law and company legislation. There is however a discrepancy between the way in which those duties are classified in company law and the definition of truly fiduciary duties set out above. With the exception of the duties to exercise reasonable care, skill and diligence, company law jurisprudence (particularly that in South Africa and England) categorises and refers to all the general duties of directors and officers as 'fiduciary duties'.[37] For example, the director's common-law duties to act within the company's powers and

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[35] *Bristol & West Building Society v Mothew* [1988] Ch 1 18.

[36] *Attorney-General v Blake* [1998] Ch 439 (CA), [2001] AC 1; *University of Nottingham v Fishel* [2000] ICR 1462 1493; *Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd* [1991] ICR 524 596.

[37] See, for example, F Cassim, M Cassim, R Cassim, R Jooste, J Shev and J Yeats *Contemporary Company Law* 2 ed (2012) chapter 12.

to act in the interests of the company have consistently been regarded as fiduciary duties.[38] In its report on the Reform of Directors' Duties, the English Company Law Reform Steering Group also defined the director's duties to act within his or her powers and to promote the success of the company, as well as the powers to exercise an independent judgment and to declare any personal interest in company-related matters, as fiduciary ones.[39] It is clear however that apart from the no-conflict and no-profit duties and their more specific sub-duties, such as the duty not to take corporate opportunities, the duties of directors and officers are not all both peculiar and generic to all fiduciaries, and therefore do not fulfil the definitional criteria for truly fiduciary duties set out above. The duty to act within powers, for example, does not apply to all fiduciaries.[40] It also applies within other non-fiduciary relationships and is therefore not unique to fiduciaries.[41] In addition and unlike fiduciary duties, the duty is not directly and primarily aimed at preventing self-interested conduct (although that may also be involved in its breach).

(c) Reconciling company law with general fiduciary principles

Stafford and Ritchie explain company law's indiscriminate fiduciary classification of all the general duties of directors and officers as 'fiduciary' ones on the basis that the undisputed fiduciary status of directors and officers has allowed for the avoidance of a proper analysis of the source, nature and content of their duties.[42]

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[38] *Howard Smith Ltd v Ampol Petroleum Ltd and Others* [1974] AC 821; *Re Smith & Fawcett Limited* [1942] 1 Ch 304; *Extrasure Travel Insurance Ltd v Scattergood* [2003] 1 BCLC 598; *Green v Walkling* [2007] EWHC 3251 (Ch).

[39] Modern Company Law for a Competitive Economy URN 01/943, section B11 paras 11.4–11.20.

[40] As Birks points out, solicitors or attorneys and other professional advisors, for example, do not operate within defined powers: P Birks 'The Content of Fiduciary Obligation' (2000) 34 *Israel LR* 3 47.

[41] The duty arises whenever limited powers are given to one party to a relationship, such as a mortgagee and certain other contracting parties: Stafford and Ritchie *Fiduciary Duties* 64 para 2.181(1); M Conaglen 'The Nature and Function of Fiduciary Loyalty' (2005) 121 *LQR* 452; Birks 'The Content of Fiduciary Obligation'.

[42] Stafford and Ritchie *Fiduciary Duties* 61 paras 2.168–2.171.

The no-conflict and no-profit duties cover substantially the whole of directors' and officers' positions, functions and powers and there are (apart from limited areas of legitimate self-interest) few aspects of their role in which they are permitted to act self-interestedly. So, in a wide practical sense, every duty that is performed and every power that is exercised by them is a 'fiduciary' one.[43] This substantive reality has resulted in a glossing over of, and a conceptual confusion between (or, at least, a lack of analytical recognition of), the true theoretical nature of and distinctions between the various duties.

This mechanistic approach to the classification of director and officer duties in company law is problematic in a number of respects. On a more abstract level, the failure to examine the true basis and nature of the different duties of directors and officers has produced a position that is theoretically unsound and unprincipled. It has also become increasingly misaligned with developments in general fiduciary theory and principle in other areas of law. There is also a danger, particularly in relation to employment, of an undiscerning importing of company law's fiduciary misconceptions into relationships between employees and employers.

It is therefore necessary to carefully scrutinise and ensure a principled approach to the classification of the various duties that may attach to employees. This is important for reasons of doctrinal integrity and because truly fiduciary duties are structurally and functionally unique and give rise to different remedies. These distinctions are significant for broader regulatory or protective reasons and may have tactical implications for employers wishing to take action against employees who have acted improperly. Unfortunately, there is little evidence of this kind of analysis of the different kinds of duties in company law in the case law to date. This is particularly evident in the Canadian courts' use of the 'key' or 'senior' employee concept as the basis for recognising the incidence

[43] Stafford and Ritchie *Fiduciary Duties* 12 para 2.9(5).

of employee fiduciary duties.[44] As Stafford and Ritchie put it:[45] 'The junction between company law, employment law and equity has revealed itself to be poorly sign-posted.'

The continuation of this trend will sharpen the inconsistency between company law and principles that are becoming established in other areas in which the fiduciary concept is relevant and, more specifically, in relation to employment. It will also perpetuate existing confusion and uncertainty as to the true nature, purpose and basis of an employee's potential fiduciary duties and liability and how they differ from his or her other non-fiduciary duties and liability.

It is of course possible (and desirable) to apply the same fiduciary principles consistently in company law, employment law and all other areas. Ideally, this would involve the recognition in company law that it is only the no-conflict and no-profit duties and their sub-duties that are truly fiduciary ones and that give rise to the exclusively fiduciary remedies. All the other general duties of directors and officers would have to be formally re-classified as non-fiduciary ones. This could of course have potentially far-reaching implications for both established general principles of company law and the substantive regulation of directors and officers, although there are many cases in which breaches of technically non-fiduciary duties could instead have been dealt with as breaches of either the no-conflict and/or the no-profit duty, thereby achieving the same 'end-result' in terms of accountability and liability.[46]

Such radical changes to well-established company law principles are however unlikely. As Stafford and Ritchie acknowledge, the duties of directors and officers in terms of company law are more realistically likely to continue to be mistreated as all being fiduciary

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[44] These cases and their link with company law are discussed in detail in chapters 6 and 7 of this thesis.
[45] Stafford and Ritchie *Fiduciary Duties* 61 para 2.169.

[46] For a South African example of where breach of a technically non-fiduciary duty could (and should) have been dealt with as a breach of a truly fiduciary duty, see *Da Silva v CH Chemicals (Pty) Ltd* 2008 (6) SA 620 (SCA).

ones.[47] That being the case, the more modest suggestion is that, while there is still space to ensure this, the recognition and development of fiduciary duties in company law should proceed with greater sensitivity to, and greater consistency with, the general fiduciary principles that are evolving and becoming established in other areas of law. The most obvious places where there may still be this kind of space are in the interpretation and application of the relatively new statutory definition of 'prescribed officers' introduced by the 2008 Act and in the development of the concepts of 'de facto' directors and 'shadow' directors and the duties that attach to them.

And, as Stafford and Ritchie argue in relation to employees, employment law should be 'hostile to the introduction of company law [principles and] developments through the medium of equity.'[48] This is particularly so where those principles and developments are incongruent with general fiduciary principles.[49]

4. THE DISTINCTIVE NATURE, PURPOSE AND OPERATION OF FIDUCIARY DUTIES

4.1 THE CORE AND DISTINGUISHING FIDUCIARY DUTY OF 'UNDIVIDED LOYALTY'

> The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary.[50]

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[47] Stafford and Ritchie *Fiduciary Duties* 67 para 2.186.

[48] Stafford and Ritchie *Fiduciary Duties* 67 para 2.186.

[49] Such as the recognition of the no-conflict and no-profit duties as the only truly fiduciary ones and the application of the same criteria for the incidence of all truly fiduciary duties.

[50] Per Lord Millett in *Bristol & West Building Society v Mothew* [1988] Ch 1 18, cited with approval in numerous cases including, for example, *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch); *University of Nottingham v Fishel* [2000] ICR 1462; *University of Nottingham v Fishel* [2000] ICR 1462; *Item Software (UK) Ltd v Fassihi* [2004] EWCA Civ 1244, [2005] 2 BCLC 91 / *Item Software (UK) Ltd v Fassihi* [2005] 2 BCLC 91.

This obligation of 'fiduciary-loyalty', expressed through the general no-conflict and no-profit duties, requires a kind of loyalty that is unique to the fiduciary regime and distinguishable in various respects from other duties that require loyalty, such as the duties of good faith and the employee's common-law duty of loyalty. With regard to its nature, the duty is a comparatively wide-ranging and exacting one that demands the 'undivided' or 'single-minded' loyalty of the fiduciary.[51] It was described by Lord Millett in *Mothew* as having–[52]

> 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. This is not ... an exhaustive list but it is sufficient to indicate the nature of fiduciary obligations.

In requiring the fiduciary to deny all self-interest and avoid all actual and potential conflicts of interest, undivided loyalty goes beyond the kind of loyalty required by other duties. Both fiduciary duties and duties of good faith, for example, require 'loyalty'. For the purposes of fiduciary duties, 'loyalty' has the specific meaning of acting solely and exclusively in the interests of another. In relation to duties of good faith, on the other hand, 'loyalty' generally has a narrower, less exacting meaning that merely requires the incumbent to have regard to or to take the interests of another into account.[53] In addition, fiduciary duties and the loyalty they require differ from other duties in their purpose and in the way they, and the remedies that are available for their breach, function.

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[51] *Breen v Williams* (1994) 186 CLR 71; *Ranson v Customer Systems plc* [2012] EWCA Civ 841, 2012 WL 2191508 26.

[52] *Bristol & West Building Society v Mothew* [1988] Ch 1 12/18.

[53] *University of Nottingham v Fishel* [2000] ICR 1462 1492; *Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd* [1991] ICR 524 532.

4.2 THE PROSCRIPTIVE OPERATION OF FIDUCIARY DUTIES

The primary aim of fiduciary duties is to protect and secure the paramountcy of the interests of one party to a relationship over those of another by imposing a regime of loyalty on the latter in favour of the former.[54]

In broad terms, they aim to prevent self-interested and opportunistic behaviour in relationships in which one party (the fiduciary) has a duty to act only in the interests of the other (the beneficiary).[55] Where they apply, fiduciary duties seek to ensure that the fiduciary acts solely and exclusively in the beneficiary's interests and does not abuse his or her power, access, discretion or position by acting to advance his or her several interests or by using his or her position for unauthorised personal gain. As discussed in chapter 5, these duties will exist where the fiduciary has some access in relation to the beneficiary's assets, interests or affairs in circumstances that fulfil the general criteria for fiduciary accountability or, as this thesis argues, that give rise to a justified expectation of undivided loyalty on the part of the fiduciary.

In effect, fiduciary duties aim to achieve two results. One is to ensure that, if the fiduciary acts, he or she does so only in the beneficiary's interests. This seeks to prevent the fiduciary from acting for him- or herself (or any third party) rather than in the beneficiary's interests alone, and ensures that (apart from properly authorised gains) fiduciaries are financially disinterested in fulfilling their duties and do not misuse their positions for personal gain.[56] At this level, they protect the beneficiary's interests against self-interested and opportunistic behaviour by the fiduciary by preventing the fiduciary

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[54] P Finn 'The Fiduciary Principle' inYoudan (ed) *Equity, Fiduciaries and Trusts* (1989) 1 27.

[55] Or, in some cases, to act in their joint or mutual interests, but not the fiduciary's own several interests: P Finn 'The Fiduciary Principle' 32.

[56] *Attorney-General v Blake* [1998] Ch 439 (CA), [2001] AC 1 280; *Chan v Zacharia* 154 CLR178 14.

from being swayed or compromised by interest rather than duty[57] and by protecting him or her from 'the disease of temptation'.[58]

Their other purpose and function is to enhance the likelihood of the fulfilment of the fiduciary's related but conceptually distinguishable positive duty to act only in the interests of the beneficiary. By prohibiting conduct that is not in the beneficiary's exclusive interests, the only course they leave open to the fiduciary is to act in those exclusive interests, thereby seeking to ensure that if the fiduciary acts, he or she does not fail to fulfil that positive duty by acting self-interestedly.[59] They are thus designed to deter the fiduciary from conduct that is disloyal in the sense of being contrary to the execution of his or her fiduciary role and positive duty to act only in the beneficiary's interests. This support for the fiduciary's positive duty to act solely in the beneficiary's interests through the imposition of fiduciary duties is necessary because of the difficulties of direct enforcement.[60] In addition to the challenges of identifying and prescribing required end-positions in relation to exercises of discretion in advance, breach of a positive duty requires some form of *mens rea* and gives rise to a remedy only where there is proven, causally related loss or damage.

The nature of the deterrence provided by fiduciary duties, coupled with their proscriptive nature, also distinguish them from other duties (such as those of good faith) that simply require one party to act in or have regard to another's interests and/or refrain from conduct that is

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[57] *Bray v Ford* [1896] AC 44 (HL) 51.
[58] *Harris v Digital Pulse Pty Ltd* [2003] NSWCA 10 114.
[59] Conaglen *Fiduciary Loyalty*; De Mott argues that in relationships with agency, the agent's fiduciary duties are linked to the principal's right to control the agent and act as directions to the agent as to how to interpret the principal's instructions: D de Mott 'The Fiduciary Character of Agency and the Interpretation of Instructions' forthcoming in A Gold and P Miller (eds) *Philosophical Foundations of Fiduciary Law* (2014) 34.

[60] The only other possibility would be the imposition of duties of care, skill and diligence.

considered improper or wrongful.[61] These protective purposes are reflected in various distinctive features.

(a) The nature of proscriptive duties

One of the most significant features of fiduciary duties is their primarily proscriptive or 'negative' mode of operation. They are essentially duties that prohibit the fiduciary from acting in certain ways, but do not directly, positively require him or her to act in any particular way, or even to act at all.[62] In effect, they tell fiduciaries what they must not do, rather than what they must,[63] thereby defining the prohibited rather than the required or permissible behaviour.

(b) Distinctions between proscriptive and prescriptive duties

Proscriptive duties are distinguishable from prescriptive ones in their nature and purpose, what they require, and in how they function to achieve their aims.

Prescriptive duties are positive duties that require a party to actually perform some act, or to behave in a certain way, in order to ensure the achievement of a particular, pre-defined 'end-position'[64] (which is usually something that has been identified in advance as being beneficial to or in the interests of the party to whom the duty is owed). They are thus duties that compel and seek to produce a certain outcome. Proscriptive duties, by contrast, are duties that prohibit and whose direct aim is to avoid certain, generally more broadly defined, kinds of behaviour and outcomes. In addition, while the remedies for the breach of proscriptive duties are generally restorative and restitutionary in nature, the usual remedy for the

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[61] Worthington *Equity* 133.

[62] *Attorney-General v Blake* [1998] Ch 439 (CA), [2001] AC 1;. See also the English Law Commission Consultation Paper and Report on Fiduciary Duties and Regulatory Rules No 124 (1995).

[63] *Attorney-General v Blake* [1998] Ch 439 (CA) 15.

[64] Worthington *Equity* 128.

breach of a prescriptive duty is a claim for compensatory damages. The latter focus on loss, and seek to place the wronged party in the end-position in which they would have been had the duty concerned been properly fulfilled.[65]

(c) Reasons and rationale for the proscriptive nature and operation of fiduciary duties

There is a clear and rational connection between the proscriptive nature of fiduciary duties, their underlying regulatory purpose and aims, the remedies that re-enforce them, and (as will be argued in chapter 5) the criteria that determine the circumstances in which they apply.

Fiduciary duties are concerned with the regulation of the use of some power, control or discretion by the fiduciary and with protecting the beneficiary against certain kinds of abuse thereof. In many cases, that power, control or discretion is a necessary and desirable feature of the underlying relationship between the parties. For example, the conferring on directors of the exclusive power and discretion to manage the company's business and affairs[66] is the basis for the conceptual separation of corporate ownership and control that underpins company law's division of powers structure.[67] It is similarly necessary in order to give effect to the purpose and accommodate the substantive demands of other fiduciary relationships, such as those between trustees and beneficiaries and relationships of agency. Prescriptive duties, by actively requiring the performance of some prescribed act, constrain and limit the exercise of the power, control or discretion to which they apply. In many fiduciary relationships (particularly the established classes of fiduciary relationships) any such constraint would conflict with the purpose of

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[65] Worthington *Equity* 128.

[66] Section 66 of the Companies Act 71 of 2008.

[67] A Berle Jr 'For When Corporate Managers are Trustees: A Note' (1931) 45 *Harvard LR* 1365.

the relationship between the parties and the fiduciary's intended role within it. And even when the underlying relationship can accommodate some restriction on the fiduciary's power, control or discretion there is the difficulty of finding the proper balance between proper control and undue compromise.

A further related issue is that it is extremely difficult to define a particular end-position, kind of behaviour, or way in which power, control or discretion is to be used in advance through the imposition of positive prescriptions. The difficulties with attempting to do so are both practical and definitional. On a practical level, it is almost impossible to predict how the fiduciary should act within the context of an underlying relationship that needs to remain flexible, often on a long-term basis, such as the relationship between directors and their companies or between trustees and trust beneficiaries. It is, for example, almost impossible to accurately foresee all the circumstances in which the fiduciary might have to exercise his or her power or discretion, and to identify which behaviour will be in keeping with and which will defeat the purpose for which he or she was given that power or discretion in the first place. Even if it is possible to overcome these difficulties through the use of sufficiently broad and flexible prescriptive duties, proscription would still be problematic in other respects. In particular, the inclusion of proscriptions would significantly increase the transactional costs of structuring and regulating the relationship between the fiduciary and the beneficiary and their unavoidably broad nature may render them vague, uncertain and thus ineffective controls. Given these difficulties, the only feasible controls that can be imposed are proscriptive, negative ones that prohibit certain forms of behaviour that are harmful to the beneficiary's interests.[68]

Proscriptive duties also have other regulatory advantages. It is more efficient and effective from both control and transactional cost perspectives to remove certain broad forms of behaviour from what is

[68] Worthington *Equity* 155–6.

acceptable than to attempt to positively specify and require certain acts or kinds of conduct. A further regulatory benefit is that proscriptive duties can be more easily applied within a wide range of relationships. This is because they are widely framed and generic, when compared to positive duties that have to vary in relation to different relationships. As Nolan says:[69]

> The positive undertakings of various fiduciaries vary enormously: what has to be done by the trustee of a family settlement is very different from what an executive director of a publicly traded company has to do. The transposition of their positive duties to act therefore makes no sense at all ... .

Another concern with the prescriptive application of fiduciary duties is that it conflicts with the general principle that, where a fiduciary relationship arises out of an underlying contractual relationship, the fiduciary relationship 'must accommodate itself to the terms of the contract so that it is consistent with and conforms to them'. It 'cannot be superimposed upon the contract in such a way as to alter the operation that the contract was intended to have according to its true construction'.[70] Applying fiduciary duties prescriptively to fiduciaries such as employees, whose duties are contractually based by requiring them to perform some positive act, or to positively act in a particular way that is not expressly or impliedly required by the contract itself, would alter the operation of the contract.[71] The better view therefore is that while fiduciary duties may have indirect or secondary 'positive' effects, they do not, in and of themselves, directly, actively require the fiduciary to actually act in any particular way, or at all. They are not an 'independent source of

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[69] R Nolan 'Controlling Fiduciary Power' (2009) 68(2) *Cambridge LJ* 293 311.

[70] *Hospital Products v United States Surgical Corp* (1984) 55 ALR 417 (HCA), (1984) 156 CLR 41 (HCA) 97.

[71] Stafford and Ritchie *Fiduciary Duties* 66 para 2.184(4).

positive obligations that go beyond the exaction of loyalty in relationships'.[72]

A prescriptive conceptualisation of fiduciary duties is also theoretically problematic and is arguably undesirable as a matter of policy. As Flannigan points out, only an exclusively proscriptive formulation is in keeping with the purpose of the fiduciary jurisdiction. That purpose is to operate as a general prevention against self-interested conduct, and not to supervise how fiduciaries perform their functions, exercise their powers or fulfil their other, non-fiduciary duties. How the fiduciary does, or should, actually do those things is regulated by other legal rules and duties that, depending on the nature of the fiduciary's position, may include contractual provisions, common-law rules, statutory provisions, and/or company constitutional provisions.[73]

Treating fiduciary duties as prescriptive could also have undesirable consequences. It would replace and make contract and delict/tort superfluous in various relationships. More problematically, liability for breach of fiduciary duty would require reference to whether or not the beneficiary's interests were in fact served, which is often an impossible enquiry.[74] Stafford and Ritchie also argue, in relation to employment and as a matter of policy, that a prescriptive fiduciary regime would expose employees to liability that is unduly onerous. There are two reasons for this. One is that they do not have access to the kinds of statutory relief from liability for the breach of fiduciary duty that is available to other fiduciaries, such as company directors and officers. The other is that they are often not even aware

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[72] P Finn 'The Fiduciary Principle' 32.

[73] R Flannigan 'Fiduciary Duties of Shareholders and Directors' (May 2004) *J of Business Law* 277; R Flannigan 'The [Fiduciary] Duty of Fidelity' (2008) 124 *LQR* 273.

[74] P Finn 'The Fiduciary Principle' 28. Although Finn does not mention it, it is conceptually possible to approach the enquiry into whether the fiduciary acted in the best interests of the beneficiary as a subjective enquiry similar to that employed in assessing compliance with the common-law duty of company directors to act *bona fide* in the best interests of the company as a whole. Such an approach would not however address the other difficulties with the prescriptive approach mentioned here.

that they owe fiduciary duties. Treating fiduciary duties as exclusively proscriptive limits the ambit of their application, allows them to be defined in clearer terms, and thus reduces the burden of potential liability.[75]

The primarily proscriptive nature of fiduciary duties (in the sense suggested above of not directly imposing any positive behavioural requirements on the fiduciary) is one of the features that distinguishes them from other non-fiduciary duties.

(d) The proscription / prescription debate

Although there is no doubt that fiduciary duties operate proscriptively, there is some debate as to whether they are entirely and exclusively proscriptive.

The majority of commentators subscribe to an exclusively proscriptive conception.[76] The Australian and English courts have also generally described fiduciary duties as exclusively proscriptive.[77] There are however more recent English judgments in which they have been described as, or as including, prescriptive obligations. In *Item Software (UK) Ltd v Fassihi*,[78] for example, the English Court of Appeal held that a director's duty to act in good faith is a fiduciary duty and that it is prescriptive in that it requires the director to disclose any information of interest to the company, including his or her own wrongdoing.[79] In *Hanco ATM Systems Ltd v Cashbox*[80] the court adopted the same approach in relation to employees.

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[75] Stafford and Ritchie *Fiduciary Duties* 66 para 2.184(2).
[76] For example, R Austin 'Moulding the Content of Fiduciary Duties' in A Oakley (ed) *Trends in Contemporary Trust Law* (1996) 153 153, 159; R Nolan 'A Fiduciary Duty to Disclose?' (1997) 113 *LQR* 220; Sir Peter Millett 'Equity's Place in the Law of Commerce' [1998] *LQR* 214; S Worthington 'Fiduciaries: When is Self-Denial Obligatory?' (1999) 58(3) *Cambridge LJ* 500; Birks 'The Content of Fiduciary Obligation'; Conaglen *Fiduciary Loyalty*; Stafford and Ritchie *Fiduciary Duties* 12 para 2.09(3); P Finn 'The Fiduciary Principle'.

[77] For example, *Breen v Williams* (1994) 35 NSWLR 522.
[78] *Item Software (UK) Ltd v Fassihi* [2005] 2 BCLC 91.
[79] For a critique of the judgment in *Item Software*, see Nolan 'A Fiduciary Duty to Disclose?'; Stafford and Ritchie *Fiduciary Duties* 52–60 paras 2.139–2.165.

As discussed earlier in this chapter, the better view is that fiduciary duties are confined to the no-conflict and no-profit duties. Although they are closely linked to other non-fiduciary duties and co-operate with those other duties to achieve the broader aim of protecting and/or promoting the beneficiary's interests, it does not follow that those other duties are also fiduciary ones. And where the no-conflict and no-profit fiduciary duties do give rise to positive obligations (such as those of disclosure), those positive obligations, although 'secondary' or 'consequential' to fiduciary duties, are the principle distinct and non-fiduciary duties.

It is however debatable whether it is conceptually possible for any duty to be either exclusively proscriptive or exclusively prescriptive. All negatives, by comparative definition, require the existence of a corresponding positive. There are two such corresponding positives to the proscriptive operation of fiduciary duties. On a more general level they ensure (or seek to ensure) that if and when the fiduciary acts, he or she does so solely and exclusively in the beneficiary's interests. More specifically, they have a positive purpose and effect in that, by denying the fiduciary all unauthorised personal advantage, the only course of conduct they leave open is to protect or promote the beneficiary's interests. As Birks says:[81]

> The obligation of disinterestedness cannot be severed from the obligation to promote and preserve. It does not make sense without that principal obligation. An independent obligation to abstain from pursuing interests of one's own is unintelligible, certainly unworkable ... [I]t is an obligation of disinterestedness in the course of doing something: the [fiduciary] shall not pursue any interests of his own which might possibly conflict with his duty to the beneficiary, scilicet his duty to promote and preserve the interests of the beneficiary ... The core obligation of the [fiduciary] is the compound

[80] *Hanco ATM Systems Limited v Cashbox ATM Systems Limited* [2007] EWHC 1599 (Ch).
[81] Birks 'The Content of Fiduciary Obligation'.

> obligation and it is indivisible at least in the sense ... the obligation of disinterestedness cannot [exist on its own].

4.3 THE PURPOSE OF FIDUCIARY DUTIES

The primary aim of fiduciary duties is to protect and secure the supremacy of the beneficiary's interests over those of the fiduciary (and any other person) by imposing a regime of loyalty on the latter in favour of the former.[82]

In broad terms, their aim is to prevent self-interested and opportunistic behaviour in relationships in which one party has a duty to act only in the interests of the other.[83] As discussed in chapter 4, such a duty will exist where the fiduciary has some power, access or discretion to the beneficiary's assets, interests or affairs in circumstances that fulfil the general criteria for fiduciary accountability which, this thesis argues, will be the case where there is a justified expectation of undivided loyalty. Where they apply, fiduciary duties aim to ensure that the fiduciary acts only in the beneficiary's interests and does not abuse his or her power, access, discretion or position by acting to advance other interests or for unauthorised personal gain.

In effect, fiduciary duties therefore have two purposes. One is to ensure that if the fiduciary acts, he or she does so only in the beneficiary's interests. By preventing the fiduciary from acting for him- or herself (or any third party), they ensure that (apart from properly authorised gains) fiduciaries remain financially disinterested in fulfilling their duties and do not misuse their positions for personal advantage.[84] In effect they prevent the fiduciary from 'being swayed or compromised by interest rather than duty'[85] and protect him or her

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[82] Finn 'The Fiduciary Principle' 27.

[83] Or, in some cases, to act in their joint or mutual interests, but not in the fiduciary's own, several interests: Finn 'The Fiduciary Principle' 32.

[84] *Attorney-General v Blake* [1998] Ch 439 (CA), [2001] AC 1 280; *Chan v Zacharia* (1984) 58 ALJR 353.

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

from 'the disease of temptation'.[86] Their other purpose and function is to indirectly enforce the fulfilment of the fiduciary's related but conceptually distinguishable positive duty to act only in the beneficiary's interests or, at least, to ensure that the fiduciary will not fail to fulfil that duty by acting self-interestedly.[87] This indirect enforcement of the fiduciary's positive duty to act solely in the beneficiary's interests through the imposition of fiduciary duties is necessary because of the difficulties of direct enforcement.[88] In addition to the duties identifying and prescribing required end-positions in relation to exercises of discretion in advance, which have already been discussed, the breach of a positive duty generally requires proof of some form of *mens rea* and only gives rise to a remedy where there is proven, causally related loss or damage. The nature of the deterrence afforded by fiduciary duties, coupled with their proscriptive nature, thus distinguishes them from other duties.

4.4 DETERRENCE, PROPHYLAXIS AND SUBSIDIARITY

Fiduciary duties are also unique and distinguishable in the kind and scope of protection they provide for the beneficiary's interests, and in the way in which they and the remedies available for their breach provide that protection.

(a) Deterrence and prophylaxis

Fiduciary duties define the behaviour they proscribe broadly, as including both that which actually harms the beneficiary and that which may do so. They do this by prohibiting the fiduciary from placing him- or herself in any situation in which there is a reasonable

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[86] *Harris v Digital Pulse Pty Ltd* [2003] NSWCA 10 114.

[87] Conaglen *Fiduciary Loyalty*; . De Mott argues that, within relationships of agency, the agent's fiduciary duties are linked to the principal's right to control the agent and act as directions to the agent as to how to interpret the principal's instructions: De Mott 'The Fiduciary Character of Agency and the Interpretation of Instructions' 34.

[88] The only other possibility is the imposition of duties of care, skill and diligence.

or 'real sensible possibility'[89] of actual harm to the beneficiary (in the form of self-interested conduct or gain by the fiduciary) occurring. By addressing and guarding against the risk of potential harm, they operate prophylactically.[90] And by doing so, they provide a comparatively wider form of protection or regulation than that afforded by other kinds of duties. These other kinds of duties are usually concerned with preventing actual, materialised harm, provide remedies only if that actual harm occurs, and give rise to remedies that are designed to compensate the wronged party for it. Fiduciary duties, by contrast, not only guard against the risk of potential harm, but (as will be discussed later in this chapter) also give rise to remedies once the level of risk of actual harm becomes a 'real sensible possibility'. A claim for breach of fiduciary duty does not therefore require proof of breach of any other duty or form of actual loss or harm,[91] an absence of good faith,[92] or any other *mens rea*,[93] or that the beneficiary suffered any loss.[94] This capturing of situations in which there may have been no wrong other than the fiduciary's entry into a situation that merely carried the risk of wrong is unique to the fiduciary regime and provides a wider ambit of regulation and accountability than other duties.[95]

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[89] *Boardman v Phipps* [1967] 2 AC 46 124; *Industrial Development Consultants Ltd v Cooley* [1972] 2 All ER 162 172; *Jenkins v Enterprise Gold Mines NL* (1991) 6 ACSR 539 SC (NSW) 555; *Bhullar v Bhullar* [2003] 2 BCLC 241 [30]. The degree of risk was described in *Hospital Products v United States Surgical Corp* (1984) 55 ALR 417 (HCA), (1984) 156 CLR 41 (HCA) 103 as 'a real or substantial possibility.

[90] *Pilmer and Others v Duke Group Limited (In Liquidation) and Others* [2001] HCA 31 [153]; Conaglen *Fiduciary Loyalty* especially chapter 4.

[91] *Symington v Pretoria Oos Privaat Hospitaal* [2005] 4 All SA 403 [24]; *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 177–8, 192, 241–2; *Phillips v Fieldstone a (Pty) Ltd and Another* [2004] 1 All SA 150 (SCA); 2004 (3) SA 465 (SCA) [30].

[92] *Collinge v Kyd* [2005] 1 NZLR 847 [6].

[93] *Daraydan Holdings Ltd v Solland International Ltd* [2004] EWHC 622 (Ch) [51]; *Imperial Mercantile Credit Association v Coleman* (1873) LR 6 (HL); *Cohen v Directors of Rand Collieries Ltd* 1906 TS 197 201–2; *Guinness plc v Saunders* [1990] 1 All ER 652 (HL) 697.

[94] *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134 386, 392; *Woolworths v Kelly* (1991) 4 ACSR (CA(NSW)) 431 447; *Transvaal Cold Storage Co Ltd v Palmer* 1904 TS 4 15, 16, 21.

[95] Conaglen *Fiduciary Loyalty*.

This unique 'fiduciary-prophylaxis' also has a more pragmatic purpose and rationale. The application of fiduciary duties to all situations carrying the requisite degree of risk overcomes the evidentiary difficulties of proving whether the fiduciary did everything he or she ought to have done. As Conaglen explains:[96]

> [T]o relax standards for situations where the defendant allegedly acted properly cannot be allowed because most of the relevant evidence will be peculiarly within the defendant's knowledge and control, so making it very difficult for the ... plaintiff beneficiaries to know whether or not they have a case for saying the defendant acted 'improperly'.

The regulatory philosophy is thus one of the avoidance rather than the redress of harm. In other words, 'prevention is better than cure'.

(b) Subsidiarity

As mentioned earlier, although fiduciary duties are primarily proscriptive in nature and in their direct effect, they do indirectly compel fulfilment of the positive, prescriptive duties that the fiduciary owes to the beneficiary. There are in this respect 'subsidiary' and 'parasitic' duties that co-exist with and support the fulfilment of other positive duties. Although fiduciary duties are dependent upon the concurrent existence of some other such positive duty or duties, the two kinds of duties are conceptually distinct. This is reflected in the principle that where the positive duty is breached, it is a separate breach. The fact that the fiduciary also owed the beneficiary a fiduciary duty is irrelevant and does not alter the basis, nature or extent of the liability for the breach of the positive duty. In the same way, the fiduciary duty can be breached without a breach of the

[96] D Hayton and C Mitchell *Hayton and Marshall's Commentary and Case on the Law of Trusts and Equitable Remedies* 12 ed (2005).

positive duty and will give rise to the peculiarly fiduciary remedies discussed later in this chapter.[97]

This 'separateness' of fiduciary duties also explains why it is, for the purposes of fiduciary liability, unnecessary to explore the fiduciary's compliance with any positive duty owed to the beneficiary, and why compliance with a positive duty such as a duty of good faith is not a defence to a claim for breach of fiduciary duty.[98]

(c) Conaglen's 'prophylactic and subsidiarity' thesis

The most comprehensive analysis of the prophylactic and subsidiary aspects of fiduciary duties is provided by Conaglen.[99] His central argument is that the proscriptively prophylactic and supporting protective nature, aims and functioning of fiduciary duties are both more specific and extensive than is generally acknowledged, and also provide their most distinctive and significant features. They provide a subsidiary and prophylactic form of protection for the proper performance of other non-fiduciary duties that the fiduciary owes to the beneficiary, and their purpose is to enhance the chances that the fiduciary will properly perform those other duties by seeking to remove self-interested and opportunistic influences and temptations that are likely to distract the fiduciary from providing that proper performance. This guarding against harm and potential harm in the form of non-fulfilment of other non-fiduciary duties is unique. To the extent that other kinds of duties may seek to achieve a similar effect, they do so indirectly and as a secondary

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[97] Stafford and Ritchie *Fiduciary Duties.*

[98] Stafford and Ritchie *Fiduciary Duties* 62–3 para 2.176; *Howard Smith Ltd v Ampol Petroleum Ltd and Others* [1974] AC 821 834; *Fraser v Whaley* 2 Hem & M 10; *Hogg v Cramphorn Ltd* [1967] Ch 254. This is illustrated in the well-known cases of *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134; *Aberdeen Railway Co v Blaikie Bros* (1854) 1 Maq 461 (HL); *Cook v Deeks* [1916] AC 554. See also Stafford and Ritchie *Fiduciary Duties* 63–4 paras 2.177–2.179.

[99] Conaglen *Fiduciary Loyalty* M Conaglen 'The Nature and Function of Fiduciary Loyalty' (2005) 121 *LQR* 452. For critiques of Conaglen's thesis, see R Lee 'In Search of the Nature and Function of Fiduciary Loyalty: Some Observations on Conaglen's Analysis' (2007) 27 *Oxford J of Legal Studies* 327; D de Mott 'Disloyal Agents' (2007) 58 *Alabama LR* 1049; L Smith 'The motive, not the deed' in J Getzler (ed) *Rationalizing Property, Equity and Trust* (2003) 64 68–9.

objective. Fiduciary duties, by contrast, are inherently designed for, and directly concerned with, achieving that aim.

The ambit of prophylactic subsidiary protection that fiduciary duties provide is also wider than that provided by other duties. They do not simply avert breaches of other duties, but also seek to remove influences, temptations and incentives to commit them.

Conaglen argues that it is these distinctive prophylactic and subsidiary functions of fiduciary duties that are their 'very nature', purpose and rationale.[100] They are also the conceptual starting point for distinguishing fiduciary from non-fiduciary duties and should be accommodated and reflected in all the general principles that govern their application. In particular, they should inform the determination of when they arise and, when they do, their scope of application. Based on the argument advanced in this thesis, they should also be factors considered in determining whether there is the justified expectation of undivided loyalty that is necessary for the existence of those duties. Another obvious implication of Conaglen's thesis with regard to the issue of incidence is that fiduciary duties cannot arise unless the fiduciary also owes the beneficiary some other appropriate primary, non-fiduciary duty for them to attach to and support. '[I]n the absence of any non-fiduciary duties, there is nothing for the fiduciary doctrine to protect and thus no sensible function for [it] to serve.'[101] In addition, the scope of application of fiduciary duties must not only reflect their prophylactic and subsidiary protective function, but also the content and scope of the non-fiduciary duties they protect.[102] As will be discussed later in this chapter, that function and purpose is also reflected in and supported by the remedies available for breach of fiduciary duty.

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[100] Conaglen *Fiduciary Loyalty* 62.

[101] Conaglen *Fiduciary Loyalty* 185.
[102] Conaglen *Fiduciary Loyalty* 179.

4.5 THE DURATION OF FIDUCIARY DUTIES

The general principle is that fiduciary duties terminate upon the termination of the fiduciary relationship.[103] There are however exceptions with regard to the no-conflict duty, which continues to apply in relation to the exploitation of confidential information, opportunities and property that the former fiduciary became aware of or acquired during the currency of the fiduciary relationship, and the no-profit duty in relation to benefits acquired during the course of that relationship.[104]

5. VARIATIONS IN THE APPLICATION AND SCOPE OF FIDUCIARY DUTIES

5.1 GENERAL PRINCIPLES

Although the same generic duties attach to all fiduciaries, the shape and scope of those duties (in the sense of the area or extent of application and operation rather than their general nature or content)[105] vary as between different fiduciaries.

This is because the duties that attach to the fiduciary capacity are superimposed on the underlying relationship between the parties. The result of this superimposition is a relationship between them that is made up of a combination of co-existent duties that derive partly from the general underlying relationship and partly from the fiduciary aspect(s) of it. In the case of employees, the underlying relationship is the contractual relationship of employment, as qualified by employment legislation, and the rights and duties it confers on the employer and employee respectively. Where that relationship has

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[103] *Attorney-General v Blake* [1998] Ch 439 (CA), [2001] AC 1 455; *HRH Prince JefriBolkia v KPMG* [1999] 2 AC 222 235.

[104] *Phillips v Fieldstone a (Pty) Ltd and Another* [2004] 1 All SA 150 (SCA) [30]; *CyberScene Ltd and Others v i-Kiosk Internet and Information (Pty) Ltd* 2000 (3) SA 806 (C) 820I.

[105] Cf *Kelly v Cooper* [1993] AC 205 215, which suggested that there could be variations in the content of the duties.

any fiduciary aspect that attracts fiduciary duties, the employee's duties will consist of duties that derive from the employment contract (the employee's non-fiduciary duties as ordinary employee) and further duties that derive from the fiduciary aspect(s) of the relationship (the employee's fiduciary duties as fiduciary).

When the fiduciary duties are superimposed on the underlying relationship, they are also moulded by and shaped to fit it[106] and the facts of the case.[107] Fiduciary duties can attach only to those aspects of the underlying relationship that have a fiduciary character in that they are aspects of the relationship that fulfil the general criteria for fiduciary accountability and in relation to which the fiduciary is required to completely subjugate all personal interests and act exclusively in the beneficiary's interests.[108] They cannot however attach to any aspects of the underlying relationship in relation to which the fiduciary is legitimately entitled (and expected) to act in his or her own several interests. Those areas of legitimate self-interest have no fiduciary character and cannot be infringed upon by the imposition of fiduciary duties. In those areas, the fiduciary retains what the court in *Noranda Australia v Lachlan Resources NL*[109] referred to as his or her 'economic liberty'. Similarly, no fiduciary duties attach to aspects of the relationship in relation to which the fiduciary is simply required to have regard to, but not to act solely in, the beneficiary's interests (although those aspects will be subject to other duties, such as those of good faith). Since the classification and boundaries of these fiduciary and non-fiduciary aspects of the

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[106] *University of Nottingham v Fishel* [2000] ICR 1462 1491–2; *Hospital Products v United States Surgical Corp* (1984) 55 ALR 417 (HCA), (1984) 156 CLR 41 (HCA) 97; *New Zealand Netherlands Society 'Oranje' Inc v Kuys* [1973] 1 WLR 1126 1130; *Ross River and Another v Cambridge City Football Club* [2007] EWHC 2115 (Ch) [197]; *Kelly v Cooper* [1993] AC 205 (PC) 215; *Phillips v Fieldstone a (Pty) Ltd and Another* [2004] 1 All SA 150 (SCA), 2004 (3) SA 465 (SCA); *Helmet Integrated Systems Ltd v Tunnard* [2006] EWCA Civ 1735 [37]–[39].
[107] Conaglen *Fiduciary Loyalty* 80.

[108] *Hospital Products v United States Surgical Corp* (1984) 55 ALR 417 (HCA), (1984) 156 CLR 41 (HCA) 68–9; *University of Nottingham v Fishel* [2000] ICR 1462 1492; *Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd* [1991] ICR 524 532.
[109] *Noranda Australia v Lachlan Resources NL* (1988) 14 NSWLR 1 15.

relationship are determined by the terms of the underlying relationship, variations in that framework will be reflected in corresponding variations in the areas of application and in the shape of the fiduciary duties that are, and can be, superimposed on it. As Lord Wilberforce explained in *New Zealand Netherlands Society 'Oranje' Inc v Kuys*:[110] 'A person ... may be a fiduciary quoad a part of his activities and not quoad other parts; each transaction, or group of transactions, must be looked at.'

In relation to employees, there are clearly various areas of the employment relationship in which employees are both entitled and expected to act in their own interests and even contrary to the interests of their employers. These include, for example, the right to participate in collective bargaining and lawful strike action to secure more favourable terms of employment, the assertion of the employee's statutory rights, and the right to pursue statutory remedies against the employer for contraventions of the employment legislation. Since these areas have no fiduciary character, they are not, and cannot be, subject to any fiduciary duties on the part of the employee. There will also be further and more particular variations in the shape and scope of different individual employee's fiduciary duties that reflect variations in the terms of their respective contracts of employment.

5.2 DETERMINING THE SCOPE OF FIDUCIARY DUTIES

The aspects of the underlying relationship that have a fiduciary character and that attract fiduciary duties (and the particular shape and scope of those duties) are not always easy to determine.

The enquiry is sometimes presented as a two-stage process of analysis. The first stage is to determine whether the relationship in issue is a fiduciary one, by showing that it either falls within one of the categories of established 'fiduciary relationships' or that its

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[110] *New Zealand Netherlands Society 'Oranje' Inc v Kuys* [1973] 1 WLR 1126 1130.

particular factual features afford it a fact-based fiduciary character. The second stage of the enquiry considers which of the fiduciary's particular functions, powers and activities are subject to fiduciary duties.[111]

Engaging in such a dual enquiry is however not necessary. As will be explained in the following chapter, showing that the relationship falls within one of the established classes of fiduciary relationships will not, in itself, necessarily reveal the precise scope and areas of application of the fiduciary duties that exist within in. Even though (as chapter 8 will suggest) the fiduciary duties of fiduciaries who fall within one of those established classes generally cover substantially the whole of the underlying relationship and the fiduciary's position, powers and functions within it, there are still some areas of self-interest to which they do not attach. Simply bringing the relationship within such a class does not identify the nature or boundaries of those areas. Ultimately, the areas to which fiduciary duties do (and do not) apply in established classes of fiduciary relationships have to be determined by applying the general criteria for the incidence of fiduciary duties. Where the relationship does not fall within one of the established fiduciary classes, the application of those same criteria is required. Regardless of the nature of the relationship, stage one of the dual enquiry approach is therefore superfluous and unnecessary. In all cases, the determination of the scope of the fiduciary duties that apply within any given relationship requires only a single enquiry into whether the particular power, function or conduct in question, within the broader context of the relationship as a whole, fulfils the general criteria for fiduciary accountability. On the analysis that will be presented in chapter 5, that will be the case only in circumstances where there is a 'justified expectation' that one party will act only in the interests of another. Whether such an expectation exists will

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[111] For example, *Birtchnell v Equity Trustees, Executors and Agencies* (1929) 42 CLR 384 408, where Vixen J referred to looking first at the terms of any arrangement or contract between the parties and then at the actual conduct of the parties in relation to the particular aspect of the relationship or transaction in question.

depend on the application of one or more incidence criteria to the circumstances of the case. Depending on those circumstances, potentially relevant facts include the nature and extent of the employee's access, discretion or power in relation to the employer's assets[112] or affairs,[113] the purpose for which it was conferred on the employee,[114] the employer's vulnerability or susceptibility to abuse of that access, discretion or power, and the nature and extent of any trust or reliance that the employer has placed in the employee to act in the employer's interests.[115] These will depend in turn on more specific factors, such as the terms of the employment contract as a whole,[116] the tasks, functions and areas of responsibility entrusted to the employee,[117] the degree of control that the employer has over the employee,[118] and the way in which the parties have conducted themselves in the employment relationship.[119] Whether the appropriate incidence criteria are fulfilled in a combination and to the extent necessary to give rise to the requisite justified expectation will therefore, in all cases, depend on an application of the same requirements.

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[112] In the broad sense of anything in relation to which the employer has a commercial interest.

[113] *PMC Holdings v Smith* [2002] EWHC 1575 (QB); *Helmet Integrated Systems Ltd v Tunnard* [2006] EWCA Civ 1735; *Charter PLC v City Index Limited* [2008] 2 WLR 950.

[114] *Ross River and Another v Cambridge City Football Club* [2007] EWHC 2115 (Ch).

[115] *Frame v Smith* (1987) 42 DLR (4th) 81, [1987] 2 SCR 99 136; *Lac Minerals v International Corona Resources Ltd* [1990] FSR 441 29; *Hodgkinson v Simms* 1994 CarswellBC 438 2.

[116] *Woolworths v Kelly* (1991) 4 ACSR (CA(NSW)) 431.

[117] *PMC Holdings v Smith* [2002] EWHC 1575 (QB); *Phillips v Fieldstone a (Pty) Ltd and Another* [2004] 1 All SA 150 (SCA), 2004 (3) SA 465 (SCA) 163; *Uni-Erections v Continental Engineering Co Ltd* [1981] 3 All SA 73 (W*),* 1981 (1) SA 240 (W) 252H.

[118] *Helmet Integrated Systems Ltd v Tunnard* [2006] EWCA Civ 1735; *PMC Holdings v Smith* [2002] EWHC 1575 (QB).

[119] *New Zealand Netherlands Society 'Oranje' Inc v Kuys* [1973] 1 WLR 1126 1130; Tufton v Sperni [1952] TLR 516; *Birtchnell v Equity Trustees, Executors and Agencies* (1929) 42 CLR 384.

6. REMEDIES FOR BREACH OF FIDUCIARY DUTY

6.1 INTRODUCTION

There are a number of remedies that, depending on the circumstances, may be available for breach of fiduciary duty. These are *sui generis*, fiduciary-exclusive remedies and are not based in either contract or delict (tort),[120] although they may arise concurrently with a contractual or delictual (tortious) remedy for breach of some other duty.[121]

The position in South African law in relation to remedies differs from that in English and Canadian law. As explained in chapter 2, the only general principles, doctrines and maxims of English and Canadian Equity that form part of South African law are those that have been formally recognised by the South African courts or legislature. The only remedies for breach of fiduciary duty that have received such recognition are those discussed below. There has however been no recognition of constructive trust liability, tracing, or any of the other equitable remedies available in England and Canada.[122]

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[120] *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 199, 241–2; *Uni-Erections v Continental Engineering Co Ltd* [1981] 3 All SA 73 (W*),* 1981 (1) SA 240 (W) 253; *Cohen v Segal* 1970 (3) SA 702 (W) 706; *Noble Spirit Ltd v Wang Shu Yuen* 2013 WL 5915488 [25].

[121] For example, in *Timber Engineering Co Pty Ltd v Anderson* [1980] NSWLR 488, employees were found to be in breach of both their fiduciary duty and their common-law duty of good faith to their employer, resulting in the employer's recovery of both damages for loss suffered as a result of the breach of good faith and a claim for the employees' unauthorised profits for breach of their fiduciary duties.

[122] On constructive trusts and tracing, see, for example, *Phipps v Boardman* [1967] 2 AC 268 *Sinclair v Brougham* [1914] AC 398; *Attorney-General for Hong Kong v Reid* [1994] 1 AC 324 (PC) 336; *Daraydan Holdings Ltd v Solland International Ltd* [2004] EWHC 622 (Ch) [86]; *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch) [149]; *Primlake Ltd (in liquidation) v Matthews Associates and Others* [2007] 1 BCLC 666 / *Primlake Ltd v Matthews Associates* [2006] EWHC 1227 (Ch) [334]; *Pakistan v Zardari* [2006] EWHC 2411 (Comm) [164]; *Sinclair Investment Holdings SA v Versailles Trade Finance Ltd* [2007] EWHC 915 (Ch).

6.2 POTENTIAL REMEDIES

(a) An interdict or injunction

A threatened and imminent breach of fiduciary duty entitles the beneficiary to apply to court for an interdict or injunction to prevent that breach from occurring.

(b) A claim for damages

There is a view that the fiduciary doctrine has no compensatory aims or functions and that damages are therefore not an appropriate remedy.[123] The more widely accepted view however is that where a breach of fiduciary duty causes the beneficiary actual loss, the beneficiary does have a claim for damages[124] in the amount necessary to put him or her in the position in which he or she would have been had there been no breach.[125] Although the same principles of causation and measure of damages apply, the claim is not a delictual (tortious) one and there is no need to prove any fault on the part of the fiduciary.[126]

The rationale for the damages claim extends beyond mere compensation. If such a claim were not permitted, the remedies available to the beneficiary would be limited to rescission and a claim for the fiduciary's unauthorised profits. If that were so, the fiduciary's only potential liability would be to hand over his or her gains. That would encourage (or at least reduce the deterrence to) the fiduciary to act self-interestedly and commit a breach of duty because only the beneficiary would bear the risk of loss. The fiduciary's only risk would

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[123] See, for example, Worthington *Equity*.

[124] *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1981 (2) SA 173 (T) 197, 200–1; *Du Plessis v Phelps* [1995] 2 All SA 469 (C) 474. (C) 171; *Nocton v Ashburton* [1914] AC 932 (HL); *Symington v Pretoria-Oos Privaat Hospitaal* [2005] 4 All SA 403 SA [27].

[125] For a discussion of whether the claim extends to 'springboard' damages, see *University of Nottingham v Fishel* [2000] ICR 1462 1500–1.

[126] *Cohen v Segal* 1970 (3) SA 702 (W) 706; *Du Plessis v Phelps* [1995] All SA 469 (C) 475..

be that he or she might be stripped of his or her gain which, unlike a damages payment, would not diminish his or her pre-existing legitimate personal resources.

There is also some authority for the proposition that the beneficiary's claim for the fiduciary's unauthorised profits and a claim for damages are 'alternate and inconsistent' and that the beneficiary must choose between them.[127] The better view however is that the two remedies are not mutually exclusive but cumulative, and that the beneficiary always has a claim for any unauthorised gains by the fiduciary, regardless of whether or not the beneficiary has suffered any loss. And where the beneficiary has suffered loss, he or she is entitled to a claim for damages in addition to a claim for any such unauthorised gains. As Birks points out, it would be absurd if a fiduciary could escape liability for unauthorised profits simply because he or she also inflicted (possibly greater) damage.[128]

(c) Rescission

Where a fiduciary commits a breach of duty involving a transaction with a third party who, at the time of the transaction, was or reasonably ought to have been aware of the breach, the beneficiary has a right to require rescission of the transaction,[129] in which event the fiduciary must make restitution of everything received under it.[130]

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[127] For example, *Island Records v Tring International plc* (1995) 3 All ER 44; *Tang Man Sit v Capacious Investments Ltd* [1996] 1 AC 514.
[128] P Birks 'Inconsistency between Compensation and Restitution' (1996) 112 *LQR* 375.
[129] *African Claim and Land Co Ltd v W J Langermann* 1905 TS 494 507–9, 518–22; *Hogg v Cramphorn Ltd* [1967] Ch 254 269; *Tito v Waddell (No 2)* [1977] 1 Ch 106 241; *Rolled Steel Products (Holdings) Ltd v British Steel Corp* 1986 Ch 246; *Logicrose Ltd v Southend United Football Club* [1988] 1 WLR 1256 1261; *Guinness plc v Saunders* [1990] 1 All ER 652 (HL) 665.

[130] *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218 1278; *Guinness plc v Saunders* [1990] 1 All ER 652 (HL) 697–8; *Cowan de Groot Properties Ltd v Eagle Trust plc* [1992] 4 All ER 700 (ChD) 762.

(d) A claim for the fiduciary's unauthorised profits

Breach of fiduciary duty also results in strict liability on the part of the fiduciary to account for all unauthorised profits obtained by the breach.[131]

Strict liability to account

On a strict application of fiduciary principles, honesty is no defence to a claim for breach of fiduciary duty,[132] and there is no need to prove any form of fault or *mens rea* on the part of the fiduciary or that the beneficiary suffered any loss or damage. It is also irrelevant whether the fiduciary's conduct prejudiced or benefited the beneficiary, that the fiduciary was not under any obligation to obtain the profit for the benefit for the beneficiary,[133] or whether it prevented the beneficiary from making a profit.[134] As Lord Russell said in *Regal (Hastings) Ltd v Gulliver*:[135]

> The rule of equity which insists on those who by use of a fiduciary position make a profit, in no way depends on fraud, or absence of bona fides; or upon such questions or considerations as whether the property would or should otherwise have gone to the plaintiff; or whether the profiteer was under a duty to obtain the source of the profit for the plaintiff, or whether he took a risk or acted as he did for the benefit of the plaintiff, or whether the plaintiff has in

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[131] *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134; *Dorbyl Ltd v Vorster* [2011] 4 All SA 387 (GSJ).

[132] *Daraydan Holdings Ltd v Solland International Ltd* [2004] EWHC 622 (Ch) [51]; *Imperial Mercantile Credit Association v Coleman* (1873) LR 6 (HL); *Guinness plc v Saunders* [1990] 1 All ER 652 (HL) 697.

[133] *Transvaal Cold Storage Co Ltd v Palmer* 1904 TS 4; *Westcoast and Rand Native Labour Agency Ltd v Abernethy* 1908 EDC 174 179.

[134] *Transvaal Cold Storage Co Ltd v Palmer* 1904 TS 4; *Durand v Louw* 1935 TPD 47 51–5; *Uni-Erections v Continental Engineering Co Ltd* [1981] 3 All SA 73 (W*),* 1981 (1) SA 240 (W) 252–3.

[135] *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134 144–5. Also, inter alia, *Phipps v Boardman* [1967] 2 AC 268;; *United States Surgical Corporation v Hospital Products International Pty Ltd* (156 CLR 41 19; *Bray v Ford* [1896] AC 44 (HL) 51; *Phillips v Fieldstone a (Pty) Ltd and Another* [2004] 1 All SA 150 (SCA) [31].

> fact been damaged or benefitted by his action. The liability arises from the mere fact of a profit having in the stated circumstances, been made.

There may thus even be liability where the beneficiary has benefited from the fiduciary's conduct.[136]

To permit a fiduciary to escape liability on the basis that he or she acted in good faith or without some other prescribed state of mind would render the enforcement of fiduciary duties both difficult (if not almost impossible) and expensive, thereby heightening the temptation for the fiduciary to prefer his or her own interests to those of the beneficiary. The absolute nature of fiduciary liability removes, insofar as possible, 'the danger ... of the person holding a fiduciary position being swayed by interest rather than duty'.[137]

The meaning of 'unauthorised profits'

As mentioned earlier, profits are 'unauthorised' unless the fiduciary has properly disclosed them and the beneficiary has consented to the fiduciary obtaining or retaining them. The requirements for proper disclosure and consent are dealt with elsewhere in this chapter.

The concept of 'profit' is a wide one. It is not confined to money but includes any form of gain, benefit or advantage that has a monetary value and that is obtained by the fiduciary for him- or herself or a third person.[138] The principle is generally stated as including anything received, made or obtained by virtue of the fiduciary's fiduciary position or powers, or anything that belongs to the beneficiary (including information) and that the fiduciary has

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[136] *Boardman v Phipps* [1967] 2 AC 46.
[137] *Bray v Ford* [1896] AC 44 (HL) 51–2; *Panama and South Pacific Telegraph Co v India Rubber GuttaPercha and Telegraph Works Co* (1875) LR 10 Ch 515 523, 527; *Furs Ltd v Tomkies* (1936) 54 CLR 583 (HC of A); *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134.

[138] *Osry v Hirsch, Loubser & Co Ltd* 1922 CPD 531 566.

access to in a fiduciary capacity,[139] regardless of whether or not it arose from a transaction that fell within the beneficiary's business. This would include, for example, gifts, bribes, secret commissions and receipts obtained by the fiduciary through or by virtue of his or her fiduciary position. Employees have been held liable for breach of this duty where, for example, they have diverted funds belonging to the employer to themselves,[140] or have persuaded co-employees to undertake work for third parties in return for commissions from those third parties.[141] Although such gains are usually referred to as 'secret' profits, they are more accurately 'unauthorised' ones. Ultimately, it is the giving or the absence of the beneficiary's properly informed consent that determines whether or not their receipt constitutes a breach of duty. The beneficiary's knowledge of them (and whether they are 'secret' in the sense of being unknown to the beneficiary) is only relevant to the question of whether the beneficiary has given consent and whether such consent was properly informed. Without such consent, the gain will constitute a breach of fiduciary duty, even if it was disclosed. There is also authority for the proposition that the beneficiary's claim is not limited to gains made within the ambit of the fiduciary relationship, but extends to those made from any act which was not in itself a breach of fiduciary duty but was done only to enable the obtaining of another gain in breach of the fiduciary duty.[142]

There is some debate as to whether 'unauthorised profit' includes 'incidental profits'.[143] The term 'incidental profits' is itself a nebulous one. Generally it is used to refer to gains that are made by a fiduciary and that have a less direct and predictable nature than those for

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[139] *Mangold Bros Ltd v Minnaar & Minnaar* 1936 TPD 48 54; *Peacock v Marley* 1934 AD 1 5; *Jones v East Rand Extension Gold Mining Co Ltd* 1903 TH 325 335.
[140] For example, *Agip (Africa) Ltd v Jackson* [1990] Ch 265.

[141] *University of Nottingham v Fishel* [2000] ICR 1462; *Sappi Novoboard (Pty) Ltd v Bolleurs* (1998) 19 *ILJ* 784 (LAC), [1998] 5 BLLR 460 (LAC).

[142] *Hospital Products v United States Surgical Corp* (1984) 55 ALR 417 (HCA), (1984) 156 CLR 41 (HCA) 113; *Green and Clara Pty Limited v Bestobell Industries Pty Limited* [1982] WAR 1; *McLeod and More v Sweezey* [1944] 2 DLR 145.
[143] See, for example, P Finn (ed) *Equity and Commercial Relationships* (1987) 194.

which the beneficiary clearly has a claim. Bishop and Prentice define 'incidental profits' as gains that are derived from profit-making opportunities that have a much higher uncertainty, are probably discovered and usually exploited through the fiduciary's own efforts, and that the fiduciary is not under any positive duty to exploit.[144] They argue that although a rule requiring the fiduciary to disgorge such profits is at first sight attractive, it may lead to some productive inefficiency on the part of the fiduciary. Their reasoning is that the way in which the law allocates profits has a powerful incentive effect on fiduciaries' behaviour.[145] If an absolute prohibition were placed on profit-making by fiduciaries, they would have no incentive to seek opportunities for them or to exploit them when they arise. This could result in the non-realisation of innocent and lucrative opportunities. Although allowing fiduciaries to exploit opportunities for all profits would increase the costs of monitoring their behaviour, it would also increase the expected joint revenues of both the fiduciary and the beneficiary. 'If expected joint revenue, discounted for increased risk (if any), exceeds increased monitoring costs, then there is scope for a mutually beneficial deal' and the incidental profit should be shared between them.[146]

They do however suggest that the stricter prohibition on all profit-making be retained for company directors and others who have a fiduciary relationship with a company. They justify the stricter prophylactic rule for them on the basis that the monitoring costs and risks in relation to corporate fiduciaries are higher than those for other fiduciaries. Directors and officers can obtain dominant positions within companies, and assessing whether they have abused those positions to further their own interests presents 'acute

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[144] W Bishop and D Prentice 'Some Legal and Economic Aspects of Fiduciary Remuneration' (1983) 46 *MLR* 289.

[145] Bishop and Prentice 'Some Legal and Economic Aspects of Fiduciary Remuneration' 295–302.

[146] Bishop and Prentice 'Some Legal and Economic Aspects of Fiduciary Remuneration' 296..

if not insoluble issues of proof'. Furthermore, directors and officers have an overriding obligation to direct economic opportunities to the company and the legal rules should reinforce, not attenuate, that duty. Insofar as the encouragement of profit-making is desirable, it can be achieved through the appropriate structuring of the service-type contracts that directors and officers usually have with their companies and by providing share option schemes, bonus payments and other incentives. To the extent that these arguments are persuasive, the same points of principle and policy suggest that employees who owe their employers fiduciary duties should be treated in the same way as company directors and officers, and should also be prohibited from obtaining or retaining unauthorised incidental profits.

Another point on which there has been some debate is whether the beneficiary's claim for unauthorised profits ought to be reduced by any amount by which the profits were increased as a result of the fiduciary's own skill, time, effort or other input. Most authorities favour the making of such a discount or 'allowance', unless the fiduciary was under a duty to devote the skill, time or effort concerned to the beneficiary's interests.[147] The general principle laid down by the English Court of Appeal in *Phipps v Boardman* is that such an 'allowance' may be made where it is equitable to do so.[148] One justification for this suggested by the High Court of Australia is that if the profits result partly from the work of the fiduciary, then they do not, to that extent, derive profit directly from the breach of fiduciary duty.[149] However, in *Guinness v Saunders* Lord Goff held that an allowance should be made only in circumstances where it will not

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[147] *Guinness plc v Saunders* [1990] 1 All ER 652 (HL).

[148] *Phipps v Boardman* [1967] 2 AC 268; *University of Nottingham v Fishel* [2000] ICR 1462 1499.

[149] *Warman International Ltd v Dwyer* (1995) 182 CLR 544; *University of Nottingham v Fishel* [2000] ICR 1462 1499.

have the effect of encouraging a fiduciary to put him- or herself in a position where his or her personal interest and duty might conflict.[150]

There is however less certainty as to how the appropriate allowance ought to be calculated. Any sum awarded must be equitable in all the circumstances of the case.[151] According to the court in *Fishel*, in most cases this requirement, coupled with Lord Goff's principle in *Guinness*, renders it unlikely that the fiduciary should receive the full value of any services that he or she has rendered in relation to the profit.[152] 'Even short of any profit element, fiduciaries would not necessarily be encouraged to hold to the straight and narrow if they were to be properly rewarded for their breach of duty.' Some reward for services rendered in appropriate circumstances would not however encourage breaches of duty in the normal case.[153]

6.3 THE SIGNIFICANCE OF RESCISSION AND THE CLAIM FOR PROFITS

Of the remedies potentially available for breach of fiduciary duty, it is the beneficiary's claims for rescission and for the fiduciary's unauthorised profits that are most significant.

These disgorgement remedies are a distinctive feature of fiduciary claims.[154] They also reflect and support the unique protective purpose of fiduciary duties, and have a number of 'user-friendly' features that make them comparatively attractive to potential claimants. In the employment context, they may well have significant

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[150] *Guinness plc v Saunders* [1990] 1 All ER 652 (HL) 701; *University of Nottingham v Fishel* [2000] ICR 1462 1499.

[151] *University of Nottingham v Fishel* [2000] ICR 1462 1500.

[152] In *University of Nottingham v Fishel* [2000] ICR 1462 1499 Elias J said that, in principle, the fiduciary should also be entitled to deduct any tax that he or she has paid in respect of the profits.

[153] *University of Nottingham v Fishel* [2000] ICR 1462 1499–1500.

[154] *Bristol & West Building Society v Mothew* [1988] Ch 1 18.

strategic and practical implications and advantages for employers wishing to take action against employees who have acted improperly.

Rescission and claims for profits are both profit-stripping remedies that deprive the fiduciary of all gains that he or she may acquire by breaching his or her fiduciary duty. Their rationale is often explained as being that any profit that the fiduciary gains from his or her position 'belongs' to the beneficiary in the wide, equitable sense that it ought not to have gone to anybody else.[155] The better explanation however is that the profit should go to the beneficiary partly because it is made by the fiduciary at the beneficiary's risk, but primarily because it is contrary to the fiduciary's primary duty to act only in the beneficiary's interests. More specifically, the prospect of losing his or her potential gains is intended to discourage the fiduciary from breaching that duty by removing its incentives and making it futile, the logic being that '[r]emoving the fruits of the temptation is an effective means of reducing the temptation itself'.[156] The purpose of disgorgement is however not only negative in nature. By denying the fiduciary any personal advantage, it seeks to channel his or her conduct by leaving the protection or advancement of the beneficiary's interests as the only way open to him or her. These deterrent and regulatory functions reflect and give practical effect to the unique prophylactic and subsidiary kind of protection that fiduciary duties afford the beneficiary.

The deterrent and restorative aims and functions of these two fiduciary remedies and their focus on the fiduciary's gain rather than any loss to the beneficiary are also distinguishable from the compensatory ones of contractual and delictual (tortious) remedies.[157]

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[155] Worthington *Equity* 133.
[156] Conaglen *Fiduciary Loyalty* 80.

[157] It is for this reason that it is irrelevant to the fiduciary's liability whether his or her conduct prejudiced or benefited the beneficiary, or that the gain concerned was not otherwise available to the beneficiary: *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134 144–5; *Industrial Development Consultants Ltd v Cooley* [1972] 2 All ER 162.

For potential claimants, it is the strict nature of the fiduciary's liability that renders the fiduciary remedies more attractive than others. These attractions include the afore-mentioned absence of any need to prove any *mens rea*, loss, or that any profit obtained by the fiduciary was made at the beneficiary's expense, and the imposition of liability even where the beneficiary has benefited from the fiduciary's conduct. All that the beneficiary has to prove, on a balance of probabilities, is that the fiduciary made a profit in circumstances where there was a conflict of interests or by virtue of his or her fiduciary position.[158] The absence of any need to prove anything further significantly eases the beneficiary's evidentiary burden.

7. AVOIDANCE OF AND RELIEF FROM LIABILITY

7.1 AVOIDANCE OF LIABILITY – DISCLOSURE AND CONSENT

Fiduciaries can avoid liability for breach of fiduciary duty by making full and proper disclosure of, and obtaining the beneficiary's consent to, any conduct that would otherwise constitute a breach of duty.[159]

In order to be 'full and proper', the disclosure must be made frankly[160] and must include all material facts,[161] including the source,

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[158] *Symington v Pretoria-Oos Privaat Hospitaal* [2005] 4 All SA 403; *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134; *Phillips v Fieldstone a (Pty) Ltd and Another* [2004] 1 All SA 150 (SCA), 2004 (3) SA 465 (SCA) para 31.

[159] *New Zealand Netherlands Society 'Oranje' Inc v Kuys* [1973] 1 WLR 1126. Section 75(5) of the Companies Act 71 of 2008 imposes a statutory duty on all directors, prescribed officers and members of any committee of the board of a company (which would include any employee who holds any of those positions) to make disclosure of any financial interest that he or she or any related person has in any matter to be considered at a meeting of the company's board of directors. For the common-law duty of disclosure of company directors and officers, see Cassim et al *Contemporary Company Law* 567.

[160] *Crown Dilmun and Another v Sutton and Another* [2004] 1 BCLC 468, [2004] EWHC 52 (Ch) [137]; *Fine Industrial Commodities Ltd v Powling* (1954) 71 RPC 253 262; *Imperial Mercantile Credit Association v Coleman* (1873) LR 6 HL.

nature and full extent of the fiduciary's interests so that the beneficiary is 'fully informed of the real state of things'.[162] Whether or not there has been sufficiently full disclosure will depend on the facts of the case,[163] and the burden of proving that it has been given rests on the fiduciary.[164] The consent can be express or implied and can be obtained in advance or by way of subsequent ratification.[165]

7.2 RELIEF FROM LIABILITY – COMPANY DIRECTORS AND OFFICERS

In South African law, employees who are directors, prescribed officers or members of a committee of the board of a corporate employer and who have breached a statutory fiduciary duty that they owe to their employer in any of those capacities can in certain circumstances obtain relief under the Companies Act 71 of 2008 from liability for that breach.

Section 77(9) of the Act provides in this regard that in any proceedings against such a person (other than for wilful misconduct or wilful breach of trust) the court may relieve him or her, either wholly or partly, from any liability for that breach provided for in s 77, on any terms that the court considers just, if it appears to the court that the person concerned has acted honestly and reasonably or, having regard to all the circumstances of the case (including those connected to his or her appointment), it would be fair to excuse him or her. In terms of s 77(10), any such person who has reason to apprehend that a claim for such a breach will be made against him or her may apply to court for relief 'in advance' of any such claim actually being made.

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[161] *Bristol & West Building Society v Mothew* [1988] Ch 1 18; *Gwembe Valley Development Co Ltd v Koshy (No 3)* [2004] 1 BCLC 154 (CA) [65].

[162] *Gwembe Valley Development Co Ltd v Koshy (No 3)* [2004] 1 BCLC 154 (CA) [65]; *Gray v New Augarita Porcupine Mines Ltd* [1952] 3 DLR 1 14.

[163] *Hurstanger Ltd v Wilson* [2007] EWCA Civ 299 [35].

[164] *Hurstanger Ltd v Wilson* [2007] EWCA Civ 299 [35].

[165] *Re Pauling's Settlement Trusts* [1962] IWLR 86 108.

7.3 THE IMPLICATIONS OF THE LABOUR RELATIONS ACT

As explained in chapter 2, the enforcement of an employer's remedies against an employee for breach of fiduciary duty is subject to the Labour Relations Act's provisions relating to unfair dismissals and unfair labour practices, the Employment Equity Act's provisions relating to unfair discrimination, and s 34 of the Basic Conditions of Employment Act. In certain circumstances, these provisions may affect the employer's recourse against the employee.

8. DISTINCTIONS BETWEEN FIDUCIARY AND OTHER DUTIES

8.1 INTRODUCTION – THE CONFUSION OF DUTIES

There is a significant amount of confusion regarding the distinction and relationship between fiduciary and other duties. This is clearly evident in labour and employment law, with the result that the 'problem of identifying the scope of any fiduciary duties arising out of the relationship is particularly acute in the case of employees'.[166]

There are numerous cases in which employee non-fiduciary duties have been described or treated as indistinguishable from fiduciary ones or have been otherwise conflated with them, without proper distinction.[167] This has resulted in incorrect statements and

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[166] *University of Nottingham v Fishel* [2000] ICR 1462 1492.

[167] For example, *Polinsky v Theron*; *Premier Medical & Industrial Equipment (Pty) Ltd v Winkler and Others* [1971] 4 All SA 94 95; *Uni-Erections v Continental Engineering Co Ltd* [1981] 3 All SA 73 (W*),* 1981 (1) SA 240 (W) 85 87; *Sappi Novoboard (Pty) Ltd v Bolleurs* (1998) 19 *ILJ* 784 (LAC), [1998] 5 BLLR 460 (LAC) [7]–[9]; *Nel v Ndaba and Others* (1999) 20 *ILJ* 2666 (LC) [25]–[26]; *Ganes and Another v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA), [2004] 2 All SA 609 (SCA) [25]–[27]; *Thompson and Samaki Beach Lodge* (2009) 30 *ILJ* 1396 (CCMA) 141819. Also Grogan *Workplace Law* 9 ed (2007) 53–4.

applications of the relevant legal principles and in the granting of inappropriate remedies.[168]

The duties most commonly confused with fiduciary ones are the employee's common-law contractual duties of 'good faith', 'loyalty', 'faithfulness', trust and confidence, and duties of disclosure. In English and Canadian law there is further confusion with regard to the employee's implied duty of 'fidelity'. As the court in *Fishel* noted, '[t]here are many cases which have recognised the existence of the employees' duty of good faith, or loyalty, or the mutual duty of trust and confidence – concepts that tend to shade into one another'.[169] These duties are not however fiduciary duties. Although they have some features in common with fiduciary duties, they are fundamentally different from them.[170]

Much of the confusion between these different duties is due to the loose use of imprecise and ambiguous terminology. Terms such as 'good faith', 'loyalty', 'fidelity', and 'trust and confidence' are used interchangeably in descriptions of employee duties without any recognition or acknowledgment that they have functionally different meanings in different contexts, and that those meanings may have changed over time. The terms 'good faith' and 'loyalty', for example, are used in relation to a number of different duties. For the purposes of fiduciary duties, these concepts have the specific meaning of acting solely in the interests of another. In relation to other duties, they have a narrower, less exacting meaning that merely requires the incumbent to have regard to or to take the interests of another into

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[168] Such as the awarding of the fiduciary remedy of a claim for profits for breach of a contractual duty of good faith in, for example, *Uni-Erections v Continental Engineering Co Ltd* [1981] 3 All SA 73 (W) 85 87; *Sappi Novoboard (Pty) Ltd v Bolleurs* (1998) 19 *ILJ* 784 (LAC), [1998] 5 BLLR 460 (LAC) [8]–[9]; *Nel v Ndaba and Others* (1999) 20 *ILJ* 2666 (LC) [25]; *Ganes and Another v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA), [2004] 2 All SA 609 (SCA) [25]–[28]. And see *Thompson and Samaki Beach Lodge* (2009) 30 *ILJ* 1396 (CCMA) 1418 where it was incorrectly held that a breach of fiduciary duty gives rise to an action for damages for breach of contract.

[169] *University of Nottingham v Fishel* [2000] ICR 1462 1492.
[170] *University of Nottingham v Fishel* [2000] ICR 1462; *Noble Spirit Ltd v Wong Shu Yuen* 2013 WL 5915488 [58].

account, but not to disregard his or her own interests and act exclusively in the interests of the other.[171] All these duties are also often described as 'equitable' ones, which invites confusion as to both their source and nature.[172]

Confusion between these duties and fiduciary ones has also resulted from misconceptions and conflicting interpretations of the nature and the historical origins and developments of certain of them, and from the fact that there is substantial overlap in both the kinds of behaviour they regulate and in their common aim of employer protection. In a number of cases the courts have also focused only on the issue of whether an employee's conduct rendered their dismissal for breach of duty substantively fair, and have not found it necessary to decide whether, properly analysed, the duty infringed was of a contractual or fiduciary nature.[173] In South African law, the confusion has been exacerbated by the general lack of understanding of the true nature and application of the fiduciary concept and a failure to appreciate that other jurisdictions rely on different legal grounds to regulate certain kinds of employee behaviour. This is particularly so in relation to competitive activity and the use of the employer's confidential information by current and former employees. While English and Canadian law refer in this regard to a duty of 'fidelity' or 'good faith and fidelity',[174] South African law generally treats competitive activity during the currency of employment as falling within the ambit of the duty of good faith, and activity post-employment as governed by the general principles of

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[171] *University of Nottingham v Fishel* [2000] ICR 1462 1492; *Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd* [1991] ICR 524 533.

[172] 'Equitable' can refer to general fairness or it can be used to describe duties that arise through the application of the fiduciary doctrine or some other doctrine or maxim of English or Canadian Equity.

[173] *University of Nottingham v Fishel* [2000] ICR 1462 1493.

[174] *Imperial Sheet Metal v Landry* 2006 NBQB 303 (NBQB), [2006] NBJ No 373 / *Imperial Sheet Metal v Landry* 2007 Carswell NB 298, 2007 NBCA 51; *Helmet Integrated Systems Ltd v Tunnard* [2006] EWCA Civ 1735; *Nova Plastics v Froggatt* [1982] IRLR 146; *Hivac Ltd v Park Royal Scientific Instruments Ltd* [1946] 1 Ch 169; *Robb v Green* (1895) 2 QB 1.

contractual restraint of trade undertakings. In addition, there is increasing reliance on the law of delict (tort) in guarding against the misuse of confidential information.

However, despite their potential co-existence and overlap, the truly fiduciary no-conflict and no-profit duties are fundamentally different from any other employee duties in their application, form, function and operation. The most significant differences between them and some of the other employee duties with which they are most commonly confused are summarised below.

8.2 FIDUCIARY DUTIES AND DUTIES OF GOOD FAITH

There is a close association between fiduciary duties and duties of good faith. The South African courts have traditionally explained fiduciary principles as arising out of a general duty of good faith,[175] which they have interpreted as being a matter of honour,[176] fidelity,[177] faithfulness,[178] honesty and absolute candour,[179] and as including a requirement that the incumbent act in the interests of the beneficiary.[180] In *Mothew*, Lord Millett included a requirement that the fiduciary act in good faith in his description of the facets of the core fiduciary obligation of loyalty.[181]

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[175] For example, *Olifants Tin 'B' Syndicate v De Jager* 1912 TPD 305 314; *Moorcroft v Biddulph* (1896) 10 EDC 172 185; *African Claim and Land Co Ltd v W J Langermann* 1905 TS 494 504; *Howard v Herrigel* 1991 (2) SA 660 (A) 678.
[176] *Matabele Syndicate v Lippert* (1897) 4 OR 372.

[177] *Gerry Bouwer Motors (Pty) Ltd v Preller* 1940 TPD 130 133; *Premier Medical & Industrial Equipment (Pty) Ltd v Winkler and Others* [1971] 4 All SA 94 (W) 96.,.

[178] *Levin v Levy* 1917 TPD 702 708; *Gerry Bouwer Motors (Pty) Ltd v Preller* 1940 TPD 130 133.

[179] *Levin v Levy* 1917 TPD 702 708; *Durand v Louw* 1935 TPD 47 52; *Gerry Bouwer Motors (Pty) Ltd v Preller* 1940 TPD 130 133.

[180] *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 197; *Transvaal Cold Storage Co Ltd v Palmer* 1904 TS 4 33; *S v Heller* 1971 (2) SA 29 (A) 43–4; *Uni-Erections v Continental Engineering Co Ltd* [1981] 3 All SA 73 (W*),* 1981 (1) SA 240 (W) 252.

[181] *Bristol & West Building Society v Mothew* [1988] Ch 1 18 There is also evidence in the Court of Appeals judgment in *Attorney-General v Blake* [1998] Ch 439 (CA),

There are also a number of similarities between fiduciary duties and duties of good faith. Both are imposed in circumstances in which one party has some power or ability to affect the assets or interests of another. Both seek to protect the second party's interests against exploitation or exclusively self-interested conduct by the first party by constraining the former's use of his or her powers or advantages in relation to the latter. As such, both constrain actions that would otherwise be within one party's independent discretion.[182] However, despite their links and similarities, and even if duties of good faith give rise to fiduciary duties, the two are distinct and fundamentally different from each other.[183] The mere fact that a duty of good faith was included in the core duties that attach to the fiduciary capacity in *Mothew* does not necessarily mean that all of those core duties are fiduciary ones.[184]

Duties of good faith also differ from fiduciary duties in their content, their source, what they require of the parties to whom they apply, and in what they seek to achieve. While duties of good faith are contractual duties, fiduciary duties are equitable ones.[185] The meaning of 'acting in good faith' is difficult to define in precise terms. Summers refers to it as an 'excluder' concept that does not have a single meaning of its own but that takes on specific meaning in particular contexts by excluding various forms of bad faith.[186] It has also been described as requiring one party to acknowledge the

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[2001] AC 1 and in the English Law Commissions 1995 Report on Fiduciary Duties of the acceptance of good faith as a fiduciary concept.

[182] Worthington, *Equity* Chapter 5.

[183] For a detailed analysis of the relationship and distinctions between duties of good faith and fiduciary duties, see Conaglen *Fiduciary Loyalty* 40–4.

[184] Conaglen *Fiduciary Loyalty* 40. And, as Stafford and Ritchie point out, there is evidence later in the *Mothew* judgment that Lord Millett did not intend to suggest that fiduciaries are bound by an open-ended prescriptive duty of good faith, but simply that a fiduciary must not act in bad faith: Stafford and Ritchie *Fiduciary Duties* 19 para 2.344.

[185] *University of Nottingham v Fishel* [2000] ICR 1462; *Noble Spirit Ltd v Wang Shu Yuen* 2013 WL 7494; *Citipost (Asia) Ltd v Julian Robert Holliday CACV* 111/2004; *Glock (HK) Ltd v Brauner* [2007] HKLRD 852.

[186] R Summers '"Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code' (1968) 54 *Va LR* 195 201.

interests of another when making a decision or taking action. Nolan (interpreting the judgment in *Mothew*) defines the duty of good faith as 'a duty qualifying performance of some other activity, virtually a duty not to misbehave, rather than a duty to do any particular thing'.[187]

For the purposes of the implied duty of all employees, the South African courts have defined it as a duty that requires the employee to serve the employer 'honestly and faithfully',[188] and 'not to work against the employer's interests'.[189] In the often-cited case of *Robb v Green*, Lord Esher described the test for breach of the duty as being whether the employee's conduct was 'what any person of ordinary honesty would look upon as dishonest conduct towards his employer, and a dereliction from the duty ... owed to the employer to act ... in good faith'.[190]The most significant distinction with regard to content and purpose centres however on the different kinds or degrees of loyalty that the duties require. Duties of good faith require 'loyalty' only in the sense of 'having regard to' or 'not acting contrary to' the interests of another. They are thus essentially concerned with mediating the parties' competing interests by avoiding certain forms of 'bad faith' behaviour. Fiduciary duties, on the other hand, require 'loyalty' in the absolute or 'undivided' sense of acting solely and exclusively in another's interests. Their aim is thus to secure the supremacy of one party's interests by completely subjugating those of the other. Duties of good faith permit self-interested conduct but ensure that it is not so extreme as to constitute abuse of some power, discretion and corresponding vulnerability on the part of the

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[187] R Nolan 'A Fiduciary Duty to Disclose?' (1997) 113 *LQR* 220.

[188] *Robb v Green* (1895) 2 QB 1 3; *Sappi Novoboard (Pty) Ltd v Bolleurs* (1998) 19 *ILJ* 784 (LAC); [1998] 5 BLLR 460 (LAC) [7]; *Gerry Bouwer Motors (Pty) Ltd v Preller* 1940 TPD 130 133; *Standard Bank of SA Limited v Council for Conciliation, Mediation and Arbitration and Others* [1998] JOL 2129 (LC).

[189] *Ganes and Another v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA), [2004] 2 All SA 609 (SCA).

[190] *Robb v Green* (1895) 2 QB 1 316. Also *Pelunsky & Co v Teron* 1913 WLD 34 38.

other party. Fiduciary duties by contrast do not permit any such conduct at all.[191]

In addition to these differences in content and purpose, duties of good faith are not exclusive to fiduciaries. There are also differences in the way the two kinds of duties function, and in the remedial consequences that attach to their breach. Duties of good faith operate both proscriptively and prescriptively, unlike fiduciary duties which (this thesis argues) are primarily proscriptive in nature. Duties of good faith are contractual duties. As such, if breached, they give rise to contractual remedies.[192] In relation to employees, these remedies comprise termination of the employment (subject to the LRA's unfair dismissal provisions) and/or a claim for compensatory damages for financial loss suffered as a result of the breach. In terms of the conventional position, South African law of contract does not provide for a claim for any profits that the breaching party may have obtained pursuant to their breach. The truly fiduciary no-conflict profit duties that attach to the fiduciary-employee are not contractual (or delictual (tortious)) duties but *sui generis* ones. If breached they give rise to the primarily deterrent and restorative remedies of rescission and a claim for unauthorised gains,[193] in addition to a claim for any loss caused by the breach and dismissal (again subject to the LRA's unfair dismissal provisions). Good faith remedies therefore focus on loss to the beneficiary while the focus of fiduciary remedies is on the benefits obtained by the fiduciary.[194]

8.3 FIDUCIARY DUTIES AND THE DUTY OF 'FIDELITY'

English, Canadian and Australian law recognise an implied duty of 'fidelity' (which is often coupled with the duty of good faith and

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[191] D de Mott 'Beyond Metaphor: An Analysis of Fiduciary Obligation' 892.
[192] A Rycroft and B Jordaan *A Guide to South African Labour Law* (1990) 84.
[193] *University of Nottingham v Fishel* [2000] ICR 1462 1477; *Phillips v Fieldstone a (Pty) Ltd and Another* [2004] 1 All SA 150 (SCA), 2004 (3) SA 465 (SCA); *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134 386.
[194] D de Mott 'Beyond Metaphor: An Analysis of Fiduciary Obligation' 892.

described as a composite 'duty of good faith and fidelity')[195] on the part of all employees.

This is a somewhat vague duty[196] that prohibits all employees, as ordinary employees, from competing with their employers during the currency of the employment relationship and from at any time using their employers' confidential information. The Canadian Court of Appeal has described it in the following terms:[197]

> A non-fiduciary employee owes the employer a general duty of good faith and fidelity during the currency of the employment relationship. This translates into a duty not to compete with the employer, either directly or indirectly, during the currency of the employment relationship. It also translates into a duty not to disclose 'trade secrets' and other confidential information. Once the employment relationship ends, the duty of non-disclosure persists.

It appears that this duty is the result of a series of historical misconstructions of fiduciary duties in English law.[198] However, in its modern form, it (like the employee duty of good faith) is generally classified as an implied contractual duty that attaches to all

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[195] For example, *Imperial Sheet Metal v Landry* 2006 NBQB 303 (NBQB), [2006] NBJ No 373 / *Imperial Sheet Metal v Landry* 2007 CarswellNB 298, 2007 NBCA 51; *Helmet Integrated Systems Ltd v Tunnard* [2006] EWCA Civ 1735; *Nova Plastics v Froggatt* [1982] IRLR 146; *Hivac Ltd v Park Royal Scientific Instruments Ltd* [1946] 1 Ch 169; *Robb v Green* (1895) 2 QB 1.

[196] Per Lord Greene in *Hivac Ltd v Park Royal Scientific Instruments Ltd* [1946] 1 Ch 169 174.

[197] Per Robertson JA in *Imperial Sheet Metal v Landry* 2006 NBQB 303 (NBQB), [2006] NBJ No 373 / *Imperial Sheet Metal v Landry* 2007 CarswellNB 298, 2007 NBCA 51 [33].

[198] For the tracing of this duty from its origins to its current incarnation, see R Flannigan 'The [Fiduciary] Duty of Fidelity' (2008) 124 *LQR* 273. For confusion between the 'modern' duty of fidelity and fiduciary duties, see *British Midland Tool Limited v Midland International Tooling Limited* [2003] EWHC 466 (Ch), [2003] 2 BCLC 523 [94]; *Helmet Integrated Systems Ltd v Tunnard* [2006] EWCA Civ 1735 [33], [36]; *Crowson Fabrics Limited v Paul Rider, Warren Stimson, Concept Textiles Limited* [2007] EWHC 2942 (Ch), [2008] IRLR 288 [82].

employees as ordinary employees and that is accordingly governed by the principles of the law of contract.[199]

Although there are occasional references to it (usually when referring to English cases),[200] South African law does not appear to recognise a separate duty of 'fidelity'. This is probably due to the use of other regulatory or protective mechanisms. As already mentioned, competitive activity during the currency of employment is generally treated as falling within the ambit of a broad duty of good faith, while activity post-employment is usually dealt with in terms of the general principles relating to restraint of trade undertakings, together with an increasing reliance on delict (tort) for protection against the misuse of confidential information. If however a separate duty of fidelity does exist in South African law, the only aspect of it that is of direct relevance for present purposes is its classification as a fiduciary or non-fiduciary duty. If it applies only to employees who are fiduciaries, applies to them as fiduciary and requires them to act solely and exclusively in their employer's interests, it is a fiduciary duty. If, as is more likely, it applies to all employees as ordinary employees and only requires something less than undivided loyalty, it is a contractual duty.

8.4 FIDUCIARY DUTIES AND THE MUTUAL DUTY OF TRUST AND CONFIDENCE

There is also potential confusion between fiduciary duties and the mutual duty of trust and confidence that English, Canadian and South African law all imply into employment relationships.[201]

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[199] *Imperial Sheet Metal v Landry* 2006 NBQB 303 (NBQB), [2006] NBJ No 373 / *Imperial Sheet Metal v Landry* 2007 Carswell NB 298, 2007 NBCA 51 [33].

[200] See, for example, *Sappi Novoboard (Pty) Ltd v Bolleur* (1998) 19 *ILJ* 784 (LAC), [1998] 5 BLLR 460 (LAC) [7]; *Gerry Bouwer Motors (Pty) Ltd v Preller* 1940 TPD 130 133.

[201] For a detailed analysis of this duty in South African law, see C Bosch 'The Implied Term of Trust and Confidence in South Labour Law' (2006) 27 *Industrial Law Journal* 28, and for the position in English law, D Brodie 'Mutual Trust and the

The duty was described by the South African Supreme Court of Appeal in *Council for Scientific and Industrial Research v Fijen* as a reciprocal duty on both parties not to 'without reasonable and probable cause, conduct [themselves] in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the parties.'[202]

It is debatable whether this duty is only proscriptive or whether it also operates prescriptively by imposing positive duties.[203] In any event, there are clearer distinctions between it and fiduciary duties. It is an implied contractual duty that requires mutual co-operation between the employee and employer or, at most, that they have regard to each other's interests.[204] However, like fiduciary duties, it does not require either of them to completely forego their own interests. This, coupled with the fact that it is not exclusive to fiduciaries, distinguishes it from the fiduciary duties of undivided loyalty.

8.5 FIDUCIARY DUTIES AND DUTIES OF DISCLOSURE

There is some confusion in English law regarding the relationship between fiduciary duties and duties of disclosure.[205]

In English law, the general principle traditionally applied by the courts is that ordinary employees owe their employers an implied

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Values of the Employment Contract' (2001) 30(1) *Industrial Law Journal* 84; D Brodie 'The Heart of the Matter: Mutual Trust and Confidence' (1996) 25 *Industrial Law Journal* (UK) 121; *University of Nottingham v Fishel* [2000] ICR 1462 1492 and the authorities cited there.

[202] *Council for Scientific & Industrial Research v Fijen* 1996 (2) SA 1 (A), (1996) 17 *ILJ* 18 (A), [1996] 6 BLLR 685 (A) 691. As Bosch points out, the words 'probable cause' appear to be a misquote from the English authorities, which refer in cases such as *Mahmud v Malik BCCI* [1998] AC 20 (HL) 34 to 'proper cause': C Bosch 'The Implied Term of Trust and Confidence in South Labour Law' (2006) 27 *Industrial Law Journal* 28.

[203] For a discussion of this issue, see C Bosch 'The Implied Term of Trust and Confidence in South Labour Law' 48–50.

[204] The House of Lords in *Mahmud v Bank of Credit and Commerce International SA* [1997] ICR 606; *University of Nottingham v Fishel* [2000] ICR 1462 1493.

[205] This confusion and the debates surrounding it are discussed in Stafford and Ritchie *Fiduciary Duties* 50–60.

contractual duty of disclosure, but that this duty does not require them to disclose their own wrongdoing[206] (although in certain circumstances and depending on the employee's seniority, position, functions and terms of employment, the duty may require disclosure of wrongdoing by more senior employees,[207] more junior employees,[208] and employees of the same rank).[209] There is also some authority for the proposition that fiduciaries are also under a positive duty to disclose their own breaches of fiduciary duty. Relying on the judgment in *Bell v Lever Bros*[210] and subsequent cases, the courts in *Tesco Stores Ltd v Pook*[211] and *Crown Dilmun v Sutton*[212] expressed the *obiter* opinion that, in their capacity as fiduciaries, directors and senior employees have a positive duty to disclose their own breaches of duty. A bolder statement to the same effect was made in *Hanco ATM Systems*, where the court said that an employee who owes his or her employer fiduciary duties also owes, as part of those duties, a duty to disclose his or her own wrongdoing and information relating to other employees' intended departure; however, the court also said that the law in this regard is not clear.[213]

More problematic, however, is the more recent judgment in *Item Software (UK) Ltd v Fassihi*, where the court held that a director's duty to disclose his or her misconduct and any other information of relevance and concern to the company was an incidence of his or her fundamental duty to act in good faith in the best interests of the

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[206] *Bell v Lever Bros* [1932] AC 161.
[207] *Swain v West (Butchers) Ltd* [1984] 1 Ch 112; *RGB Resources plc v Rastogi and Others* [2002] EWHC 2782 (Ch); *Penwell Publishing (UK) v Ornstein* [2007] EWHC 1570 (QB).
[208] *Sybron Corporation v Rochem Ltd* [1984] 1 Ch 112.

[209] *British Midland Tool Limited v Midland International Tooling Limited* [2003] EWHC 466 (Ch), [2003] 2 BCLC 523.

[210] *Bell v Lever Bros* [1932] AC 161.
[211] *Tesco Stores Ltd v Pook* [2004] IRLR 618 [10]–[20].

[212] *Crown Dilmun and Another v Sutton and Another* [2004] 1 BCLC 468, [2004] EWHC 52 (Ch) [181].
[213] *Hanco ATM Systems Limited v Cashbox ATM Systems Limited* [2007] EWHC 1599 (Ch).

company, which the court then described as part of the fiduciary duty of loyalty.[214] The decision is a controversial one, particularly with regard to the classification of the duty of good faith as a fiduciary one and as a fiduciary duty providing a basis for any such positive obligation of disclosure.[215] The debate surrounding the existence, nature and source of fiduciary and contractual duties of disclosure is beyond the scope of this thesis. The better view however is that, even if it is correct that a positive duty of disclosure flows from the existence of a fiduciary position, it does not mean that the duty itself is a fiduciary one. Its proscriptive nature, the compensatory remedies available for its breach, and the fact that it is not peculiar to fiduciaries indicate that it is rather a contractual duty.

9. CONCLUSIONS

This chapter has defined 'fiduciary duties' and has explained their core nature and purpose, and the ways in which they and the remedies they give rise to function to achieve that purpose. It has also explained which of those features are unique to the fiduciary regime, how they relate to and differ from other non-fiduciary duties, and how they render fiduciary remedies particularly attractive to potential claimants.

These matters are significant for a number of reasons. On a theoretical level, a principled and coherent approach to fiduciary accountability requires that the nature, purpose and function of fiduciary duties be taken into account and be reflected in the criteria that are used to determine their existence and scope in any given case. Although they co-exist with other duties, they operate as 'gap-fillers' by performing functions that other duties do not and cannot

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[214] *Item Software (UK) Ltd v Fassihi* [2004] EWCA Civ 1244, [2005] 2 BCLC 91 / *Item Software (UK) Ltd v Fassihi* [2005] 2 BCLC 91 [44].
[215] The decision was followed in *Shepherd's Investment v Walters and Others* [2006] EWHC 836 (Ch), [2007] IRLR 127, for example, but rejected by the Australian court in *P & V Industries Pty Ltd v Porto and Others* (2006) 14 VR 1. For a critical analysis of the *Fassihi* judgment, see Nolan 'A Fiduciary Duty to Disclose?' 220; Stafford and Ritchie *Fiduciary Duties* 52–60 paras 2.139–2.165.

perform. As this chapter has pointed out, one of those unique functions is the 'subsidiary' support that they provide for the fulfilment of other non-fiduciary duties that the fiduciary owes to the beneficiary and, more specifically, his or her duty to act in the latter's interests. It follows therefore that the first prerequisite for the existence of fiduciary duties is that the alleged fiduciary must be bound by such a duty. In addition, the unique form of protection that fiduciary duties provide must be both necessary and appropriate in the case concerned. Later chapters of this thesis will argue that this will only be so if there is, having regard to all the circumstances, a justified expectation of the alleged fiduciary's undivided loyalty to the protection or promotion of the beneficiary's interests.

On a more practical level and in relation to employment in particular, fiduciary duties provide employers with a valuable form of protection against self-interested and opportunistic misconduct by their employees. This kind of misconduct is occurring more and more frequently, and there are no other duties that provide quite the same kind of protection and recourse against them. This, coupled with their 'user-friendly' and flexible remedies,[216] give fiduciary duties the potential to play a unique and significant regulatory or protective role in the employment context.

[216] *Bayley Associates Pty Ltd v DBR Australia Pty Ltd* [2013] FCA 1341 [242].

CHAPTER 4

THE INCIDENCE OF FIDUCIARY DUTIES – ISSUES OF ANALYSIS, THEORY AND PRINCIPLE

1. INTRODUCTION

The incidence of fiduciary duties refers to the criteria or circumstances that need to exist in order for one party to a relationship to owe fiduciary duties to another party or parties to that relationship. It concerns, therefore, the meaning of a 'fiduciary relationship', and questions of what it is that makes relationships 'fiduciary' ones; how those relationships are to be identified; and how, on what basis, and why they are distinguishable from other 'non-fiduciary' relationships.

These are the most unsettled and controversial aspects of fiduciary law and theory. Academic commentators have suggested various theories regarding the nature of 'fiduciary relationships' and the proper criteria for their identification. Apart from Finn's 'reasonable expectation' criterion,

[1] these have received little recognition from the courts and none have gained significant academic support. Although issues of incidence criteria have been raised in innumerable reported Canadian and English cases, the judgments in those cases have generally failed to clearly articulate or agree on what the proper criteria are, or to explain why their presence gives rise to fiduciary accountability. Furthermore, the courts in the different jurisdictions, as well as within them, have adopted inconsistent and shifting positions on these matters.[2] And while a greater measure of consensus now appears to be emerging in this regard, the question

[1] P Finn 'The Fiduciary Principle' in T Youdan (ed) *Equity, Fiduciaries and Trusts* (1989) 1, discussed in chapter 5 of this thesis.
[2] Finn 'The Fiduciary Principle' 26.

of when fiduciary duties arise remains a 'notoriously intractable problem'[3] that continues to stimulate a substantial amount of judicial and academic debate in Canada and England,[4] and to have 'something of the fascination for equity lawyers … that the search for the Holy Grail had for the knights of antiquity'.[5]

Chapter 5 will provide a detailed and critical analysis of leading case law and certain select academic theories on these incidence issues and criteria. It is however necessary to first consider some general and fundamental aspects of analysis, theory and principle.

This chapter focuses on two such issues of theory and principle. One issue is whether it is possible to formulate a single incidence criterion or 'unifying' theory to adequately identify and explain all 'fiduciary' relationships. The other issue is whether there is any merit or utility in the traditional approach of categorising certain types of relationships as 'fiduciary' ones on a class-wide basis. I also consider some of the more prominent analytical approaches that have been suggested for identifying the proper criteria for determining the existence of fiduciary duties, and the principles that govern those duties, as well as some of the difficulties associated with those methodologies. Finally, I make some proposals with regard to an appropriate analytical approach and suggest a set of requirements that the criteria for the incidence of fiduciary duties would have to fulfil in order to be principled, theoretically sound and analytically useful.

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[3] E Weinrib 'The Fiduciary Obligation' (1975) 25 *University of Toronto Law Journal* 1 5.
[4] As well as in other comparable Commonwealth jurisdictions, such as Australia.
[5] D Waters 'Banks, Fiduciary Obligations and Unconscionable Transactions' (1986) 65 *Canadian Bar Review* 37 56.

2. THE [IM]POSSIBILITY OF A SINGLE OR UNIFIED CRITERION FOR DETERMINING THE INCIDENCE OF FIDUCIARY DUTIES

The kinds of relationships in which fiduciary duties have been recognised and the grounds on which they have been so recognised vary greatly, particularly in individual relationships outside of the categories of relationships that have become established as 'fiduciary' ones.

This gives rise to some doubt as to whether it is possible to formulate a single, general definition of a 'fiduciary relationship' that is able to explain all these differing relationships and to reveal what distinguishes them from non-fiduciary relationships in which no such duties arise.[6] In *Hospital Products*, for example, the High Court of Australia accepted the proposition that there can be no such universal, all-purpose definition.[7]

There is also a view that attempting to define fiduciary relationships in specific or absolute terms would unduly compromise the fiduciary concept and that the courts have been both deliberate and correct in refraining from attempting such a definition. Sir Eric Sachs said in *Lloyds Bank v Bundy*, for example, that '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 [fiduciary] duty passes into one that does'.[8]

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[6] S Beck 'The Quickening of Fiduciary Obligation' (1975) 53 *Canadian Bar Review* 771 781.

[7] *Hospital Products v United States Surgical Corp* (1984) 55 ALR 417 (HCA) 432–3 (Gibbs CJ), 458–9 (Mason J), 488 (Dawson J). Also *Lloyds Bank v Bundy* [1975] QB 326 (CA) 342; *Re Craig* [1970] 2 All ER 390 396 and R Austin 'Commerce and Equity: Fiduciary Obligation and Constructive Trust' (1986) 6 *Oxford J of Legal Studies* 444 445–6.

[8] *Lloyds Bank v Bundy* [1975] QB 326 (CA) 341, as quoted by M Conaglen *Fiduciary Loyalty: Protecting the Due Performance of Non-fiduciary Duties* (2010) 9.

These arguments are in some respects attractive. It seems unlikely that there is a single, 'stand-alone' criterion that is able to identify and explain every one of the very wide range of relationships in which fiduciary duties exist. Furthermore, the fiduciary concept is a 'situation-specific' one that requires flexibility in order to apply in a wide range of situations, which makes it 'resistant to precise definition'.[9] This does not mean however that all attempts to determine questions relating to the incidence of fiduciary duties ought to be rejected. Natural justice and commercial convenience[10] require some measure of clarity and predictability with regard to the principles that govern fiduciary accountability, however broadly or generally framed they need be. As the court in *Hodgkinson v Simms* acknowledged:[11]

> The difficulty lies in determining what … [is] … sufficient to give rise to a fiduciary obligation. An objective criterion must be found to identify this measure if the law is to permit people to conduct their affairs with some degree of certainty. … Accepting that a bright line may be elusive, is there some hallmark that provides a reliable indicator of the acceptance of a fiduciary obligation? The vast disparity between the remedies for negligence and breach of contract … and those for breach of fiduciary obligation, impose a duty on the court to offer clear assistance … .

One of the greatest challenges in this regard is to achieve an appropriate balance between certainty and flexibility, specificity and generality. Any criterion that is poised at an inappropriate balance-point will be unworkable, and undesirable in both principle and policy. It will fail to provide a basis for distinguishing between fiduciary and

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[9] D de Mott 'Beyond Metaphor: An Analysis of Fiduciary Obligation' (1988) 5 *Duke LJ* 879 881.

[10] As Austin says: 'equity and commerce will co-exist in an atmosphere of critical hostility unless … judges reinforce their broad fiduciary incantations … with some more specific rules or themes which will make the application of fiduciary principles more predictable to business and their advisors.' R Austin 'Fiduciary Accountability for Business Opportunities' in P Finn (ed) *Equity and Commercial Relationships* (1987) 185.

[11] *Hodgkinson v Simms* (1994) 117 DLR (4th) 161 [217].

non-fiduciary relationships and will accordingly be of limited, if any, analytical assistance in determining the incidence of fiduciary accountability.[12] Criteria that are too general risk capturing both fiduciary and non-fiduciary relationships and, in that sense, of being too over-inclusive. Those that are too specific will, in addition to unduly inhibiting the elasticity that is inherent in the fiduciary concept and necessary for its proper functioning, be under-inclusive in their failure to explain all fiduciary relationships.

3. THE RECOGNITION AND OF FIDUCIARY RELATIONSHIPS AND THEIR CATEGORISATION AS FIDUCIARY RELATIONSHIPS 'PER SE' AND 'IN FACT'

3.1 THE RECOGNITION OF 'FIDUCIARY RELATIONSHIPS'

Canadian and English case law reflects two different approaches to the recognition of relationships as 'fiduciary' ones that give rise to fiduciary duties.

3.1.1 'Status-based' fiduciary relationships 'per se' or 'in law'

The more traditional approach is to recognise and classify particular kinds or species of relationships as categories of fiduciary relationship on a general, collective and class-wide basis, usually through the drawing of analogies between those relationships and the paradigm trust fiduciary relationship discussed later in this chapter.

All relationships of the type classified in this way are then automatically labelled and accepted as 'fiduciary' ones and, in the absence of rebutting evidence on the particular facts of any case, all members of those classes are automatically classified as fiduciaries on the mere basis of their position within the kind or class of

[12] Shepherd criticises general fiduciary theories and criteria as being 'virtually useless in borderline or particularly complex situations'. See J Shepherd 'Towards a Unified Concept of Fiduciary Relationships' (1981) 97 *LQR* 51 72–3.

relationship concerned. These 'established' fiduciary relationships are often referred to in other jurisdictions as fiduciary relationships '*per se*' or 'in law' because the law automatically, 'as a matter of course',[13] characterises them as fiduciary ones or as 'status-based' fiduciary relationships because they classify persons as fiduciaries on the basis of their status within them.

The categories that have been classified as fiduciary ones in this way differ slightly from one jurisdiction to the next, but generally include, for example, the relationships between trustees and trust beneficiaries,[14] company directors and officers and their companies,[15] agents and their principals,[16] solicitors or attorneys and their clients,[17] and the relationship between partners.[18] Some jurisdictions have also classified the relationships between members of 'domestic' or 'closely held' companies as 'fiduciary' ones.[19]

3.1.2 'Fact-based' fiduciary relationships 'in fact'

The comparatively recent approach considers individual relationships independently, on an *ad hoc* case-by-case basis, and recognises them as fiduciary ones on the basis of their particular factual circumstances. This approach is becoming increasingly

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[13] Finn 'The Fiduciary Principle' 33.
[14] *Keech v Sandford* (1726) SelCast King 61 (25 ER 223).
[15] *African Claim and Land Co Ltd v Langermann* 1905 TS 494 504–5; *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168; *R v Milne and Erleigh (7*) 1951 (1) SA 791 (A) 828; *R v Herholdt* 1957 (3) SA 236 (A) 258; *S v Heller* 1971 (2) SA 29 (A) 43; *Bellairs v Hodnett* 1978 (1) SA 1109 (A) 1130; *Sibex Construction (SA) (Pty) Ltd v Injectaseal CC* 1988 (2) SA 54 (T); *Howard v Herrigel* 1991 (2) SA 660 (A) 678.
[16] *Hodgkinson v Simms* 1994 CarswellBC 438, 97 BCLR (2d) 1 [118]; *Moorcroft v Biddulph* (1896) 10 EDC 172 185; *Evans & Jones v Johnston* 1904 TH 238 244; *Transvaal Cold Storage Co Ltd v Palmer* 1904 TS 4 19–20; *Osry v Hirsch, Loubser & Co Ltd* 1922 531 549 562 563; *Peacock v Marley* 1934 AD 1 5–16.
[17] *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 96.
[18] *Hodgkinson v Simms* 1994 CarswellBC 438, 97 BCLR (2d) 1 [118]; *Matabele Syndicate v Lippert* (1897) 4 OR 372; *Ford v Abercrombie* 1904 TS 878 884 885; *Olifants Tin 'B' Syndicate v De Jager* 1912 TPD 305; *Tshabalala v Tshabalala* 1921 AD 311; *Spilg v Walter* 1947 (3) SA 495 (EDLD); *Korb v Roos* 1948 (3) SA 1219 (T); *Hargreaves v Anderson* 1915 AD 519; *Purdon v Muller* 1961 (2) SA 211 (A); *Bellairs v Hodnett* 1978 (1) SA 1109 (A) 1130; *Erasmus v Pentamed Investments* 1982 (1) SA 178 (W).
[19] For example, *Ebrahimi v Westbourne Galleries Ltd* 1972 All ER 492 (HL); *Re Yenidje Tobacco Co Ltd* [1916] 2 Ch 426 (CA); *Lawrence v Lawrich Motors (Pty) Ltd* 1948 (2) SA 1029 (W).

prevalent and has resulted in the recognition of fiduciary duties within a wide range and variety of individual relationships that have included, for example, relationships between joint venturers,[20] manufacturer and distributor,[21] banker and customer,[22] and stockbroker and client.[23]

3.2 WAYS OF SHOWING A RELATIONSHIP IS A 'FIDUCIARY RELATIONSHIP'

These two approaches mean that there are effectively four ways in which relationships can be shown to be 'fiduciary' ones.

One way is to show that the relationship concerned falls squarely within an existing, established category, such as that of 'trustee', 'director', 'agent' or 'partner'. Another way is to show that, although it does not fall squarely within an existing, established category, the definitional boundaries of a particular category ought to be extended or altered to accommodate or include it.[24] A third possibility is to show that the relationship forms part of an identifiable and distinguishable 'type' of relationship that has its own *essentialia* and definitional criteria and then argue that it and all others of that same type warrant recognition as a new class or category of fiduciary relationship. The final option is to argue that the particular facts of the case merit fact-based fiduciary recognition of that particular, individual relationship.

Although the courts have stressed that the list of categories of fiduciary relationships is not closed and it remains open to them to recognise new classes or categories as appropriate,[25] the class-wide

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[20] *LAC Minerals Ltd v International Corona Resources* (1989) 61 DLR (4th) 14; *Dempster v Mallina Holdings Ltd* (1994) 15 ACSR 1; *United Dominions Corporation Ltd v Brian Pty Ltd* [1985] HCA 49.
[21] *Watson v Dolmark Industries* (1992) 3 NZLR 311.
[22] *Commonwealth Bank of Australia v Smith* (1991) 102 ALR 453.
[23] *Daly v Sydney Stock Exchange* (1982) 2 NSWLR 421.
[24] I advanced a similar argument in relation to the new concept of a 'prescribed officer' introduced by the South African Companies Act 71 of 2008. See K Idensohn 'The Meaning of "Prescribed Officers" under the Companies Act 2008' (2012) 129(4) *South African LJ* 717.
[25] *Phillips v Fieldstone Africa (Pty) Ltd* 2004 (3) SA 465 SCA.

recognition and classification of ‘fiduciary’ relationships has become increasingly infrequent. It is not clear why this is so. It may be that categorisation creates a fear of an application of what is often (erroneously) considered to be a particularly ‘high’ or ‘strict’ standard of conduct in an overly-inclusive way. Or it may be that there are too many variations in modern relationships to give rise to any further sufficiently homogeneous or generic ‘types’ of relationships that can be grouped together as an identifiable and distinguishable ‘class’ of relationships. Another possibility is that there is, for the kinds of reasons discussed later in this chapter, an unarticulated recognition of the difficulties with and ultimate meaninglessness of categorisation and the related distinctions between fiduciary relationships ‘*per se*’ and ‘in fact’.

This is however mere speculation on my part. Whatever the reasons may be, it is clear that although there has been some re-working of the definitional boundaries of some of the existing categories (particularly that of company ‘director’ with the recognition of *de facto* directors, ‘prescribed officers’ under the South African Companies Act 71 of 2008, and other managerial participants), the greatest shift has been towards fact-based fiduciary recognition of specific, individual relationships. But, as I argue later in this chapter, each of these routes to establishing a ‘fiduciary relationship’ requires the same determination of the basis of and essential criteria for a fiduciary relationship. If the argument is that a particular relationship ought to be included within an established status-based fiduciary category, it becomes necessary to determine the basis on which the established relationship was recognised as a fiduciary one and then show sufficient similarities with the features of the relationship under consideration. If the argument is for recognition as a new category or as a fact-based fiduciary relationship, it is necessary to determine the general essential and distinguishing features of such relationships. At that point, the different routes converge. And ultimately, regardless of

which of them was chosen, one will have to confront the 'intractable question'[26] of what it is that gives rise to fiduciary duties.

3.3 THE POSITION OF EMPLOYMENT RELATIONSHIPS

There is some debate as to whether all relationships of employment are, or should be, classified as a class or category of 'fiduciary relationships'. That debate, which I consider in depth in chapter 8 of this thesis, essentially concerns the position of 'ordinary employees' and their fiduciary accountability in that 'ordinary' employee capacity.

Employees do however often attract fiduciary accountability because there is some 'other' aspect to their relationship with their employers that brings them within one of the established categories of fiduciary relationships. The categories most commonly associated with employees are those of 'agent' or, in the case of employees of corporate employers, 'director' or 'officer'. The Canadian courts have developed a further category of 'senior' or 'key' employee to identify those employees who are subject to fiduciary duties. The case law on the recognition of fiduciary duties on the part of employees on the basis that they fall within one of those categories is considered in chapter 7 of this thesis. For present purposes, the concern with those cases is that they, as examples of the categorisation approach, are subject to all the general categorisation problems and criticisms discussed below.

4. PROBLEMS WITH THE CATEGORISATION APPROACH

4.1 INTRODUCTION

Legal categorisation and classifications are desirable only when they facilitate analysis and assist in the reaching of principled, logical and rational conclusions. In relation to fiduciary issues, categorisation of certain types of relationships as 'fiduciary ones' on a class-wide

[26] Weinrib 'The Fiduciary Obligation' 1 5.

basis is therefore acceptable only insofar as it advances the analysis and application of fiduciary principles and assists in producing sound conclusions on issues such as the incidence and scope of fiduciary duties and liability.

However, as this section will show, the categorisation approach to fiduciary accountability does none of these things. Rather, it raises a number of inter-related concerns in both theory and principle, is of very limited analytical utility or substantive or evidentiary import, and has some (generally unacknowledged) ideological and policy implications for how we perceive and present certain kinds of relationships and the respective roles of the parties within them.

I provide a critical discussion of case law in which the categorisation approach has been applied in relation to employees in chapters 6 and 7 of this thesis and, in chapter 8, I examine the ideological and policy-related significance of classifying all employment relationships as 'fiduciary' ones. The doctrinal and analytical shortcomings of categorisation and the ways in which they have been compounded by the related drawing of distinctions between fiduciary relationships '*per se*' and 'in fact', as well as some of the general policy issues that categorisation raises, are set out below.

4.2 LACK OF CLARITY ON THE BASIS FOR THE 'FIDUCIARY' CLASSIFICATION

A significant difficulty with the categorisation approach is the lack of certainty and agreement about the criteria in terms of which relationships within the established categories were classified as 'fiduciary' ones. This again raises the general question of what criteria govern the incidence of fiduciary duties.

In the case of the established categories, the courts have generally explained their fiduciary classification in terms of broad analogies with the 'paradigm' fiduciary relationship between trustee and trust beneficiary. The difficulties with that trust analogy and its

failure to fully address the issue of incidence are discussed later in this chapter. The uncertainties relating to incidence criteria generally are considered in the next chapter's discussion of that topic.

4.3 SUGGESTS NON-EXISTENT DIFFERENCES BETWEEN CATEGORIES

As Flannigan explains, categorisation is useful only when it is used to sort, separate and classify things or arrangements that differ from each other, and it is based on those differences. As he says, categorisation must be used 'to sort different physical arrangements into separate … categories defined by rules that reflect their idiosyncratic nature'.[27]

Fiduciary relationships in the different established fiduciary categories do not however differ sufficiently from each other in ways that are relevant for fiduciary purposes. They are all the same in that they all give rise to fiduciary duties because they all fulfil the same general criteria for the existence of those duties or, in Flannigan's terms, because they all involve the same 'generic mischief'[28] that attracts fiduciary regulation. As he says, '[t]he various fiduciary rules are merely specific responses to specific manifestations of [that] singular mischief … and are applied across categories as required.'[29]

The categorisation approach is therefore artificial, irrational and misleading insofar as it suggests that there are relevant differences between relationships in different 'fiduciary' categories when no such differences exist.

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[27] R Flannigan 'The Boundaries of Fiduciary Accountability' (2004) 83 *The Canadian Bar Review* 35 48.
[28] Flannigan 'The Boundaries of Fiduciary Accountability' 48. Flannigan defines this 'generic mischief' as opportunistic or self-interested abuse by the fiduciary of his or her limited access in relation to the property, interests or affairs of the beneficiary.
[29] Flannigan 'The Boundaries of Fiduciary Accountability' 48.

4.4 INCONSISTENT WITH FUNDAMENTAL FIDUCIARY PRINCIPLES OF INCIDENCE AND SCOPE AND LEGALLY MEANINGLESS

The classification of certain relationships as 'fiduciary' ones also presumes that there is some legal significance or 'magic' in that pre-labelling, and that it has some effect on and reveals something about fiduciary accountability in that relationship. This however is not so. Calling a relationship a 'fiduciary' one has little meaningful legal import or meaning. It tells us nothing definite about the incidence of fiduciary duties in that relationship. It also tells us nothing about the scope of any fiduciary duties that do exist, or whether they have breached in the circumstances in issue. It is therefore of no analytical utility in determining those fundamental issues.

In principle however the primary difficulty with categorisation is that it is out of alignment with the general fiduciary principle expressed in Millett LJ's widely cited statement in *Bristol & West Building Society v Mothew* that 'a person is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary.'[30]

'[I]t is the obligation and duty which makes the obligor a fiduciary'.[31] The fiduciary classification and label themselves have no substantive effect on the relationship in question or on the parties' respective rights and duties within it. The classification is not what confers fiduciary character on a person or a relationship. Fiduciary character is determined by the substantive principles of fiduciary law and accountability and, where it is established, the label 'fiduciary' should be used only to reflect that compliance. The question of whether any fiduciary duties apply at all within the relationship concerned depends on whether the proper criteria for the incidence of fiduciary duties are fulfilled. If they are, it will then be necessary to

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[30] *Bristol & West Building Society v Mothew* [1998] Ch 1 18; also *Chirnside v Fay* [2006] NZSC 68 [72].
[31] *Arklow Investments Ltd v Maclean* [2000] 1 WLR 594 600.

determine the scope of those duties and the aspects of the relationship to which they attach. As I have argued elsewhere in this thesis, fiduciary duties can attach only to those aspects of the relationship that have a fiduciary character. Since the principles that govern their scope are essentially the same as those that govern their existence, this will again require the application of the general fiduciary incidence criteria.

Finally, in order to establish liability, it will be necessary to determine whether any of the fiduciary duties applicable within the relationship were actually breached on the facts of the case. The fact that the relationship may fall within one of the established categories of 'fiduciary relationship' and has been classified as a 'fiduciary' one upfront does not assist in any of these determinations or provide any answers with regard to actual fiduciary accountability. It also tells us nothing about why fiduciary accountability arises or, when it does, how it functions, or what it does, and why it does it. It is of no analytical utility and reveals nothing about the fiduciary concept or its component principles. Flannigan makes a related point when he says that categorisation might create the misleading impression that all objectionable conduct by the fiduciary constitutes a breach of fiduciary duty.[32]

This raises the question of whether the classification of relationships as 'fiduciary' ones is of any legal or analytical import or effect at all and, if so, in what respects.

Conaglen argues that, although there is no consensus on the criteria on which the established categories are based, it is still possible to analyse the fiduciary duties of persons in those categories, without needing to determine what factual circumstances might result in the same duties being owed in other circumstances. 'One can analyse a concept based on a set of paradigm cases or instances of that concept, even if there is not universal agreement as

[32] Flannigan 'The Boundaries of Fiduciary Accountability' 50.

to criteria of application of the concept.'[33] He goes on to say, by way of example, that one can focus on the fiduciary duties of solicitors, trustees, company directors and other recognised 'fiduciaries', and analyse the nature and function of those duties without needing to first develop a principle capable of identifying all the circumstances in which those duties apply.[34] However, the utility of analysing the duties of established categories of fiduciaries is largely confined to issues relating to the nature and function of fiduciary duties. Although these aspects are relevant to the issue of incidence, they cannot in themselves identify when fiduciary duties apply. Conaglen says that once the analysis into nature and function has been completed through a consideration of the established categories, 'one can return to the question of when fiduciary duties may be owed'. That is true, but one does still have to return.

It has also been suggested that 'fiduciary' classification is a convenient, shorthand label to refer to relationships in which fiduciary duties are assumed to apply. Glover describes relationships within the established fiduciary categories as ones that are 'easily established' as having fiduciary aspects, and notes that they are cases where 'the courts make a ready inference to the existence of a fiduciary relationship'.[35] However, any such assumption or 'ready inference' falls short of a rebuttable presumption in the technical sense and has no significant effect on the evidentiary position or on the parties' respective burdens of proof. Glover does go on to explain that assertion when he says that the 'fiduciary' label 'does not mean that presumptive effect is given to the relationship' and that:[36]

> [t]he claim of a beneficiary who stands within an accepted category of relationship is just like the claim of

[33] Conaglen *Fiduciary Loyalty* 11, citing J Coleman *The Practice of Principle* (2001) 157; R Dworkin *Law's Empire* (1986) 72; R Dworkin 'Thirty Years On' (2002) 115 *Harvard LR* 1655 1683–4.
[34] Conaglen *Fiduciary Loyalty* 11, referring also to R Austin 'Moulding the Content of Fiduciary Duties' in A Oakley (ed) *Trends in Contemporary Trust Law* (1996) 153, 153–4.
[35] J Glover 'The Identification of Fiduciaries' in P Birks (ed) *Privacy and Loyalty* (1997) 269 444.
[36] Glover 'The Identification of Fiduciaries' 444.

> any other fiduciary beneficiary ... . A person alleging "accepted" fiduciary status simply brings the defendant within the court's range of reliable inference – unless special circumstances exist. So, for example, a principal suing an agent who makes a wrongful gain in the course of his or her agency has still to make out a case that the agency was a fiduciary one at the relevant time.

At most, the label operates as an initial indicator, signal or *prima facie* acknowledgment that it is likely that the relationship embodies *some* fiduciary duties – that *some* aspects of it are subject to *some* fiduciary duties. That might prompt or encourage an enquiry into those issues, but that enquiry will still have to take place, and it will require an application of the appropriate general principles of fiduciary accountability, regardless of the 'fiduciary' label. As the court said in *Breen v Williams*, the enquiry (in every case) is 'whether a fiduciary duty existed in law in the relationship between the parties …; whether it had been breached; and, if it had, what equitable relief should be granted'.[37] The court said in *United States Surgical Corporation v Hospital Products International Pty Ltd*[38] that the enquiry is '[s]omething of a formality in "accepted" cases, but one must nevertheless still establish the existence of a fiduciary relationship. Thus, fiduciary aspects of the relationship must be isolated and precedent cited to justify a fiduciary conclusion.' The following statement by Frankfurter J in *Securities and Exchange Commission v Chenery Corporation* is often quoted in this regard:[39]

> But to say that a man is a fiduciary only begins the analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary? In what respect has he failed to discharge these obligations? And what are the

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[37] *Breen v Williams* (1994) 35 NSWLR 522 542–50, quoted with approval in *Pilmer and Others v Duke Group Limited (In Liquidation) and Others* [2001] HCA 31 [116].
[38] *United States Surgical Corporation v Hospital Products International Pty Ltd* (1983) 2 NSWLR 157 (NSWCA) 204–5.
[39] *Securities and Exchange Commission v Chenery Corporation* (1943) 318 US 80 85–6, quoted with approval in *Pilmer and Others v Duke Group Limited (In Liquidation) and Others* [2001] HCA 31 [77].

consequences of his deviation from duty?

Even this over-states the consequences of the ‘fiduciary’ label. It does not actually begin the analysis; it simply signals a reminder to undertake it.

4.5 LEADS TO SUPERFICIAL ANALYSIS AND OBSCURES THE TRUE ISSUE

Most analyses relating to the fiduciary accountability of persons who fall within (or are alleged to fall within) one of the established categories of fiduciary relationships focus on whether the person concerned satisfies the definitional requirements for the particular category in question. So, for example, in order to determine whether a person is subject to fiduciary duties as a director, the usual enquiry would be into whether he or she satisfies the definition of a ‘director’. Similarly, in order to establish that a person is bound by fiduciary duties as an ‘agent’, the enquiry is usually into whether he or she and the relationship with the alleged principal meet the definitional requirements for classification as an ‘agent’ and ‘agency’. The same applies to trusts and the other relationships that have become established as ‘fiduciary’ ones.

In most cases, the enquiry does not proceed beyond that point. Once it is shown that the person concerned does fulfil the categorical definitional requirements in issue, it is automatically accepted that he or she is subject to fiduciary duties. So, for example, as soon as a person is shown to be a company ‘director’ as defined by the relevant legal regime, it is accepted that he or she will owe the company fiduciary duties in the performance of his or her functions and in the exercise of his or her powers in that capacity.

In some cases, this is sufficient to arrive at the ‘right’ conclusion with regard to the fiduciary rights and obligations between the parties. For example, trustees’ fiduciary duties generally apply to everything that they do as trustees. So, once it is shown that a person is a ‘trustee’ and that the conduct complained of fell within the

ambit of the trust relationship, it is almost certain that it will have been subject to fiduciary duties.

In other circumstances, however, the enquiry may be a little more demanding. This would be the case where the definitional boundaries of a particular fiduciary category are not settled, or it is not clear whether the alleged fiduciary falls within them. This is particularly evident in relation to, for example, the established fiduciary category of 'director or officer'. Modern developments and increasing sophistication in the ways in which corporate entities are structured and managed have given rise to new varieties of corporate controllers and managers, such as *de facto* and shadow directors. As a result, it has become increasingly necessary to consider the positions of these kinds of managerial participants in relation to the traditional director-officer fiduciary category. This has in turn required consideration of the definitions of '*de facto'*, 'shadow directors' and other corporate managers, of the relationship between those definitions and those of the fiduciary 'director' and 'officer', and therefore also of the definitional boundaries of the established director-officer fiduciary category itself. These issues and the ways in which the courts have approached them are discussed in detail in chapter 7, where the circumstances in, and grounds on, which employees will owe fiduciary duties to their employers are analysed.[40] This however simply adds another layer and question to the enquiry into whether the person concerned falls into the established category as alleged. Again, once it is established that they do, it is generally accepted that they are subject to fiduciary duties in the same way as all other persons who fall within that category.

However, insofar as they are concerned with establishing fiduciary accountability, all of these analyses are formalistic, indirect and

[40] I also discuss the meaning and fiduciary implications of the concept of a 'shadow director' in K Idensohn 'The Regulation of Shadow Directors' (2010) 22(3) *South African Mercantile LJ* 326 and that of the South African Companies Act 71 of 2008's new concept of a 'prescribed officer' in Idensohn 'The Meaning of "Prescribed Officers" under the Companies Act 2008'.

superficial. None of them addresses the real issue. The real issue, and the proper enquiry, is whether the relationship and person concerned fulfil the proper criteria for the incidence of fiduciary duties. This is the case even where the analysis includes the additional layer of having to determine the boundaries of one or more class-related definitions such as ‘director’. This ‘second layer enquiry’ usually takes the form of an analysis of the substantive nature of the category of relationship in issue and of the position and functions of the recognised fiduciary within it. So, for example, in determining whether a person is a *de facto* director and falls within the fiduciary ‘director-officer’ category on that basis, the courts have generally identified the nature, functions and powers of *de jure* directors and compared them to those of the (alleged) *de facto* director.

It is true that, in many cases, the considerations that are taken into account in drawing such comparisons are the criteria that govern the incidence of fiduciary duties, such as power and control over company assets, the degree of discretion to make decisions affecting the company’s position, and so on. In other words, many of the criteria that determine the definitional boundaries of ‘director’ and *de facto* director are also the criteria that govern the incidence of fiduciary duties. Compliance with a class-based definition is thus often a reliable indicator of the existence of fiduciary duties. Nonetheless, it is presented and perceived as an analysis of class definitional boundaries rather than an analysis of the principles of fiduciary accountability. This ‘shortcut circumvention’ fails to appreciate and obscures the existence and true nature of the general principles that govern the purpose, existence, nature, scope and operation of fiduciary duties and remedies. It also discourages any deeper analysis of those issues. As a result, the categorisation of certain kinds of relationships as ‘fiduciary’ ones and the use of those classifications in enquiries in relation to fiduciary accountability is superficial, displaced and incomplete. The only necessary and principled enquiry is a direct enquiry in every case (without consideration of any potentially applicable established category or

class of fiduciary relationship) into whether the proper criteria for the instance of fiduciary duties are fulfilled.[41]

There is no legal significance or magic in bringing a relationship within an established category and, on that basis, attaching the descriptor 'fiduciary' to it.[42] Fiduciary duties do not arise as a result of such labels and classifications. They arise because a relationship, regardless of how it is labelled and classified, fulfils the criteria for the incidence of those duties. It is a matter of principle and substance, not legal taxonomy. Agents (and all other established fiduciaries) attract fiduciary duties not because they fall within the definition of 'agent' (or any other formal definition used to demarcate the established fiduciary categories), but because underlying and implicit in those definitions are factors, circumstances or behaviours that the law considers sufficient to require and justify fiduciary accountability. Form follows function, and function is a matter of substance, not legal classification.

4.6 CREATES THE POTENTIAL FOR FRAGMENTATION AND INCONSISTENCY

Referring to fiduciary relationships in terms of separate classes or categories, and classifying and labelling them differently from individual fiduciary relationships that fall outside those categories, also creates the potential for a fragmented development of inconsistent fiduciary principles.

This might take the form of the development of different principles in relation to general fiduciary issues (such as incidence and scope) as between different categories. So, for example, the principles relating to the scope of fiduciary duties in relationships of agency

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[41] I made a similar argument in Idensohn 'The Meaning of "Prescribed Officers" under the Companies Act 2008' where I suggested that the definition of a 'prescribed officer', which the South African Companies Act 71 of 2008 includes in its definition of a 'director', should be interpreted on the basis of fiduciary incidence criteria and should be construed as including only persons whose positions and behaviour fulfil those criteria.

[42] *Phillips v Fieldstone Africa (Pty) Ltd and Another* [2004] 1 All SA 150 (SCA), 2004 (3) SA 465 (SCA) [27].

may be developed in isolation and without reference to other categories, such as partnership, or the broader fiduciary doctrine as a whole.

Similarly, resort to categorisation, classification and labelling could suggest that there may be variations in the fiduciary principles applicable to different individual fiduciary relationships 'in fact', or as between the established classes of '*per se*' fiduciary relationships on the one hand and individual, fact-based ones on the other. There have already been cases in which these propositions have been endorsed by the courts. A particularly remarkable example is the judgment of the Canadian Supreme Court in *Hodgkinson v Simms*. In his majority judgment in that case, La Forest J (referring to the test for a fiduciary relationship that Wilson J suggested in *Frame v Smith*)[43] said that that test was applicable only to the identification of categories of fiduciary relationships *per se*, thereby implying that there are different incidence criteria for the identification of individual fact-based fiduciary relationships.[44] There is clearly no justification in theory, principle or policy for the proposition that the principles that govern fiduciary duties differ in any way depending on whether the relationship in question has been 'pre-labelled' a 'fiduciary' one or not and, if it has, on which categorical label it has been given.

4.7 NO EVIDENTIARY OR OTHER PRACTICAL EFFECT

It is also necessary to consider whether categorisation's pre-classification of a relationship (or type of relationship) has any practical implications for the parties' respective positions in relation to each other, particularly in cases where the claimant is actually alleging breach of fiduciary duty by the defendant.

With regard to burdens of proof and other evidentiary issues, categorisation has little (if any) evidentiary or other practical or substantive significance to the parties' relative rights and obligations.

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[43] *Frame v Smith* (1987) 42 DLR (4th) 81, [1987] 2 SCR 99.
[44] *Hodgkinson v Simms* 1994 CarswellBC 438 [30], [31], [134].

It has been described in this regard as performing 'a modest signalling function' that affords a claimant alleging a breach of fiduciary duty 'a slightly more favourable' evidentiary onus.[45] Generally, a claimant seeking relief for such a breach by the defendant would need to prove that the defendant owed the claimant a fiduciary duty, and then that the duty was breached by the conduct complained of. Regardless of whether the relationship in question falls within or outside of any of the established categories, the claimant will always have to show that a fiduciary duty applied in relation to, and was breached by, the conduct or behaviour complained of. As such and as Flannigan points out, the 'shortcut' afforded by the prior fiduciary classification provides the claimant with only 'a tiny advantage, if it is any advantage at all'.[46]

The pre-classification does not however go so far as to create a rebuttable presumption in the true sense of either fiduciary accountability (in the sense of 'being subject to fiduciary duties') or liability (in the sense of established breach of duty). Rebuttable presumptions, in the true, technical sense, allow for conclusions to be drawn or for something to be taken as true unless and until the contrary is proved.[47] At the most, the only thing that the pre-classification of a relationship as a 'fiduciary' one presents as true is that the relationship embodies *some* fiduciary duties, or that *some* aspects of it are subject to such duties. It does not however allow it to be taken as true that all aspects of the relationship are subject to fiduciary duties, that the existing fiduciary duties applied to the conduct complained of, or that the conduct complained of constituted a breach of any applicable fiduciary duty.

This is a consequence of the general principle that the existence and scope of fiduciary duties are 'shaped by' and subject to the nature of the broader, underlying relationship in which they apply.[48]

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[45] Flannigan 'The Boundaries of Fiduciary Accountability' 49.
[46] Flannigan 'The Boundaries of Fiduciary Accountability' 49.
[47] *R v Bakes* 1986 26 DLR (4th) 200.
[48] This principle is discussed in greater detail in chapter 3 of this thesis.

Fiduciary duties can attach and apply to only those parts of the underlying relationship that have a fiduciary character because they fulfil the criteria for incidence of fiduciary duties and accordingly give rise to, and are subject to, such duties.[49] Since they do not necessarily apply to all aspects of the relationship or the defendant's behaviour in relation to it (and are not taken to do so by any prior 'fiduciary' classification of the underlying relationship), the claimant still has to prove that fiduciary duties (that might be accepted as applicable to *some* aspect of his or her relationship with the defendant by virtue of the pre-classification) actually applied to the conduct in issue, and that there was an actual breach of one or more of those duties.

This does not ease the claimant's own evidentiary burden significantly. If the pre-classification provides any relative advantage for the claimant it would be in making the defendant bear the slightly heavier burden of showing that the relationship is not a 'fiduciary' one and is therefore not subject to any fiduciary duties. The defendant could do this by, for example, showing that the relationship does not actually fall within the fiduciary relationship category alleged. For example, if the claimant is alleging that the defendant breached his or her fiduciary duties as an agent, the defendant could prove that he or she did not, at the relevant time, fulfil the legal definition of 'agent'. Alternatively, the defendant could prove that, although his or her relationship with the claimant might satisfy the formal definition attached to the alleged fiduciary category, it is different or distinguishable from the generic norm of the relationships that comprise that category in some way that is material to the incidence of fiduciary duties. But it is not necessary for the defendant to prove any of those things in order to avoid liability. The defendant can

[49] *University of Nottingham v Fishel* [2000] ICR 1462 1491–2; *Hospital Products v United States Surgical Corp* (1984) 156 CLR 41 97; *New Zealand Netherlands Society 'Oranje' Inc v Kuys* [1973] 1 WLR 1126 1130; *Ross River and Another v Cambridge City Football Club* [2007] EWHC 2115 (Ch) [197]; *Kelly v Cooper* [1993] AC 205 215; *Phillips v Fieldstone Africa (Pty) Ltd* [2004] 1 All SA 150 (SCA) 163; *Helmet Integrated Systems Ltd v Tunnard* [2006] EWCA Civ 1735 [37]–[39].

concede that his or her relationship with the claimant is a 'fiduciary relationship' and then simply produce evidence to refute the claimant's allegations that the defendant's fiduciary duties actually applied within the circumstances in issue and/or that he or she actually breached them.

It can thus be concluded that categorisation's pre-classification of a relationship (or type of relationship) as a 'fiduciary' one is at best an initial indicator or prima facie acknowledgment that the relationship embodies *some* fiduciary duties and that those duties apply to *some* aspects of the relationship. Yet there is little (if any) assistance or relief offered for a claimant and it is unlikely to affect the outcome of the case or the claimant's prospects of success. The label 'fiduciary relationship' simply holds no evidentiary sway.

4.8 ISSUES OF POLICY AND IDEOLOGY

It has also been suggested that policy considerations may justify applying certain of the fiduciary principles that govern fiduciary relationships '*per se*' differently to fiduciary relationships 'in fact'. Tuch suggests that there may, for example, be stronger policy considerations for limiting the parties' ability to contractually exclude or modify the duties applicable in status-based fiduciary relationships than there are in fact-based ones.[50] It is arguable that this is less objectionable in the case of those fiduciary principles that the parties are free to 'tailor' to their own needs, but less so in the case of the more fundamental and generic fiduciary principles, such as that of proscription, for example. But in any event, it would encourage the continued drawing of distinctions between '*per se*' and 'in fact' fiduciary relationships and aggravate the difficulties of principle that it raises. It is debatable whether that is desirable.

The practice of categorisation itself and the particular kinds of relationships that have been classified as 'fiduciary' ones as a result

[50] A Tuch 'Investment Banks as Fiduciaries Implications for Conflicts of *Interest'* (2005) 29 *Melbourne LR* 502.

of it also raise some more general issues of policy. For example, there are questions as to whether the established status-based fiduciary classifications are still appropriate, whether the underlying assumptions and perceptions about their nature and purpose still properly reflect modern reality, and whether (if only for reasons of ideology and hegemony) their fiduciary label should be questioned and re-assessed against the same, more contemporary criteria that are being applied in the recognition of 'fact-based' fiduciary relationships.[51]

However, despite its lack of any substantive legal, evidentiary and analytical effect, the labelling of a relationship as a 'fiduciary one' does have some ideological significance. It describes a particular conception of the nature and purpose of the relationship and of the parties' respective roles, rights and duties within it. This in turn may shape perceptions and expectations about that relationship and responses to it. In chapter 8 I suggest some ways in which this may impact on relationships of employment in particular.

4.9 CONCLUSIONS ON CATEGORISATION AND THE DRAWING OF DISTINCTIONS BETWEEN FIDUCIARY RELATIONSHIPS 'PER SE' AND 'IN FACT'

As the above discussion has shown, a rational, coherent and principled theory of fiduciary accountability requires that the same generic, general fiduciary principles relating to the incidence, scope, operation, remedial consequences and other aspects of fiduciary accountability be applied consistently to all relationships. If they are, the substantive outcome in relation to the parties' respective positions will be the same, regardless of whether their relationship was initially approached as one '*per se*' or 'in fact'. That starting point has no significance for the analysis that follows it, and is of little practical or substantive consequence. As such, the categorisation of

[51] For a critique of the continued fiduciary classification of company directors, see K Alces 'Debunking the Corporate Fiduciary Myth' (2010) 35(2) *The J of Corporation Law* 239.

fiduciary relationships into those '*per se*' and 'in fact' and the use of both those labels is neither meaningful nor necessary.

This suggests that all relationships should be approached in the same way and given the same 'label'. The categorisation of classes of relationships as ones '*per se*' is, as has been shown, inherently problematic in both theory and principle. If applied alone, it would also constitute an 'all or nothing approach' in which fiduciary accountability would exist only within relationships that are classified, on a class-wide basis, as 'fiduciary' ones. Fortunately there is no suggestion of such restricted application of the fiduciary concept in the case law, which has recognised, and continues to recognise, fiduciary accountability in an increasing number of individual relationships that do not fall within, and are not capable of, class-wide fiduciary classification.

The ultimate conclusion therefore must be that all fiduciary accountability should be approached as fact-based. It is a factual question, in each and every case, whether the proper criteria for the incidence of fiduciary duties (which criteria are the same, regardless of whether the relationship in question falls within or outside of an established 'fiduciary' category) are fulfilled,[52] and, if they are, whether the nature, scope and operation of those duties and the consequences of their breach will also be governed by the same generic, indiscriminate general fiduciary principles.

If there are any arguments to be made for the retention of categorisation and the labelling of certain types of relationships as classes of 'fiduciary relationships', those arguments would have to be based on considerations of public policy and ideological symbolism, and they would have to portray or advance a particular view of the inherent nature and purpose of particular kinds of relationships. This would however be at the cost of principle and theoretical coherence. It is debatable whether such costs are worthwhile.

[52] Flannigan reaches the same conclusion: See Flannigan 'The Boundaries of Fiduciary Accountability' 49.

5. ISSUES OF ANALYTICAL METHODOLOGY

5.1 INTRODUCTION

The difficulties relating to the identification of the criteria for the incidence of fiduciary accountability are not however limited to their substantive nature and content. There are also difficulties in finding an analytical approach that is effective for the purposes of identifying that nature and content.

A number of approaches have emerged. One is the traditional approach of reasoning by analogy from the original and 'paradigm fiduciary relationship' that exists between a trustee and trust beneficiary. Following on from that is the 'categorisation' approach of identifying and classifying certain kinds of relationships as 'fiduciary' ones on a class-wide basis, as previously discussed. Another approach (particularly prominent in earlier academic commentary) is to attempt to define or describe the characteristics or features of a 'fiduciary' relationship and then apply them as indicators of the existence of fiduciary duties. A more recent approach is to focus on the purpose, function and/or underlying aims of fiduciary duties, what they do and how they do it, in order to understand and explain when they should apply.

5.2 THE TRADITIONAL APPROACH – REASONING BY ANALOGY FROM THE 'PARADIGM' FIDUCIARY RELATIONSHIP BETWEEN TRUSTEE AND TRUST BENEFICIARY

The traditional approach to the identification and classification of relationships as 'fiduciary' ones was analogical. As mentioned in chapter 2, the first relationship to be classified as a 'fiduciary' one was the relationship between trustees and trust beneficiaries,[53] which

[53] Finn 'The Fiduciary Principle' 34.

became established as the ‘paradigm’ or ‘archetype’ fiduciary relationship.[54]

Using the trust relationship as their conceptual point of reference, the courts extended the fiduciary classification to other relationships that they considered to be sufficiently analogous to the trust-beneficiary relationship to justify the same fiduciary regulation.[55] Initially they did so in relation to whole classes of relationships. They made generalised assumptions about the nature of certain types of relationships and then compared their assumed features with those of the trustee-beneficiary paradigm. As discussed below, the features considered relevant for these comparative purposes are not clear but, in broad terms, related to the nature of the trustee's power over the trustee’s property, the need for the power to be exercised for the sole purpose of promoting the beneficiary’s interests and otherwise in accordance with the trust directive, the potential for the abuse of that power, and the corresponding vulnerability it gave rise to. Where the assumed features of a class of relationship were sufficiently similar to those of the trustee-beneficiary relationship it was presumed that, as between trustee and beneficiary, the relationship existed, and the one party’s power in relation to the other was held for the exclusive purpose of promoting the other party’s interests (or in certain

[54] As the court said in *Hospital Products Ltd v United States Surgical Corporation*,[54] ‘the trustee is the archetype of a fiduciary’ and, in *Gwembe Valley Development Co Ltd v Koshy (No 3)*,[54] ‘the fiduciary relationship has developed by analogy from the trust relationship’.

[55] Waters 'Fiduciary Obligations and Unconscionable Transactions' 44: ‘The relationship between the trustee and the trust beneficiary was “the first ‘fiduciary relationship” and, indeed the dominant one until the term of the nineteenth century'; J Gautreau 'Demystifying the Fiduciary Mystique' (1989) 68 *Canadian Bar Review* 1, referring to the trustee as the ‘original fiduciary’; Finn ‘The Fiduciary Principle’ 32 34–5; L Sealy 'The Director as Trustee' (1967) *Cambridge LJ* 83 85–6, 91–103, Sealy 'Fiduciary Relationships' (1962) *Cambridge LJ* 69 71–3. In *Hospital Products Ltd v United States Surgical Corporation* (1984) 55 ALR 417 488, Dawson J described the trustee-beneficiary relationship as 'the clearest of all fiduciary relationships', and in *International Corona Resources Ltd v Lac Minerals Ltd* (1988) 44 DLR 592 639 (Ont CA), the Ontario Court of Appeal said: 'In its early stages, the law of fiduciary relationships developed from the vesting of property in a trustee for the sale benefit of the beneficiary. The courts, concerned with the protection of the property for the benefit of the beneficiary, recognised a fiduciary relationship which carried with it an obligation on the trustee to hold the property in trust for the beneficiary. Subsequently, the classes of relationships which have been recognised by the court to be fiduciary in nature have been extended.'

circumstances, the joint interests of both parties). Such relationships were then categorised as 'fiduciary' ones. This process resulted in the recognition of the 'established' categories of 'fiduciary relationship' discussed earlier in this chapter.

Difficulties with the trust analogy

Despite its use in numerous cases,[56] the traditional approach of reasoning by analogy from the trust relationship is problematic.

(a) Lack of clarity on the basis for and application of the analogy

Perhaps the most significant difficulty with the traditional trust-based analogical analysis is the lack of clarity regarding the criteria that the courts employ as the basis for the identification of analogous fiduciary relationships, and the weight afforded to those criteria.

The drawing of analogies is rational only where they are based on relevant similarities and differences.[57] It is therefore necessary to know which criteria are the relevant ones, and the degree of symmetry with them that is necessary to sustain the analogy. In the case of fiduciary duties, this requires certainty on *what* features of the trust relationship make it a fiduciary relationship, and on the extent to which each of those features needs to be present in order to give rise to fiduciary duties in any other given relationship. Neither of these aspects of the traditional trust analogy is entirely clear. Apart from calling into question the rationality of the analogy, the lack of clarity on these matters has contributed to the ongoing uncertainty regarding the incidence of fiduciary duties. It has also impeded the ability of conventional methods of legal analysis to resolve that uncertainty.

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[56] For example, *Gwembe Valley Development Co Ltd v Koshy (No 3)* [2003] EWCA Civ 1048 [89]; *Giradet v Crease & Co* (1987) 11 BCLC (2d) 361 362; *Re West of England and South Wales District Bank, ex parte Dale & Co* (1879) 11 ChD 772 778; *Foley v Hill* (1848) 2 HLC 28 35–6; *Land Credit Co of Ireland v Fermoy* (1870) LR 5 Ch App 763 771; *Sydney v Ranger* (1841) 12 Sim 118 120.

[57] Stone *Legal Systems and Lawyer's Reasonings* (1964) 316.

In determining whether a given relationship was sufficiently analogous to the trust relationship to give rise to fiduciary duties, the courts tended (at least initially) to draw their analogies in very broad and vague terms, with little articulation or explanation of which particular relational features they were based on, the extent to which each of those features needed to be present in order for a relationship to be 'sufficiently similar' to the trust one to justify the same fiduciary regulation, or why it is that they give rise to that regulation.[58]

This is particularly evident in the earlier case law. While the fiduciary doctrine remained largely exclusively associated with established categories, the analogical methodology was relatively uncontroversial. Flannigan, for example, argues that the courts applied the trust analogy and the 'conventional boundaries' of fiduciary accountability that it embodied intuitively, and although this was 'conceptually untidy in some respects … [,] the functions and boundaries of the [fiduciary] jurisdiction were uncontroversial'.[59]

The extent to which this is true is debatable. The courts' initial recognition of fiduciary duties on the basis of broad and unexplained analogies with the trust relationship did not always provide a clear indicator or means of predicting the existence of those duties, or a clear explanation for why they exist when they do.

This is not the result of uncertainty about the nature and core features of the trust relationship. That relationship does have some clear characteristics. The trustee has certain powers or control in relation to the trust property but no personal right to the beneficial enjoyment thereof. As a result of that power or control the trustee also has the ability to affect the interests of the trust beneficiaries. The trustee is therefore given and holds that power subject to a

[58] As Waters points out, when the courts of Equity first applied the fiduciary principle they never felt the need to spell out the criteria for fiduciary relationships in any great detail: D Waters 'Bankers' Fiduciary Obligations and Unconscionable Transactions' 1986 *Canadian Bar Review* 37 55.
[59] Flannigan 'The Boundaries of Fiduciary Accountability' 89.

condition that it be used only for the purposes of benefiting the trust beneficiaries and furthering the aims of the trust arrangement.[60] And there is a corresponding vulnerability or susceptibility on the part of the beneficiaries to the possibility that the trustee may abuse his or her powers, either for personal gain or by otherwise acting contrary to the trust terms.

However, the exact nature of these kinds of features and, more particularly, their respective roles in the use of the trust analogy have never been completely clear or uncontroversial. There have, for example, always been unanswered questions about how these features are to be defined outside of trusts, the extent to which each feature needs to be present and, more generally, the extent to which a relationship has to mirror the trust relationship in order to give rise to fiduciary duties.

To some extent Flannigan is correct when he says that the extent of concern about (or academic interest in) the lack of clarity on the criteria for the incidence of fiduciary duties does seem to have been relatively limited while the courts were applying the fiduciary doctrine to certain kinds of relationships on a general, class-wide basis. However, the criteria for the incidence of such duties become increasingly controversial once they began to be called upon to consider their application to the facts of particular, individual relationships outside of the traditional fiduciary categories. Initially the courts retained 'a considerable fidelity' to the trust analogy[61] as the implicit underlying fiduciary paradigm and measure, continuing to describe fiduciary duties as, for example, 'equitable extensions of trustee duties'.[62] The shift towards individual 'fact-based' fiduciary relationships, and the wide variety of those relationships, has however required them to identify and articulate the features of a 'fiduciary relationship' in terms of more particular criteria. Those

[60] Finn 'The Fiduciary Principle' 34.
[61] Finn 'The Fiduciary Principle' 35.
[62] *Swindle v Harrison* [1997] 4 All ER 705 (CA) 734.

particular criteria do correspond with the obvious core features of the trust relationship to some extent, but the courts have also refined, qualified and added to them over the years.

The analogy is also applied too broadly and bluntly in other respects. For example, class-wide classification on the basis of the trust analogy (and generally) assumes that all individual relationships of a particular kind are homogeneous and share the same features both with each other and with the paradigm relationship, without acknowledging the possibility or probabilities of the existence or absence of sufficient similarities. As Zajtay points out, where resemblance is presumed, probability disappears (or is no longer necessarily present), the presumption (of similarity) 'loses its rational character and the analogy becomes fictitious'.[63] In the drawing of analogies, the more that is presumed, the less the probabilities of truth and the more irrational the presumptions become. This contributes to the further analytical difficulties discussed below.

(b) The inability of the trust analogy to sustain further syllogistic analysis

In Commonwealth jurisdictions, where common-law principles are derived 'from judicial decisions upon particular instances, not the other way around',[64] much legal analysis is syllogistic in nature. Particular kinds of obligations are associated with particular kinds of circumstances or factual scenarios and the deductive syllogism is then used to determine whether those obligations are also applicable in other given scenarios.

As Conaglen explains, the reasoning is as follows: '[W]here the circumstances are X, there is a duty of kind Y (the major premise); in a given factual scenario, the circumstances are (or are not) X (the

[63] I Zajtay 'Reasoning by Analogy as a Method of Law Interpretation' (1980) 13 *Comparative and International LJ of Southern Africa* 324 331.
[64] *Roxborough v Rothmans of Pall Mall Australia Ltd* [2001] HCA 66 [72].

minor premise); therefore, in that factual scenario, there is (or is not) a duty of kind Y (the conclusion)'.[65]

The efficacy of this syllogistic analysis is dependent upon the precision with which the major premise circumstances (in Conaglen's explanation, X) are defined. The clearer those circumstances are, and the easier they are to apply to the minor premise factual scenario, the more accurate the analysis will be. Where however the circumstances on which the major premise are based (in the case of fiduciary duties, the features of the trust relationship that give rise to those duties) are too broadly framed or unclear, they cannot be applied to any other, minor premise circumstances with any confidence that they will produce a useful or 'correct' conclusion. At best, broadly farmed, abstract and unclear major premise circumstantial factors such as those provided by the courts and commentators in relation to the trust analogy can only operate as rough preliminary indicators of, and explanations for, the incidence of fiduciary duties.

(c) Developments in the fiduciary concept

The modern fiduciary doctrine has also evolved and developed to the extent that trust analogy is becoming an increasingly out-dated basis and explanation for the incidence of fiduciary duties. Significant changes in the nature of our societies are producing new kinds of commercial and other relationships with new and evolving protective and regulatory needs. This requires the courts to consider and apply fiduciary accountability in an increasingly large number and variety of individual relationships that are less obviously analogous to the trust relationship than those relationships within the established categories.

In expanding their conception and application of the fiduciary concept, the courts are accordingly decreasing their reliance on the trust analogy and its strict application. They are also acknowledging

[65] Conaglen *Fiduciary Loyalty* 7.

the difficulties of applying it to non-trust relationships.[66] And even when they do still apply it, they qualify it by emphasising that even though a particular person may be subject to fiduciary duties because they occupy a position that is analogous to that of a trustee, it does not necessarily mean that their duties are identical to those of a trustee.[67] Austin J said in 2001 that 'judicial thinking about … fiduciary duties has changed significantly over the last decade'.[68] Those changes have continued with increasing momentum since then and have shaped a modern fiduciary concept that is more expansive and that cannot be fully explained in terms of a rough analogy with the trust relationship. Continued references to the trust as the 'paradigm fiduciary relationship' should therefore be construed as a mere acknowledgment of historical origin rather than an analytical template for the recognition of fiduciary duties.

5.3 DESCRIPTION RATHER THAN ANALYSIS

Much of the jurisprudence on the incidence of fiduciary duties (particularly that which has been relied upon by the analogical and syllogistic analysis referred to above) has attempted to identify and define the features that a relationship must have in order to give rise to fiduciary duties. As is more fully discussed in the following chapter of this thesis, their focus has thus been on describing the nature and characteristics of a 'fiduciary relationship'.

The courts have referred to various individual and combinations of individual relational features in this regard. These have included 'traditional' criteria[69] such as representing or administering the affairs of or acting for or on behalf of another; trust or confidence or reliance; power or control; vulnerability or dependence; and, more recently, criteria such as discretion and a voluntary assumption or

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[66] E Rock and M Wachter 'Dangerous Liaisons: Corporate Law, Trust Law and Interdoctrinal Legal Templates' (2002) 96 *NWUL Rev* [651].
[67] Conaglen *Fiduciary Loyalty* 15 and the authorities cited there.
[68] Per Austin J in *Aequitas v AEFC* [2001] NSWSC 14 [283].
[69] Flannigan refers to these as the 'conventional criteria' for fiduciary accountability: Flannigan 'The Boundaries of Fiduciary Accountability' 36ff.

mutual understanding of trust or confidence or reliance. There have also been numerous academic attempts to define, refine and organise these and other relational features into theories of fiduciary accountability. These are discussed in detail in the following chapter. Their significance for present purposes is that, by focusing only on identifying the features of 'fiduciary relationships' and attempting to define them in terms of general, abstract characteristics or criteria, these theories are more descriptive than analytical in nature.

Most (if not all) of the criteria are also either over and/or under-inclusive in their identification of when fiduciary duties exist. Those that are over-inclusive (such as power, control and dependence) refer to characteristics that are present in some fiduciary relationships, but are also present in other relationships that do not attract fiduciary accountability. Those that are under-inclusive (such as trust, confidence or reliance, or a voluntary assumption of or mutual understanding thereof) are present in only some but not all fiduciary relationships. Others (such as power and vulnerability) are in some respects both over- and under-inclusive.

By virtue of this over-inclusivity and/or under-inclusivity, these descriptive incidence criteria do not and cannot explain what it is that makes a relationship a 'fiduciary' one or how those relationships differ from non-fiduciary ones. As such, they do not accurately predict the incidence of fiduciary duties, or justify or explain them. Being descriptive rather than analytical, they are of limited utility in determining issues of incidence. At best they can operate as the 'rough and ready guide' Wilson J referred to in *Frame v Smith*,[70] or as general 'indicia that help recognize a fiduciary relationship rather than ingredients that define it'.[71]

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[70] *Frame v Smith* (1987) 42 DLR (4th) 81 98–9, quoted with approval in, *inter alia, Lac Minerals v International Corona Resources Ltd* [1990] FSR 441 453, 455, 484–5; *Hodgkinson v Simms* 1994 CarswellBC 438 [30]; *Canson Enterprises Ltd v Boughton & Co* (1991), [1991] 3 SCR 534 543; *M (K) v M (H)* [1992] 3 SCR 6.
[71] *Hodgkinson v Simms* 1994 CarswellBC 438 [30].

5.4 INSTRUMENTALIST AND 'PURPOSIVE' ANALYSES

The above-mentioned lack of clarity on the nature and application of the proper criteria for the incidence of fiduciary duties, their limitations as a basis for identifying 'fiduciary relationships' through conventional syllogistic legal reasoning, coupled with the objections in principle to the categorisation approach and the drawing of distinctions between fiduciary relationships '*per se*' and 'in fact', have caused a shift in academic analysis towards more functionally, purpose-driven or 'instrumentalist' analytical approaches.

These analytical models begin with an identification of the duties and remedies that are 'truly' fiduciary ones and then seek to explain them in terms of *what* they do and *how* and *why* they do it, rather than in terms of when they apply. Although they do not deny the importance of the issue of when fiduciary duties arise, they begin the analysis by seeking to determine the purpose of those duties and how they operate to fulfil that purpose. Once established, that purpose and function (in the sense of what the duties require of the fiduciary and what they effectively do) are used as the conceptual starting point for further analysis of the issue of incidence. The methodology is therefore one of analysis from underlying purpose, function and operation to issues of form and incidence. The rationale, as Birks says, is that:[72]

> Among the many questions that can be asked of any obligation, or its correlative right, two are especially important. The first goes to content. What does the obligation require? The second seeks the causative event. From what facts does it arise? It is often difficult to formulate a crisp answer to the second question unless one has a firm grip on the answer to the first.

[72] P Birks 'The Content of Fiduciary Obligation' (2000) 34 *Israel LR* 3 16, quoted and discussed in Conaglen *Fiduciary Loyalty* 10–11.

5.4.1 Examples of instrumentalist and 'purposive' analyses

Instrumentalist and 'purposive' considerations feature in the works of a number of leading commentators. Finn, for example, defines fiduciary duties in terms of an underlying policy-based purpose of 'maintain[ing] 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'.[73] Flannigan also emphasises the importance of the function of fiduciary accountability, which he defines as the prevention of the 'mischief of opportunism'.[74] Similarly, Weinrib used a purpose-based approach in defining fiduciary accountability in terms of a 'primary' purpose of controlling the exercise of discretion and a 'secondary' purpose of promoting the integrity of certain commercial relationships.[75]

The most comprehensive and persuasive instrumentalist analysis of fiduciary accountability from the perspective of its purpose and function is Conaglen's more recent 'prophylactic subsidiarity' theory.[76] Conaglen's central thesis and theoretical starting proposition are that the core and defining feature of the fiduciary concept and the principles that comprise it is, as Millett LJ described it in his leading judgment in *Bristol & West Building Society v Mothew*, one of 'undivided loyalty'.[77]

According to Conaglen, this uniquely 'fiduciary loyalty' requires the fiduciary to act only in accordance with the non-fiduciary duties that he or she owes to the beneficiary. The fiduciary concept seeks to ensure this by imposing duties of no-conflict and no-profit. The sole purpose for the existence of those fiduciary duties is to increase the likelihood of proper performance of the fiduciary's non-fiduciary duties to the beneficiary by avoiding 'influences or temptations that

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[73] Finn 'The Fiduciary Principle' 27.
[74] For example, in Flannigan 'The Boundaries of Fiduciary Accountability' 37ff.
[75] Weinrib 'The Fiduciary Obligation' 1–3.
[76] Conaglen's analysis is discussed in detail in chapter 3 of this thesis and in Conaglen *Fiduciary Loyalty*.
[77] *Bristol & West Building Society v Mothew* [1988] Ch 1 18.

are likely to distract the fiduciary from providing such proper performance'.[78] Although Conaglen does not describe it in these terms, the loyalty they require is thus that the fiduciary remain committed to acting only in accordance with his or her non-fiduciary duties, by avoiding all opportunistic, self-interested and other behaviour that is likely to compromise[79] that commitment.

5.4.2 Contributions of instrumentalist and 'purposive' analyses

Instrumentalist and purposive analyses of 'truly' fiduciary duties, particularly those that are concerned with only those purposes and functions that are unique and exclusive to fiduciary duties, make a number of valuable contributions to the understanding of the fiduciary doctrine. In extending the analysis beyond issues of incidence, they provide a fuller and more holistic account of the fiduciary concept than do earlier purely descriptive theories.

Conaglen's 'prophylactic subsidiarity' thesis is particularly useful in its explanation of various aspects of fiduciary accountability. It explains the nature, rationale for and purpose of fiduciary duties and remedies, their proscriptive and subsidiary nature, and their operation. Furthermore, it shows the ways in which their nature, rationale and operation differ from those of other, non-fiduciary duties and remedies, thereby distinguishing fiduciary accountability from other kinds of accountability.

By recognising the link between fiduciary duties and the non-fiduciary duties they protect, Conaglen's thesis also provides a new perspective on and insight into issues relating to the scope of fiduciary duties. A fiduciary's position and relationship with the beneficiary will be determined by the non-fiduciary duties that he or

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[78] Conaglen *Fiduciary Loyalty* 4.

[79] The court in *Boardman v Phipps* [1967] 2 AC 46 124 described the likelihood necessary as 'a real, sensible possibility'. See also *Industrial Development Consultants Ltd v Cooley* [1972] 2 All ER 162 172; *Jenkins v Enterprise Gold Mines NL* (1991) 6 ACSR 539 SC (NSW) 551; *Bhullar v Bhullar* [2003] 2 BCLC 241 [30]. The degree of risk was described in *Hospital Corporation Ltd v United States Surgical Corp* (1984) 156 CLR 41 103 as 'a real or substantial possibility'.

she owes to the beneficiary. If, as Conaglen argues, fiduciary duties exist to protect the proper performance of non-fiduciary duties, they are 'reactive to'[80] and will be shaped to align with those non-fiduciary duties. By determining the nature and shape of those non-fiduciary duties, it becomes possible to see the shape and scope of the subsidiary fiduciary duties that attach to and support them. As the court in *Hospital Products v United States Surgical Corp* said, a fiduciary's non-fiduciary duties are what[81] 'regulate 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 [non-fiduciary duties] so that it is consistent with, and conforms to, them.'

Another useful and related aspect of Conaglen's thesis is that it highlights the importance of the need, in every case, to carefully analyse non-fiduciary duties when analysing fiduciary ones. There are three inter-related reasons for this. One is the existence of non-fiduciary duties, which is a necessary prerequisite for the existence of fiduciary duties. In terms of Conaglen's thesis, 'in the absence of any non-fiduciary duties, there is nothing for the fiduciary doctrine to protect and thus no sensible function for the fiduciary doctrine to serve'.[82] The need for the existence of non-fiduciary duties also confirms that it is necessary for there to be some kind of a 'relationship' between the parties for there to be fiduciary accountability, even if that relationship comprises nothing more than some (or perhaps even one) appropriate non-fiduciary duty.[83] Finally, the need for non-fiduciary duties and the role of fiduciary duties in relation to them can provide some assistance in determining the incidence of fiduciary duties.

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[80] Conaglen *Fiduciary Loyalty* 179.
[81] *Hospital Products v United States Surgical Corp* (1984) 156 CLR 41 (HCA) 97, quoted by Conaglen *Fiduciary Loyalty* 179 and also quoted with approval in, *inter alia*, *Kelly v Cooper* [1993] AC 205 (PC) 215, *Strother v 3464920 Canada Inc* [2007] SCC 24 [141].
[82] Conaglen *Fiduciary Loyalty* 185.
[83] The issue of whether a 'relationship' is a requirement for the incidence of fiduciary duties is discussed in chapter 5 of this thesis.

Another advantage of instrumentalist and purposive analyses is that they reveal a rational connection between the purpose, nature and functioning of fiduciary duties and remedies. This presents a framework of fiduciary principles that is attractively coherent, consistent and doctrinally sound.

The ability of instrumentalist and purposive analyses to determine the incidence of fiduciary duties is however more limited. They cannot, by Conaglen's own admission,[84] in themselves indicate when fiduciary duties exist. They are nonetheless useful to various aspects of the analysis of the existence of those duties. Although Conaglen himself does not make the claim expressly, his thesis, for example, can operate as a preliminary exclusionary filter at the initial stage of the analysis of the existence of fiduciary duties in any given case. If fiduciary duties require the existence of some other, non-fiduciary duties then relationships that do not embody any appropriate non-fiduciary duties can be dismissed as 'non-fiduciary' relationships. Where there are no appropriate non-fiduciary duties, there can by definition be no fiduciary duties. In other words, although Conaglen's thesis cannot tell us when a relationship is a 'fiduciary' one, it can tell us when it is not.

However, in order for the thesis to be of even this much use, it is necessary to know more about the kind of non-fiduciary duties that are necessary for the existence of fiduciary ones. Unfortunately Conaglen is not entirely clear on this issue. Although he refers to the kinds of non-fiduciary duties that typically or usually attach to fiduciaries, he does not indicate which of them his thesis refers to. The answer must be that the relevant non-fiduciary duties are ones that are rationally connected to the underlying purpose of fiduciary accountability and that, together with all the other circumstances of the relationship in question, fulfil the requirements for, and explain and justify the imposition of, fiduciary accountability. In terms of Conaglen's view of the purpose of fiduciary duties, the kinds of non-

[84] Conaglen *Fiduciary Loyalty* 245.

fiduciary duties necessary would presumably be ones that the fiduciary is particularly likely to be diverted from properly performing, due to self-interest, opportunism and other temptations, and which, together with all of their other circumstances, provide a rational justification for the incidence of fiduciary accountability. The two non-fiduciary duties that are most obviously potentially relevant (in appropriate circumstances taken as a whole) are a duty of good faith and a duty to act solely in the interests of another. Both of these duties are closely linked with fiduciary duties in all three jurisdictions under consideration. The South African courts in particular have historically associated the no-conflict and no-profit fiduciary duties with the general duty of good faith owed by the administrator to his or her beneficiary. They have also understood the general principles governing fiduciary relationships as arising, ultimately, from that duty,[85] which they have interpreted as including a requirement that the fiduciary exercise his or her powers in the interests of the beneficiary.[86] The difficulty with this approach however is that duties of good faith also apply in other kinds of relationships that do not attract fiduciary duties. So, while the existence of a duty of good faith is relevant to the incidence of fiduciary duties, it is too over-inclusive to identify, in itself, when fiduciary duties apply. A duty to act solely in another's interests, on the other hand, is a more discerning, theoretically sound and analytically viable criterion.

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[85] For example, in *Transvaal Cold Storage Co Ltd v Palmer* 1904 TS 4 19 Innes CJ said that it is 'a fundamental principle in all such cases that good faith should be strictly observed'; *Olifants Tin 'B' Syndicate v De Jager* 1912 TPD 305 320 314; *Moorcroft v Biddulph* (1896) 10 EDC 172 185; *African Claim and Land Co Ltd v W J Langermann* 1905 TS 494 504; *Howard v Herrigel* 1991 (2) SA 660 (A) 678.

[86] See *Forbes, Still and Co v Sutherland* (1856) 2 Searle 231 236; *Moorcroft v Biddulph* (1896) 10 EDC 172 185; *Transvaal Cold Storage Co Ltd v Palmer* 1904 4 33; *Naturman v Preskovsky* 1935 WLD 36 38; *R v Herholdt* 1957 (3) 236 (A) 258; *S v Heller* 1971 (2) SA 29 (A) 43–4; *Uni-Erections v Continental Engineering Co* 1981 (1) SA 240 (W) 252. For example, in *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 197 Innes CJ held: 'A man, who procures the election of a board of directors under circumstances which make it impossible for them to exercise an independent judgment, must, in my opinion, observes he utmost good faith in his dealings with the company ... . And it is wholly inconsistent with the obligations of good faith that the defendant should have made for himself these profits by method which the evidence discloses. That being so, he ought not to be allowed to retain them.'

In any event, it is unlikely that an application of Conaglen's thesis would result in an 'upfront' exclusion of all employment relationships as definite non-fiduciary relationships. Employees clearly owe their employers a number of statutory and common-law non-fiduciary duties, including duties of good faith and faithfulness. Those who are 'agents' or 'directors' are also subject to a clear duty to act in the interests of their employer or principal.[87] There are also circumstances in which 'ordinary' employees will have a duty to act in the interests of their employers.[88] These duties would almost certainly constitute the kinds of non-fiduciary duties necessary for Conaglen's thesis to identify them as a potential basis for fiduciary duties. Even so and for the reasons given above, his thesis is still useful to determine the scope of fiduciary duties in employment and other relationships. If, as I argue in this thesis, the same principles and criteria govern both the incidence and scope of fiduciary duties, then the enquiries into incidence and scope are essentially the same. As such, any thesis – like Conaglen's – that is relevant to the scope of fiduciary duties is also relevant (together with other appropriate considerations) to their incidence.

However, the relevance of instrumentalist and purposive analyses remain both limited and indirect. A theoretically sound model of fiduciary accountability needs to reflect the conceptual inter-connectedness between the purpose, nature, functioning and existence of fiduciary duties. The criteria that govern the incidence of fiduciary duties therefore need to be consistent with the purpose and function of those duties. However, although instrumentalist and purposive analyses are relevant to issues of incidence in this respect, they cannot in themselves predict or fully explain when fiduciary duties exist. The issue and analysis of the proper criteria for the incidence of fiduciary duties are broader than those of purpose and function.

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[87] *Robb v Green* (1895) 2 QB 1.
[88] *University of Nottingham v Fishel* [2000] ICR 1462.

5.5 'ENDS' OR 'REMEDY-DRIVEN' APPROACHES

As earlier chapters have explained, one of the main attractions of the fiduciary doctrine for potential claimants is that the remedies available for breach of fiduciary duty are often easier to prove and more 'rewarding' than other remedies, which usually require proof of some form of fault or *mens rea* and, in the case of the compensation-based contractual and delictual remedies, proof of loss causally related to the breach. Unlike those other remedies, a claim for breach of fiduciary duty 'holds out the prospect of a flexible, often bountiful, remedy system'.[89] As Finn says, practical considerations are often the greatest concern and '[f]or so long as our classification process draws sharp distinctions between remedies … the [ones] with greatest remedial amplitude will inevitably be the one[s] to which resort is had, however questionable this might be'.[90]

The danger therefore is that the attractions of the fiduciary remedial regime may tempt the courts to grant fiduciary relief to a claimant in circumstances that do not fulfil the proper requirements for that relief, either because no other form of relief is available, or because they wish to give the claimant the peculiar benefits of fiduciary relief.[91] According to Finn, this has already 'been the fate of the "fiduciary class", which has been disfigured and distorted as a result'.[92]

Such manipulation and misapplication of fiduciary principles in order to achieve or justify a particular outcome is clearly unprincipled and undesirable. As the court in *Fishel* said, the tendency to describe someone as a fiduciary simply as a means of enabling the courts to impose the equitable remedies is a wholly illegitimate use

[89] Finn 'The Fiduciary Principle' 56.
[90] Finn 'The Fiduciary Principle' 56.
[91] Finn refers in this regard to the 'phenomenon' of 'a compliant judiciary, particularly in some North American jurisdictions, [which] has been prepared … to use the fiduciary principle to provide desired solutions in situations where the law is otherwise deficient or is perceived to be so.' (Finn 'The Fiduciary Principle' 24–5).
[92] Finn 'The Fiduciary Principle' 56.

of the concept.[93] The court in *Attorney-General v Blake* (quoting from *Norberg v Wynrib*[94]) expressed similar concern when it said that '[f]iduciary duties should not be superimposed on those common law duties simply to improve the nature or extent of the remedy.'[95]

It is, as always, far more desirable to formulate a coherent, rational and consistent set of principles and then apply them impartially and objectively to the facts of each case, without manipulating them in order to achieve a particular outcome.

6. REQUIREMENTS FOR PRINCIPLED, THEORETICALLY SOUND AND ANALYTICALLY USEFUL INCIDENCE CRITERIA

In order for the criteria that govern the incidence of fiduciary duties to incorporate the advantages and avoid the shortcomings of the theoretical and analytical approaches that have been discussed in this chapter, and to be principled and theoretically sound, they need to fulfil a number of requirements.[96]

First, they must be as clear, certain and predictable as is possible but without sacrificing the flexibility that is necessary to accommodate, in appropriate circumstances, a wide variety of

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[93] *University of Nottingham v Fishel* [2000] ICR 1462 1490.
[94] *Norberg v Wynrib* (1992) 92 DLR (4th) 449 481.
[95] *Attorney-General v Blake* [1998] Ch 439 (CA), [2001] AC 1.
[96] Shepherd suggests a different list comprising the following eight requirements: '(1) a legal principle in a form useable by the courts and therefore characterised by precision and certainty, which (2) exhibits a natural congruence with the basic equitable approaches to morality and justice, (3) naturally adjusts for the commercial realities of different situations, (4) continues the motif of an underlying reliance by the beneficiary on the fiduciary's good faith (or some form of vulnerability of the part of the beneficiary), (5) centres around some power held by the fiduciary that in its exercise affects the beneficiary, (6) provides a method of attaching the duty to the fiduciary either directly or through some connecting factor, (7) has an infinite variation in the duty flowing from the relationship, and (8), in order to justify the restitutionary method of arriving at quantum, has implicit in it a sense of proprietary interests or property rights.' (Shepherd 'Towards a Unified Concept of Fiduciary Relationships' (1981) 97 *LQR* 51 71.) Shepherd's requirements (1), (2) and (8) clearly reflect a particular view of the criteria that govern the incidence of fiduciary duties that is not completely congruent with the view that I advance in chapter 5 of this thesis.

different relationships, and to fulfil all of the further requirements listed below.

Second, they must be objective criteria that are capable of impartial application. As already argued above in relation to the difficulties of categorisation and the fiduciary relationship '*per se*' and 'in fact' distinction, they need to be the same for all relationships, and they need to be applied consistently and in the same way to all relationships, without any consideration of whether the relationship in question falls within or outside of an existing or potential class of fiduciary relationship.

They must also be capable of explaining all 'fiduciary relationships', of distinguishing them from other 'non-fiduciary' relationships, and of explaining that distinction. In order to do so, they cannot be too over-inclusive or too under-inclusive.

Finally, they need to logically linked to, and provide a rational and persuasive explanation of and justification for, the existence, purpose, nature, scope, operation and remedial consequences of fiduciary duties and the ways in which they differ from those of other kinds of 'non-fiduciary' duties.

7. CONCLUSIONS

In this chapter I have highlighted the issues of fiduciary principle and theory that are particularly relevant to the enquiry into the broader, fundamental issue of what governs and determines the incidence of fiduciary duties.

I have also argued that there is no principled, rational or practically significant causal relationship between the classification or pre-labelling of a relationship as a 'fiduciary relationship' or one of the parties as a 'fiduciary' and the existence of fiduciary duties or liability for their breach. For these and the other reasons given in this chapter, I have rejected categorisation and 'fiduciary' pre-

classification as unprincipled, theoretically unsound, and of very limited analytical, evidentiary or substantive import.

I have also considered some of the theoretical models and analytical methodologies that have been used by the courts or suggested by commentators in seeking to resolve the issue of incidence, and the extent to which they make a principled, sound and useful contribution to doing so.

Finally, and having regard to these relative theoretical, doctrinal and analytical strengths and weaknesses, I have suggested a set of requirements that would have to be fulfilled in order for any suggested criteria for the incidence of fiduciary duties to be principled, theoretically sound and analytically useful. In the next chapter I argue that the criterion that best meets these requirements is that of ‘a justified expectation of undivided loyalty’.

CHAPTER 5

CRITERIA FOR THE INCIDENCE OF FIDUCIARY DUTIES

1. INTRODUCTION

The previous chapter considered various general issues of analysis, theory and principle relating to the determination of the criteria that govern the incidence of fiduciary duties. It rejected the 'trust analogy' and the 'categorisation' approach of identifying certain kinds of relationships as fiduciary ones on a class-wide 'by type' basis as inadequate for the purposes of determining or explaining the existence of fiduciary duties. The chapter also argued for a consistent application of the same incidence criteria to all relationships and suggested some requirements that those criteria would have to meet in order to be theoretically sound, principled and analytically useful. In particular, it argued for criteria that are clear, predictable and impartial; that provide a rational explanation for all aspects of the existence, nature and operation of fiduciary duties; that explain all relationships in which those duties exist; and that distinguish them from other non-fiduciary relationships.

This chapter builds on that discussion by providing a critical, comparative analysis of the specific incidence criteria that have been applied by the English, Canadian and South African courts, as well as those suggested by certain academic commentators with reference to the above-mentioned conclusions and suggestions as to appropriate criteria.

Given the very large number of reported cases in England and especially Canada, the discussion and analysis will, of necessity, be confined to those cases that have been particularly influential or that best reflect the general contemporary fiduciary principles in those jurisdictions.

[1]

Given the paucity of South African cases, the discussion will cover all the cases where the South African courts have considered the incidence of fiduciary accountability outside of the established classes of fiduciary relationships.

The parameters of this thesis do also not extend to a consideration of all the extensive academic commentaries that have been published in Canada and England. The discussion will therefore be limited to a select few commentaries that have either received judicial approval or are particularly useful in resolving issues of incidence. A substantial portion of the discussion will focus on Finn's proposition that 'a person will be a fiduciary in his relationship with another when and insofar as that other is entitled to expect that he will act in that other's or [in exceptional circumstances] in their joint interest to the exclusion of his own several interests'.[2]

Finn described this expectation criterion as a 'reasonable expectation of loyalty',[3] and this expectation, and the subsequently developed 'legitimate expectation' and other variants thereof have found significant support from the courts, particularly in Australia.[4] I argue however that there are some difficulties with the concept of 'reasonableness' (and with the use of the 'legitimacy' terminology), and that the better formulation, and the most persuasive explanation of what it is that determines the core issue of the incidence of fiduciary duties, is a *justified expectation* that the one party to a relationship will, with undivided loyalty, act solely and exclusively in the interests of the other.

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[1] This chapter is concerned with the determination of general, generic incidence criteria. Those criteria that have been more specifically identified as particularly relevant to employment are considered in chapter 6.

[2] P Finn 'The Fiduciary Principle' in T Youdan (ed) *Equity, Fiduciaries and Trusts* (1989) 1 54.

[3] Finn 'The Fiduciary Principle' 3–5.

[4] Examples of such support are cited later in this chapter.

The chapter will end with a critique of the positions that the courts in each of the three jurisdictions are adopting with regard to incidence criteria. It will conclude that, although less developed, the South African courts' approach is preferable to that of the Canadian courts and is also both consistent with and, in some respects, an improvement on that of the English courts.

2. TRADITIONAL INDIVIDUAL INCIDENCE CRITERIA

2.1 INTRODUCTION

The courts have identified various individual criteria (and combinations of individual criteria) as giving rise to fiduciary duties.[5] There have also been various academic attempts to organise those criteria into a 'unified' theory of fiduciary accountability. As will be explained later in this chapter, there are difficulties with all those criteria and attempts.

On theoretical and analytical levels, none of the individual criteria or the models based on them provides a complete basis, justification or explanation for the incidence of fiduciary accountability. In most cases they merely describe but do not explain the relevance of some characteristics of certain fiduciary relationships, or are too under-inclusive and/or over-inclusive.

Another more substantive difficulty is the lack of clarity, consensus and consistency regarding the meaning of these criteria and the relative emphasis to be attributed to them. There are also differences of opinion as to which of them are essential for the existence of fiduciary duties and which are merely relevant, but not crucial or decisive. As a result (and particularly if applied alone), they fail to adequately identify the circumstances in which fiduciary duties exist, or to distinguish them from those in which they do not. Although the

[5] For a discussion of a number of these criteria, see J Campbell 'Fiduciary Relationships in a Commercial Context' available at http://ssrn.comalshalt=2404202 10–33.

courts have attempted to address these shortcomings by qualifying the individual criteria and applying them in various combinations rather than individually, they generally still suffer from these shortcomings. As this chapter will argue, the only criterion that addresses these difficulties and reconciles all the other individual criteria that the courts have applied, and the different ways and combinations in which they have applied them, is the criterion of a 'justified expectation of undivided loyalty'.

2.2 THE NEED FOR A 'RELATIONSHIP'

Fiduciary duties exist within the context of some underlying relationship between the parties and, where they do, they seek to secure the paramountcy of the interests of one of the parties to that relationship.[6] As such, it is clear (although rarely articulated) that the existence of some relationship is a necessary prerequisite for their incidence.[7]

It is also well established that the necessary underlying relationship may be contractual and that it may be created either expressly or impliedly.[8] However it is also clear that a contractual relationship or basis is not necessary,[9] although there does not appear to be any judicial decision or literature on the kind of relationship, other than a contract-based one, that would suffice. Presumably, it could take the form of a statutory relationship, or one arising out of the general principles of public law. In other cases it would probably require some connection between the parties that goes beyond a mere random intersection of their factual

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[6] P Finn 'Contract and the Fiduciary Principle' (1989) 12 *University of New South Wales LJ* 76.

[7] *University of Nottingham v Fishel* [2000] ICR 1462 [70]. For a contrary view, see R Flannigan 'The Boundaries of Fiduciary Accountability' (2004) 83 *The Canadian Bar Review* 35, where he argues that no relationship is necessary.

[8] *Hospital Products v United States Surgical Corp* (1984) 55 ALR 417 (HCA), (1984) 156 CLR 41 (HCA); *Johnson v Birkett* (1910) 21 OLR 319 (P Finn 'Contract and the Fiduciary Principle'; *Standard Investments Ltd v Canadian Imperial Bank of Commerce* (1985) 22 DLR (4th) 410 (Ont CA); *Silent Pond Investments CC v Woolworths (Pty) Ltd and Another* [2007] JOL 2008 (D).

[9] *Volvo (Southern Africa) (Pty) Ltd v Yssel* [2009] JOL 24109 (SCA).

circumstances, unlike those that would, for example, give rise to delictual (tortious) liability between strangers. It is not however necessary to explore this issue further for present purposes. This thesis is primarily concerned with the fiduciary duties of 'employees' as defined in the Labour Relations Act 66 of 1995 (LRA)[10] who, by that definition, all have a legal, usually contractual, relationship with their employers. Similarly, those employees who attract fiduciary duties as agents, directors or officers all have relationships with their principals that are well established as providing a basis for fiduciary duties.

In any event, it is the substantive nature and not the form of the relationship that must be considered in determining the existence of fiduciary duties,[11] usually with reference to the position once the relationship is in place rather than the circumstances that existed before the parties entered into it.

There are however a number of aspects relating to the relationship that the courts have identified as relevant to the incidence of fiduciary duties. Those most commonly referred to are its nature and purpose and the parties' respective positions or roles within it, the purpose for which a party is given any powers they may enjoy in terms of it, and considerations of public policy and expectations with regard to the kind of relationship in question. Generally, these aspects are assessed with reference to the position once the relationship is in place rather than the circumstances that existed before the parties entered into it.[12]

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[10] Section 200A.
[11] *Bellairs v Hodnett* 1978 (1) SA 1109 (A) 1130E–F.
[12] *Perez v Galambos* 2009 SCC 48, [2009] 3 SCR 247, 2009 CarswellBC 2787 [68].

2.3 A DUTY TO ACT IN THE INTERESTS OF ANOTHER

In a number of leading cases the courts have defined the obligation of loyalty that is the 'key feature'[13] or 'core liability'[14] of the fiduciary position in terms of a duty to act in the interests of another,[15] and have accordingly held the existence of such a duty to be a prerequisite for the incidence of fiduciary duties.

It is the existence of this duty to act in another's interests that provides the basis and the rationale for the fiduciary no-conflict and no-profit duties and it is inexorably linked to the way in which those fiduciary duties function. It is the underlying positive duty, discussed in chapter 3 of this thesis, that underpins fiduciary duties, that they attach to, and whose breach they seek to guard against.

The duty to act in another's interests does however require further qualification. First, it is clear that it has the precise and exacting meaning of acting 'solely' or 'exclusively' in the interests of another. As explained in chapter 3, it is thus distinguishable from contractual duties that only require 'acting in the interests of another' in the sense of having regard to, or taking account of, another's interests.[16]

Secondly, fiduciary duties may attach to only certain aspects of the relationship between the fiduciary and the beneficiary.[17] As such, the underlying duty to act in the beneficiary's interests need only exist in relation to some aspect(s) of the broader relationship or the fiduciary's functions or role within it.

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[13] *University of Nottingham v Fishel* [2000] ICR 1462 1490.
[14] *Bristol & West Building Society v Mothew* [1988] Ch 1 18; *University of Nottingham v Fishel* [2000] ICR 1462 1490.
[15] *University of Nottingham v Fishel* [2000] ICR 1462 1490; *Hong Da Development & Investment Holding Co Ltd v China Aayman Property Group Ltd* [2011] MKEC 1664 [142] WL 5506457; *Hospital Products v United States Surgical Corp* (1984) 55 ALR 417 (HCA), (1984) 156 CLR 41 (HCA).

[16] *University of Nottingham v Fishel* [2000] ICR 1462 1490–3. See further chapter 3 of this thesis and the cases cited there.
[17] *New Zealand Netherlands Society 'Oranje' Inc v Kuys* [1973] 1 WLR 1126 1130; *University of Nottingham v Fishel* [2000] ICR 1462 1490–3.

Reference to the need for such a duty is however merely descriptive of the 'fundamental feature which ... marks out the relationship as a fiduciary one'.[18] In order to determine what it is that governs and gives rise to fiduciary duties and, thus, when they exist, it is necessary to know when and in what circumstances the requisite duty to act exclusively in the beneficiary's interests will exist. The enquiry into the existence of such a duty, however, simply approaches the issue of the incidence of fiduciary duties from a different angle. In the absence of an express contractual agreement or other binding undertaking by the fiduciary, reference has to be made to the same circumstantial factors as in an enquiry into the existence of fiduciary duties.

A duty to act in another's interest, while a prerequisite for the incidence of fiduciary duties, does not in itself, therefore, provide an analytical criterion for determining that incidence.

2.4 THE PURPOSE OF THE RELATIONSHIP

There are a number of cases in which the courts have associated fiduciary duties with the purpose of the underlying relationship between the parties and have held that fiduciary duties apply where 'the purpose of a relationship and the role and reason for one party in it [is] to promote the interests of the other ... and not his own'.[19] As Finn says, where the purpose of a relationship and the rights, powers and duties it confers on the party are to promote the interests of another party alone, it provides 'a cogent rationale for characterising [the relationship] in whole or in part as fiduciary'.[20] The importance of the purpose of the relationship was also emphasised in the court's statement in *Fishel* that relationships 'which can readily and universally be recognised as "fiduciary relationships"' are relationships in which 'the very essence of the relationship is that one

[18] *University of Nottingham v Fishel* [2000] ICR 1462 1490.
[19] Finn 'The Fiduciary Principle' 33–5, 37.
[20] Finn 'The Fiduciary Principle' 34–5.

party must exercise his powers for the benefit of another'.[21] This is clearly the case in all the established categories of fiduciary relationships. Trust relationships, for example, exist for the purpose of benefiting the trust beneficiaries.[22] Similarly, the purpose of the relationship and the function of a director or agent is to serve the interests of their company or principal.

Determining the purpose of a relationship and the interests that it serves, and the functions that are to be performed by the parties to it exist to serve[23]

> can call, variously, for an appraisal of the nature of a relationship and the parties' intentions as manifested in it; of the intendment of the document and instrument constituting the relationship ... such terms as are alleged of themselves to give rise to a fiduciary responsibility; of such benefits as the relationship contemplates being derived by the parties severally and whether their several derivation represents the purpose of the relationship, of the powers and other duties given one to affect the rights or property of the other and the reasons therefore, etc.

There are also a number of cases in which the courts have referred to considerations of public policy when characterising the nature and purpose of a relationship and determining the existence of fiduciary duties. These are discussed in more detail later in this chapter.

Reference to the purpose of the underlying relationship between the parties requires the same qualifications as those discussed above in relation to a duty to act in another's interests. As with that duty, it is not necessary for the whole relationship to exist for the purpose of protecting, maintaining or advancing the beneficiary's sole interests. It is possible for only certain aspects of the relationship to have such

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[21] *University of Nottingham v Fishel* [2000] ICR 1490.
[22] *Letterstedt v Broers* (1884) 9 App Cas 371 (PC) 386, as cited in Finn 'The Fiduciary Principle' 33.

[23] Finn 'The Fiduciary Principle' 38.

a purpose. In those cases, fiduciary duties will attach to only those parts that do exist for that purpose. It is not however clear whether the purpose of securing or promoting the beneficiary's interests need be the sole purpose of a relationship (or part thereof) in order for fiduciary duties to arise, or whether it need only be one of a number of purposes. Even if it is not necessary for it to be the sole purpose, it would, presumably, have to be the dominant purpose for fiduciary duties to exist.

However, a determination of the purpose of a relationship does not, in itself, determine (or fully determine) the incidence of fiduciary duties. Again, as with the duty to act in another's interests, it will (in the absence of an express agreement or other expression of intention by the parties) be necessary to have regard to the additional circumstantial incidence criteria discussed below.

2.5 REPRESENTATION OR ACTING FOR OR ON BEHALF OF OR ADMINISTERING THE AFFAIRS OF ANOTHER[24]

There are numerous cases in which the courts have associated the fiduciary doctrine with relationships in which one party 'represents', 'acts for' or 'on behalf of', or 'administers' the property or affairs of the other. Such 'representation' and 'administration' criteria have played a central role in South African fiduciary law. Following their acceptance of Roman Law Digest 18.1.34.7 as the original source of the fiduciary concept,[25] the South African courts have expressly used the concept of representation to explain the fiduciary status of all the established categories of fiduciaries, including trustees,[26] agents,[27] company directors,[28] managers and officers,[29]

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[24] For purposes of convenience I shall refer to all these different permutations generally as 'administration' or 'representation'.
[25] As discussed in chapter 2 of this thesis.
[26] *Sackville West v Nourse* 1925 AD 516 533–4.

[27] *Transvaal Cold Storage Co Ltd v Palmer* 1904 TS 4 19; *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 178.
[28] *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 178; *Transvaal Cold Storage Co Ltd v Palmer* 1904 TS 4 19–20; *Peacock v Marley* 1934 AD 1 5–6; *R v Milne and Erleigh (7*) 1951 (1) SA 791 (A); *R v Herholdt* 1957

partners,[30] guardians, tutors and curators,[31] executors of estates,[32] and promoters of companies yet to be incorporated.[33] It is clear that these established categories of fiduciary relationships all involve some form of representation or administration on the part of the fiduciary. In the trust–beneficiary relationship, for example, the trustee administers the trust property for the benefit of the beneficiaries. Company boards of directors administer the company's property and affairs, and agents enter into transactions and perform other juristic acts for and on behalf of their principals. References to 'representation' or 'administration' also appear in many of the South African cases in which employees have been held to owe their employers fiduciary duties.[34]

There are two issues relating to this criterion that require further analysis. The one concerns the meaning of 'administration' and 'representation' within this context and the kind of administration or representation that gives rise to fiduciary duties. The other is the question of whether administration or representation is a necessary prerequisite for the existence of those duties.

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(3) SA 236 (A); *S v Heller* 1971 (2) SA 29 (A) 43; *Sibex Construction (SA) (Pty) Ltd v Injectaseal CC* 1988 (2) SA 54 (T); *Howard v Herrigel* 1991 (2) SA 660 (A) 678.

[29] *Transvaal Cold Storage Co Ltd v Palmer* 1904 TS 4; *Peacock v Marley* 1934 AD 1 5–6; *Premier Medical & Industrial Equipment (Pty) Ltd v Winkler and Others* [1971] 4 All SA 94 (W), 1971 (3) SA 866 (W) 867; *Sibex Construction (SA) (Pty) Ltd v Injectaseal CC* 1988 (2) SA 54 (T) 66.

[30] *Olifants Tin 'B' Syndicate v De Jager* 1912 TPD 305 315; *Tshabalala v Tshabalala* 1921 AD 311; *Hargreaves v Anderson* 1915 AD 519; *Purdon v Muller* 1961 (2) SA 211 (A); *Bellairs v Hodnett* 1978 (1) SA 1109 (A) 1130; *Erasmus v Pentamed Investments* 1982 (1) SA 178 (W).

[31] *Hargreaves v Anderson* 1915 AD 519 522.

[32] *Ex parte Van Niekerk* 1918 CPD 108.

[33] *Herzfelder v McArthur, Atkinson & Co* 1908 TS 332 351–2; *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 197.

[34] For example, *Jones v East Rand Extension Gold Mining Co Ltd* 1903 TH 325 325; *Peacock v Marley* 1934 AD 1 5–6; *Gerry Bouwer Motors (Pty) Ltd v Preller* 1940 TPD 130; *Coolair Ventilator Co (SA) (Pty) Ltd v Liebenberg and Another* [1967] 2 All SA 125 (W), 1967 (1) SA 686 (W) 690; *Premier Medical & Industrial Equipment (Pty) Ltd v Winkler and Others* [1971] 4 All SA 94 (W), 1971 (3) SA 866 (W) 867; *Uni-Erections v Continental Engineering Co Ltd* [1981] 3 All SA 73 (W), 1981 (1) SA 240 (W).

The kind of 'representation' or 'administration' that gives rise to fiduciary duties

As with all the individual criteria that have been suggested as giving rise to fiduciary duties, 'administering', 'representing' and 'acting for' and 'on behalf of' another can be used and understood in different ways.

The 'strongest' form of representation is where one person (A) is authorised or mandated to transact or perform some other juristic act for and in the place of another person (B), which creates, alters or discharges legal relations between B and a third party. In such cases the relationship will fall within the definition of 'strict agency' and A will be classified as B's agent.[35] Agency is one of the established categories of fiduciary relationship '*per se*' and A will owe B fiduciary duties in relation to the carrying out of his or her mandate.[36]

It is however clear that agency in the strict sense is not a prerequisite for fiduciary duties.[37] There are cases in which the courts have recognised 'representation' or 'administration' that does not amount to strict agency as giving rise to fiduciary duties.

In *Transvaal Cold Storage v Palmer* Innes CJ said that, for the purposes of fiduciary duties, 'administration' refers to any person 'transacting business [that] is not his own' as either 'a *mandatarius*, an *institor* or a *procurator*.[38] It would therefore include any person

[35] F du Bois, G Bradfield, C Himonga, D Hutchison, K Lehmann, R le Roux, M Paleker, A Pope, CG van der Merwe and D Visser *Wille's Principles of South African Law* 9 ed (2007) 984; *Totalisator Agency Board OFS v Livanos* 1987 (3) SA 283 (W) 291.
[36] *Transvaal Cold Storage Co Ltd v Palmer* 1904 TS 4.;
[37] *Sibex Construction (SA) (Pty) Ltd v Injectaseal CC* 1988 (2) SA 54 (T); *Phillips v Fieldstone Africa (Pty) Ltd and Another* [2004] 1 All SA 150 (SCA), 2004 (3) SA 465 (SCA) [27], [30]; *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 177–80.
[38] Per Innes CJ in *Transvaal Cold Storage Co Ltd v Palmer* 1904 TS 4 19–20, referring to Digest 47.1.8.9, Code 4.35, Gaius 3.155, Voet *ad Pandectas* 3.3.7.17, 14.3.8 and 17.1.9.

who takes charge of the affairs of another,[39] or is in a position in which he or she 'should in some way act for another'.[40]

Those concepts are however still capable of various constructions and are not particularly useful for determining when fiduciary duties apply. They could be interpreted broadly as 'assisting' another person in doing something that the latter would otherwise have had to do personally (or would have to get someone else to do for him or her). That would include, for example, all employees, independent contractors and any other person who may 'assist' another. As a number of commentators have pointed out, there are various relationships where there is representation or acting for another in this broad sense that do not give rise to fiduciary duties.

Such constructions of the representation or administration concept are clearly too over-inclusive. In order to identify the incidence of fiduciary duties and provide a persuasive explanation and rationale for it, the concept of representation or administration must be of a more qualified or specific nature. Insofar as it is relevant, it must take the form of 'strict agency' or must fall somewhere between it and the other, over-inclusive extreme of 'acting for' or 'assisting' in the broad, unqualified sense referred to above. Where the appropriate place lies on that continuum depends, I would suggest, on a holistic assessment of all of the surrounding circumstances. In *Galambos*, the court referred to the need for the representation or administration to relate to the alleged beneficiary's 'practical or legal interests',[41] which would presumably include the beneficiary's legal position, rights, obligations or proprietary or commercial interests or affairs. Supplementing representation or administration with other incidence criteria such as trust, confidence or reliance, or some discretion or power and corresponding vulnerability to its abuse, begins to provide

[39] *Clarkson v Gelb* 1981 (1) SA 288 (W) 295.
[40] *Refco Ltd v Amicor Investments* 1964 (3) SA 184 (FC) 190.
[41] *Perez v Galambos* 2009 SCC 48, [2009] 3 SCR 247, 2009 CarswellBC 2787 [83]–[84].

the ‘something more’ that is necessary to identify, explain and rationalise fiduciary regulation.

The issue of whether some of form of representation or administration is necessary for the incidence of fiduciary duties is more easily resolved. Although some commentators have suggested that it is an essential characteristic of a fiduciary relationship, they have generally also qualified the representation or administration concept with reference to one or other incidence criteria. Scott, for example, coupled it with the concept of an undertaking to act in another’s interests and described a ‘fiduciary’ as ‘a person who undertakes to act in the interests of another person’.[42] Finn took the same approach when he said:[43]

> For a person to be a fiduciary he must first and foremost have bound himself in some way to protect and/or advance the interests of another. This is perhaps the most obvious of the characteristics of the fiduciary office for Equity will only oblige a person to act in what he believes to be in another’s interests if he himself has assumed a position which requires him to act for or on behalf of that other in some particular manner.

There does not however appear to be any express authority for the proposition that representation or administration is essential for the incidence of fiduciary duties. The better view therefore is that, depending on the circumstances, it may be relevant to, but is neither necessary nor decisive in, the incidence of fiduciary duties.

2.6 TRUST, CONFIDENCE AND RELIANCE

The terms ‘trust’, confidence’ and ‘reliance’ have been associated with fiduciary duties since the English courts of Equity first developed the fiduciary concept, and continue to be used both to describe one of the three broad ‘kinds’ of relationships in which fiduciary

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[42] A Scott ‘The Fiduciary Principle’ (1949) 37 *California Law Review* 521 539.

[43] Finn *Fiduciary Obligations* (1977) [15].

obligations arise[44] and in general references to the incidence of fiduciary duties.[45] They are also the criteria that have dominated South African law since Innes CJ's statement in *Robinson* that the test for a fiduciary relationship 'rests upon the broad doctrine that a man, who stands in a position of trust towards another, cannot, in matters affected by that position, advance his own interests ... at the other's expense'.[46]

Applying these criteria, the courts have in numerous cases held that fiduciary duties arise where one party places trust, confidence or reliance in the other's loyalty.[47]

There are some significant difficulties with these criteria. These relate to their substantive meaning, how their presence is to be determined, their potentially unilateral focus on the position of the beneficiary, and their exclusively descriptive nature.

'Trust, confidence and reliance' alone are too wide and simplistic to identify and distinguish all fiduciary relationships. Not all forms of reliance will, or should, be recognised as giving rise to fiduciary duties. As Gautreau points out, we place confidence and reliance in others daily and in a variety of situations, without this necessarily or

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[44] As mentioned in chapter 2, there are three categories of relationships in which fiduciary obligations have traditionally been recognised: relationships of undue influence, relationships in which one party is in receipt of information imparted in confidence by the other, and relationships of trust and confidence: Sir Peter Millett 'Equity's Place in the Law of Commerce' [1998] *LQR* 214; *University of Nottingham v Fishel* [2000] ICR 1462 1489.

[45] As Shepherd says, it is rare to find a judgment that does not refer to trust, confidence or reliance as fundamental to the issue of fiduciary accountability: J Shepherd 'Towards a Unified Concept of Fiduciary Relationships' (1981) 97 *LQR* 51 59.

[46] *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 179.

[47] For example, *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168; *Furs Ltd v Tomkies* (1936) 54 CLR 583 590; *United Dominions Corporation Ltd v Brian Pty Ltd* (1985) 157 CLR 1 12; *Murad v Al-Saraj* [2004] EWHC 1235 (Ch) [328], [332]; *Chirnside v Fay* [2006] NZSC 68 [85]. In a number of cases including, for example, the recent decision of the Hong Kong High Court in *Hong Da Development & Investment Holding Co Ltd v China Aayman Property Group Ltd* 2011 HKEC 1664, the courts have expressly or implicitly accepted criteria of trust and confidence as essential prerequisites for the incidence of fiduciary duties.

automatically leading to fiduciary relationships.[48] Mere trust, confidence or reliance are clearly insufficient to found fiduciary duties and, by failing to distinguish relationships in which such duties exist from those in which they do not, are too over-inclusive.

There are also differences in judicial opinion on the degree or extent of the trust or reliance that is required. The two dissenting judgments in *Hodgkinson v Simms*, for example, took a restrictive approach and held that, in order to establish the existence of fiduciary duties, it is necessary to show 'total reliance and dependence on the fiduciary by the beneficiary'. They went on to say that the 'critical question' is 'whether there is a total assumption of power by the fiduciary, coupled with total reliance by the beneficiary.'[49]

Another concern with the trust, confidence and reliance criteria is that they focus exclusively on the beneficiary's (actual or deemed) conduct or position without due regard to those of the proposed fiduciary and are in that respect unduly beneficiary-centred. Something more than bare, unilateral beneficiary-centred trust, confidence or reliance must be required. There are different ways in which that 'something more' can be provided.

(a) Actual, subjective trust, confidence or reliance

As mentioned earlier, the courts have generally held that there is no need for the beneficiary to actually, consciously, subjectively trust or rely on the fiduciary.[50] The 'something more' must therefore be provided in some other way. The most obvious possibilities are to qualify the substantive meaning of the concepts themselves, or to restrict loose meanings with reference to other incidence criteria or circumstantial factors.

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[48] J Gautreau 'Demystifying the Fiduciary Mystique' (1989) 68 *Canadian Bar Review* 1 9.

[49] *Hodgkinson v Simms (*1995) 117 DLR (4th) 161, 1994 DLR (4th) 161 (SCC) 219, 222.

[50] For example, *Hospital Products v United States Surgical Corp* (1984) 55 ALR 417 (HCA), (1984) 156 CLR 41 (HCA).

(b) Kinds of trust, confidence or reliance

The English Court of Appeal in *Lloyds Bank Ltd v Bundy*,[51] for example, referred to three types of reliance as giving rise to fiduciary duties: (a) reliance on the guidance or advice of another, (b) reliance on another person who is aware of that reliance, and (c) reliance on a person who has or could obtain some benefit from that reliance.

There is some support for the relevance of the second of these forms of trust, confidence or reliance. In *Volvo*, for example, the South African Appeal Court of Appeal listed the respondent's knowledge that he was being trusted and relied on to act in the appellant's interests as one of the factors that gave rise to fiduciary duties on his part in favour of the appellant.[52]

(c) A mutual understanding of trust, confidence or reliance

Another qualification to the trust, confidence or reliance criterion that has found some favour is the addition of a requirement that there must have been a mutual understanding between the fiduciary and the beneficiary that the fiduciary has relinquished his or her own self-interest and agreed to act solely on behalf of the beneficiary.

Although this addresses the one-sidedness of the criterion, it is also problematic. For example, it is not clear whether the mutual understanding must be express, or whether it can be deemed or implied from the circumstances of the case. Relying on deemed or implied mutual understandings would, through the reference to surrounding circumstances and an assessment of whether they can objectively support a finding of a mutual understanding, brings the criterion closer to that of a justified or reasonable expectation. It does not however resolve the question of the kinds of circumstantial factors that would support a finding of a deemed or implied mutual understanding.

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[51] *Lloyds Bank v Bundy* [1975] QB 326 (CA) 341D.

[52] *Volvo (Southern Africa) (Pty) Ltd v Yssel* [2009] JOL 24109 (SCA) 11.

In any event, the courts have generally held that, although a mutual understanding of trust, confidence or reliance may be relevant to, it is not essential for, the incidence of fiduciary duties. The Canadian Supreme Court of Appeal in *Galambos*, for example, held *obiter* that a mutual understanding 'may not always be necessary' for fiduciary duties to arise.[53] The difficulties with this description of the status of a mutual understanding are discussed in the commentary on that case in chapter 6.

(d) An undertaking of trust, confidence or reliance by the fiduciary

Another related qualification to the trust, confidence or reliance criterion that has found judicial favour is the addition of a requirement that the alleged fiduciary must have undertaken to honour the trust, confidence or reliance concerned.

This is the approach favoured by the English, Australian and New Zealand courts. In *Mothew* Lord Millett said that 'a fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence'.[54] In relation to employment, the court in *Fishel* said that fiduciary duties will arise where 'there are specific contractual obligations which the employee has undertaken which have placed him in a situation where equity imposes these ... duties'.[55]

The advantages of the 'undertaking' qualification are that it addresses the issue of undue beneficiary-centeredness and provides a basis for connecting a number of incidence criteria in a way that begins to provide a more compelling explanation and rationale for the existence of fiduciary duties. As Conaglen points out, an undertaking

[53] *Perez v Galambos* 2009 SCC 48, [2009] 3 SCR 247.

[54] *Bristol & West Building Society v Mothew* [1988] Ch 1 18, applied in numerous cases, including *Global Container Lines Ltd v Bonyad Shipping Co* [1998] 1 Lloyd's Rep 528 (QBD); *Arklow Investments Ltd v Maclean* [2000] 1 WLR 594; *Daraydan Holdings Ltd v Solland International Ltd* [2004] EWHC 622 (Ch); *Haines v Carter* [2006] NZHC 566 [30]; *Oceanic Life Ltd v HIH Casualty & General Insurance Ltd* [1999] NSWSC 292 [74]; *University of Nottingham v Fishel* [2000] ICR 1462 1489.

[55] *University of Nottingham v Fishel* [2000] ICR 1462 1491.

requirement provides a link with the representation criterion.[56] In *Hospital Products* Mason J linked it to criteria of discretion and vulnerability when he said:[57]

> The critical feature of these relationships is that the fiduciary undertakes or agrees to act for and 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. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position. The expressions 'for', 'on behalf of' and 'in the interests of' signify that the fiduciary acts in a 'representative' character in the exercise of his responsibility.

The undertaking criterion was also listed by the Canadian Supreme Court of Appeal in its unanimous judgment in *Galambos* as a fundamental and necessary requirement for fiduciary duties in *ad hoc* fiduciary relationships in fact, and the court pointed out that it is also always present in fiduciary relationships *per se*.[58] It said in this regard that while 'it may not be necessary for the beneficiary in all cases to consent to this undertaking, it is clearly settled that the undertaking itself is fundamental to the existence of an *ad hoc* fiduciary relationship'.[59]

With regard to the nature of the undertaking the court held that it must be an undertaking by the fiduciary 'to act in accordance with the duty of loyalty reposed on him or her by exercising a discretionary

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[56] M Conaglen *Fiduciary Loyalty: Protecting the Due Performance of Non-fiduciary Duties* (2010) 257.
[57] *Hospital Products v United States Surgical Corp* (1984) 55 ALR 417 (HCA), (1984) 156 CLR 41 (HCA) 96–7.
[58] The court's statements in relation to this criterion are discussed in more detail in the commentary on the *Galambos* case later in this chapter.
[59] *Perez v Galambos* 2009 SCC 48, [2009] 3 SCR 247, 2009 CarswellBC 2787 [77].

power in the interests of the other party'.[60] This undertaking may be either express or implied.

> It may be the result of the exercise of statutory powers, the express or implied terms of an agreement or, perhaps, simply an undertaking to act in this way. In cases of *per se* fiduciary relationships, this undertaking will be found in the nature of the category of relationship in issue. The critical point is that in both *per se* and *ad hoc* fiduciary relationships, there will be some undertaking on the part of the fiduciary to act with loyalty.[61]

As the court pointed out, there are a number of commentators who support an undertaking as a requirement for fiduciary accountability. It referred in this regard to Finn's statement that:[62]

> For a person to be a fiduciary he must first and foremost have bound himself in some way to protect and/or advance the interests of another. This is perhaps the most obvious of the characteristics of the fiduciary office for Equity will only oblige a person to act in what he believes to be another's interests if he himself has assumed a position which requires him to act for or on behalf of that other in some particular matter.

It also referred to Scott's statement that 'a fiduciary is a person who undertakes to act in the interests of another person'.[63] And, finally, it held as follows:[64]

> This does not mean, however, that an express undertaking is required. Rather, the fiduciary's undertaking may be implied in the particular circumstances of the parties' relationship. Relevant to the enquiry of whether there is such an implied undertaking are considerations such as professional norms,

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[60] *Perez v Galambos* 2009 SCC 48, [2009] 3 SCR 247, 2009 CarswellBC 2787 [75].

[61] *Perez v Galambos* 2009 CarswellBC 2787 25.

[62] Finn *Fiduciary Obligations* [15], cited with approval in *Perez v Galambos* 2009 2009 CarswellBC 2787 [78].

[63] A Scott 'The Fiduciary Principle' (1949) 37 *California LR* 521 540.

[64] *Perez v Galambos*, 2009 CarswellBC 2787 [79].

> industry or other common practices and whether the alleged fiduciary induced the other party into relying on the fiduciary's loyalty.

However, even though an undertaking requirement (like that of a mutual understanding) has the advantages of ensuring that the incidence of fiduciary duties does not depend entirely on the beneficiary and of revealing some of the conceptual links between different individual incidence criteria, it remains problematic. As with the other individual incidence criteria, its most fundamental shortcoming is that, regardless of whether it is applied in isolation or in combination with other individual incidence criteria, it is more descriptive than analytical. It identifies certain features as present in some (but not all) fiduciary relationships but does not fully explain why they attract fiduciary duties.

2.7 POWER, DISCRETION, OR CONTROL, AND CORRESPONDING VULNERABILITY

There are few cases that do not expressly or impliedly refer to some form of 'power', 'discretion' or 'control' on the part of one party in relation to the other and some form of 'vulnerability' on the part of the other in relation to the incidence of fiduciary duties.[65] The two concepts are clearly inter-connected. The existence of any form of power, discretion or control on the part of the fiduciary in relation to the beneficiary gives rise to a corresponding vulnerability on the part of the beneficiary to its exploitation or abuse by the fiduciary. It is this combination that justifies the need for the protection provided by fiduciary duties. Given that connection, the two criteria are considered here concurrently.

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[65] For example, *Lac Minerals v International Corona Resources Ltd* [1990] FSR 441; *Hodgkinson v Simms (*1995) 117 DLR (4th) 161, 1994 CarswellBC 438, 97 BCLR (2d) 1, [1994] 3 SCR 377; *Frame v Smith* (1987) 42 DLR (4th) 81, [1987] 2 SCR 99; *Hodgkinson v Simms (*1995) 117 DLR (4th) 161, 1994 CarswellBC 438, 97 BCLR (2d) 1, [1994] 3 SCR 377; *Perez v Galambos* 2009 SCC 48, [2009] 3 SCR 247, 2009 CarswellBC 2787; *University of Nottingham v Fishel* [2000] ICR 1462; *Phillips v Fieldstone Africa (Pty) Ltd and Another* [2004] 1 All SA 150 (SCA), 2004 (3) SA 465 (SCA); *Volvo (Southern Africa) (Pty) Ltd v Yssel* [2009] JOL 24109 (SCA).

There is a clear and appealing logic to requiring some form of power, control or discretion and consequential vulnerability in order to explain the incidence of fiduciary duties. Without any vulnerability, there is no risk of harm. And without a risk of harm, there is nothing for fiduciary duties to guard against and, thus, no need for them to apply.

Criteria of power, control and discretion have generally been used most consistently in relation to the established classes of fiduciary relationships *per se*. For example, control, discretion and power are the criteria most frequently used to explain the fiduciary duties of both *de jure* and *de facto* directors and company officers.[66] They are also clearly features of the relationships between trustees and trust beneficiaries, agents and their principals, and other established fiduciary relationships, such as those between partners.[67] The court in *Fishel*, for example, included the existence of 'considerable autonomy over decision making' by the fiduciary as one of the typical characteristics of a 'fiduciary relationship in the classic sense'.[68] In *Frame v Smith* (discussed in more detail later in this chapter), Wilson J described the three common characteristics of fiduciary relationships *per se* as some discretionary power on the part of the fiduciary, an ability to use it so as to affect the beneficiary's legal or practical interests, and a resulting 'peculiar vulnerability' on the part of the beneficiary.[69] The court in *Hodgkinson* took the same approach, describing 'discretion', 'influence over interests' and an 'inherent vulnerability' as the 'essence' of fiduciary relationships *per se*.[70]

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[66] *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 177–8; *Sackville West v Nourse* 1925 AD 516 533–4; *Canadian Aero Service v O'Malley* 1973 40 DLR (3rd) (SCC) 371 382.

[67] Finn 'The Fiduciary Principle' 35–7.
[68] *University of Nottingham v Fishel* [2000] ICR 1462 1491.
[69] *Frame v Smith* (1987) 42 DLR (4th) 81, [1987] 2 SCR 99 99.
[70] *Hodgkinson v Simms*, 1994 CarswellBC 438 [126].

There is also general consensus that the discretion, power or control must relate to the beneficiary's 'practical or legal interests'[71] or what Smith refers to as a 'critical resource' belonging to the beneficiary.[72] This would include both physical assets and intangible property such as confidential information.

However, apart from these aspects, there are numerous inconsistencies in the case law on the nature and extent of the power, control or discretion and vulnerability that must exist in order for them to be relevant to the incidence of fiduciary duties.

In *Frame v Smith* Wilson J elaborated on her discretion or power criterion by saying that it is the fact that the fiduciary's ability to exercise the power or discretion can detrimentally affect the beneficiary's interests that necessitates and justifies the imposition of the fiduciary duty. In this context, 'interests' are not confined to legal interests but also include 'vital and substantial practical interests, such as financial well-being and even more intangible interests such as public image or reputation'.[73]

She also restricted her concept of vulnerability to the kind of vulnerability that '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'.[74]

'Vulnerability' can however also be understood as some form of physical, financial, commercial, emotional or other dependence, susceptibility or inferiority. These kinds of vulnerability are evident in the association of fiduciary duties with so-called 'positions of

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[71] *Frame v Smith*, [1987] 2 SCR 99 99; *Perez v Galambos* 2009 SCC 48, [2009] 3 SCR 247.

[72] D Smith 'The Critical Resource Theory of Fiduciary Duty' (2002) 55 *Vanderbilt LR* 1399 1402.

[73] *Frame v Smith* [1987] 2 SCR 99 [44].
[74] *Frame v Smith*([1987] 2 SCR 99 100.

ascendancy or influence'[75] and 'power-dependency' relationships in which one party has some supremacy, dominance or influence over the other. The court in *Hodgkinson* described such a relationship as existing in 'any situation where one party, by statute, agreement, a particular course of conduct, or by unilateral undertaking gains a position of overriding power or influence over another party'.[76]

There are also conflicting positions on the extent to which power, discretion or control and vulnerability are necessary for fiduciary accountability. The court in *Galambos* included some 'discretionary power' as one of the two criteria that are essential but not sufficient requirements for the existence of fiduciary duties.[77] With regard to its meaning, the court said that:[78]

> [T]his discretionary power to affect the beneficiary's legal or practical interests may, depending on the circumstances, be quite broadly defined. It may arise from power conferred by statute, agreement, perhaps from a unilateral undertaking or, in particular situations such as the professional advisory relationship addressed in *Hodgkinson*, by the beneficiary entrusting the fiduciary with information or seeking advice in circumstances that confer a source of power; see, e.g., *Lac Minerals* and *Hodgkinson*. 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. The presence of this sort of power will not necessarily on its own support the existence of an *ad hoc* fiduciary duty; its absence, however, negates the existence of such a duty.

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[75] Finn 'The Fiduciary Principle' 41–7.

[76] *Hodgkinson v Simms (*1995) 117 DLR (4th) 161.

[77] *Perez v Galambos* 2009 SCC 48, [2009] 3 SCR 247, 2009 CarswellBC 2787 [83].

[78] *Perez v Galambos* 2009 SCC 48, [2009] 3 SCR 247, 2009 CarswellBC 2787 [84].

However, in both *Fieldstone* and *Volvo* the South African Court of Appeal classified discretion and vulnerability as relevant, but not necessary nor decisive.[79]

Furthermore, none of the variations on the power, control, discretion and vulnerability criteria is adequate to identify and distinguish all fiduciary relationships. Not every fiduciary relationship is one in which an actual 'substantive' power imbalance exists, or can even be deemed to exist. And not all forms of control, discretion or power result in the imposition of fiduciary duties.

These difficulties, as well as the above-mentioned seeming inconsistencies in the courts' positions on these criteria, can be relatively easily resolved.

Power, discretion or control understood in the sense of some form of 'access' in relation to another's legal or practical interests, assets or affairs as suggested by Flannigan[80] is clearly present in all fiduciary relationships. It is also what, in the absence of the availability of adequate controls or other protective mechanisms, creates a vulnerability on the part of the beneficiary in the sense of a susceptibility to the risk of self-interested or opportunistic abuse of that 'access' by the fiduciary. And it is that vulnerability that necessitates the protection afforded by the fiduciary regime and that is therefore necessary for the incidence of fiduciary duties. Vulnerability in any sense other than this 'susceptibility to the risk of abuse' may well be relevant, but is not necessary for the incidence of fiduciary duties.[81]

However, these qualifications remain too under-inclusive or over-inclusive to describe, identify and distinguish all relationships in which

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[79] *Phillips v Fieldstone Africa (Pty) Ltd and Another* [2004] 1 All SA 150 (SCA), 2004 (3) SA 465 (SCA); *Volvo (Southern Africa) (Pty) Ltd v Yssel* [2009] JOL 24109 (SCA).

[80] Flannigan's arguments on this point are discussed later in this chapter.

[81] *Hodgkinson v Simms* (1995) 117 DLR (4th) 161, 1994 CarswellBC 438, 97 BCLR (2d) 1; *Phillips v Fieldstone Africa (Pty) Ltd and Another* 2004 (3) SA 465 (SCA) ; *Volvo (Southern Africa) (Pty) Ltd v Yssel* [2009] JOL 24109 (SCA) 9.

fiduciary duties arise and, like the other individual criteria, they fail to explain why we choose to impose those duties in some circumstances but not in others, or even at all.

2.8 POLICY CONSIDERATIONS

(a) Introduction

The fiduciary principle is 'an instrument of public policy'[82] and considerations of public policy therefore play a significant role in the incidence of fiduciary duties. In terms of the justified expectation criterion argued for in this thesis, the determination of whether an expectation of one party's loyalty to the other is justified is essentially a question of policy.

> If from whatever combination of ... conditions, the parties in their relationship are so circumstanced that one is reasonably entitled to expect that the other is acting or will act in his interests, then that person should be entitled on bare grounds of public policy, to have that expectation protected.[83]

(b) The nature of the relationship and the parties' positions within it

As discussed earlier in this chapter, the courts have often explained the existence of fiduciary duties with reference to the nature and purpose of the relationship concerned. And, in assessing that nature and purpose, they have had regard to societal perceptions and mores. There are also cases where the recognition fiduciary duties may be justified on the basis that there is some public value in subjecting the relationship concerned to fiduciary regulation. As Finn says, the fiduciary principle–[84]

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[82] Finn 'The Fiduciary Principle' 26.

[83] Finn 'The Fiduciary Principle' 46.

[84] Finn 'The Fiduciary Principle' 26. Also Conaglen *Fiduciary Loyalty* 263; J Glover 'The Identification of Fiduciaries' in P Birks (ed) *Privacy and Loyalty* (1997) 269 277; Shepherd 'Towards a Unified Concept of Fiduciary Relationships' 57.

> has been used and is demonstrably used, to maintain the integrity, credibility and utility of relationships perceived to be of importance in a society. And it is used to protect interests, both personal and economic, which a society is perceived to deem valuable.

Considerations of public policy are also emphasised in Weinrib's dual 'discretion and policy' theory. He argues that, in addition to regulating discretion, the purpose of the fiduciary principle is to protect the integrity of certain commercial organisations or institutions.[85] Policy considerations that are relevant to the incidence of fiduciary duties in relationships of employment in particular are discussed in chapters 7 and 8 of this thesis.

Policy considerations are also frequently referred to in the context of commercial relationships and in relation to the 'strict' and 'onerous' nature of fiduciary duties.

(c) Commercial contexts

There are a number of cases in which the courts have held that it is inappropriate to impose fiduciary duties on parties interacting in a purely commercial context and at arm's length. The reasoning is usually that parties dealing at arm's length in purely commercial relations can be assumed to be able to look after their own interests. Implicit in that is an assumption that there is no 'vulnerability' on the part of either party and thus no need for the protection of fiduciary duties. In addition, purely commercial interactions are generally perceived by both the parties themselves and by society as existing for the purposes of enabling each of the parties to advance their own several or mutual interests, rather than the sole interests of only one of them. As such, it would not be justified to expect one party to act

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[85] E Weinrib 'The Fiduciary Obligation' (1975) 25 *University of Toronto LJ* 1 15; *Canadian Aero Service v O'Malley* 1973 CarswellOnt 236, [1974] SCR 592; *Midcon Oil and Gas v New British Dominion Oil Co Ltd* [1958] SCR 314; *Pre-Cam Exploration v McTavish* (1966) 57 DLR (2d) 557 (SC).

solely and exclusively in the other's interests.[86] There is also a view that imposing fiduciary obligations in commercial contexts would create uncertainty and undermine commercial expediency. For example, in *New Zealand and Australian Land Co v Watson* Bramwell LJ said:[87]

> 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 the commercial case turned into a trustee with all the troubles that attend that relation.

There are however commercial relationships in which fiduciary duties are imposed and in which an expectation of one party's undivided loyalty to the other is justified or reasonable.[88] As Mason J said in *Hospital Products*:[89]

> [I]t 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 comes under an obligation to act in the interests of another.

With regard to the concern about creating commercial uncertainty, the better view, expressed by the court in *Lac Minerals*, is the following:[90]

> Certainty, in commercial law is, no doubt, an important value but it is not the only value ... In any event, it is difficult to see how giving legal recognition to the parties' expectations will throw commercial law into turmoil. Commercial relationships will

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[86] Millett 'Equity's Place in the Law of Commerce' [1998] *LQR* 214 217–18.

[87] *New Zealand and Australian Land Co v Watson* (1881) 7 QBD 374 (CA) 382.

[88] Conaglen *Fiduciary Loyalty* 267, which gives the example of the relationships between directors and their companies.

[89] *Hospital Products v United States Surgical Corp* (1984) 55 ALR 417 (HCA), (1984) 156 CLR 41 (HCA) 100.

[90] *Lac Minerals v International Corona Resources Ltd* [1990] FSR 441 666–7.

> more rarely involve fiduciary obligations. That is not because they are immune from them, but because in most cases they would not be appropriately imposed.

(d) The 'strict' and 'onerous' nature of fiduciary duties

Fiduciary duties are often described as being 'stricter' or more 'onerous' than any other kinds of duties. There are a number of cases in which the courts have, for example, referred to them as 'inflexible' duties that must be applied 'inexorably'.[91] In the widely quoted judgment in *Meinhard v Salmon* Chief Justice Cardoza described the fiduciary duty of loyalty as a 'tradition that is unbending and inveterate'. He went on to say that '[u]ncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by "disintegrating erosion" of particular exceptions ... Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd.'[92]

Statements such as these have often been relied on to support refusals by the courts to recognise the existence of fiduciary duties in various circumstances. This is particularly so in the Canadian case law on employee duties, where the courts have repeatedly used it as a reason for refusing to recognise fiduciary duties on the part of 'ordinary' employees. In *Imperial Sheet Metal*, for example, the court said that fiduciary duties are too strict and onerous to be applied to them and would result in 'too many employees "of humble origin" … being swept into the fiduciary net'.[93] The merits of contentions such as these are debatable. It is true that fiduciary duties cover a wide range of behaviour and require a more general denial of self-interest than other kinds of duties.[94] The no-conflict duty requires the fiduciary

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[91] *Parker v McKenna* (1874) 10 Ch App 96 124–5; *Phipps v Boardman* [1967] 2 AC 268 280; *New Zealand Netherlands Society 'Oranje' Inc v Kuys* [1973] 1 WLR 1126 1129; *Harris v Digital Pulse Pty Ltd* [2003] NSWCA 59...

[92] *Meinhard v Salmon* 164 NF (1928).

[93] *Imperial Sheet Metal v Landry* 2006 NBQB 303 (NBQB), [2006] NBJ No 373 / *Imperial Sheet Metal v Landry* 2007 CarswellNB 298, 2007 NBCA 51 [6], [48], [58].

[94] S Worthington *Equity* 2 ed (2006) 141.

to avoid not only situations that are actual, materialised conflicts, but also those where there is a reasonable risk of a conflict arising. The no-profit duty also applies in a broad range of circumstances. And by constraining the fiduciary's autonomy even if his or her action does not cause the beneficiary any harm, the fiduciary's regime regulation is more 'aggressive and extensive' than those of other duties.[95] It is however arguable that fiduciary duties are not in these respects more 'onerous' than other duties, but that they simply regulate different kinds of behaviour, and in different ways, than other kinds of duties do.

The only aspect of fiduciary that is 'strict' is that liability for breach arises without the need for any *mens rea* on the part of the beneficiary. This strict liability is not however peculiar to fiduciary duties. In addition, the fiduciary disgorgement remedies merely require the fiduciary to surrender unauthorised, illegitimate gains. The claims for damages for breaches in contract and for delicts (torts) on the other hand are arguably more onerous in that they require the defendant to make a compensatory payment out of his or her own resources.

2.9 THE AVAILABILITY OF OTHER PROTECTIVE MECHANISMS

Another factor that has been suggested as relevant to the incidence of fiduciary duties is the availability of other self-protective mechanisms. Frankel, for example, argues that fiduciary duties provide protection against the risk of abuse 'when the protective mechanisms outside of fiduciary law cannot adequately eliminate this risk'.[96]

The underlying logic is that, if the party whose interests are to be protected from self-interested conduct by the other party is able to

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[95] Worthington *Equity* 155–6.

[96] T Frankel 'Fiduciary Law' (1983) 71 *California LR* 795 808. Also *Frame v Smith* (1987) 42 DLR (4th) 81, [1987] 2 SCR 99 100.

achieve that protection through the use of other mechanisms, there is no vulnerability and, consequently, no need for the fiduciary regime's protection. Viewed from the perspective of the justified expectation criterion, it is also arguable that expectations and duties of loyalty are justified only when they are necessary. As De Mott suggests:[97]

> A plaintiff may justifiably expect loyal conduct from an actor when either the nature of their relationship or of the specific role occupied by the actor, leaves the plaintiff unable to self-protect against the actor's misconduct once the relationship is formed or the actor assumes the specific role.

It is not clear however what kinds of non-fiduciary protective mechanisms would suffice to preclude a need for fiduciary accountability. Presumably they must at least be ones that are legal and reasonably available and viable. The court in *Fishel* suggested that any form of 'control' that the beneficiary has, or is able to exert, is relevant.[98] The extent to which the 'beneficiary' is able to monitor and control the activities of the fiduciary is also often used in explaining the need for actors such as company directors and officers who enjoy high levels of autonomy and independence to be subject to fiduciary duties.

Contractual provisions may provide another potentially relevant form of alternative self-protection. The availability of contractual alternatives has, for example, been used by the courts to justify a refusal to recognise fiduciary duties on the part of employees[99] and distributors.[100]

There are however circumstances in which contractual and other protective mechanisms would be neither viable nor desirable. This would be the case where, for example, it is necessary for a fiduciary

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[97] D de Mott 'Breach of Fiduciary Duty: On Justifiable Expectations of Loyalty and Their Consequences' (2006) 48 *Arizona LR* 925 945.

[98] *University of Nottingham v Fishel* [2000] ICR 1462 1491.
[99] *Imperial Sheet Metal v Landry* 2006 NBQB 303.
[100] *Lac Minerals v International Corona Resources Ltd* [1990] FSR 441 607.

such as a company director or officer or a trustee to enjoy significant discretion in order to give effect to the purpose of the relationship, and it is difficult to define in advance how that discretion may and may not be exercised.[101] In such circumstances, mechanisms such as contractual provisions are not feasible, at least not without incurring disproportionately high transaction costs and risking undesirable restriction of the fiduciary's necessary discretion.[102]

There is also a view that the mere availability of contractual provisions should not preclude the existence of fiduciary duties. In his dissenting judgment in *Lac Minerals*, Le Forest J said the following in this regard:[103]

> The fact that the parties could have concluded a contract to cover the situation but did not in fact do so does not, in my opinion, determine the matter. Many claims in tort could be avoided through more prudent negotiation of a contract, but the courts do not deny tort liability.

The better view appears therefore to be that alternate protective mechanisms are relevant only if the parties could reasonably be expected to have used them[104] and, even then, are just one factor to be taken into account in determining whether an expectation of undivided loyalty by one party in favour of the other is justified in the circumstances.[105]

2.10 COMBINATIONS OF CRITERIA

In most cases the courts have referred to the need for a number of particular individual criteria to be present in order to give rise to fiduciary duties.

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[101] See further the arguments in chapter 3 of this thesis in relation to the proscriptive nature of fiduciary duties.

[102] Frankel 'Fiduciary Law'; T Frankel *Fiduciary Law* (2008) 813.

[103] *Lac Minerals v International Corona Resources Ltd* [1990] FSR 441 664.

[104] *Lac Minerals v International Corona Resources Ltd* [1990] FSR 441 664–5.

[105] Conaglen *Fiduciary Loyalty* 266.

The three characteristics of fiduciary relationships that Wilson J formulated in *Frame v Smith*,[106] for example, have already been discussed. In *Hospital Products*, Mason J said that 'the essence of a fiduciary relationship' comprises the following elements: (1) it is a relationship of trust and confidence; (2) the fiduciary undertakes or agrees to act; (3) for or on behalf of or in the interests of another person; (4) in the exercise of power or discretion; (5) that will affect the interests of the other person in a legal or practical sense; (6) the fiduciary has the special opportunity to exercise the power or discretion to the detriment of the other person; and (7) the other person is vulnerable to abuse by the fiduciary of his or her position.[107]

In *Alberta v Elder Advocates*, the Supreme Court of Canada said that for an *ad hoc* fiduciary relationship in fact to exist, the claimant must show, in addition to the vulnerability referred to in *Frame v Smith*:[108]

> (1) An undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries; (2) a defined person or class of persons vulnerable to [the] fiduciary's control (the beneficiary or beneficiaries) and (3) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercised discretion or control.

The main difficulties with such judicial combinations of incidence criteria are, again, the courts' failure to clearly define them, or to explain why it is that they give rise to fiduciary duties. They have also generally failed to indicate the relative weighting to be attached to each of the criteria that make up the combination. In addition, there are notable difficulties in the particular combinations that the courts have employed. However, as this chapter will later argue, these difficulties can

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[106] *Frame v Smith* [1987] 42 DLR (4th) 81, [1987] 2 SCR 99.
[107] *Hospital Products v United States Surgical Corp* (1984) 55 ALR 417 (HCA), (1984) 156 CLR 41 (HCA) 96–7.
[108] *Alberta v Elder Advocates* 2011 SCC 24 [36].

be explained and the differences reconciled in terms of the concept of a 'justified expectation'.

2.11 ACADEMIC THEORIES

There are a number of academic theories that attempt to explain certain of the individual incidence criteria mentioned above (or combinations of those criteria) in terms of a 'unified' theory or explanation of the fiduciary concept.[109]

Some of the more prominent ones are the reliance theory, which is based entirely on the criterion of trust, confidence or reliance and describes fiduciary relationships as ones in which one party reposes trust, confidence or reliance on another; the unjust enrichment theory, which explains fiduciary relationships as existing when one party obtains some 'property or advantage which justice requires should be treated as belonging to another'; and the property theory, which maintains that 'a fiduciary relationship exists where one person has legal title and/or control over property or other advantage and another is the beneficial owner thereof'. Others include the commercial utility theory that fiduciary duties exist where the courts consider it necessary to hold a person or class of person to the fiduciary standard in order to protect the integrity of commercial enterprise;[110] the unequal relationship theory, which defines fiduciary relationships in terms of an 'established inequality of footing' between the parties; and the undertaking, contractual and voluntary assumption theories, which are based on the criteria of an undertaking by one party to act in the sole interests of the other or a mutual understanding that that will be the case. Weinrib proposes a dual 'discretion and policy theory' that fiduciary duties exist to control the exercise the discretion in relationships or institutions whose integrity the law, for reasons of

[109] These are discussed and critiqued in detail in Shepherd 'Towards a Unified Concept of Fiduciary Relationships' 51–79.

[110] Weinrib 'The Fiduciary Obligation'; Shepherd 'Towards a Unified Concept of Fiduciary Relationships' 57.

public policy, wishes to protect.[111] In terms of Shepherd's 'transfer of encumbered power' theory, a fiduciary relationship exists 'whenever any person receives a power of any type on condition that he also receives with it a duty to utilise that power in the best interests of another and the recipient of the power uses that power'.[112]

With the exception of Weinrib's theory, which influenced the *Frame v Smith* judgment, there is little reference to these theories in the case law and none of them appears to have received any judicial support.

There are also more fundamental difficulties with these theories than their lack of judicial support. Those that are based on individual criteria, or combinations thereof, are subject to the same shortcomings as the criteria to which they refer. Most problematically, they are all too descriptive and too over-inclusive or under-inclusive, and are of limited analytical utility in identifying, distinguishing, rationalising and fully explaining the incidence of fiduciary duties in all circumstances.

2.12 FLANNIGAN'S 'LIMITED ACCESS' THESIS

(a) Introduction

One academic theory that goes further towards resolving the issue of when fiduciary duties exist than do the individual incidence criteria and the descriptive theories mentioned earlier is Flannigan's 'limited access' thesis.[113] Although it does not appear to have been endorsed or even referred to in any reported cases and (as will be argued later)

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[111] Weinrib 'The Fiduciary Obligation'.

[112] Shepherd 'Towards a Unified Concept of Fiduciary Relationships' 75.

[113] Although he does not acknowledge it and employs different terminology, there is a substantial overlap between Flannigan's limited access thesis and Shepherd's 'transfer of encumbered power' theory, which suggested that fiduciary duties arise where there is a transfer of some power from the beneficiary to the fiduciary, subject to a condition that the fiduciary may use it only for a particular purpose. Shepherd described a fiduciary relationship as existing whenever any person receives a power of any type on condition that he or she also receives with it a duty to utilise that power in the best interests of another: Shepherd 'Towards a Unified Concept of Fiduciary Relationships' 75.

does not alone provide a full account of when and why fiduciary accountability exists, it does go some way towards explaining the circumstances in which it arises.

(b) Flannigan's argument

Flannigan argues that conventional fiduciary accountability applies whenever one party negotiates or assumes 'an arrangement of limited access' in relation to another.[114]

His thesis is therefore based on the concept of 'access', which he does not define expressly but appears to use in the sense of some power to affect or exploit or otherwise make use of the property, interests or affairs of another. Although he denies it (particularly in the sense of 'discretion'),[115] this appears to be substantially the same as some 'power' or 'discretion', in the wide sense of 'an ability to affect', another's assets or interests.

Flannigan identifies two possible types of access. One is 'open access' and the other is 'limited access'. '[W]hen access is given on an open basis no constraint is imposed on freedom to exploit the resource'.[116] It exists therefore whenever one party has access to another's assets or interests and there are no restraints on their freedom to use that access as they may wish. They are free to use and exploit it in any way they see fit, including for their own benefit and in a self-interested way. Where the access is open, 'consumption or exploitation does not amount to objectionable self-regard'.[117] As such, fiduciary duties do not apply in cases of such open access. If

[114] R Flannigan 'Fact-Based Fiduciary Accountability in Canada' (2010) 36 *The Advocates' Quarterly* 431 432.
[115] For example, in his critique of the judgment in *Galambos v Perez* 2008 BCCA 91 in Flannigan 'Fact-Based Fiduciary Accountability in Canada' 431, he rejects the 'discretionary power' criterion as out of line with conventional fiduciary accountability, describing it as 'radical', 'unsubstantiated' and as having the potential both to significantly narrow the ambit of conventional fiduciary accountability and to permit the courts to 'assess the merits of a good faith exercise of discretion'.
[116] R Flannigan 'The Boundaries of Fiduciary Accountability' (2004) 83 *The Canadian Bar Review* 35 37–9.
[117] Flannigan 'The Boundaries of Fiduciary Accountability' 37–9.

there are no limitations on the use of the access, there can be no cause for concern or objection with regard to how it is used.

'Limited access', on the other hand, is where the recipient has 'access to the property or interests of another person which may only be used for the defined or limited purpose of acting in the interests of that other person'.[118] It is thus access that is constrained or restricted in that the recipient may not use it opportunistically, selfishly, for their own gain or in any way other than in the interests of the other person. It is in those cases that fiduciary duties arise. The rationale for their incidence is that–[119]

> [t]he 'mischief associated with that access is that the value of the assets will be exploited for personal advantage. The function of fiduciary regulation is to control that opportunism. Every action associated with a limited access is subject to fiduciary *accountability* in the specific respect that any action potentially may be opportunistic. The accountability assigned by law initially serves to define the self-denial expected of those with limited access (a guidance function) and to deter their opportunism.

(c) Critique of Flannigan's 'limited access' thesis

Advantages of the 'limited access' thesis

The concept of 'limited access' is appealing in a number of respects.

There is no doubt that fiduciary accountability is concerned with protecting the beneficiary by preventing the fiduciary from acting other than in the beneficiary's interests and, more specifically, protecting the beneficiary's interests against actual and potential harm in the form of self-interested conduct by the fiduciary that is not in those interests. It follows therefore that some form of 'access', power or discretion on the part of the fiduciary in relation to the

[118] Flannigan 'The Boundaries of Fiduciary Accountability' 88–9.
[119] Flannigan 'Fact-Based Fiduciary Accountability in Canada' 432–3 fn 3. Also Flannigan 'The Boundaries of Fiduciary Accountability'; R Flannigan 'The Core Nature of Fiduciary Accountability' [2009] *New Zealand Law Review* 375.

beneficiary's interests is the basic prerequisite for fiduciary accountability. Without any such access, it is not possible for the alleged fiduciary to affect the interests of the alleged beneficiary. There is no risk of harm to the beneficiary's interests, nothing to regulate or guard against and, consequently, no need for fiduciary duties. It is also true that the access concerned must be 'limited' or subject to some restriction that it may be used only in the beneficiary's interests. As Flannigan correctly says, without such a limitation, its use for any other purposes is not objectionable and cannot be considered 'wrongful'. And it is clear that some form of 'limited access' is present in all cases in which the courts have recognised the existence of fiduciary duties. As such, it is an accurate descriptor of at least one of the features of all fiduciary relationships. However, in itself, it is not a sufficient indicator or a complete explanation of the incidence of fiduciary duties.

Difficulties with the 'limited access' thesis

(i) The meaning of 'limited access'

One difficulty with Flannigan's thesis is that he does not define the concept of 'limited' access in express or specific terms. He does not, for example, explain the extent to which the access must be restricted in order to qualify as 'limited' and although it appears implicit in his argument, it is not entirely clear whether it suffices if it is restricted to only *some* extent, however slight. Similarly, it is not clear whether the limitation must be of a particular type, whether it may take any form and derive from any source, and whether it must be 'actual' or may also be deemed or implied.

(ii) Problems of over-inclusivity

The main difficulty with Flannigan's 'limited access' criterion is that it is over-inclusive.

Although all fiduciary relationships do involve limited access, limited access is not exclusive or peculiar to them. There are other

relationships that involve 'limited access', but that have not been recognised as giving rise to fiduciary duties.

Conaglen gives the example of the relationship between a mortgagor and a mortgagee. Mortgagors have access to the property of the mortgagee (in the form of powers to get possession of the property and sell it) but that access is limited because the mortgagor is entitled to use the power to sell the property only in order to recoup what the mortgagee owes. This falls within Flannigan's concept of 'limited access', but mortgagors are not generally recognised as owing the mortgagee any fiduciary duties in relation to their access to and powers in relation to the mortgaged property.[120] Flannigan's thesis fails to explain why this is the case, unless he is suggesting that the courts have simply been incorrect in failing to subject mortgagors and all others with limited access (in his broad sense) to fiduciary duties.

This over-inclusivity presents a number of difficulties. One is that it fails to provide a means for identifying 'fiduciary relationships', or for persuasively distinguishing them from other, non-fiduciary relationships. Not all situations involving access and the risk of its abuse attract fiduciary accountability. Limited access is simply a feature that is present in all 'fiduciary relationships' but that is not exclusive to them. It cannot therefore be the defining or distinguishing feature of a fiduciary relationship or the only criterion for the incidence of fiduciary duties. If it alone is insufficient to give rise to fiduciary duties the conclusion must be that 'something more' than bare, limited access is required. There are also other factors, apart from some limitation or restriction on the access, that are clearly relevant to whether or not fiduciary duties arise. For example, the court in *Fishel* referred to the beneficiary's ability to monitor and control the way in which the access is used.[121] Flannigan's thesis does not acknowledge these kinds of additional considerations. It

[120] Conaglen *Fiduciary Loyalty* 252–4.

[121] *University of Nottingham v Fishel* [2000] ICR 1462 1491.

also does not explain why it is that limited access gives rise to fiduciary duties in some circumstances but not in others.

Although it does go further than the individual incidence criteria and other merely descriptive academic theories referred to earlier in this chapter by providing a 'fuller' explanation of the purpose and rationale of fiduciary accountability, it still does not accurately predict or explain the existence of fiduciary duties. It tells us that fiduciary duties arise in relationships where there is limited access. It also tells us that the reason why it applies is to protect the beneficiary against the self-interested or opportunistic abuse of that access. But it does not tell us *why* we wish to provide that protection in certain relationships, *why* we consider it necessary and desirable, and why we do so in some limited access relationships and not in others. It does not therefore provide a complete explanation, rationale and justification for fiduciary accountability.

As will be explained later in this chapter, the argument advanced in this thesis regarding the proper basis for the incidence of fiduciary duties is that the only criterion that does provide (or at least comes closer to) a complete theory of fiduciary accountability is a justified expectation of the fiduciary's undivided loyalty to the protection or promotion of the beneficiary's sole interests. I argue that the 'something more' that is required for the incidence of fiduciary duties is a justified expectation that the recipient of the limited access will use it solely in the interests of the party to whose interests it relates, and that the existence of such a justified expectation requires more than mere limited access. Applying this to the mortgage example, the mortgagor is not subject to fiduciary duties because there is a justified expectation that they will (or that they ought to) act in their own interests.

Another, more practical, concern with Flannigan's thesis and its use of limited access as the sole determinant of the incidence of fiduciary duties concerns its broad ambit. If limited access were the only requirement for the incidence of fiduciary duties, it would result

in their existence in an inappropriately wide range of relationships, including those outside the conventional boundaries of fiduciary accountability. The effect of such an extension of the fiduciary regime would be to constrain a larger range of actors and render too many relationships 'fiduciary' ones, which could be unduly restrictive and undesirable on policy or practical grounds.

Flannigan acknowledges this wide application but does not consider it problematic. He argues that a broad-based approach is justified on policy grounds and that it is not impractical because, if a person finds him- or herself bound by fiduciary duties he or she finds to be too restrictive, the possibility of incurring liability for breach of those duties can be avoided by simply making disclosure of any self-interested conduct he or she wishes to engage in and by obtaining the beneficiary's consent, thereby securing protection from potential liability for breach of duty.[122]

The problem with that response is that it is easier said than done. It is not always practicable for a 'fiduciary' to make disclosure to or get the necessary consent from the beneficiary, or even to know whether or when it is necessary. It is problematic and undesirable to rely on disclosure and consent as the guard against the inappropriate imposition of fiduciary liability. Fiduciary accountability requires an exacting standard of conduct and gives rise to strict and far-reaching liability if contravened. It is undesirable and unprincipled to automatically impose it on such a wide and indiscriminate 'default' basis whenever there is limited access, leaving it up to individual fiduciaries to negotiate their release when and where they can. Although the fiduciary doctrine may well be, as Weinrib famously described it, 'the law's blunt tool for the control of … discretion',[123] it is not an entirely indiscriminate one.

[122] Flannigan 'The Boundaries of Fiduciary Accountability' 43.
[123] Weinrib 'The Fiduciary Obligation' 7.

(iii) Failure to acknowledge the true nature of the fiduciary concept

Another difficulty with Flannigan's thesis is that it relies on a purely objective determination of whether there is, factually, limited access or not. It does not permit consideration of the parties' own expectations or any other circumstantial features of the particular relationship in issue. As a result, it ignores the relationship-specific necessarily flexible and inherently normative nature of the fiduciary concept as an equitable doctrine and instrument of public policy.

2.13 LIMITATIONS OF INDIVIDUAL INCIDENCE CRITERIA AND ACADEMIC THEORIES

As the above discussion has highlighted, all the individual incidence criteria referred to in the case law and commentaries (both alone and in any given combination) fail to adequately define, identify, explain or justify all circumstances in which fiduciary duties have (properly) been recognised.

This is mainly the result of their under-inclusivity or over-inclusivity, and/or their emphasis on description rather than analysis. In order to overcome these limitations, the criteria determining issues of incidence need to do more. They need to satisfy all the requirements for a theoretically sound, principled and analytically useful approach that I suggested in the previous chapter. In particular, they need to accommodate existing case law and all the criteria that the courts have recognised as relevant. In addition, they need to recognise that the relevance of those 'established' individual criteria may vary from one fiduciary relationship to another, and that there may be further individual criteria that have yet to be recognised or developed.

This suggests that the requirements for the incidence of fiduciary duties need to be explained in terms of a single 'composite' criterion or concept that is sufficiently general, flexible, open and multi-faceted

to meet these needs. The only criterion that does so is the concept of a justified expectation of undivided loyalty discussed below.

3. JUSTIFIED EXPECTATIONS OF UNDIVIDED LOYALTY

3.1 INTRODUCTION – FINN'S 'REASONABLE EXPECTATION' CONCEPT

The concept of 'expectation' as the foundation for fiduciary accountability was first suggested by Finn.[124] He identified a three-tiered hierarchy of standards of protective responsibility that are used for the regulation of conduct in voluntary and consensual relationships. These, in ascending order of intensity, are 'the unconscionability standard', 'the good faith standard' and 'the fiduciary standard'.[125]

Whether and which of these standards applies in any given case requires three inter-related enquiries. The first enquiry is to ascertain the nature, purpose and progress of the actual relationship between the parties. The second is to determine what in 'the circumstances of the relationship ... the one party [is] entitled reasonably to expect ... of the other ...; that he will act in his own interests; that he will have regard to the former's interests; or that he will act in the former's interest?' The third is whether 'there are any independent reasons in public policy which ... call for the regulation of the conduct of the one party, or which would justify according a significant primacy to the expectation of the other'.[126]

Finn described a 'fiduciary relationship' as one in which one party, because of his or her position in it, has or is presumed to have a

[124] Finn 'The Fiduciary Principle'.

[125] Finn emphasised that these three standards are not separated by clear lines of demarcation but rather 'represent the dominant shades on a spectrum' and that the 'points of transition are often indistinct though they are confused … and that each … shares characteristics with the others': Finn 'The Fiduciary Principle' 3.

[126] Finn 'The Fiduciary Principle' 5.

power to affect the interests of the other which the law decrees must be used (if it is used at all) in that other party's interests.[127] He argued that this will be the case and 'a person will be a fiduciary in his relationship with another when and insofar as that other is entitled to expect that he will act in that other's or in their joint interest to the exclusion of his own several interest.'[128]

The 'end point' in each situation is therefore to ascertain whether the actual circumstances of a relationship are such that one party (the beneficiary) has the right to expect that the other (the fiduciary) will use the power that the relationship affords the fiduciary to affect the beneficiary's interests only in the beneficiary's interests (or in some exceptional cases, in their joint interests) to the exclusion of his or her own several interest.[129]

Finn's reasonable expectation criterion and the 'justified' and 'legitimate' expectation variations thereof have received significant support from courts throughout the Commonwealth.[130] Although much of this support has come from the Australian judiciary,[131] there has been increasing reference to some of form of 'expectation' by courts in other jurisdictions, including England and Canada.[132] For example, in *Glandon (Pty) Limited v Strata Consolidated (Pty) Limited*, the New South Wales Court of Appeal referred to 'the appropriate expectation as the hallmark of the [fiduciary]

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[127] Finn 'The Fiduciary Principle' 33.

[128] Finn 'The Fiduciary Principle' 54.

[129] P Finn 'Contract and the Fiduciary Principle' (1989) 12 *University of New South Wales LJ* 76 at 88; Finn 'The Fiduciary Principle' 46.

[130] For example, *Australian Securities Commission v AS Nominees Ltd* (1995) 13 ACLC 1; *Harris v Digital Pulse Pty Ltd* [2003] NSWLR 298, 197 ALR 626.

[131] This may be attributable to the fact that Finn now resides as an Australian Federal Court judge.

[132] There is however also some evidence of a move away from it in some Canadian cases. See, for example, *Soulos v Korkontz* (1997) 146 DLR (4th) 214 (SCC); *Cadbury Schweppes Inc v FBI Foods Ltd* (1998) 167 DLR (4th) 577 (SCC); *KLB v British Columbia* (2003) 230 DLR (4th) 513 (SCC); *Perez v Galambos* 2009 SCC 48, [2009] 3 SCR 247, 2009 CarswellBC 2787.

relationship'.[133] In his majority judgment in the leading Canadian case of *Hodgkinson* (which has been particularly influential in South African law),[134] La Forest J said that, in determining whether fiduciary duties exist, 'the question to ask is whether, given all the surrounding circumstances, one party could reasonably have expected that the other party would act in the former's best interests with respect to the subject-matter at issue'.[135] In *Arklow Investments Ltd v Maclean*, the Privy Council described the fiduciary concept as one that 'encaptures a situation where one person is in a relationship with another which gives rise to a legitimate expectation, which equity will recognise, that the fiduciary will not utilise his or her position in such a way which is adverse to the interests of the principal'.[136] Similarly, in the New Zealand case of *DHL International NZ Limited v Richmond Ltd*, the court described fiduciary duties as arising 'where one party to the relationship (A) is reasonably entitled to expect of the other (B) that B will act in the interests of A, not in the interests of B'.[137]

As I will argue later in this chapter, although the South African courts have not expressly referred to any such 'expectation' criterion, the Supreme Court of Appeal's 'justified reliance' in *Volvo* requirement is substantively similar.[138]

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[133] *Glandon Pty Limited v Strata Consolidated Pty Ltd* (1993) 11 ACSR 543.
[134] This is discussed in the analysis of *Volvo (Southern Africa) (Pty) Ltd v Yssel* [2009] JOL 24109 (SCA), 2009 (4) All SA 497 (SCA) later in this chapter.

[135] *Hodgkinson v Simms (*1995) 117 DLR (4th) 161, 1994 CarswellBC 438, 97 BCLR (2d) 1, [1994] 3 SCR 377, quoted with approval by the South African Supreme Court of Appeal in *Volvo (Southern Africa) (Pty) Ltd v Yssel* [2009] JOL 24109 (SCA), 2009 (4) All SA 497 (SCA).

[136] *Arklow Investments Ltd v Maclean* [2000] 1 WLR 594 598.
[137] *DHL International (NZ) Limited v Richmond Ltd* [1993] 3 NZLR 10.
[138] *Volvo (Southern Africa) (Pty) Ltd v Yssel* [2009] JOL 24109 (SCA), 2009 (4) All SA 497 (SCA). Other case support for some form of expectation basis for fiduciary duties includes, for example, *Australian Securities & Investments Commission v Citigroup (No 4)* (2007) 160 FCR 35 [273]–[274]; *Hospital Products v United States Surgical Corp* (1984) 55 ALR 417 (HCA), (1984) 156 CLR 41 (HCA) 63–4; *Global Container Lines Ltd v Bonyad Shipping Co* [1998] 1 Lloyd's Rep 528 (QBD) 546; *Sinclair Investment Holdings SA v Versailles Trade Finance Ltd* [2005] EWHC 2169 (Ch), [2005] EWCA Civ 722 [85]–[88]; *Pilmer and Others v Duke Group Limited (In Liquidation) and Others* [2001] HCA 31 [136].

There is also support for some form of expectation-based incidence criterion in a number of academic commentaries, including those of Scott[139] and, with some reservations, Conaglen.[140] De Mott also argues that 'the law applicable to fiduciary duty can best be understood as responsive to circumstances that justify the expectation that an actor's conduct will be loyal to the interests of another'.[141]

However, despite the increasing reference to expectation in relation to the incidence of fiduciary duties, there are a number of issues relating to its nature and determination that have yet to be resolved.

3.2 SOME ISSUES RELATING TO THE EXPECTATION CRITERION

(a) The nature of the requisite expectation

One of the main issues relating to the expectation criterion that is still unsettled concerns the nature or kind of expectation of loyalty that is necessary to give rise to and to warrant fiduciary duties. The three main variants that have been suggested in this regard are those of a 'reasonable expectation', a 'justified expectation' and a 'legitimate expectation'.

A 'reasonable expectation'

Although Finn's original 'reasonable expectation' formulation has been favoured by some courts,[142] there are some difficulties with it.

As De Mott points out, the 'reasonableness' standard is too narrow to capture all the circumstances in which fiduciary accountability

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[139] Scott 'The Fiduciary Principle' 540.

[140] Conaglen *Fiduciary Loyalty* 249–54, 257–61.

[141] De Mott 'Breach of Fiduciary Duty: On Justifiable Expectations of Loyalty and Their Consequences' 926.

[142] In, for example, *DHL International (NZ) Limited v Richmond Ltd* [1993] 3 NZLR 10 23; *Hodgkinson v Simms (*1995) 117 DLR (4th) 161.

does, and should, apply.[143] She gives the example of a particular company director who is known to be dishonest and disloyal. For that director's company to expect him or her to be loyal would be objectively unreasonable. No reasonable person having that knowledge of the director's character would expect any loyalty from him or her, and any such expectation would therefore not be reasonable. And yet, all company directors are subject to fiduciary duties, regardless of their personal characters and of the beneficiary's knowledge thereof. And that is because all companies, and we as a society, should be able to expect, do expect, and are recognised as entitled to expect all company directors not to act in their own interests rather than those of the company, not to use their positions to steal funds, and not to obtain bribes and secret commissions or any other unauthorised gains.

A 'justified expectation'

The better formulation of the expectation criterion is that of a 'justified expectation'. This is broader than a 'reasonable expectation' and captures situations in which fiduciary duties do clearly exist in circumstances in which no reasonable person would expect them. An expectation of loyal conduct may well be justifiable even when a reasonable person would doubt whether the actor concerned will fulfil that expectation.[144]

De Mott argues that–[145]

> [a]ssessing whether a plaintiff's expectations of loyalty are justifiable is related to, but not identical to, assessing whether they are reasonable. Focusing on justifiability reinforces the point that fiduciary duties, although necessarily shaped by or

[143] De Mott 'Breach of Fiduciary Duty: On Justifiable Expectations of Loyalty and Their Consequences' 938.

[144] De Mott 'Breach of Fiduciary Duty: On Justifiable Expectations of Loyalty and Their Consequences' 938–9.

[145] De Mott 'Breach of Fiduciary Duty: On Justifiable Expectations of Loyalty and Their Consequences' 938–9.

> related to any contract between the parties or their conduct more generally are imposed by the law.

Although ‘justified’ is therefore a better formulation and reference to ‘reasonableness’ is not necessary to provide the desired measure of objectivity in determining the incidence of fiduciary duties, a ‘reasonable expectation’ is the more prevalent version. It also has the advantage of being a more familiar and established legal standard. If, however, it is employed, it should be construed in the broader sense suggested below.

Reconciling ‘reasonable’ and ‘justified’ expectations

The ‘reasonableness’ standard is objectionable on the grounds mentioned above only if it is based on whether a reasonable person *would actually have expected* the alleged fiduciary’s undivided loyalty. It is however possible (and, if it is chosen as the appropriate descriptor, also preferable) to construe ‘reasonableness’ more broadly with reference to whether a reasonable person *should be entitled to expect*, rather than on what they would actually expect. This reduces the distinction between a ‘reasonable’ and a ‘justified’ expectation to one of mere semantics and allows for their conceptual reconciliation.

Applied in this way, determinations of ‘reasonable’ and ‘justified’ expectations would both involve consideration of the same kinds of circumstantial factors, such as the parties’ states of mind, the nature and history of their relationship, whether there are any public policy interests in protecting the integrity of that relationship, and so on. Once all those circumstantial considerations become part of the enquiry into whether the alleged fiduciary can properly be expected to act with undivided loyalty to the protection or promotion of the beneficiary’s interests, ‘reasonable’ and ‘justified’ expectations become substantially the same.

A ‘legitimate expectation’

There are a number of cases in which the courts and commentators have described the requisite expectation as a ‘legitimate’ expectation.[146]

It appears that this is substantially the same as a ‘justified’ expectation and that the two terms are used interchangeably to describe the same concept. However, I would suggest that the ‘justified’ descriptor is the preferable one simply because the concept of a ‘legitimate’ expectation’ has become established as having a particular meaning in South African administrative law.[147] Although that meaning is conceptually similar to the fiduciary expectation incidence criterion, use of the same term could result in unnecessary confusion.

(b) Whether an actual, subjective expectation is necessary

There is significant authority for the principle that there is a difference between a ‘justified’ and an ‘actual’ expectation, and that it is not necessary for the beneficiary to actually, subjectively expect the fiduciary’s undivided loyalty.[148]

The beneficiary may in fact actually trust or expect the fiduciary to act loyally but actual trust or expectation is not necessary. ‘The expectation may be a judicially prescribed one because the law itself ordains it to be that other’s entitlement.’[149] It follows therefore that a court may determine that the claimant was entitled to expect that the other party would act in the claimant’s best interests to the exclusion of all other interests, even if the claimant personally doubted whether that expectation would be fulfilled. De Mott gives the example of a situation in which a person occupies a conventional fiduciary position (such as that of trustee) and the beneficiary is subjectively aware of

[146] For example, *Arklow Investments Ltd v Maclean* [2000] 1 WLR 594 598.

[147] The terminology may be different in other jurisdictions.
[148] *Hospital Products v United States Surgical Corp* (1984) 156 CLR 41 (HCA) 69.
[149] Finn 'The Fiduciary Principle' 47.

the fiduciary's transgressions in that position. In those circumstances, the beneficiary would not subjectively actually expect the fiduciary to act loyally and to properly fulfil their fiduciary duties, yet those duties still apply.[150] The underlying principle, therefore, is that fiduciaries should be trustworthy, not necessarily trusted.[151]

The 'justified expectation' criterion is thus primarily objective, although subjective factors such as the parties' states of mind will be relevant to its existence. Its objective nature and absence of the need for any actual expectation is perhaps better expressed as a justified 'entitlement' rather than an expectation.

Whether or not the requisite justified expectation exists in any given case will depend on an objective assessment of all the surrounding circumstances of the relationship in question.

(c) Determining the existence of a reasonable or justified expectation of undivided loyalty

One of the criticisms that has been levelled at the reasonable or justified expectation criterion is that it does not indicate how its existence is to be determined or the factors that are relevant to that determination.

The answer is that the existence or absence of a justified expectation depends on an application of the individual incidence criteria that the courts have conventionally applied, whether with (or more commonly) without reference to any expectation of loyalty, together with judicial perceptions of the kinds of expectations (if any) that would be justifiable in the circumstances. Reasonable or justified expectation is thus an 'amalgam' of objectively assessed

[150] De Mott 'Breach of Fiduciary Duty: On Justifiable Expectations of Loyalty and Their Consequences' 938–9.

[151] Frankel 'Fiduciary Law' 824–5.

circumstances, subjective and objective expectations and judicial prescription.[152]

Conaglen suggests that one should look at the characteristics of the established classes of fiduciary relationships *per se* and draw presumptions from them by analogy.[153] He also refers to the need to have regard to issues of public policy (particularly whether 'there is societal value in protecting the integrity of performance of obligations in that relationship and others of its kind'),[154] as well as factors such as discretion, influence, vulnerability, trust, the nature of any contractual relationship between the parties, whether they are interacting in a purely commercial context, the availability of other self-protective legal mechanisms, and whether an expectation of loyalty would be 'realistic'.[155] Further criteria suggested by De Mott are the course of the parties' relationship or dealings over time and whether there is any evidence of the alleged fiduciary's allegiances that either support or undermine the justifiability of an expectation of loyalty. She argues in this regard that the course of the parties' dealings should justify an expectation of loyalty 'when the relationship has deepened into one in which one party is invited to and does repose substantial trust in the other's fidelity to the trusting party's interests'. Where however it is evident that the alleged fiduciary's loyalties lie elsewhere, an expectation of loyalty is not likely to be justifiable.[156] Finn, the originator of the 'reasonable expectation' concept, places the emphasis on the relationship between the parties. He suggests that the justifiability (or, on his variation, the reasonableness) of the expectation is to be determined with reference to the nature of that relationship, its terms, its contemplated

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[152] Finn 'Contract and the Fiduciary Principle' 87.

[153] The limitations of this kind of analogical reasoning with reference to the established classes of fiduciary relationships are discussed in chapter 4 of this thesis.

[154] Conaglen *Fiduciary Loyalty* 263.

[155] Conaglen *Fiduciary Loyalty* 249–51, 260–8.

[156] De Mott 'Breach of Fiduciary Duty: On Justifiable Expectations of Loyalty and Their Consequences' 940–51.

purpose, its business setting, its actual progress, and the relative positions of the parties.[157]

In cases in which they have applied to an expectation-based incidence requirement, the courts have referred to a number of conventional individual incidence criteria. In his majority judgment in *Hodgkinson v Simms*, for example, La Forest J said that–[158]

> [t]he existence of a fiduciary duty in a given case will depend on the reasonable expectations of the parties, and these in turn depend on factors such as trust, confidence, complexity of subject matter, and other community or industry standards.

Those individual incidence criteria, their limitations, and how they should be construed so as to best give effect to the fiduciary concept's underlying purpose and rationale have already been discussed. The more significant aspect of the relationship between those individual incidence criteria and a justified expectation is that it reveals the seemingly unacknowledged but, I would suggest, the true nature, function and value of the expectation element in 'capturing' a range of 'primary' incidence criteria.

3.3 CRITICISMS AND A DEFENCE OF THE JUSTIFIED EXPECTATION CRITERION

The main criticisms that have been levelled at the reasonable or justified expectation criterion are that it is 'tautologous and subjective'[159] and, because it does not indicate what specific incidence criteria are necessary, that it is 'too vague or indeterminate, conceptually and linguistically, to identify with any clarity the

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[157] Finn 'Contract and the Fiduciary Principle'.. Similar considerations were taken into account by the courts in, for example, *Global Container Lines Ltd v Bonyad Shipping Co* [1998] 1 Lloyd's Rep 528 (QBD) 545–6; *University of Nottingham v Fishel* [2000] ICR 1462.

[158] *Hodgkinson v Simms* 1994 CarswellBC 438 2.

[159] Per Kirby J in *Pilmer and Others v Duke Group Limited (In Liquidation) and Others* [2001] HCA 31 [136].

boundaries of fact-based accountability'.[160] As Campbell says, '[t]he ability of such an account to identify when a fiduciary relationship arises ... is only as great as its ability to identify what it is that generates the entitlement to expect.' [161]

These concerns misconstrue both the way in which the existence of such an expectation is to be determined and the way in which it functions. Consequently, they fail to appreciate its utility and value in resolving the 'intractable question' of when fiduciary duties arise.

As mentioned earlier, all the individual incidence criteria that have conventionally been applied by the courts are relevant to the enquiry into the existence of the justified expectation of undivided loyalty that is necessary to give rise to fiduciary duties. Depending on the circumstances, certain of these may be more significant, or may be applied in different combinations, in different cases. It is also conceivable that, as the nature of relationships (particularly commercial ones) change and develop, the courts may refine those incidence criteria or devise new ones to accommodate those changes.

It seems to me that all those individual criteria operate as 'primary incidence criteria', both because they are the actual, substantive circumstantial factors that need to be taken into account in determining the incidence of fiduciary duties, and because they are taken into account at the first stage of what is effectively a two-stage enquiry into the existence of the requisite justified expectation and, ultimately, the incidence of such duties. Once the existence of the primary incidence criteria has been assessed, the second stage of the enquiry is to determine whether they are present in such form and combination and to the extent necessary to produce a justified expectation of one party's undivided loyalty to the other.

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[160] Flannigan 'Fact-Based Fiduciary Accountability in Canada' 438.
[161] Campbell 'Fiduciary Relationships in a Commercial Context' available at http://ssrn.comalshalt=2404202 [29].

I am suggesting therefore that the individual primary criteria are all simply factors to consider in determining whether there was, in all the circumstances surrounding the relationship in question, a justified expectation that the fiduciary would act only in the interests of the beneficiary. Viewed in this way, various individual primary criteria combine to produce a justified expectation of loyalty from the fiduciary. The enquiry into the existence and sufficiency of those individual 'primary' criteria therefore precedes the enquiry into the existence of a justified expectation, and the conclusion on whether such an expectation exists then encompasses and reflects the result of that preceding enquiry. In other words, it is the presence of the appropriate combination of individual 'primary' criteria that gives rise to the justified expectation, which will then exist because there are appropriate 'primary' criteria in place that give rise to and result in it. My argument therefore is that the expectation criterion is better construed not as a 'primary' requirement, but rather as the 'composite' product or cumulative result of the existence of an appropriate combination of other 'primary' criteria, such as access in relation to another's assets or affairs, vulnerability to the risk of its abuse, the nature and purpose of the relationship concerned, and so on.

The function of the expectation criterion is however not confined to capturing the existence of primary incidence criteria. It also provides the analytical focal point for the assessment of those primary incidence criteria and, where it is found to be present, it rationalises and explains *why* fiduciary duties exist. If the need to ultimately establish the existence or absence of a justified expectation of loyalty is recognised as the end-point of the enquiry into the incidence of fiduciary duties, it tells us why we enquire into the existence of the primary criteria, why they are relevant, and what we are trying to ascertain by asking whether they are present. Conaglen makes a similar point when he says that the expectation criterion 'usefully focuses attention on what the fiduciary has done to justify the

expectation that he will comply with duties of loyalty, thereby giving structure to the evidence that ought to be considered when determining whether the expectation of loyalty is appropriate in all the circumstances of the case'.[162] Without the expectation criterion (understood in this way), the conventional criteria fail to fully explain why fiduciary accountability exists, and why it is that different 'primary' criteria (or combinations thereof) have been recognised as founding fiduciary duties.

This conceptualisation of the nature and role of expectations in the incidence of fiduciary accountability addresses the main criticisms of its use as the measure of such accountability. The only sense in which it is 'tautologous' and 'subjective' is that it itself does not provide or add any new primary incidence criterion or any explanation of how the primary criteria that have become established are to be assessed. However, as explained above, that is not is purpose. Its purpose, and the value it adds, is the provision of a focus point for the analysis and a more complete and compelling rationale and justification for the incidence of fiduciary accountability than is afforded by the primary criteria alone. It is those features that render it not only a useful but also a necessary component in the incidence of that accountability. Furthermore, the discretion it permits the courts in selecting, assessing and weighing up the primary incidence criteria is a positive attribute, not a shortcoming. It allows the fiduciary concept to function with the flexibility and sensitivity that it, as an equitable doctrine, is designed to enjoy.

The other main criticism of the expectation criterion is that it is unacceptably vague and malleable. Flannigan argues in this regard that it confers an 'uncontrolled discretion' on the courts that they 'may employ to find fiduciary responsibility wherever they please', thus resulting in judicial arbitrariness.[163] He argues further that it is 'too

[162] M Conaglen 'Fiduciary Duties in Canada' (2010) 69(3) *Cambridge LJ* 450 452.
[163] Flannigan 'The Boundaries of Fiduciary Accountability' 74.

vague or indeterminate, conceptually and linguistically' and that it has 'confounded the jurisprudence'.[164]

There are of course discrepancies and differences of opinion on how the primary criteria are to be defined, which of them are necessary or relevant, and on their relative importance.[165] Some of the criteria that have emerged are controversial. It is also true that there is no certainty as to exactly what is ultimately necessary to give rise to a justified expectation in any given case. To reject the expectation criterion as unacceptably vague and 'arbitrary' on these grounds is however unduly alarmist.

Although there are differences in judicial and academic opinion between (and within) the different jurisdictions in relation to the primary criteria and their application, there does also appear to be a growing consensus on at least some of the criteria that are necessary for or relevant to the incidence of fiduciary accountability. For example, all jurisdictions seem to have accepted the need for the fiduciary to have some form of access, control or discretionary power in relation to the beneficiary's assets or interests, and a resulting susceptibility or 'vulnerability' on the part of the beneficiary to the risk that the fiduciary will abuse it by acting other than in the beneficiary's interests.

There are also a number of other legal concepts that we successfully employ that are equally open-ended and 'elastic, such as 'good faith', 'undue influence' and 'unconscionability'. The best analogous example is the standard of 'reasonableness'. The similarities between 'reasonableness' and 'justified expectation' are not hard to find. 'Reasonableness' (like justified expectation) is the product or cumulative result of the existence of a number of varying

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[164] Flannigan 'Fact-Based Fiduciary Accountability in Canada' 438.

[165] As discussed in chapter 6 of this thesis, for example, the South African Supreme Court of Appeal in *Volvo (Southern Africa) (Pty) Ltd v Yssel* 2009 (4) All SA 497 (SCA) held that a mutual understanding of the fiduciary's loyalty to the beneficiary's interests is not necessary, while the Canadian Supreme Court in *Galambos v Perez* was not prepared to go that far.

'primary' circumstantial factors within the factual matrix of the case in question. And, as with the justified expectation standard, although a number of primary factors have become established as relevant, there is no closed list, and their presence, nature and mix may (and often do) vary from case to case.

For example, in order to establish liability in delict (tort) for loss suffered as a result of a motor vehicle collision in South African law, the claimant must show, *inter alia,* that the defendant failed to exercise reasonable care. In determining the reasonableness or otherwise of the defendant's behaviour, the court will usually take into account a number of 'established' factors, such as whether the defendant maintained a proper lookout, adhered to the prescribed speed limit and other rules of the road, drove under the influence of alcohol, and so on. The extent to which these factors are present or relevant, whether there are any other factors that are relevant within the particular circumstances of the case, and how they combine to produce a finding of reasonableness or unreasonableness are all matters that fall within the discretion of the court to decide. The same applies to the determination of whether or not there is, within any particular relationship, a justified expectation that one party will act only in the other's interests. As with the enquiry into reasonableness, the court will consider a variety of factors within the context of all the surrounding circumstances, and the way in which it does so will vary, along with the facts of each individual case.

The 'space' within the expectation concept does not however mean that the courts can or will act arbitrarily. As already mentioned, some courts have already identified certain criteria as essential. Where criteria have been identified as essential in this way, the ordinary rules of precedent will ensure consistency in their application within each jurisdiction and, with time and as more judgments are delivered, the nature and definition of the relevant criteria will become more and more settled. Assessing the existence of a justified expectation objectively with reference to, *inter alia*, subjective factors

and policy considerations also employs the same kind of reasoning process as an assessment of reasonableness. The courts are well versed in this kind of reasoning and there is no reason to expect them to have any difficulty in employing it in determining justified expectations.

The categories of negligence are never closed[166] and there is no single general principle that is able to 'provide a practical test which can be applied to every situation to determine whether a duty of care is owed and, if so … its scope'.[167] As Finn himself acknowledges, the reasonable or justified expectation measure may be no more precise than that.[168] Both 'negligence' and 'reasonable or justified expectations' are 'fairly blunt tools' that 'merge in the final element of fairness, justice and reasonableness', yet the 'courts have persevered with the concept of reasonableness and the skies have not fallen'.[169]

4. CONCLUSIONS

As appears from the above analysis, the existence of a 'justified expectation of undivided loyalty' is the criterion that has emerged as most theoretically sound, principled, coherent, and analytically useful for the purposes of determining and explaining the incidence of fiduciary duties.

The justified expectation criterion is the only one that does not suffer from the same analytical and theoretical shortcomings as do other theories of fiduciary accountability and suggested grounds for its incidence, and that meets all the requirements for a theoretically sound and principled approach. It accommodates all the individual

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[166] *Donoghue v Stevenson* [1932] AC 562 562, cited in Conaglen *Fiduciary Loyalty* 261.

[167] *Caparo Industries plc v Dickman* [1990] 2 AC 605 617, as cited in Conaglen *Fiduciary Loyalty* 261.

[168] P Finn 'Fiduciary Law and the Modern Commercial World' in E McKendrick (ed) *Commercial Aspects of Trusts and Fiduciary Obligations* (1992) 9.

[169] *Customs & Excise Commissioners v Barclays Bank plc* [2006] UKHL 28 [71], as quoted in Conaglen *Fiduciary Loyalty* 261.

incidence criteria that have become established in the case law, and allows for the recognition of new ones in appropriate and changing circumstances, while simultaneously providing an analytical point of focus for the application of those criteria.

The justified expectation criterion is also sufficiently clear and certain yet flexible enough to accommodate the wide variety of fiduciary relationships and adapt to the emergence of new forms of relationships. It describes all fiduciary relationships, distinguishes them from other, non-fiduciary relationships and, unlike any other approach, explains *why* they attract fiduciary accountability and the nature, purpose and functioning of that accountability. As Kirby J said in *Pilmer v Duke Group Ltd*, despite any difficulties it may have, justified expectation 'represents the best attempt to express what is involved'.[170] Or, to borrow Dworkin's terminology, it is the criterion that best fits and justifies the record.[171]

Furthermore, concerns about the 'open-ended' nature and potentially 'arbitrary' application of the justified expectation criterion are over-alarmist. It is an inherently somewhat amorphous concept, and it will necessarily continue to be so, particularly in its development stages. However, as explained above, it is no more 'arbitrary' than other similarly amorphous concepts that have been successfully applied in other legal contexts.

However, in order to fulfil its proper function, the justified expectation of undivided loyalty criterion needs to be applied in accordance with the requirements suggested in chapters 3 and 4. In particular, it needs to be administered consistently and to all relationships in which fiduciary duties are alleged to exist, regardless of whether the relationship in issue falls within or outside of any of the established classes of fiduciary relationship, and without any other form of categorisation. The extent to which it has been applied in

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[170] *Pilmer v Duke Group Ltd* [2001] HCA 31 [136].
[171] R Dworkin *Law's Empire* (1986).

English, Canadian and South African case law generally is discussed in the following chapter. The extent to which it has been specifically referred to and/or is able to explain the decisions in which employees in particular have (correctly) been found to owe their employers fiduciary duties is considered in chapter 7.

Ultimately, of course, its ability to prove itself to be a consistent and workable mechanism for determining the incidence of fiduciary duties will depend on the extent to which the courts embrace it and how they apply and develop it. Their progress and success in this regard are explored in chapter 6, where leading English, Canadian and South African cases are analysed.

CHAPTER 6

CANADIAN, ENGLISH AND SOUTH AFRICAN CASES ON THE INCIDENCE OF FIDUCIARY DUTIES

1. INTRODUCTION

The preceding three chapters critically considered and advanced certain propositions in relation to the general principles that govern the incidence, nature, scope, operation and purpose of fiduciary duties. This chapter provides a critical analysis of the ways in which the courts have formulated and applied those general fiduciary principles in a number of leading cases from Canada, England and South Africa. Cases dealing with the specific application of those principles to employees are discussed in chapter 7.

The Canadian cases I consider are *Frame v Smith*,

[1] *Hodgkinson v Simms*,[2] (*Hodgkinson*) and *Perez v Galambos*[3] ('*Galambos*'). The English case is *Bristol and West Building Society v Mothew*[4] ('*Mothew'*) and the South African cases are *Robinson v Randfontein Estates Gold Mining Co Ltd*[5] ('*Robinson'*), *Philips v Fieldstone*[6] ('*Fieldstone'*) and *Volvo (Southern Africa) (Pty) Ltd v Yssel*[7] ('*Volvo'*).

I have selected these particular cases for a number of reasons. All of them provide good reflections of the dominant positions that the

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[1] *Frame v Smith* (1987) 42 DLR (4th) 81, [1987] 2 SCR 99.
[2] *Hodgkinson v Simms (*1995) 117 DLR (4th) 161, 1994 CarswellBC 438, 97 BCLR (2d) 1, [1994] 3 SCR 377.

[3] *Perez v Galambos* 2009 SCC 48, [2009] 3 SCR 247, 2009 CarswellBC 2787.

[4] *Bristol & West Building Society v Mothew* [1988] Ch 1.
[5] *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168.
[6] *Phillips v Fieldstone Africa (Pty) Ltd and Another* [2004] 1 All SA 150 (SCA), 2004 (3) SA 465 (SCA).
[7] *Volvo (Southern Africa) (Pty) Ltd v Yssel* [2009] JOL 24109 (SCA), [2009] 4 All SA 497 (SCA).

Canadian, English and South African courts have taken on the issues of incidence criteria and other general fiduciary principles, and have played a prominent role in shaping the jurisprudence within and across all three jurisdictions. They also all illustrate the differences of approach between the three jurisdictions, the developments and changes that have taken place within them, and the current position, thereby providing a useful basis for comparative analysis.

2. THE APPROACH OF THE ENGLISH COURTS

(a) Introduction

The English courts have generally been more consistent and conservative in their approach to fiduciary principles compared to the Canadian courts. While there may not be significant differences in terms of outcomes, the English courts have based their decisions on traditional and conventional fiduciary principles and have not shared the Canadian courts' willingness to reconfigure and re-conceptualise them.

There is also a stronger emphasis in the English cases on the express articulation of fiduciary principles in general abstract terms. The general principles they have laid down with regard to the nature, purpose and scope of application of fiduciary duties and remedies are discussed in more detail elsewhere in this thesis.[8] As those discussions indicate, they have included a recognition that not all the duties of, and not all breaches of duty by, fiduciaries are fiduciary ones,[9] that restitution and a claim for unauthorised profits are the only truly fiduciary remedies,[10] that fiduciary duties attach to only those aspects of a relationship that fulfil the general requirements for fiduciary accountability,[11] that 'undivided loyalty' is the core feature of

[8] Particularly in chapter 3.
[9] *Mothew* 17.
[10] *Mothew* 17.
[11] *University of Nottingham v Fishel* [2000] ICR 1493.

fiduciary accountability.[12] and that, when they apply, fiduciary duties are essentially proscriptive in nature.[13]

With regard to the incidence of fiduciary duties, the English courts have generally favoured concepts of trust and confidence[14] as the fundamental basis for fiduciary accountability, although they have more recently supplemented these with other criteria, particularly those of vulnerability[15] and an undertaking to act for or on behalf of another.[16]

Most of these principles are clearly reflected in the leading *Mothew* case considered below, which has been particularly influential both in 'solidifying' the position in English law and in the development and application of fiduciary principles in other jurisdictions.

(b) Bristol & West Building Society v Mothew [1988] Ch 1

The facts in *Mothew*

A solicitor agreed to act for both the lender and the borrower in the entering into of a mortgage transaction. He negligently gave the lender certain incorrect information that caused the lender to suffer loss. The lender sued for, *inter alia*, breach of trust and fiduciary duty.

The issues before the court were, *inter alia*, whether the solicitor owed the lender any fiduciary duties and, if so, whether those duties had been breached.

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[12] *Mothew* 18.
[13] There has however been something of a departure from this position in *Item Software (UK) Ltd v Fassihi* [2004] EWCA Civ 1244, [2005] 2 BCLC 91.
[14] *Re Agriculturist Cattle Insurance Co* (1870) LR 5 Ch App 725 (LJJ) 733; *Murad v Al-Saraj* [2004] EWHC 1235 (Ch) [328], [332] which was unchallenged on appeal, 2005 EWCA Civ 959 [4].
[15] *Mothew* 11.

[16] For example, *Mothew* 18; *Global Container Lines Ltd v Bonyad Shipping Co* [1998] 1 Lloyd's Rep 528 (QBD) 546; *Arklow Investments Ltd v Maclean* [2000] 1 WLR 594 599; *Daraydan Holdings Ltd v Solland International Ltd* [2004] EWHC 622 (Ch) [55]; *Conway v Ratiu* [2005] EWCA Civ 1302 [57]; *Button v Phelps* [2006] EWHC 53 (Ch) [58]–[60]; *Sinclair Investment Holdings SA v Versailles Trade Finance Ltd* [2005] EWHC 2169 (Ch), [2005] EWCA Civ 722 [78]; *University of Nottingham v Fishel* [2000] ICR 1462.

The court's judgment

In his majority judgment, Millett LJ laid down a number of general principles.

(i) The meaning of 'fiduciary' duties and breaches

The fiduciary capacity has a number of facets and imposes various duties on the fiduciary. Not all duties based in equity and not all the duties that apply to fiduciaries are however fiduciary duties.[17] As such, 'not every legal claim arising out of a relationship with fiduciary incidents will give rise to a claim for breach of fiduciary duty'.[18] 'The expression "fiduciary duty" is properly confined to those duties which are peculiar to fiduciaries and the breaches of which attract legal consequences differing from those consequent upon the breach of other duties.'[19] The defining and distinguishing obligation of a fiduciary is that of 'undivided loyalty'. The principal is entitled to the single-minded loyalty of his fiduciary.[20]

(ii) Fiduciary remedies

Truly fiduciary duties are those duties that are special to fiduciaries and that attract remedies that are peculiar to the equitable jurisdiction. Those remedies are primarily restitutionary or restorative rather than compensatory.[21]

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[17] *Mothew* 11, quoting Ipp J in *Permanent Building Society v Wheeler* (1994) 14 ACSR 109 157.

[18] *Mothew* 10, citing La Forest J in *Lac Minerals v International Corona Resources Ltd* (1989) 61 DLR (4th) 14 28.

[19] *Mothew* 10–11.
[20] *Mothew* 18.
[21] *Mothew* 12.

(iii) Criteria for the incidence of fiduciary duties or the nature of a 'fiduciary'

> A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence.[22]

(iv) Distinctions between fiduciary duties and a duty to exercise reasonable care and skill

A duty to exercise reasonable care and skill is not a fiduciary duty.[23] There are two main differences between the two duties. Fiduciary duties are concerned with positions of disadvantage or vulnerability. A duty to exercise reasonable care has nothing to do with such positions. Fiduciary duties also stem from requirements of trust and confidence that are imposed on the fiduciary. The duty of care and skill does not.[24]

> The nature of the obligation determines the nature of the breach ... Breach of fiduciary obligation ... connotes disloyalty or infidelity. Mere incompetence is not enough. A servant who loyally does his incompetent best for his master is not unfaithful and is not guilty of a breach of fiduciary duty.[25]

Negligence does not constitute a breach of fiduciary duty. It is a breach of the separate 'non-fiduciary' duty to exercise reasonable care and skill. Where that duty arises in equity, the remedy for its breach is a claim for equitable compensation rather than damages, although it resembles common-law damages in that it compensates the claimant for his or her loss.

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[22] *Mothew* 12.
[23] *Mothew* 10–11, quoting Southin J's complaint in *Giradet v Crease & Co* (1987) 11 BCLC (2d) 361 362 on the 'perverse' 'over-use' of the word 'fiduciary'.
[24] *Mothew* 11, approving Ipp J's statements in *Permanent Building Society v Wheeler* 14 ACSR 109 58.

[25] *Mothew* 18,

(v) Dealings between a fiduciary and beneficiary

Where a fiduciary deals with the beneficiary on his or her own behalf or on behalf of a third party, the fiduciary must affirmatively prove that the transaction is fair and must make full disclosure to the beneficiary of all facts that are material to the transaction.

(vi) Fiduciaries who act for two beneficiaries

This situation is not likely to arise in many relationships of employment but would do so where, for example, an employee has more than one job and thus more than one employer.

A fiduciary can act for two beneficiaries with potentially conflicting interests, provided that he or she obtains both the informed consent of both of them. Acting without such consent constitutes a breach of the fiduciary duty of undivided loyalty because it places the fiduciary in a position where his or her duty to one principal may conflict with his or her duty to the other. This is sometimes called 'the double employment rule'.[26]

Even where a fiduciary obtains the necessary informed consent and properly acts for two beneficiaries, he or she must act in the interests of each and must not intentionally further the interests of one to the prejudice of the interests of the other. This goes further than a duty of good faith. He or she must not allow the performance of his or her obligations to one beneficiary to be influenced by his or her relationship with the other, and must serve each one as faithfully and loyally as if each were his or her only principal.

The fiduciary duty of loyalty also prohibits the fiduciary from placing him- or herself in a position where there is an actual conflict between his or her duties to both beneficiaries so that he or she cannot fulfil his or her obligations to one beneficiary without failing in his or her obligations to the other. If the fiduciary does, there may be

[26] *Mothew* 12, citing *Clark Boyce v Mouat* [1994] 1 AC 428.

no alternative but to cease to act for at least one and preferably both. The fact that the fiduciary cannot fulfil his or her obligations to one beneficiary without breaching his or her obligations to the other will not absolve him or her from liability. This is 'the actual conflict rule'.[27]

Applying those principles to the facts of the case, the court found that there had been no breach of fiduciary duty. The lender had been aware that the solicitor was also acting for the borrower when the lender instructed him to act for it. Any potential conflict of interests was thus of the lender's own 'making' and not something it could properly complain of. There had also been no breach of the no-conflict rule or any fiduciary duty.

Some comments on the court's judgment

The judgment in *Mothew* has been extensively cited in fiduciary jurisprudence throughout the Commonwealth and has been described as 'a masterly survey of the modern law of fiduciary duties'.[28] Although it did not deal specifically with the criteria for the incidence of fiduciary duties (beyond the broad descriptions of fiduciary relationships as ones of 'trust and confidence' that give use to an obligation of undivided loyalty), it does clearly articulate and explain a number of important and fundamental general fiduciary principles. Those principles have become largely established as correctly reflecting the position in English law. *Mothew* has also provided the basis for the principled and consistent approach of the English courts in subsequent cases (including the leading employment case of *Fishel* discussed in the following chapter) and of many of the propositions advanced in this thesis.

[27] *Mothew* 13.
[28] *Johnson v EBS Pensioner Trustees Ltd* [2002] EWCA Civ 42 [32].

3. THE APPROACH OF THE CANADIAN COURTS

(a) Introduction

The Canadian courts have been the most inconsistent in the incidence criteria they have favoured and in their statements of other general fiduciary principles. Up until the case of *Guerin*[29] their decisions rarely fell outside of the conventional boundaries of fiduciary accountability and were 'relatively conservative and restrictive'.[30] Some of this conservatism has continued in certain areas and, for present purposes, is most notable in the courts' consistent refusal to apply fiduciary duties to ordinary, 'non-key' employees.[31] However, post-*Guerin* and as fiduciary duties began to be asserted and recognised in increasing numbers of individual relationships outside the traditional categories, the courts' decisions in other areas have reflected greater judicial creativity and the use of the 'unconventional conceptualisation of various fiduciary principles'.[32]

These trends are clearly visible in the three leading cases of *Frame v Smith*,[33] *Hodgkinson*, [34] and *Galambos*,[35] where there is, in particular, evidence of varying support for a number of different incidence criteria.

(b) Frame v Smith [1987] 2 SCR 99

The judgment in *Frame v Smith* was delivered in the midst of a surge of fiduciary cases and was one of the first cases in which the

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[29] *Guerin v R* [1984] 2 SCR 335 (SCC).
[30] R Flannigan 'The Boundaries of Fiduciary Accountability' (2004) 83 *The Canadian Bar Review* 35 69.

[31] This is discussed in detail in the following chapter.
[32] Flannigan 'The Boundaries of Fiduciary Accountability' 69.

[33] *Frame v Smith* (1987) 42 DLR (4th) 81, [1987] 2 SCR 99.
[34] *Hodgkinson v Simms* 1999 CarswellBC 438.

[35] *Perez v Galambos* 2009 SCC 48, [2009] 3 SCR 247, 2009 CarswellBC 2787.

Canadian courts sought to define the principles that govern the incidence of fiduciary duties in general, abstract terms.

The facts of the case

A husband and wife separated. The mother was awarded custody of their minor children and the father was granted liberal rights of access to them. The mother moved to various cities, changed the children's names and religion, and took various other actions relating to the children without notifying the father. She also denied him any access to the children.

The father sued the mother for wrongful interference with his legal relationship with his children. One of the potential bases for such a claim that Wilson J considered in her dissenting judgment was a breach of fiduciary duty.

The court's judgment

Wilson J, in her dissenting judgment, described relationships in which fiduciary duties have been imposed as having the following three general characteristics:[36]

(1) The fiduciary has scope for the exercise for 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 of power.

Applying these three characteristics, Wilson J concluded that the relationship between a custodial parent and a non-custodial parent has the characteristics of a fiduciary relationship.[37] Her reasoning

[36] *Frame v Smith* (1987) 42 DLR (4th) 81, [1987] 2 SCR 99 136.
[37] *Frame v Smith* [48].

was that the separation of the parents and of access from custody puts the custodial parent in a position of power or authority. That enables him or her to affect the non-custodial parent's relationship with his or her children in an injurious way. The non-custodial parent is thus vulnerable to that and there is little that he or she can do to restrain the custodial parent's improper exercise of authority or to obtain redress for it.

She went on to say that the non-custodial parent's interests in such circumstances are as worthy of protection as the interests that are commonly protected by fiduciary duties. The fact that such interests are not of an economic nature is not determinative.[38] In support of this argument, she then referred to various policy-based reasons for recognising the existence of a fiduciary duty on the part of the custodial parent in favour of the non-custodial parent. These included the comparative advantages of a fiduciary remedy over other potential remedies, the creation of a strong incentive on custodial parents to exercise their custodial rights in the interests of the non-custodial parent and, ultimately, the children, and the desirability of providing a court with a discretionary remedy that is more flexible and thus more attractive than other potentially available ones.[39]

Some comments on the court's judgment

Wilson J's 'three general characteristics' of fiduciary relationships have been the subject of extensive judicial and academic discussion on the criteria that govern the incidence of fiduciary duties. Although they have been applied in a number of subsequent cases (including the Supreme Court of Canada's majority judgment in *Lac Minerals v International Corona Resources Ltd),*[40] they have also been criticised for being too

[38] *Frame v Smith* [55].
[39] *Frame v Smith* [54].
[40] *Lac Minerals v International Corona Resources Ltd* [1990] FSR 441 599; *Canson Enterprises Ltd v Boughton & Co* [1991] 3 SCR 534, (1991) 85 DLR (4th) 129 SCC 543.

generalised and vague to be definitive of fiduciary relationships.[41]

However, Wilson J herself acknowledged that her three characteristics were merely descriptive and general in nature, and provided only a 'rough and ready guide'[42] for the recognition of relationships that give rise to fiduciary duties.

The value of the judgment does not therefore lie in the specific incidence criteria that Wilson J referred to, but rather in the fact that they have (and continue to be) widely cited as a conceptual and analytical starting point for the determination of issues of incidence and to stimulate further debate on those issues.

(c) Hodgkinson v Simms [1994] 3 SCR 377

One of the most prominent shifts by the Canadian courts on the issue of the criteria for the incidence of fiduciary duties occurred just a few years after *Frame v Smith* in the Supreme Court decision in *Hodgkinson.*

In *Hodgkinson*, a differently constituted majority of the same court that had delivered judgment in *Frame v Smith* changed position significantly by rejecting Wilson J's third 'vulnerability' criterion as an essential or defining feature of fiduciary relationships, and by introducing and applying the reasonable expectation criterion.

The facts of the case

The plaintiff (Hodgkinson) had appointed the defendant (Simms), who was a chartered accountant, to advise him on tax shelters and to identify attractive development projects for investment.

Simms recommended certain projects to Hodgkinson who, acting on Simms's advice, invested in those projects. What Simms failed to

[41] See for example M Conaglen *Fiduciary Loyalty: Protecting the Due Performance of Non-fiduciary Duties* (2010) 254–6 where he notes the lack of clarity about the meaning and inter-relationship between the three characteristics.
[42] *Frame v Smith* [136].

disclose to Hodgkinson, however, was that he (Simms) had a relationship with the developers of a number of those projects in terms of which they paid him certain project-structuring fees. Unfortunately the projects that Hodgkinson invested in did not prosper and, as a result, Hodgkinson suffered financial losses. Hodgkinson then sued Simms for damages for breach of fiduciary duty, arguing that Simms owed him a fiduciary duty to avoid any conflict of interests, and that by failing to disclose his conflicting personal interests and gains, he had breached that duty.

The two main issues before the court concerned the requirements for the existence of fiduciary duties and, assuming damages were an appropriate remedy for breach of fiduciary duty, how those damages were to be calculated. The focus of this discussion is on the first issue.

The court's judgment

On the issue of the incidence of fiduciary duties, the court held that the basis of fiduciary obligations is a reasonable expectation that one party will act solely in the interests of another.[43]

In this case, trust and loyalty were the central features of the parties' relationship and Hodgkinson had relied on Simms. There was a reasonable expectation that Simms would act only in Hodgkinson's interests. As such, Simms did owe Hodgkinson fiduciary duties. Simms had breached those duties by recommending investments in which he had a conflicting interest that he had not disclosed to Hodgkinson and that Hodgkinson had not consented to. That breach entitled Hodgkinson to restitutionary damages for his consequential loss.

The court's comments on particular fiduciary principles are summarised below. In the lengthy majority judgment, La Forest J discussed a number of incidence criteria in depth.

[43] *Hodgkinson* 1999 CarswellBC 438 2,3,18.

(i) On the relationship between the fiduciary concept and reliance

The court began by describing fiduciary principles as flowing 'inexorably' from the general principle stated by the English Court of Appeal in *Lloyds Bank Ltd v Bundy* that fiduciary duties–[44]

> tend to arise where someone relies on the guidance or advice of another, where the other is aware of that reliance and where the person upon whom reliance is placed obtains, or may well obtain, a benefit from the transaction or has some other interest in it being concluded. In addition, there must, of course, be shown to exist a vital element which in this judgment will for convenience be referred to as confidentiality. It is this element which is so impossible to define and which is a matter for the judgment of the court on the facts of any particular case.

(ii) On Wilson J's three-aspect description in Frame v Smith

With regard to the three characteristics for the identification of fiduciary relationships that Wilson J had proposed in *Frame v Smith*, the court said that although they had been followed as a 'rough and ready guide' in identifying new categories of fiduciary relationships, they constitute *indicia* that help to recognise a fiduciary relationship rather than ingredients that define it. They do not however always indicate whether or when fiduciary duties exist and, as such, are not useful in identifying every fiduciary relationship.

The court then drew a distinction between two 'general forms' of fiduciary relationships. The first are relationships that have as their essence discretion, influence over interests, and an inherent vulnerability. In these relationships, there is a rebuttable presumption, arising out of the purpose of the relationship, that one party has a duty to act in the best interests of the other party. These are the so-called fiduciary relationships *per se* and there are a number of recognised or established classes of them. Two obvious examples of

[44] *Lloyds Bank v Bundy* [1975] QB 326 (CA) 341.

this type of fiduciary relationship are trustee–beneficiary and agent–principal relationships.

However, the three-part analysis proposed by Wilson J encounters difficulties in identifying fiduciary relationships in fact. These are relationships in which fiduciary obligations are not innate to the kind of relationship concerned but arise as a matter of fact out of the specific circumstances of that particular relationship.

(iii) On the test for fiduciary relationships in fact

Having confined the *Frame v Smith* guidelines to fiduciary relationships *per se*, the court accepted the existence of a 'reasonable expectation' that one party would act only in the other's best interests with respect to the subject matter at issue as the determinant for the existence of fiduciary duties in individual relationships outside the established *per se* categories.[45] The presence of such a reasonable expectation in any given case depends on factors such as trust, confidence, the complexity of the subject matter, and community or industry standards.[46] Other non-exhaustive evidential factors to be considered include discretion, influence and vulnerability.

(iv) On the need for a mutual understanding of trust

Amplifying on the reasonable expectation requirement for a fiduciary relationship in fact, the court said that outside of the established categories of fiduciary relations *per se*, what is required is evidence of a mutual understanding between the parties that one would relinquish his or her own self-interest and act solely on behalf of the other. It went on to explain:[47]

> There must therefore be a state of affairs ... which impels or induces one party 'to relax the care and vigilance it would and should have ordinarily exercised in dealing with a stranger' ...

[45] *Hodgkinson 18.*

[46] *Hodgkinson* 3,18.
[47] *Hodgkinson* 17.

> [and] ... has been found to exist where there is a repose of trust ... along with an acceptance or invitation of such trust.

The court then said (with reference to advisers but seemingly also as a statement of general principle) that this must be more than a simple undertaking by one party to provide information and execute orders for the other.[48]

(v) On vulnerability

In a shift from the emphasis that Wilson J had placed on vulnerability as a feature of a fiduciary relationship in *Frame v Smith*, the court said that, although an 'inherent vulnerability' is part of the essence of a fiduciary relationship *per se* and an important indicator of one in fact, it is not the hallmark of a fiduciary relationship.[49] Fiduciary duties are only one of a number of generalised duties that the law uses to protect vulnerable persons in relationships of power-dependency. Such relationships exist whenever one party, whether by statute, agreement, a particular course of conduct, or by unilateral undertaking, gains a position of overriding power or influence over another party. In such cases the law will protect the vulnerable party through concepts such as fiduciary duty, undue influence, unconscionability and unjust enrichment. Which of these applies depends upon the reasonable expectations of the parties. However, in seeking to identify which duties flow from a particular 'power-dependency' relationship, it is wrong to focus only on the degree to which the power or discretion to harm another is somehow 'unilateral'. Persons in 'power-dependency' relationships are *ipso facto* vulnerable to harm, but the degree of vulnerability does not depend on some hypothetical vulnerability to protect oneself from harm, but rather on the party's reasonable expectations.

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[48] *Hodgkinson* 17.
[49] *Hodgkinson* 2,15.

(vi) On commercial transactions

The court also endorsed the argument that the courts are 'and should be' reluctant to recognise fiduciary duties in commercial interactions between parties dealing at arm's length. The reason for this reluctance is that those relationships derive their social utility from the pursuit of self-interest which is the 'very antitheses' of a fiduciary relationship where one party foregoes their own-interest to act solely in that of the other. Professional advisory relationships do not however fall within that category and there are not the same dangers in extending the fiduciary principle to them.[50]

(vii) On the relationship between contract and fiduciary duties

With regard to the relationship between contract and fiduciary duties, the court confirmed the generally accepted principle that, although a contractual agreement such as agency may give rise to fiduciary duties, the existence of a contract is not necessary for, and does not necessarily preclude, the existence of fiduciary obligations. The question in any case, regardless of whether or not there is some contract between the parties, is whether the one has the right to expect that the other will act in the former's best interests (or, in some instances, in their joint interests) to the exclusion of his own several interests.[51]

(viii) On policy considerations

While discussing the position of financial advisers in particular, the court indicated that there may be wider policy-based reasons for imposing fiduciary duties in certain kinds of relationships. This would be the case where, for example, specific regulation of one party's position might frustrate the very function they have to perform, and regulation through the enforcement of duties of honesty and good faith would be more appropriate. Where however one party is subject

[50] *Hodgkinson* 3,4,20,21,22,31,35.
[51] *Hodgkinson* 16.

to codes of conduct, such as rules of professional behaviour, the courts should not hold that party to a lower standard.

(ix) On reliance

Appearing to use the concepts of 'trust' and 'reliance' almost interchangeably, the court said that, within the context of fiduciary relationships, reliance 'does not require a wholesale substitution of decision-making power'. The court must, in all cases, consider the reality of the situation to determine the extent of reliance and whether it is sufficient to give rise to fiduciary duties.[52]

Some comments on the court's judgment

The main difficulty with the *Hodgkinson* judgment is the court's drawing of a distinction between fiduciary relationships *per se* and in fact.

Although the court described the features of both with reference to common criteria, such as the mutual understanding of the parties, discretion, influence and vulnerability, it also distinguished them on the basis that fiduciary relationships *per se* '[have] as their essence discretion, influence over interests, and an inherent vulnerability' and give rise to a 'rebuttable presumption' that one party has a duty to act in the ... interests of the other.[53] The court then described fiduciary relationships in fact as requiring 'a mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party'.[54]

It is not clear whether the court intended to go as far as suggesting that the incidence criteria are different for these two types of relationships, or whether the same general criteria apply to both, but do so with different emphases in the determination of the same 'ultimate' enquiry into whether there was, in all the circumstances, a reasonable expectation that the one party would act solely in the

[52] *Hodgkinson* 3.
[53] *Hodgkinson* 17..
[54] *Hodgkinson* 17.

interests of the other. In either case, the drawing of any distinction between different 'types' of fiduciary relationships (and the acceptance of the class-wide categorisation of certain relationships as 'fiduciary ones' that is implicit in it) is problematic for all the reasons set out in chapter 4.

On a more positive note, the judgment reflects the strongest Canadian support for an expectation-based criterion for the incidence of fiduciary duties. The only difficulty with the judgment in this regard is that it favoured the 'reasonable expectation' formulation over that of a 'justified expectation'; however, as previously suggested, determining the reasonableness of an expectation with reference to what a reasonable person is entitled to expect allows for a reconciliation of the two concepts.

d) *Galambos v Perez* (2008) 253 BCAC 149

The unanimous and comprehensive judgment of all nine judges of the Canadian Supreme Court in *Galambos* reflects a 'firmer', more united position than previous Canadian cases on some fundamental principles of fiduciary law and, in some respects, also brings Canadian law more in line with that of England and other Commonwealth jurisdictions such as Australia. There are however some aspects of the judgments that are problematic. These are discussed below.

<u>The facts of the case</u>

The appellant (Perez) was employed as the office manager of the defendant's (Galambos') law firm ('the firm'). As part of her duties, she oversaw all the firm's finances and accounting and had unlimited signing authority on all its bank accounts, except its trust accounts. In January 2002 the firm experienced a cash flow problem. In an attempt to resolve the problem, Perez obtained a personal loan and deposited $40,000 into the firm's account. Galambos had not asked her to advance this money and only learnt of this several days later. When Galambos found out about this, he instructed Perez to

reimburse herself with interest, an instruction she did not follow, apart from repaying herself $15,000.

During and after 2002, the firm's financial situation deteriorated. Perez made several more deposits of her own funds into the firm's accounts and covered some of the firm's expenses with her personal credit card. She made these advances voluntarily on her initiative, often without Galambos' prior knowledge and without any undue influence from him.

As the firm's financial position continued to decline, Perez began to deposit more of her own funds into the firm's general account. On 12 and 21 February 2003, she deposited cheques for $10,000 and $22,000. She testified that she would monitor the account and inform Galambos when funds were needed. According to her, he would simply ask her to 'do something'. She would then, without necessarily telling him first, deposit more of her own funds into the firm's account.

In addition to these deposits, Perez frequently paid for the firm's supplies with her own credit card and then reimbursed herself for those expenses. She also used her card to make certain personal purchases for Galambos. Galambos was aware that this was her practice. He said she volunteered to use her personal credit card in this way so that she could earn frequent flyer points.

Throughout 2003 and in early 2004, the firm's fortunes continued to decline. The firm continued to experience a reduction in revenue, laid off staff, and its bank overdraft was constantly at its limit and beyond. Perez continued advancing money to the firm, asserting in her testimony that she did so in reliance on Galambos' promises that the firm's fortunes were about to improve and that he would pay her back.

During the time she worked for the firm, it also handled the preparation and execution of new wills for Perez and her husband as well as two mortgage transactions. The firm did not expect to be and was not paid for these services.

The firm's financial position continued to deteriorate and it was eventually placed in receivership. As an unsecured creditor, Perez received nothing from the liquidation.

Perez brought an action against Galambos, the firm, and Galambos' wife for negligence, breach of contract and breach of fiduciary duty. The discussion that follows is limited to the claim for breach of fiduciary duty.

Perez claimed that during the period in which she had advanced funds to the firm, the defendants owed her fiduciary duties on the basis that there was a solicitor–client fiduciary relationship *per se* between them or, alternatively, on the basis that their relationship was a fiduciary relationship in fact. She then argued that the defendants had breached these fiduciary duties by failing to provide her with the legal advice that she required in connection with her loans to the firm and by acting for her while in a position of conflict of interest.

The details of Galambos' arguments in the Canadian Supreme Court's findings, as well as the general principles it laid down, are discussed below.

The court's judgment

The court confirmed the finding of both the trial court and the Court of Appeal that there was no ongoing solicitor–client relationship, and therefore no fiduciary relationship *per se* between the parties. Even if there was a limited solicitor–client relationship between them, whatever fiduciary duties arose from it did not extend to the cash advances she had made to the firm.

(i) The courts' obiter *statements on fiduciary relationships* per se

During the course of the judgment, the court also made the following *obiter* statements with regard to fiduciary relationships *per se*.

Fiduciary relationships *per se* are ones that are considered to give rise to fiduciary obligations because of their inherent purpose or their presumed factual or legal incidents.[55] There is no doubt that the solicitor–client relationship is an example. However, not every legal claim arising out of a *per se* fiduciary relationship will give rise to a claim for a breach of fiduciary duty.

A claim for breach of fiduciary duty may be founded only on breaches of the specific obligations imposed because the relationship is categorised as a fiduciary one.[56] So, for example, not all lawyers' duties towards their clients are fiduciary in nature. While the solicitor–client relationship has fiduciary aspects, many of the tasks undertaken in the course of that relationship do not attract a fiduciary obligation.[57]

(ii) The court's finding on the fiduciary relationship in fact argument

The court began by confirming that fiduciary obligations may arise as a matter of fact out of the specific circumstances of a particular relationship that falls outside the established categories of fiduciary relationships *per se*.[58] Whether such a relationship exists is primarily a question of fact to be determined by examining the specific circumstances of the case.[59]

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[55] *International Corona Resources Ltd v LAC Minerals Ltd* [1989] 2 SCR 574 (SCC) 646 per La Forest J.

[56] *Galambos*, reversing *Perez v Galambos* (2006) 2006 BCSC 899, citing *International Corona Resources Ltd v LAC Minerals Ltd* [1989] 2 SCR 574 (SCC) 647.

[57] *Galambos*, quoting Binnie J's statement in *3464920 Canada Inc v Strother* 2007 SCC 24 [34]: 'Not every breach of the contract of retainer is a breach of fiduciary duty'.

[58] *Galambos*, confirming *International Corona Resources Ltd v LAC Minerals Ltd* [1989] 2 SCR 574 (SCC) 648 per La Forest J and *Hodgkinson* .

[59] *Galambos*, reversing *Perez v Galambos* (2006) 2006 BCSC 899, citing *International Corona Resources Ltd v LAC Minerals Ltd* [1989] 2 SCR 574 (SCC) 648 per La Forest J.

(iii) The argument that there was a power-dependency relationship between the parties and the related issue of vulnerability

The trial court had found that there was no fiduciary relationship in fact between the parties. The Court of Appeal reversed that finding. It held that a 'power-dependency' relationship may arise on the basis of the reasonable expectations of the weaker party that the other party will act in their (the weaker party's) interests, notwithstanding the absence of a mutual understanding between the parties to that effect. According to the Supreme Court, it was implicit in this reasoning that a person may owe another person a fiduciary duty even though they have no discretionary power to affect that other person's legal or practical interests.

Applying those principles, the Court of Appeal held that the parties' relationship was similar to the 'power-dependency' relationship that had given rise to fiduciary duties in *Norberg v Wynrib*,[60] in that Galambos had gained a position of overriding power or influence over Perez of the nature referred to in *Hodgkinson*.[61] As the Court of Appeal put it:[62]

> As Perez's employer, Galambos was in a position of power and influence relative to Perez. It is clear from the circumstances that the appellant looked up to ... Galambos and expected that he would look out for her best interests as a result of the nature of their relationship.

The Supreme Court confirmed the trial court's findings that there was no evidence of any power-dependency between the parties and distinguished the facts from those in *Norberg* and *Mustaji* on the basis that in those cases the alleged fiduciaries had the opportunity to exercise power of discretion over the claimants and were capable of using that power or discretion without the claimant's knowledge or

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[60] *Norberg v Wynrib* (1992) 92 DLR (4th) 449.

[61] *Hodgkinson* ; *Mustaji v Tjin* (1995) 24 CCLT (2d) 191 (BCSC).

[62] Court of Appeal judgment in *Galambos* at [50].

consent so as to affect their legal and practical interests, and that they were especially vulnerable to that exercise of discretion and control. In Perez's case there was 'nothing of this sort'.

The court went on to say:[63]

> Power-dependency relationships are not a special category of fiduciary. They are relationships with their own governing principles. The criteria for the existence of fiduciary duties in such relationships are no different to those which apply all other *ad hoc* fiduciary relationships. In all cases, the law is ... clear that fiduciary duties will only be imposed on those who have expressly or impliedly undertaken them.[64]

La Forest J's reference to a 'power-dependency' relationship in *Hodgkinson* was simply a description of certain relationships that may also be fiduciary, but did not create a separate category of *ad hoc* fiduciary relationships. Although this concept may be useful to describe certain relationships, it has not been and should not be used as a tool for categorisation. Not all power-dependency relationships are fiduciary in nature, and identifying a power-dependency relationship does not, on its own, materially assist in deciding whether the relationship is a fiduciary one or not.

(iv) The trust and reliance argument

Perez had argued that she had advanced the loans trusting and relying on Galambos' assurances that the firm's finances would improve and that it would be securing some high-fee-generating work.

The trial court found no evidence of any such trust or reliance on Perez's part and held that, even if she had in fact placed any such trust or reliance in Galambos, it would not have been reasonable. The Court of Appeal reached a different conclusion on the facts. It

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[63] *Galambos*, reversing *Perez v Galambos* (2006) 2006 BCSC 899, additional reasons at *Perez v Galambos* (2008) 300 DLR (4th) 329 [71]–[74].

[64] *Galambos* , reversing *Perez v Galambos* (2006) 2006 BCSC 899, additional reasons at *Perez v Galambos* (2008) 300 DLR (4th) 329 [71].

held that the parties' relationship did place Perez in a position of vulnerability, that she looked up to and trusted Galambos, and that there was a power imbalance between them. It also rejected the trial court's finding that any reliance by Perez on Galambos' statements that things would turn around was unreasonable. The Court of Appeal's reasoning was that Galambos was in the best position to assess the firm and that Perez had no means of knowing whether the flow of work that Galambos had referred to would materialise.

The Supreme Court rejected the Court of Appeal's findings on the reliance issue, on two grounds.[65] The first was that Perez had not in fact relied on those statements by Galambos when she advanced the loans to the firm. As such, the issue of whether such reliance, had it occurred, would have been reasonable was both hypothetical and irrelevant. Second, even if Perez had in fact placed such reliance on Galambos' statements, there was no evidence to contradict the trial court's finding that it would have been unreasonable.

(v) The need for a mutual understanding or an undertaking by the fiduciary

Relying on *Hodgkinson*,[66] the trial judge held that, in order for there to be an *ad hoc* fiduciary duty, there must be a mutual understanding between the fiduciary and the beneficiary that the fiduciary has relinquished his or her own self-interest and has agreed to act solely on behalf of the beneficiary.[67] The judge concluded that there was no such mutual understanding between Perez and Galambos.

The Court of Appeal held that the relationship between Galambos and Perez was one of 'power-dependency' and that in such relationships there need not be such a mutual understanding. Instead, what is required in the case of power-dependency

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[65] *Galambos*, reversing *Perez v Galambos* (2006) 2006 BCSC 899, additional reasons at *Perez v Galambos* (2008) 300 DLR (4th) 329 [61]–[62].
[66] *Hodgkinson*.

[67] *Galambos*, [43].

relationships is proof of an expectation on the part of the plaintiff – which is reasonable in all the circumstances – that the defendant would act in his or her best interests. It found on the facts that Perez did have such a reasonable expectation.

The Supreme Court suggested (*obiter*) that, while a mutual understanding may not always be necessary in all cases, it is a fundamental requirement for all *ad hoc* fiduciary duties that there be an undertaking by the fiduciary, which may be either express or implied, that the fiduciary will act in the best interests of the other party. The court held further that 'it may not be necessary for the beneficiary in all cases to consent to this undertaking'. Such an undertaking on the part of the fiduciary is also always present in *per se* fiduciary relationships.[68]

On the facts, the court found that there was no evidence of any explicit undertaking by Galambos to act in Perez's interests in relation to the cash advances and that no such undertaking could be implied on the facts.[69] Galambos had never explicitly requested a loan. His requests that Perez 'do something' to solve the cash flow problem referred to contacting the bank to extend the firm's line of credit. Since Galambos had never requested the advances, it was difficult to see how he could have given any implied undertaking to act in Perez's interests in relation to them. Given this absence of an express or implied undertaking of loyalty, their relationship did not impose any fiduciary duties on Galambos.

The court later amplified on these principles by saying:[70]

> The nature of the undertaking required for any ... fiduciary duty to arise is an undertaking by the fiduciary 'to act in accordance with the duty loyalty reposed on him or her' by exercising 'a discretionary power in the interests of that other party'.

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[68] *Galambos*, [77].
[69] *Galambos*, [81].
[70] *Galambos*, reversing *Perez v Galambos* (2006) 2006 BCSC 899, [75]–[81].

As said by McLachlin J in *Norberg* 'Fiduciary relationships ... are always dependent on the fiduciary's undertaking to act in the beneficiary's interests'.

> This undertaking by the fiduciary may be express or implied. It may be the result of the exercise of statutory powers, the express or implied terms of an agreement or, perhaps, simply an undertaking to act in this way. In cases of *per se* fiduciary relationships, this undertaking will be found in the nature of the category of relationship in issue. The critical point is that in both *per se* and *ad hoc* fiduciary relationships, there will be some undertaking on the part of the fiduciary to act with loyalty.

This does not mean, however, that an express undertaking is required. Rather, the fiduciary's undertaking may be implied in the particular circumstances of the parties' relationship. Relevant to the enquiry of whether there is such an implied undertaking are considerations such as professional norms, industry or other common practices, and whether the alleged fiduciary induced the other party into relying on the fiduciary's loyalty.

In *Galambos*, there was no such express or implied undertaking.

(vi) Reasonable expectation

The trial court found no evidence that Perez had relied on or expected Galambos to act in her interests when she made the advances to the firm but that, even if she had, it would have been unreasonable in the circumstances. It held that, if there was a disparity in their knowledge of the firm's finances, it was Perez who was more knowledgeable. In such circumstances, any reasonable person would have understood that she assumed the position of a precarious unsecured creditor, not that of a protected beneficiary. The Court of Appeal reversed that finding and, after stating that a reasonable expectation is both necessary and sufficient to give rise to fiduciary duties, found that Perez did have a reasonable expectation

that the defendants would act in her interests and, for that reason, they owed her fiduciary obligations. The Supreme Court therefore confirmed the trial court's findings that there was no evidence of any such reasonable expectation on Perez's part.[71]

(vii) Transfer of discretionary power

The Supreme Court held that, in addition to an undertaking of loyalty by the fiduciary, '[i]t is fundamental to the existence of any fiduciary obligation that the fiduciary has a discretionary power to affect the other party's legal or practical interests.'[72]

The court said that this discretionary power may, depending on the circumstances, be quite broadly defined. It may arise from power conferred by statute, agreement, perhaps from a unilateral undertaking or, in particular situations such as the professional advisory relationship addressed in *Hodgkinson*, by the beneficiary entrusting the fiduciary with information or seeking advice in circumstances that confer a source of power. While what is sufficient to constitute power in the hands of the fiduciary may be controversial in some cases, the requirement that there be such power in the fiduciary's hands is not. However, the presence of this sort of power will not necessarily on its own support the existence of an *ad hoc* fiduciary duty, although its absence will negate it.

Applying these principles to the facts, the Supreme Court confirmed the findings of the trial court and the Court of Appeal that there was no evidence that Perez relinquished her decision-making power with respect to the loans to Galambos or that there was any discretion over her interests that he was able to exercise unilaterally or otherwise, and that this was fatal to her claim that there was an *ad*

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[71] *Galambos v Perez*, [75].

[72] Citing *Frame v Smith* (1987) 42 DLR (4th) 81, [1987] 2 SCR 99 136–7; *Norberg v Wynrib* [1992] SCR 226 272; E Weinrib 'The Fiduciary Obligation' (1975) 25 *University of Toronto LJ* 1 4, quoted with approval in *Guerin v R* [1984] 2 SCR 335 (SCC) 384, and followed in *Virk v Brar* 2012 CarswellBC 2030 [45].

hoc fiduciary duty on Galambos' part in relation to those cash advances.

(viii) Some further general principles of fiduciary law

In addition to those referred to above, the Supreme Court also set out a number of additional 'basic principles' of fiduciary law.[73]

On the vulnerability criterion, the court held that, although the protection of one party against abuse of power by another in certain types of relationships or in particular circumstances is an important focus of fiduciary law, asserting that the protection of the vulnerable is the role of fiduciary law puts the matter too broadly. The law seeks to protect the vulnerable in many contexts and through many doctrines. As La Forest J noted in *Hodgkinson*, 'whereas undue influence focuses on the sufficiency of consent and unconscionability looks at the reasonableness of a given transaction, the fiduciary principle monitors the abuse of a loyalty reposed'.[74] This makes two important points that help to sharpen the focus on the role of fiduciary law.

The first is that fiduciary law is more concerned with the position of the parties that results from the relationship that gives rise to the fiduciary duty than with their respective positions before they enter into that relationship. Thus, and as stated by the court in *Hodgkinson*,[75] while vulnerability in the broad sense resulting from factors external to the relationship is a relevant consideration, a more important one is the extent to which vulnerability arises from the relationship.[76]

With regard to the importance of the underlying relationship between the parties and issues of public policy, the court said that the

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[73] *Galambos v Perez*, reversing *Perez v Galambos* (2006) 2006 BCSC 899, additional reasons at *Perez v Galambos* (2008) 300 DLR (4th) 329 [67]–[82].
[74] *Hodgkinson* 406.

[75] *Hodgkinson* 406.

[76] See also *Building Solutions International Inc v Benazzi* 2014 Carswell Out 12559 [18].

fact that fiduciary law focuses on relationships underpins all the previously referred to general principles. 'It is the nature of the relationship ... that gives rise to the fiduciary duty'.[77] The underlying purpose of fiduciary law may be seen as protecting and reinforcing 'the integrity of social institutions and enterprises', recognising that 'not all relationships are categorised by a dynamic of mutual autonomy, and that the market place cannot always set the rules'.[78]

Some comments on the court's judgment

(i) The drawing of a distinction between per se *and* ad hoc *fiduciary relationships*

As with *Hodgkinson*, the judgment is problematic in its use, and thus tacit endorsement, of the drawing of a distinction between fiduciary relationships '*per se*' and '*ad hoc*' fiduciary relationships, and its explanations of how the requirement of an undertaking by the fiduciary arises in different ways in these two types of fiduciary relationships.

The theoretical, doctrinal and analytical difficulties with this distinction and with the related categorisation of certain classes of relationships as 'fiduciary' ones have been discussed in chapter 4, together with the arguments that exist in favour of the application of the same generic fiduciary principles to all relationships.

In addition, and again like the judgment in *Hodgkinson*, the judgment is not clear on the nature of any distinctions in the principles that govern these two types of fiduciary relationships or whether the criteria for the incidence of fiduciary duties within them differ. The court discussed only the essential criteria for the existence of fiduciary duties in *ad hoc* fiduciary relationships in fact. It did however also mention that the undertaking requirement applies to all kinds of fiduciary relationships, although the way it is fulfilled in *per se* fiduciary relationships may be different to the ways in which it is

[77] Quoting Dixon J (as he then was) in *Guerin v R* [1984] 2 SCR 335 (SCC) 384.
[78] Citing *Hodgkinson* 422.

fulfilled in *ad hoc* ones. Although the court's express focus on the criteria for the existence of *ad hoc* obligations is understandable, given that the relationship in question did not fall within any of the established categories of *per se* fiduciary relationships, the court continued to use the *per se* or *ad hoc* distinction when making more general (albeit often *obiter*) statements of fiduciary principle. Unfortunately, most of these were loosely phrased 'aside' comments that unnecessarily perpetuated the lack of clarity on a number of fundamental fiduciary principles.

(ii) The 'undertaking' and 'transfer of discretionary power' criteria as the two essential incidence criteria

The court held that there are two essential criteria that need to be fulfilled in order for one person (the fiduciary) to incur *ad hoc* fiduciary duties in favour of another person. The one is an express or implied undertaking by the fiduciary to act in the other's interests and the other is some transfer to the fiduciary of a discretionary power to affect the other's legal or practical interests. The court found that there was no evidence of the fulfilment of either of these two essential requirements on the facts of the case.

There are however a number of aspects of these two criteria that require further comment.

(iii) The 'undertaking' requirement

The need for some form of undertaking by the fiduciary to act in the beneficiary's interests has been accepted as essential in a number of judgments including, for example, *Mothew*[79] and *Hospital Products*[80] and, as Conaglen points out, it is more significant and analytically useful than the court's second essential 'discretionary power' criterion. Although the existence of some discretionary power

[79] *Bristol & West Building Society v Mothew* [1988] Ch 1 18.
[80] *Hospital Products v United States Surgical Corp* (1984) 55 ALR 417 (HCA), (1984) 156 CLR 41 (HCA) 96–7. See also M Conaglen 'Fiduciary Duties in Canada' (2010) 69(3) *Cambridge LJ* 450 451.

has been explicitly accepted in Anglo-Australian fiduciary orthodoxy,[81] it does not distinguish fiduciary relationships from other relationships in which one party holds such a power in relation to the other but does not attract fiduciary obligations. Insofar as it is an appropriate criterion, the undertaking requirement on the other hand does provide that differentiation. In addition, requiring some form of undertaking by the fiduciary (albeit an often implied one) also ensures that the imposition of fiduciary accountability is not unduly 'beneficiary-centred'.

Other general concerns with the undertaking criterion have already been discussed earlier in this chapter. The one most evident in *Galambos* is that an express undertaking requirement is clearly too narrow to encompass all cases in which fiduciary duties have or ought properly to be recognised. There are many cases in which persons who are recognised as being bound by fiduciary duties do not subjectively give or intend to give any such undertaking. The only way in which the undertaking requirement can operate with sufficient inclusivity is through the use of the concept of a deemed or implied undertaking. The court did say in this regard that an express undertaking is not required and that the fiduciary's undertaking may be implied in the particular circumstances of the parties' relationship. It went on to say that–

> [r]elevant to the enquiry of whether there is such an implied undertaking are considerations of professional norms, industry or other common practices and whether the alleged fiduciary induced the other party into relying on the fiduciary's loyalty.[82]

Unfortunately, the court did not offer any specificity on or examples of the kinds of circumstances that would give rise to an implied undertaking.

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[81] See, for example, Conaglen 'Fiduciary Duties in Canada' 451.

[82] *Galambos v Perez*, reversing *Perez v Galambos* (2006) 2006 BCSC 899.

This is not however to suggest that it is necessary or desirable for those circumstances to be defined in detail, for that would again improperly compromise the flexibility of the fiduciary doctrine. There are however more fundamental concerns with having to rely heavily on an implied undertaking and the 'space' within that concept to capture all fiduciary obligations. The more that the factors and circumstances that may give rise to 'implied undertaking' are kept open and flexible, the vaguer its meaning becomes.

With some strained logic Flannigan interprets the *Galambos* undertaking requirement as the equivalent of his 'limited access' thesis and, having done so, approves it as 'conventional science'.[83] He is however critical about the way in which the court described that requirement as 'an undertaking by the fiduciary, which may be express or implied, that the fiduciary will act in the best interests of the other party'. As Flannigan correctly points out, this incorrectly frames the fiduciary duty in prescriptive terms and as constituting a positive duty on the fiduciary to actually act, and to do so in the best interests of the beneficiary. This is probably simply an unfortunate, careless choice of words by the court. As I have argued, the fiduciary duty is primarily proscriptive. It only requires that if and when the fiduciary acts, he or she does not do so in order to further any interests other than those of the beneficiary. The fiduciary undertaking is therefore not a positive undertaking to actually take any action in the interests of the beneficiary. It is an undertaking of restraint not to act other than in the beneficiary's interests.

(iv) The failure to clearly explain the status of the 'mutual understanding' criterion

Another criticism of the *Galambos* judgment is its failure to clearly explain the extent to which a mutual understanding between the

[83] R Flannigan 'Fact-Based Fiduciary Accountability in Canada' (2010) 36 *The Advocates' Quarterly* 431. Also available at http://ssrn.com/abstract=1568434.

parties that one will act in the other's interests is relevant to the incidence of fiduciary obligations.

The trial court, relying on *Hodgkinson*, had held that in order for there to be a fiduciary relationship in fact, there must be a mutual understanding between the fiduciary and the beneficiary that the fiduciary party has relinquished his or her self-interest and agreed to act solely on behalf of the beneficiary. The Court of Appeal, on the other hand, held that since the relationship between the parties was one of 'power-dependency', there was no need for any such mutual understanding.

The Supreme Court in *Galambos* did not include a mutual understanding of the fiduciary's loyalty to the beneficiary's interests as an essential requirement for fact-based fiduciary duties. On the other hand, the court also failed to decide whether there are circumstances in which such an understanding will be necessary or relevant to the existence of fiduciary obligations. It said in this regard that a 'mutual understanding may not always be necessary' but that it was a point that it did not 'need to decide here' and that it was not necessary to go so far as to say that a mutual understanding is necessary in all cases.[84] This seems to suggest that, depending on the circumstances, a mutual understanding may be necessary for the incidence of fiduciary obligations in some cases. If that is correct, it would have been useful if the court had provided some indication of when it would be the case. Flannigan argues that a mutual understanding between fiduciaries and beneficiaries is not a 'conventional requirement' for fiduciary accountability, although he does acknowledge that it is present in various relationships that give rise to fiduciary duties, such as those between trustees and settlors, and between guardians and those who appoint them.[85]

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[84] *Galambos*, reversing *Perez v Galambos* (2006) 2006 BCSC 899, additional reasons at *Perez v Galambos* (2008) 300 DLR (4th) 329 [75].
[85] Flannigan 'Fact-Based Fiduciary Accountability in Canada' 437.

(v) The court's discussion of 'reasonable expectation'

Another criticism of the judgment concerns its treatment of the 'reasonable expectation' criterion. It discussed this only briefly and the fact that it afforded it so little attention is in itself disappointing, given its endorsement in the earlier decision in *Hodgkinson* where the court had referred to it as a fundamental incidence criterion.

There are also other difficulties with the court's approach to this criterion. One is that it discussed only the concept of a 'reasonable' expectation. This may be the result of how the criterion had been formulated by the parties in their arguments, but it would have been useful if the court had also considered the more compelling 'justified' variation. Furthermore, it is clear that the court was considering reasonable expectation as a 'primary' incidence criterion for fiduciary duties, in the same way as it considered its undertaking and discretionary power requirements. As argued earlier, the expectation criterion is better construed not as a 'primary' requirement, but rather as the product or cumulative result of an appropriate combination of other individual 'primary' criteria, such as an undertaking of loyalty, the existence of discretionary power and such other factors as may be relevant. So, although an expectation of loyalty will and must be present for any fiduciary obligation to exist, it will exist only because there are other 'primary' criteria in place that give rise to or result in it.

Another fundamental difficulty with the *Galambos* judgment is that the court did not express a clear position on the status of the expectation criterion. The court simply said that the Court of Appeal had 'erred by basing a fiduciary obligation on ... Perez's reasonable expectation'. This was merely a statement about the Court of Appeal's finding of fact rather than one of general principle. Its only other rejection of the expectation criterion was also specifically linked to a rejection of the argument that power-dependency relationships are a separate category of fiduciary relations, which give rise to fiduciary duties on the basis of reasonable expectation alone, and the court also did not lay down any general principle. Flannigan interprets

the *Galambos* judgment as an 'explicit rejection' of the reasonable expectation criterion and welcomes that 'rejection'.[86] There is however nothing in the *Galambos* judgment that goes as far as a complete rejection of reasonable expectation as a factor relevant to the incidence of fiduciary duties or to any statements of general principle in relation to its status. And even if Flannigan is correct on this point, the kinds of factors that the court did consider relevant as incidence criteria are the same ones that would give rise to a reasonable expectation.[87] As a result, the status of expectations and their relevance to the incidence of fiduciary obligations in Canadian law remain unclear.

(vi) The 'transfer of discretionary power' requirement

The court also made a number of conflicting statements in relation to the 'transfer of discretionary power' criterion.

Although the court identified discretionary power on the part of the fiduciary as an essential prerequisite for the existence of *ad hoc* fiduciary obligations, it did not clearly indicate whether it alone is sufficient to give rise to fiduciary obligations. The court said in this regard that discretionary power 'will not necessarily on its own support the existence of an ad hoc fiduciary duty'.[88] The phrase 'not necessarily on its own' seems to have been used loosely. Although it could be taken as suggesting that the transfer of a discretionary power alone might be sufficient to find fiduciary duties in certain circumstances, that interpretation would conflict with the court's earlier statements that an undertaking of loyalty is also always necessary.

The court's statements on whether a transfer of discretionary power is always a necessary feature of *per se* fiduciary relationships are also unclear. On the one hand, the court quoted Dixon J's

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[86] Flannigan 'Fact-Based Fiduciary Accountability in Canada' 438.

[87] Conaglen 'Fiduciary Duties in Canada' 452.

[88] *Galambos*, reversing *Perez v Galambos* (2006) 2006 BCSC 899, additional reasons at *Perez v Galambos* (2008) 300 DLR (4th) 329 [84].

statement in *Guerin* that the existence of such a discretionary power is ‘the hallmark of any fiduciary relationship’. However, in the next sentence it referred to how Dixon had endorsed Weinrib’s description of a fiduciary relationship as one involving discretion on the part of the fiduciary, but had made ‘no comment on whether it was broad enough to embrace all fiduciary obligations’.

The fact that the court considered it necessary to expressly decline to extend the requirement to ‘all fiduciary obligations’ can be interpreted as suggesting that the existence of some discretionary power on the part of the fiduciary may not be a requirement for fiduciary relationships *per se*. On the other hand, it is difficult to think of any established *per se* fiduciary relationship where the fiduciary does not enjoy a discretionary power to affect the beneficiary’s legal or practical interests. All the relationships that have become established as fiduciary relationships *per se* are ones in which the fiduciary enjoys a significant degree of discretionary power in relation to the beneficiary. In the case of trustees and company directors, for example, this discretionary power is arguably the most obvious or dominant feature of the relationship. On this basis, the *Galambos* judgment can be construed as impliedly accepting that the criteria for the incidence of fiduciary obligations are the same for both *per se* and *ad hoc* fiduciary relationships. Insofar as that interpretation is correct, the judgment is to be welcomed, although the specific criteria that the court identified as being the essential ones (an undertaking of loyalty by the fiduciary and the transfer of discretionary power to him or her) remain subject to some criticism.

In addition, the court did not offer much clarity on the kind or the extent of the discretion or power that needs to be transferred to the fiduciary. The court did say that its nature ‘may, depending on the circumstances, be quite broadly defined’ and that it ‘may arise from power conferred by statute, agreement, perhaps from a unilateral undertaking or in particular situations ... by the beneficiary entrusting the fiduciary with information or seeking advice in circumstances that

confer some power'. This suggests that the power may be either *de jure* or *de facto*. But the court also said that 'what is sufficient to constitute power in the hands of the fiduciary may be controversial in some cases'. Unfortunately, the court left it there, without offering any further guidance on what would constitute the necessary transfer of discretionary power.

Flannigan is far more critical of the court's inclusion of a transfer of discretionary power as a prerequisite for fiduciary accountability. He describes it as 'radical', 'unsubstantiated', and as having the potential both to significantly narrow the ambit of conventional fiduciary accountability and to permit the courts to 'assess the merits of a good faith exercise of discretion'.[89]

These criticisms are unpersuasive. On the issue of the ambit of conventional fiduciary accountability, the existence of some power, discretion or ability on the part of the fiduciary to adversely affect the beneficiary's interests has always been a component of a fiduciary relationship and is present in some form, albeit at times under different labels, in all cases in which the courts traditionally recognised the existence of fiduciary duties, from the paradigm trustee–trust beneficiary relationship to the other 'established' categories of fiduciary relationships *per se*, to the fact-based ones. In fact, it is the existence of such a discretionary power (in the sense of an ability on the part of the fiduciary to adversely affect the beneficiary's interests through opportunistic or self-interested behaviour) that necessitates and justifies the imposition of fiduciary duties. With regard to the concern about opening the door to judicial scrutiny on the merits of the fiduciary's conduct (as opposed to a mere enquiry into whether he or she complied with his or her no-conflict and no-profit fiduciary duties), nothing in the *Galambos* judgment suggests that the court was sanctioning or even contemplating such a possibility.

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[89] Flannigan 'Fact-Based Fiduciary Accountability in Canada' 451..

Somewhat oddly, and after elaborating on these criticisms of the transfer of discretionary power requirement, Flannigan then back-tracks completely and (correctly) concedes that he may have misconstrued the judgment, and that the court may 'have meant simply that an actor must have some capacity or ability to appropriate asset value' and must have 'the ability to choose between properly using or interacting with an asset as authorized or wrongly exploiting its value in some unauthorized way'.[90] It appears clear from a reading of the judgment as a whole that that is exactly what the court meant.

As such, there are only two criticisms of the court's judgment on this aspect. One is that it could have made the meaning of 'discretionary power' clearer. The other, on a more conceptual level, is that defining 'discretionary power' as an ability to adversely affect the beneficiary's interests, and to choose whether or not to do so, blurs the boundaries between, and to some extent conflates, the 'vulnerability' and 'discretionary power' criteria. This, however, is not unduly problematic. 'Vulnerability' on the part of the beneficiary is the logical and substantive consequence of the fact that the fiduciary holds some discretionary power in relation to the beneficiary's interests. The two concepts are inter-connected and, operating together, explain the need, the function and the justification for the existence of the fiduciary duties that are imposed on the fiduciary.

(vii) The failure to define the concept of 'vulnerability'

There are also some difficulties with the court's discussion of the role of 'vulnerability' in the incidence of fiduciary obligations. The court began by saying that an 'important focus of fiduciary law is the protection of one party against abuse of power by another in certain types of relationships or in particular circumstances',[91] but that vulnerability is neither exclusive to nor the distinguishing feature of a fiduciary relationship. It also said that, unlike other doctrines such as

[90] Flannigan 'Fact-Based Fiduciary Accountability in Canada' 453.

[91] *Galambos*, reversing *Perez v Galambos* (2006) 2006 BCSC 899, additional reasons at *Perez v Galambos* (2008) 300 DLR (4th) 329 [67]–[68].

undue influence and unconscionability, which are concerned with the relative positions of the parties before they enter into their relationship, fiduciary law is more concerned with the relative vulnerability that arises from or as a result of the relationship.[92]

The difficulty however lies in the court's failure to define the kind of vulnerability it was discussing and, therefore, its failure to resolve the ongoing debate on the nature and extent of vulnerability that is (at least implicitly) required before fiduciary obligations will arise. As mentioned earlier, 'vulnerability' can take many forms. Insofar as the court was suggesting a need for 'vulnerability' in the sense of actual or deemed power inequality, the judgment is open to the same criticism set forth in the earlier discussion of the conventional individual fiduciary criteria.

The court did however say that 'to assert that the protection of the vulnerable is the role of fiduciary law puts the matter too broadly',[93] which indicates that 'vulnerability' should not be understood in a broad, generalised sense of any form of power, inferiority or disadvantage relative to another, and therefore that not all forms of vulnerability will give rise to fiduciary duties. If, as that statement suggests, the court was referring to 'vulnerability' in the sense of susceptibility to the risk that the fiduciary might use his or her discretionary power in relation to the beneficiary's legal or practical affairs by engaging in self-interested or opportunistic behaviour, then the judgment is unproblematic.

Flannigan presents the same argument.[94] Although he frames it in terms of his own 'limited access' thesis, he is correct in arguing that fiduciary accountability arises only 'where actors are vulnerable in the specific sense of being exposed to opportunism on the part of others to whom they have 'ceded' access or proximity to their assets'. He

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[92] *Galambos*, reversing *Perez v Galambos* (2006) 2006 BCSC 899, additional reasons at *Perez v Galambos* (2008) 300 DLR (4th) 329 [68].
[93] *Galambos*, reversing *Perez v Galambos* (2006) 2006 BCSC 899, additional reasons at *Perez v Galambos* (2008) 300 DLR (4th) 329 [67].
[94] Flannigan 'Fact-Based Fiduciary Accountability in Canada' 442.

defines 'assets' as including (and apparently being limited to) information and opportunity. The court in *Galambos* however referred to the risk of opportunism on the part the fiduciary in relation to the 'legal or practical interests' of the beneficiary.[95] While this covers the same opportunism in the sense of abuse of position or power for self-gain or for the promotion of any interests other than those of the beneficiary, it also suggests the inclusion of a category of beneficiary interests that is slightly broader than that contemplated by Flannigan's 'information and opportunity' interpretation.

4. THE APPROACH OF THE SOUTH AFRICAN COURTS

(a) Introduction

South African fiduciary law remains largely based on Innes CJ's judgment in *Robinson*[96] and its references to the criteria of 'trust, confidence and reliance' as the defining features of fiduciary relationships. However, as a result of the more recent influence of Canadian law (particularly the judgment in *Hodgkinson*) and the need to consider the application of fiduciary duties outside of company law and other established classes of fiduciary relationships, the South African Supreme Court of Appeal has refined those concepts. As the discussion of the *Volvo* case will show, those refinements, together with the other general fiduciary principles the South African courts have laid down, are in accordance with those which this thesis argues to be the most theoretically sound.

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[95] *Galambos*, reversing *Perez v Galambos* (2006) 2006 BCSC 899, additional reasons at *Perez v Galambos* (2008) 300 DLR (4th) 329 [50], [56], [70] and [83].
[96] *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168.

(b) Robinson v Randfontein Estates Gold Mining Co Ltd 1921 AD 168

The facts of the case

Randfontein Estates and a number of its subsidiary companies held large mineral interests in three farms, namely, Randfontein, Uitvalfontein and Waterval. The interests in Waterval took the form of a lease of the mineral rights, which was held by Randfontein Estates.

Robinson, who was the chairperson of Randfontein Estates' board of directors, had originally wanted to purchase Waterval for Randfontein Estates but had been unable to reach terms with its owner.

Acting through an agent, Robinson subsequently personally purchased an undivided half-share in the farm for £60,000 and sold it soon afterwards for £275,000 to Waterval Trust, a company that had been formed by Randfontein Estates for the purposes of acquiring and briefly holding Waterval farm. All the shares in Waterval Trust were held by Randfontein Estates and the £275,000 purchase price was paid by it to Robinson.

The main issue before the court was whether Robinson had breached any fiduciary duty to Randfontein Estates and, if so, whether Randfontein Estates was entitled to claim the £215,000 profit that he had made on the Waterval transaction on the basis of such breach.

The court's judgment

In describing the nature and characteristics of relationships in which fiduciary duties exist, and what they require, Innes CJ said:[97]

> Where one man stands to another in a position of confidence involving a duty to protect the interests of that other, he is not

[97] *Robinson* 179.

> allowed to make a secret profit at the other's expense or place himself in a position where his interests conflict with his duty. The principle underlies an extensive field of legal relationship. A guardian to his ward, a solicitor to his client, an agent to his principal, afford examples of persons occupying such a position. ... [T]he doctrine is to be found in the civil law (*Digest* 18.1.34.7), and must of necessity form part of every civilised system of jurisprudence. It prevents an agent from properly entering into any transaction which would cause his interests and his duty to clash.

He went on to say:

> [A] fiduciary relationship ... rests upon the broad doctrine that a man, who stands in a position of trust towards another, cannot, in matters affected by that position, advance his own interests (e.g., by making a profit) at that other's expense.

Applying these principles to the facts, the court held that Robinson was in a position of trust and confidence, and of power and authority in relation to Randfontein Estates, and that with that power came a corresponding responsibility to observe the utmost good faith and a fiduciary duty to refrain from making a profit for himself by using his position. By acquiring and re-selling the Waterval farm in the way he had, he had breached that fiduciary duty and was liable to account to Randfontein Estates for the £215,000 profit.

<u>Some comments on the court's judgment</u>

Although the judgment in *Robinson* was delivered almost a century ago and concerned the fiduciary duties of directors in particular, it has formed the basis of all South African fiduciary law in all contexts. And, as Hefer JA said in the relatively recent judgment in the Supreme Court of Appeal case of *Fieldstone*, it remains 'the fullest exposition in our law' of the general fiduciary principle, and it is 'no doubt, a tribute to its adequacy and a reflection of the importance of the

principles which it sets that it has stood unchallenged for 80 years and undergone so little refinement.'[98]

The influence of *Robinson* explains the almost exclusive association of concepts of trust, confidence and reliance with fiduciary duties in South African law. The deference that has been afforded to the judgment may account for at least some of the lack of any judicial or academic incentive to enquire, beyond those broad descriptions, into the nature of fiduciary relationships. It may also explain the Supreme Court of Appeal's preference for 'justified reliance' (as opposed to 'justified expectation') as the essential determinant of fiduciary accountability in the recent case of *Volvo*, which is discussed later in this chapter.

(c) Phillips v Fieldstone Africa (Pty) Ltd 2004 (3) SA 465 (SCA)

The *Fieldstone* judgment is one of the most recent cases in which the South African Supreme Court of Appeal considered general fiduciary principles and one of the few cases in which it has done so in any detail. The case is also particularly pertinent for present purposes in that it concerned the fiduciary duties of an employee.[99]

The facts of the case

The respondents had appointed the appellant to provide a corporate face for their business activities in South Africa and to render various services on their behalf. The respondents, acting through the appellant, entered into negotiations with two South African companies, in terms of which they would assist the latter with various business undertakings.

The appellant subsequently mentioned to one of the respondent's managers that there had been some suggestion that it might be

[98] *Phillips v Fieldstone Africa (Pty) Ltd and Another* [2004] 1 All SA 150 (SCA), 2004 (3) SA 465 (SCA) [30].
[99] For a discussion of the case, see M Havenga 'Appropriation of Corporate Opportunities by Directors and Employees' (2007) 1 *Tydskrif van Suid-Afrikaanse Reg* 169.

possible to acquire shares in one of the South African companies. The manager instructed the appellant to pursue the matter but heard nothing further until he again raised it with the appellant some two months later. On that occasion the appellant indicated that the South African company was prepared to sell the shares to him personally, but not to the respondents. The respondents' manager informed the appellant that he was not permitted to personally acquire the shares as their acquisition represented a corporate opportunity that belonged to the respondents. He further informed the appellant that if he were to personally acquire the shares, he would be breaching his duty as an employee of the respondents not to take personal advantage of a corporate opportunity belonging to the respondents and not to place himself in any position involving any conflict between his personal interests and those of the respondent. There was no further mention of the shares until the appellant resigned from the respondents' employment just over a year later.

The respondents then discovered that the appellant had acquired the shares in question for an amount of R732,000 and had subsequently re-sold them for R12,250,000. The respondents sued the appellant for R11,250,000, which was the profit they claimed the appellant had made in relation to the shares. The appellant's main defence (and the one that is relevant for the purposes of this discussion) was that he was not the respondent's agent in relation to dealings with the South African companies and, as such, did not owe the respondents any fiduciary duties.

The main issues before the court were whether the appellant owed the respondents any fiduciary duty and, if he did, whether he had breached that duty by personally acquiring the shares in the South African companies.

The court's judgment

(i) On fiduciary relationships and general fiduciary principles

The court began by describing fiduciary principles as principles that govern persons who occupy a 'position of trust' and as being based on English law. It then quoted Innes CJ's statement in Robinson that a fiduciary relationship exists–[100]

> [w]here one man stands to another in a position of confidence involving a duty to protect the interests of [another] and ... whether such a relationship exists will depend upon the circumstances of each case.

(ii) On the need for agency

The court also confirmed the general principle laid down in *Robinson* that fiduciary duties are not confined to agency, and therefore a relationship of agency is not necessary for them to arise.[101]

(iii) On the strict nature of liability for breach of fiduciary duty

Describing the no-conflict rule as a 'strict one' that may extend beyond the term of employment and that 'allows little room for exceptions',[102] the court also confirmed the general principle that the duty applies to both actual conflicts and those that are a real sensible possibility,[103] and that the only defence against liability for its breach is full disclosure to and free consent by the beneficiary.[104]

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[100] *Robinson* 177, quoted in *Fieldstone* [30].
[101] *Fieldstone* [27], [30], quoting *Robinson* 177–80.
[102] *Fieldstone* [31]; *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134 392G–393C.

[103] *Fieldstone* [31]; *Aberdeen Railway Co v Blaikie Bros* (1854) 1 Maq 461 (HL); *GE Smith Ltd v Smith; Smith v Solnik* [1952] NZLR 470;; *Canadian Aero Service v O'Malley* 1973 CarswellOnt 236, [1974] SCR 592.

[104] *Fieldstone* [31]; *Robinson*;; *Warman International Limited and Another v Dwyer and Others* [1994–5] 182 CLR 544 (HCA) 559.

(iv) Determining liability for breach of fiduciary duty

The court then approved the following method of analysis set out by Lord Upjohn in *Boardman v Phipps* (which used 'agency' terminology but was clearly intended to be applicable to all fiduciary relationships generally) as 'a practical way' of determining liability for breach of fiduciary duty:[105]

1. The facts and circumstances must be carefully examined to see whether in fact a purported agent and even a confidential agent is in a fiduciary relationship to his principal.

2. Once it is established that there is such a relationship, that relationship must be examined to see what duties are thereby imposed on the agent, to see what is the scope and ambit of the duties charged on him.

3. Having defined the scope of those duties one must see whether he has committed a breach thereof by placing himself within the scope and ambit of those duties in a position where his duty and interest may possibly conflict. It is only at this stage that any question of accountability arises.

4. Finally, having established accountability it only goes so far as to render the agent accountable for profits made within the scope and ambit of his duty.

(v) The fiduciary duties of employees

The court dismissed an argument that there is (or should be) a distinction in the application of fiduciary duties to company directors and agents on the one hand and 'mere employees' on the other, and that the latter 'should not be burdened with the strict and extensive

[105] *Fieldstone* [31], citing *Boardman v Phipps* [1966] 3 All ER 721 (HL) 758.

application' of the fiduciary concept.[106] It went on to expressly reject the Canadian approach established in *Canadian Aero Service v O'Malley* of confining fiduciary duties to directors, officers and 'key employees'.[107] It held as follows in this regard:[108]

> The South African cases which recognised the duty of an employee to account for profits received in breach of fiduciary duty ... do not lay down that such a duty can only arise in the relationship of managerial employees to their employers. There is no magic in the in the term 'fiduciary duty'. The existence of such a duty and its nature and extent are questions of fact to be adduced from a thorough consideration of the substance of the relationship and any relevant circumstances which affect the operation of that relationship.[109]

The lowlier or more restricted in discretion an employee's position is, the less likely it is that such duties will arise.[110] There is however no supporting South African law for the proposition that an employee is *per se* to be approached differently to any other alleged fiduciary in his or her relationship with another.

> It is the nature of the relationship, not the specific category of actor involved that gives rise to the fiduciary duty. The categories of fiduciary, like those of negligence, should not be considered closed.[111]

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[106] This argument was based on *SA Historical Mint (Pty) Ltd v Sutcliffe and Another* 1983 (2) SA 84 (C) 90B–91B.
[107] *Canadian Aero Service v O'Malley* 1973 CarswellOnt 236, 381. This case is discussed in detail in chapter 6 of this thesis.

[108] *Fieldstone* [33], citing *Jones v East Rand Extension Gold Mining Co Ltd* 1903 TH 325; *Robinson*; *Peacock v Marley* 1934 AD 1; *Uni-Erections v Continental Engineering Co Ltd* [1981] 3 All SA 73 (W*),* 1981 (1) SA 240 (W) 252H.
[109] *Fieldstone* [27].
[110] *Fieldstone* [33]; *Sibex Construction (SA) (Pty) Ltd v Injectaseal CC* 1988 (2) SA 54 (T) 65F–G.
[111] *Fieldstone* [33], Also *New Zealand Netherlands Society 'Oranje' Inc v Kuys* [1973] 1 WLR 1126 1129.

(vi) On particular incidence criteria

With regard to the issue of incidence criteria, the court agreed with *Hodgkinson* that the three characteristics of a fiduciary relationship that Wilson J suggested in *Frame v Smith*[112] are helpful in the identification of a fiduciary relationship, but are not decisive, and that the same criteria are as applicable in the employment context as to relationships that give rise to more obvious duties of trust. Where such duties do exist, they may extend beyond the term of employment.[113]

The court's judgment

Applying the general principles outlined above to the facts of the case, the court concluded that, at all relevant times, the appellant occupied a 'position of trust, confidence and good faith' in relation to the respondents, which imposed a fiduciary duty on him to place their interests above his own whenever the real possibility of conflict arose. This was because he acted as the lead principal in the dealings with the South African companies, had the ability to direct the respondents' resources, enjoyed considerable independence, reported to the respondents at his discretion, and was closely integrated with the client and its business. He also possessed expertise that was not shared by the respondents' other employees and executives and was, to that extent, beyond their direction. The respondents were thus largely dependent upon him to exercise his judgment properly and in good faith. For these reasons, he was bound by the fiduciary no-conflict rule, a duty to promote the respondents' interests, and a duty to disclose to them such information as came to his knowledge that might reasonably be thought to have a bearing on their business.

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[112] *Frame v Smith* (1987) 42 DLR (4th) 81, [1987] 2 SCR 99 136. These were discussed earlier in this chapter.
[113] *Fieldstone* [30]; *CyberScene Ltd and Others v i-Kiosk Internet and Information (Pty) Ltd* 2000 (3) SA 806 (C) 820I.

By personally acquiring shares in one of the South African companies without disclosing it to the respondents or obtaining their consent, he had succumbed to a potential conflict of interest between his duty and his self-interest and, as such, was liable for breach of fiduciary duty.

Some comments on the court's judgment

The judgment in *Fieldstone* is substantially in accordance with and has provided South African authority for a number of the principles that I have argued for in this thesis. In particular, it is authority for the proposition that the same generic fiduciary principles govern the incidence, nature and scope of fiduciary duties in any given relationship, regardless of whether it falls within or outside any of the established categories of fiduciary relationships. The court's statements that '[t]here is no magic in the term "fiduciary duty"' and that '[t]he existence of such a duty and its nature and extent are questions of fact' that are to be determined with reference to the substance of the relationship and its surrounding circumstances also provide support for the 'anti-categorisation' arguments that I advanced in chapter 4 of this thesis. In relation to employment, it is also authority for the general principle that fiduciary duties are not confined to senior or 'key' employees and that employees, at any level, may incur such duties in appropriate circumstances. With regard to incidence criteria, it provides authority for the potential (but not decisive) relevance of some discretion or power on the part of the alleged fiduciary, the ability to use that discretion or power unilaterally to affect the beneficiary's legal or practical interests, and a 'peculiar vulnerability' on the part of the beneficiary to the exercise of that discretion or power. It also provides clear confirmation of the strict nature of fiduciary liability and the potential continuation of fiduciary duties beyond the duration of a fiduciary relationship.

The only aspect of the judgment that is problematic is the court's treatment of the criteria for the incidence of fiduciary duties. The only

criteria that the court expressly identified as being potentially relevant to the existence of fiduciary duties are discretion or power, a unilateral ability to affect the beneficiary's legal or practical interests, and the 'peculiar vulnerability' suggested by Wilson J in *Frame v Smith*.[114] Unfortunately the court did not explain how those criteria are to be interpreted, or why they (potentially) give rise to fiduciary duties. As a result, it left the meaning of concepts such as 'peculiar vulnerability' unclear.

The court also failed to explain the criteria that it applied in reaching its finding that the appellant was bound by fiduciary duties on the facts. It described a fiduciary's position as a 'position of trust'[115] and the appellant's position in relation to the respondent's as one 'of confidence and good faith'.[116] Although it is clear that the court regarded these criteria as relevant, it would again have been useful if it had explained their meaning. It is also clear from its analysis of the facts of the case that the court also treated as relevant the degree of the alleged fiduciary's independence and autonomy, his level of responsibility, and his control over the beneficiary's assets. Again, it would have been useful if it had explained these criteria in more detail. The final concern with regard to the incidence criteria is that the court failed to acknowledge the justified expectation criterion and, without it, the judgment (like many others) failed to 'pull' together the various incidence criteria it applied in a way that provides a clear account and explanation for the existence of fiduciary duties.

(d) *Volvo Southern Africa (Pty) Limited v Yssel* [2009] JOL 24109 (SCA)

The facts of the case

Volvo required a manager for its information technology ('IT') division. In 2000, a personnel placement agent introduced Volvo to

[114] *Fieldstone* [33].
[115] *Fieldstone* [30], quoting *Robinson* 177.
[116] *Fieldstone* [27].

Yssel, whom Volvo agreed to appoint to the position. For tax-related and other reasons Yssel did not want to enter into a contract of employment with Volvo but rather wanted to be appointed by a labour broker, Highveld Personnel (Pty) Ltd ('Highveld'), which would then assign his services to Volvo. Volvo agreed to that arrangement, which was implemented and renewed through a series of written contracts which provided that Volvo would pay Highveld a monthly amount for Yssel's services, and Highveld would in turn remunerate Yssel. Volvo had no direct dealings with Highveld and entered into all these contractual arrangements through Yssel. The material terms of the contracts included a description of the services to be provided by Yssel to Volvo (which contained no express reference to liaising with labour brokers for the purpose of negotiating or concluding contracts for the provision of labour to Volvo) and a number of provisions confirming that Yssel was not an employee of Volvo.

That arrangement remained in place for a number of years and, by 2004, six other people working in Volvo's IT division were similarly employed by labour brokers who assigned their services to Volvo. In mid-2004 Yssel approached Volvo's human resources manager and informed her that some of the personnel in the IT division were unhappy with their current labour brokers and that he could arrange for them to transfer to Highveld at no extra cost to Volvo. He made the same suggestion to the IT personnel concerned, pointing out that their remuneration could be structured more favourably if they moved to Highveld. Both Volvo and the individuals agreed to the proposal and Yssel made the necessary arrangements. These were subsequently recorded in a written agreement between Volvo and Highveld, which provided that Highveld would supply the services of the personnel to Volvo in return for a monthly fee. Over a period of approximately nine months Yssel accompanied each of the IT personnel to Highveld's offices, where they signed a 'confirmation of assignment'. They all subsequently gave evidence that they were given to understand that from the amounts that Volvo paid for their

services, Highveld would retain a fixed charge of about R425 per month plus an administration fee of 3 per cent of their earnings. None of them was aware of the amount that Highveld was charging Volvo for their services.

Volvo again had no direct contact with Highveld in making these arrangements and acted at all times through Yssel, who played the role of ‘facilitator’ or ‘intermediary’. Once the arrangements were in place, Highveld sent the monthly invoices to Yssel, who presented them to Volvo for payment.

Unbeknown to both Volvo and the personnel concerned, Yssel had agreed with Highveld that Highveld would pay him a ‘commission’ for arranging for the personnel to transfer to Highveld, and that this commission would not be mentioned to either Volvo or the personnel. The amounts involved were substantial. In most cases Yssel received about 40 per cent of the monies that Volvo paid to Highveld for the services of the personnel. Investigations by an internal auditor at Volvo revealed that from August 2004 to January 2006 Volvo had paid R1,976,900 to Highveld for the services of the personnel (excluding the services of Yssel). Of this, the personnel received R1,087,650, Highveld deducted its own commission of R114,143 and the balance of R775,107 was paid to Yssel.

Once the payments to Yssel were discovered, Volvo sued Yssel in the High Court for payment of the R775,107 on the basis that it was a secret profit that Yssel had earned in breach of a fiduciary duty that he owed Volvo to act in its interests and not in his own. Yssel argued that, because he was not an employee of Volvo and had no other contractual relationship with Volvo, he had no fiduciary relationship with Volvo. As such, he did not owe Volvo any fiduciary duty.

The primary issues before the court were whether Yssel owed any fiduciary duties to Volvo to act only in its interests and, if so, whether his receipt of the undisclosed commission payments from Highveld constituted a breach of that duty.

The court's judgment

At the outset, the SCA outlined some general points of principle.

As in *Fieldstone*, the court began by quoting the statement in *Robinson*[117] that, 'in general terms', the fiduciary principle applies where 'one man stands to another in a position of confidence involving a duty to protect the interests of that other'.[118] The court then confirmed that, although certain relationships have become recognised as encompassing fiduciary duties, there is no closed list of fiduciary relationships. It is therefore open to the court to regard other relationships as fiduciary ones.[119]

The court also confirmed its earlier statements in *Fieldstone* regarding the strict nature of fiduciary accountability.

On the issue of the criteria for the incidence of fiduciary duties, the court, quoting from *Hodgkinson*,[120] emphasised that whether a relationship can properly be regarded as a fiduciary one will depend on the facts of the case and the specific circumstances of the relationship concerned. Features such as the discretion that one party may have in relation to the affairs of another, the influence that he or she is capable of asserting, the vulnerability of one person to another, and the trust and reliance that he has placed in the other are all considerations that may be relevant in particular cases. The suggestion in *Hodgkinson* that some form of mutual understanding in terms whereof one party agrees to relinquish his or her own interests and act solely on behalf of the other is a prerequisite for a fiduciary relationship is too restrictive. And while '[c]ontractual duties owed by one party to another will no doubt often go a long way towards defining whether a relationship is one of trust ... contractual privity is

[117] *Robinson* 177–8.
[118] *Volvo* [13].

[119] *Volvo* [16].

[120] *Hodgkinson* 176f–177b.

not indispensable to such a relationship'.[121] In all cases, '[w]hat is called for is an assessment, upon consideration of all the facts, of whether reliance by one party upon the other was justified in the circumstances'.[122]

Finally, the court approved the statement by Gibbs CJ in the Australian High Court case of *Hospital Products v United States Surgical Corp* that it is doubtful whether–[123]

> it is fruitful to attempt to make a general statement of the circumstances in which a fiduciary relationship will be found to exist. Fiduciary relationships are of different types, carrying different obligations ... and a test which might seem appropriate to determine whether a fiduciary relationship existed for one purpose might be quite inappropriate for another purpose.

Applying these principles to the facts, the court held that it was the nature of the position to which Yssel was appointed rather than any contractual relationship with Volvo that defined what Volvo could expect of him. He occupied the most senior position in Volvo's IT division and had not been brought to 'Volvo so as to provide him with an opportunity to hawk his own wares but had been brought there in the interests of Volvo'. The fact that his functions may not have included recruiting, employing or acquiring staff and that he could not be compelled to accept instructions to engage in matters of that nature was immaterial.

What was material was that he did actually engage himself in arranging matters between Volvo and its staff and, in doing so, he did not purport to be doing so as a stranger who was conducting his own affairs, but rather as an incident of his function as manager of the division. There could be no doubt therefore that he 'was well aware

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[121] *Volvo* [18].

[122] *Volvo* [17].

[123] *Hospital Products v United States Surgical Corp* (1984) 55 ALR 417 (HCA), (1984) 156 CLR 41 (HCA) 69.

that it was precisely because he was the manager of the division that Volvo could be induced to "relax the care and vigilance it would and should have ordinarily exercised in dealing with a stranger"'.[124] Yssel was well aware in this regard that Volvo's human resources manager had made no independent enquiries regarding the arrangement with Highveld and was acting entirely upon what he told her. The fact that he found it necessary to keep his commission secret made it abundantly clear that he was aware that she believed that he was arranging matters as part of his ordinary managerial duties and not for his own account. In short, he knew that she did not consider herself to be dealing at arm's length with an independent party, but with a manager of a Volvo division. Indeed, it was only because Yssel was the IT manager that the arrangement came about at all.

As such, Yssel had occupied a position of trust when he started making the arrangements with Highveld. That position of trust gave rise to a duty on him not to allow his own interests to prevail over those of Volvo. He had breached that duty and was thus liable to disgorge his secret commissions plus the interest thereon.

Some comments on the court's judgment

The judgment in *Volvo* made a number of significant and positive contributions to the development of South African fiduciary law.

The court's approval of the statement in *Hospital Products* that it is fruitless to attempt to make a general statement of all the circumstances in which a fiduciary relationship will exist recognises the inherent and necessary flexibility of the fiduciary concept, and respects its equitable nature and purpose. As I have argued in previous chapters, this should remain an important consideration when determining the incidence of fiduciary duties.

The principles the court set out in relation to the incidence of fiduciary duties also provide a positive refinement of those referred to

[124] *Volvo* [19].

in *Fieldstone* and earlier case law. The judgment provides useful clarification in this regard that a mutual understanding in terms of which one party agrees to relinquish his or her interests and act solely on behalf of the other is not a prerequisite for a fiduciary relationship in South African law. However, although it appears implicit in the judgment that such an understanding may still be a relevant factor in appropriate circumstances, it would have been helpful if the court had expressly confirmed whether that is so.

Another aspect of the judgment that is particularly pertinent for present purposes concerns the status and relevance of trust, confidence and reliance in the incidence of fiduciary duties. The court referred to these traditional criteria throughout its judgment. This is not surprising given that they have been consistently mentioned and applied in South African cases. These repeated references to 'trust, confidence and reliance' are however also ambiguous and open to contradictory interpretations.

The court began by citing, with approval, the *Robinson* descriptions of a fiduciary position as one of 'confidence' and a breach of fiduciary as a 'breach of trust'.[125] It also approved a statement made by Hefer JA in *Fieldstone* that likewise associated fiduciaries with duties of 'trust',[126] and continued to use the terms 'trust' and 'reliance' to describe fiduciary relationships and duties in the rest of its judgment.[127] And, as will be discussed below, the court also singled out a variation of the reliance criteria as the core requirement for a fiduciary relationship. These references seem to impliedly accept trust, confidence and especially reliance as the defining characteristics of a fiduciary relationship and as essential prerequisites for the existence of fiduciary duties.

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[125] *Volvo* [13]–[14], citing *Robinson* 177–8.

[126] *Volvo* [15], citing *Fieldstone* [31].

[127] *Volvo* [17], [18], [21].

However, the court also approved the statement in *Hodgkinson* that 'trust' is merely one of a number of 'non-exhaustive examples of evidential factors'[128] and then expressly said that features such as–[129]

> the trust and reliance that is placed [by one party] in the other ... receive frequent mention in judgments on the subject of whether a relationship was one of trust. But such references do not seem ... to advance materially what was stated in *Robinson v Randfontein Estates* and do little more than identify factors that were considered to be relevant to the enquiry in the particular case.

These statements suggest that trust, confidence and reliance are not essential for the application of the fiduciary concept but are merely some features that may, depending on the particular circumstances of the case concerned, have some bearing on the enquiry into the existence of fiduciary duties.

It is not entirely clear from these statements whether the court's intention was to treat trust, confidence or reliance as an essential criterion, or merely a potentially relevant but not vital criterion for fiduciary accountability. Alternatively, it may simply have been using the 'trust and confidence' terminology that has historically been used to described fiduciary relationships and that is reflected in Lord Millett's description of the three broad types of fiduciary relationships.[130] Greater clarity on this aspect would have been useful.

However, the most notable feature of the judgment is its introduction of the 'justified reliance' criterion as the 'ultimate' and essential requirement for the incidence of fiduciary duties. This was the first reference to that concept and a new development in South

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[128] *Volvo* [17], quoting *Hodgkinson* 176f–177b.

[129] *Volvo* [17]–[18].

[130] Lord Millett 'Equity's Place in the Law of Commerce' (1998) 4 *LQR* 214.

African law. There are however some aspects of the meaning and determination of that concept that require further consideration.

The SCA made only three statements by way of elaboration on the meaning of 'justified reliance' and how its existence is to be assessed. The first was its approval of the Canadian Supreme Court's statement in *Hodgkinson* that–[131]

> the question to ask is whether, given all the surrounding circumstances, one party could reasonably have expected that the other party would act in the former's best interests with respect to the subject matter at issue.

The second was the quote from the American case of *Dolton v Capitol Federal Savings and Loan Association* that there must be a state of affairs 'which impels or induces one party to relax the care and vigilance it would and should have ordinarily exercised in dealing with a stranger'.[132] The third is the statement that '[w]hat is called for is an assessment, upon a consideration of all the facts, of whether reliance of one party upon the other was justified in the circumstances.'[133]

Another issue that arises in relation to the concept of 'justified *reliance*' is its relationship to a justified or reasonable *expectation* and whether the two are capable of conceptual reconciliation.

It seems to me that, on a proper reading of the judgment as a whole, the court used the 'justified reliance' concept in substantially the same sense as a 'justified expectation'. It is clear that it intended to apply the same principles that were laid down in *Hodgkinson*. The court quoted from *Hodgkinson* without objecting to its reference to a reasonable *expectation* and 'switched to' the term *reliance* only when summarising and confirming the general principles laid down in

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[131] *Volvo* [16], quoting *Hodgkinson* 176f–177b.

[132] *Volvo* [16],

[133] *Volvo* [17].

Hodgkinson, thus suggesting that the two concepts of reliance and expectation are substantially the same.

There is further support for this interpretation in the ordinary meanings and practical import of 'reliance' and 'expectation'. The ordinary meaning of 'expectation' is 'something looked forward to' predicted or anticipated,[134] while 'reliance' means 'dependence, confidence and trust', belief or faith.[135] And, on a practical, substantive level, there is unlikely to be any rational, reasonable or justified reliance on any state of affairs without an expectation of it. It would be irrational, unreasonable and unjustified for one party to rely on something (in this context, another party's undivided loyalty) if he or she did not also expect (or be entitled to expect) that such loyalty would actually be delivered. In other words, reliance (at least where it is rational) presupposes expectation, or put another way, expectation gives rise to reliance. On this approach the two are substantially the same and the court's use of 'reliance' as opposed to 'expectation' is better construed in terms of the 'trust, confidence and reliance' terminology that has dominated South African law since *Robinson*, rather than as a substantive variation on a 'justified expectation'.

As this thesis argues, this is the best criterion to be applied in determining and explaining the incidence of fiduciary duties and, by using the 'justifiability' rather than the 'reasonableness' measure, the court's approach is both preferable to the approach in other jurisdictions and a significant contribution to the formulation of a much-needed and theoretically sound set of general South African fiduciary principles.

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[134] *Collins' Dictionary and Thesaurus* 2 ed (2000) 413.
[135] *Collins' Dictionary and Thesaurus* 2 ed (2000) 1002.

CHAPTER 7

THE INCIDENCE OF EMPLOYEE FIDUCIARY DUTIES – WHEN EMPLOYEES OWE THEIR EMPLOYERS FIDUCIARY DUTIES

1. GENERAL INTRODUCTION

1.1 EMPLOYEE FIDUCIARY CAPACITIES AND CATEGORIES

Depending on the circumstances, employees may attract fiduciary duties in various capacities. In some cases they will attract these duties in their capacity as 'ordinary employees'. In others they will do so in some capacity other than that of ordinary employee. This occurs most commonly where the employee, in addition to or as part of the relationship of employment, has some relationship with his or her employer that falls within one of the established categories of fiduciary relationships *per se*, such as that of agent or company director or officer.

[1]It is also possible (although less likely) that the employee may also incur fiduciary duties in terms of some other relationship with his or her employer that fulfils the criteria for *ad hoc* fact-based recognition of those duties within the particular relationship concerned.

Although in practice the functions associated with an employee's different capacities may overlap, and it may be difficult to identify the

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[1] *Chillibush v Johnson NO and Others* (2010) 31 *ILJ* 1358 (LC); *Amazwi Power Products (Pty) Ltd v Turnbull* (2008) 29 *ILJ* 2554 (LAC); *SA Post Office Ltd v Mampeule* (2010) 31 *ILJ* 2051 (LAC); *Boumat Ltd v Vaughan* (1992) 13 *ILJ* 934 (LAC); *Byron v Cape Sundays River Settlement* 1923 EDL 117; *La Vita v Boymans Clothiers (Pty) Ltd* (2001) 22 *ILJ* 454 (LC); *Van Rensburg v Austen Safe Co* [1998] 1 BLLR 86 (LC); *PG Group (Pty) Ltd v Mbambo NO and Others* (2004) 25 *ILJ* 2366 (LC); *Long and Another v Chemical Specialities Tvl (Pty) Ltd* (1987) 8 *ILJ* 523 (IC); *Oak Industries (SA) (Pty) Ltd v John NO and Another* (1987) 8 *ILJ* 756 (N); *Whitcutt v Computer Diagnostics & Engineering (Pty) Ltd* (1987) 8 *ILJ* 356 (IC).

boundaries of the duties that attach to each of them, the fiduciary (and other) duties that attach to the employee as ordinary employee are in principle distinct from those that attach to him or her in any other capacity.[2] Which of these capacities and duties is applicable in any given case is a question of fact, to be determined with reference to all the surrounding circumstances.[3]

Where an employee is subject to fiduciary duties in any capacity or capacities, the scope, functioning and remedial consequences of the breach of those duties will be governed by the generic fiduciary principles set out in chapter 3 of this thesis.

1.2 CHAPTER OVERVIEW

This chapter considers the criteria that govern the incidence of employee fiduciary duties and the circumstances and most common capacities in which employees will owe such duties to their employers.

Since this thesis is concerned with the fiduciary duties of ordinary employees, the emphasis will be on the grounds on and circumstances in which they will owe their employers fiduciary duties in the capacity of ordinary employee.[4] However, many employees act as agents for their employers or are also directors or officers of corporate employers. The circumstances in which employees will incur fiduciary duties in those established fiduciary categories of agent or director-officer in terms of both the common law and statute are therefore also discussed for the purposes of completeness.[5] The

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[2] *Whitcutt v Computer Diagnostics & Engineering (Pty) Ltd* (1987) 8 *ILJ* 356 (IC) 362H–I; *Ranson v Customer Systems plc* [2012] EWCA civ 841, 2012 WL 2191508.

[3] *Oak Industries (SA) (Pty) Ltd v John NO and Another* (1987) 8 *ILJ* 756 (N).

[4] For the purposes of this thesis, 'ordinary employee' means any person who falls within the definition of an 'employee' in s 200A of the Labour Relations Act of 66 of 1995.

[5] Again, for the reasons set out in chapter 4 of this thesis, this discussion merely reflects the established approach, and is not intended as an endorsement of the categorisation of 'fiduciary relationships' on a class-wide basis or the drawing of any distinctions between fiduciary relationships '*per se*' and 'in fact'.

focus in this regard will be on the uncertainties surrounding the definitional boundaries of those categories, the fiduciary incidence criteria on which they are based, and the 'interpretive space' that still exists within them for the consistent application of the same incidence criteria in all of them. I do not however consider the less common position of employees who have some other separately identifiable relationship, contract or position in relation to their employers that may give rise to fiduciary duties.

One of the main arguments running through this thesis is that the same general criteria for the incidence of fiduciary duties ought to be applied to all relationships both within and outside of the established classes of fiduciary relationship. Similarly, those same incidence criteria should be applied to all relationships of employment, regardless of their nature, and to all employees, regardless of the level or type of position they hold. One of the purposes of this chapter is to provide a critical and comparative analysis and evaluation of the extent to which existing Canadian, English and South African cases reflect this consistency and, if they do not, the extent to which they can be reconciled with each other and with the propositions I advance in this thesis.

2. EMPLOYEES WHO ARE DIRECTORS, OFFICERS OR SHADOW DIRECTORS OF A CORPORATE EMPLOYER

2.1 INTRODUCTION

Employees who are also directors or officers of their employer will be subject to both common-law and statutory fiduciary duties[6] in their capacity as such. Although, as chapter 3 explained, the only truly fiduciary duties are the no-conflict and no-profit duties, the general common-law principles of company law also (improperly) classify a number of other duties that attach to company directors and officers

[6] In terms of ss 75 and 76 (as read with s 77) of the Companies Act 71 of 2008.

as 'fiduciary' ones. The same misclassification is reflected in the provisions of the Companies Act 71 of 2008 ('the 2008 Act').[7]

In terms of the common-law principles of company law in South Africa, England and Canada, all company 'directors' and 'officers' owe their companies fiduciary duties.[8] Although the common law in each of these jurisdictions contained definitions of a 'director' and an 'officer', those definitions have largely been either superseded by or codified into statutory definitions. In South Africa, the definition of a 'director' is now contained in s 1 of the 2008 Act. In addition, the 2008 Act introduced the concept of a 'prescribed officer' which, together with its provisions relating to members of board committees, may be applicable to employees. I consider the meaning of the positions of 'director' and 'prescribed officer' and their implications for the incurring of fiduciary duties below. Some consideration is also given to the position of employees who operate as 'shadow directors' of their employer-company.

2.2 THE DEFINITION OF A 'DIRECTOR'

In terms of s 1 of the 2008 Act, a 'director' means 'a member of the board of a company … or an alternate director of a company and includes any person occupying the position of a director or alternate director, by whatever name designated'.[9] An 'alternate director' is defined as 'any person elected or appointed to serve, as the occasion requires, as a member of the board of a company in substitution for a particular elected or appointed director of that

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[7] Section 77(2)*(b)* provides that liability for breach of the duties to disclose personal interests, not to misuse their positions for improper advantage or to harm the company, to communicate information, and to act in good faith, for a proper purpose and in the best interests of the company, applies 'in accordance with the principles of the common law relating to breach of a fiduciary duty'.

[8] *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168; *Greenhalgh v Arderne Cinemas Ltd* [1946] 1 All ER 512 (CA); *Canadian Aero Service v O'Malley* 1973 CarswellOnt 236.

[9] Section 1 of the Companies Act 71 of 2008.

company'.[10] Read together, these definitions are substantially the same as the definition of a 'director' that was contained in the 1973 South African Companies Act[11] and, like that definition, are likely to be interpreted as including both *de jure* and *de facto* directors.[12]

(a) De jure directors

A *de jure* director is a person who has been properly and lawfully appointed or elected to the office of director and who held office as such at the time in question.

(b) De facto directors

The proper meaning of a *de facto* director is a little less settled.[13] One view is that the term includes only persons whom a company has attempted to place in office as directors, but the company has failed to do so effectively due to some legal irregularity, and persons who were effectively put in office but whose office has legally ended at the time in question.[14] The other more generally accepted view is that a *de facto* director includes any person who in fact acts as, or has assumed the status, role or functions of, a director, without the need for any prior effective or attempted appointment or election.

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[10] Section 1 of the Companies Act 71 of 2008.

[11] Act 61 of 1973. Section1 provided that a 'director' included 'any person occupying the position of director or alternate director of a company, by whatever name … designated'.

[12] By virtue of the inclusion in both definitions of the words 'any person occupying the position of a director'.

[13] For a more detailed discussion of different interpretations of the terms 'director', 'de jure director' and 'de facto director', see J du Plessis 'Some Subtle Distinctions in the Term "Director"' (1995) *Journal of South African Law* 153.

[14] Some cases that support this interpretation include *Morris v Kanssen* 1946 AC 459; *R v Mall* 1959 (4) SA 607 (N); and *Inland Revenue Commissioners v Heaver* 1949 2 All ER 367.

This has some South African case support[15] and is also the view that the English courts have favoured.

In the leading English case of *Re Hydrodan (Corby) Ltd*, Millett J described a *de facto* director as 'a person who assumes to act as a director … although never actually or validly appointed as such.[16] In *Secretary of State for Trade and Industry v Tjolle* the court said that the criteria to be applied in determining whether a person is a *de facto* director–[17]

> include at least whether or not there was a holding out by the company of the individual as a director, whether the individual used the title, whether the individual had proper information (e.g. management accounts) on which to base decisions, and whether the individual has to make major decisions and so on. Taking all these factors into account, one asks 'was this individual part of the corporate governing structure?' answering it as a kind of jury question.

The enquiry as to whether a particular person is a *de facto* director is thus a factual one, the outcome of which will depend on all the circumstances of the case.[18] What is required is evidence that the person concerned undertook the kinds of functions in relation to the company that could be properly discharged only by a director,[19] participated in directing the affairs of the company, and exercised 'real influence' in the decision-making process of the company.[20]

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[15] In cases such as *S v Hepker* 1973 (1) SA 472 (W); *S v De Jager* 1965 (2) SA 616 (A).

[16] *Re Hydrodan (Corby) Ltd* [1994] BCC 161 163.

[17] *Secretary of State for Trade and Industry v Tjolle* [1998] BCC 282 290.

[18] *Re Kaytech International plc; Portier v Secretary of State for Trade and Industry* [1999] BCC 390 402.

[19] *Re Hydrodan (Corby) Ltd* [1994] BCC 161 163.

[20] *Gemma Ltd v Davies* [2008] BCC 812 [40]; *Secretary of State for Trade and Industry v Hollier* [2007] BCC 11 [68]–[69], [81].

Such participation must however be 'on an equal footing' with the *de jure* directors. 'It is not sufficient to show that [they were] concerned in the management of the company's affairs or undertook tasks in relation to its business which can properly be performed by a manager below board level'.[21] The basic test therefore is whether the person in question 'assumed the status and functions of a company director',[22] having regard to their actions rather than to what they call themselves.[23] This would include persons who claim to be or are held out to be directors, and those who perform the functions of and act on an equal footing with *de jure* directors.[24]

2.3 'OFFICERS', 'PRESCRIBED OFFICERS' AND BOARD COMMITTEE MEMBERS

(a) The meaning of an 'officer'

Employees who are 'officers' of a corporate employer will be subject to the same fiduciary duties as directors.[25]

The 2008 Act, unlike its predecessor,[26] does not contain any definition of or references to an 'officer'. It does however use the term 'prescribed officer', which appears to have impliedly replaced both the common-law and the previous statutory definitions of an 'officer'.

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[21] *Re Hydrodan (Corby) Ltd* [1994] BCC 161 163.

[22] *Re Kaytech International plc; Portier v Secretary of State for Trade and Industry* [1999] BCC 390 402.

[23] *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch) [1255]; *Re Hydrodan (Corby) Ltd* [1994] BCC 161 163.

[24] Per Cooke J, at first instance, in *Secretary of State for Trade and Industry v Deverell* 1999 WL 1142641 [31].

[25] *Sibex Construction (SA) (Pty) Ltd v Injectaseal CC* 1988 (2) SA 54 (T) 66; *Transvaal Cold Storage Co Ltd v Palmer* 1904 TS 4; *Canadian Aero Service Ltd v O'Malley* (1974) 40 DLR 3d 371 381 (SC of Can); *Tavistock Pty Ltd v Saulsman* (1990) 3 ACSR 503 509 SC (WA).

[26] Companies Act 61 of 1973.

(b) The meaning of a 'prescribed officer'

The term 'prescribed officer' is both new and unique to South African law, and all who fall within its ambit are subject to the same statutory duties, standards of conduct, restrictions and liability as company directors.[27] These include no-profit duties and a number of other duties that are classified in company law as being of a 'fiduciary' nature.[28] The provisions concerned also generally expressly incorporate 'prescribed officers' into the term 'director'.

The concept of a prescribed officer has been defined in particularly vague and general terms. Section 1 of the 2008 Act describes a prescribed officer as a person 'who, in relation to a company, performs any function that has been designated by the Minister by Regulation'.[29] The Minister has exercised his powers in this regard and has defined a prescribed officer in the Companies Regulations 2011.[30] That definition provides that:

(1) Despite not being a director of a particular company, a person is a 'prescribed officer' of the company for all purposes of the Act if that person –

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[27] The primary duty and liability ss 75, 76 and 77, for example, all begin by expressly stating that for the purposes of their provisions, '"director" includes … a prescribed officer'.

[28] Prescribed officers have a duty under s 75 to disclose any personal financial interest that they or any 'related person' (defined in s 1 as any two persons connected to one another in any manner contemplated in s 2(1)*(a)–(c)*) have or has in any matter to be considered by their company's board of directors or in any agreement or other matter in which the company has a material interest, as well as any material information they have relating to that interest, agreement or other matter (s 75). In terms of s 76 they are also subject to a duty to communicate certain information to the company's board (s 76(2)*(b)*) and a general duty to exercise reasonable care, skill and diligence (s 76(3)*(c)*). In addition, they have a duty not to use their position in relation to the company, or any information derived by virtue of that position, to obtain any gain for themselves or any person other than the company or a wholly-owned subsidiary of it (s 76(2)*(a)*(i)) or to knowingly cause harm to the company or any of its subsidiaries (s 76(2)*(a)*(ii)). There are also duties to exercise their powers and perform their functions in good faith, for a proper purpose (s 76(3)*(a)*), and in the best interests of the company (s 76(3)*(b)*).

[29] Section 1 of the Companies Act 71 of 2008.

[30] Regulation 38 of the Companies Regulations, 2011, GNR 351 in *GG*34239 of 26 April 2011.

exercises general executive control over and management of the whole, or a significant portion, of the business and activities of the company; or

regularly participates to a material degree in the exercise of general executive control over and management of the whole, or a significant portion, of the business and activities of the company.

(2) This regulation applies to a person contemplated in sub-regulation (1) irrespective of any particular title given by the company to –

(a) an office held by the person in the company; or
(b) a function performed by the person for the company.

The difficulty with this definition is that it is based on very loose and open-ended criteria of managerial involvement. Phrases such as ‘exercises general executive control’ over ‘a significant portion’, ‘regularly participates in’ and ‘to a material degree’ are capable of a very wide construction. There is nothing in the definition itself that indicates where the limits of these criteria lie, and therefore no indication of the nature, degree, consistency or reach of the participation or control that would suffice to render a person a ‘prescribed officer’.

For example, it is not clear whether the participation or control has to be of a direct nature, or whether that which is effected indirectly through the instrumentality of another person or entity would suffice. If such ‘indirect’ control or participation is insufficient to render a person a prescribed officer, it would exclude, for example, the so-called ‘shadow director’ discussed below, who exercises indirect influence or control by giving instructions or directions to a company’s directors.

I have suggested elsewhere that considerations that should be taken into account in interpreting the ‘prescribed officer’ definition are

its own wording, its relationship with the 2008 Act's concept of a 'director', the common-law concept of a company 'officer', the criteria that other jurisdictions have applied in the regulation of other analogous managerial participants, and the duties and liability that attach to prescribed officers.[31] I have also suggested that the most significant of those considerations is that prescribed officers attract fiduciary duties. The primary interpretive imperative must therefore be to find a principled interpretation that complies with the theoretical basis and ambit of the common-law fiduciary principles 'in accordance' with which those statutory fiduciary duties apply. More specifically, my suggestion here is that insofar as is possible, the meaning attributed to prescribed officers should be based on the same criteria that give rise to fiduciary duties on the part of directors, and in all other relationships both within and outside of the established categories of fiduciary relationships.

As reg 38(2) states, the determination of whether those incidence criteria are fulfilled must be based on the substantive reality and the actual conduct of the person in question, rather than on any job title or function that may be formally attached to him or her.

With regard to the relationship between 'prescribed officers' and 'directors' (both as defined in the 2008 Act) I have argued that, although the wording is not entirely clear, the better interpretation is that the two concepts do not overlap and that the concept of a prescribed officer is limited to persons who do not fall within the Act's definition of a director (whether *de jure*, *de facto* or alternate).[32] That is not however a material point for present purposes. The argument is that, regardless of the relationship between 'prescribed officers' and 'directors', both attract fiduciary duties and, as such, the question of whether an employee is a 'director' or 'prescribed officer' should be determined with reference to the same fiduciary duty incidence

[31] K Idensohn 'The Meaning of "Prescribed Officers" under the Companies Act 2008' (2012) 129(4) *South African LJ* 717 719.

[32] Idensohn 'The Meaning of "Prescribed Officers" under the Companies Act 2008' 719–20.

criteria, and that those incidence criteria should, insofar as there is still interpretive space to do so, be the same as those applied in all other relationships, both within and outside of the established categories of fiduciary relationships. Given that the meanings of *de jure* and alternate directors are settled, the only such space that remains is in relation to the new prescribed officer concept and, to a lesser degree, the concept of a *de facto* director.

(c) Members of board committees

Employees who are members of a committee of the board of directors of their employer company are subject to the same duties (and liability for breach of duty) as directors and prescribed officers, irrespective of whether they are also members of the board or not.[33]

2.4 'SHADOW DIRECTORS'

An employee may also be a shadow director of his or her corporate employer. Although this is likely to be rare (particularly outside of private companies), the possibility and its implications for the attraction of fiduciary duties are considered briefly here for the purposes of completeness.

(a) The meaning of a 'shadow director'

'Shadow directors' are not defined and are rarely expressly referred to in South African law.[34] The concept is used in a number of other jurisdictions[35] to regulate persons who exercise indirect influence or control by giving directions or instructions to a company's board of directors.

The English Companies Act, for example, defines a 'shadow director' as 'a person in accordance with whose directions or

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[33] Sections 75, 76 and 77 of the Companies Act 71 of 2008.

[34] For a comparative analysis of the nature and regulation of shadow directors, see K Idensohn 'The Regulation of Shadow Directors' (2010) 3 *SA Merc LJ* 326; N Locke 'Shadow Directors: Lessons from Abroad' (2002) 14 *SA Merc LJ* 420.

[35] These include Australia, New Zealand, England and Hong Kong.

instructions the directors of a company are accustomed to act',[36] but excludes persons who give advice only in a professional capacity.[37] Similar 'shadow director' definitions are contained in the English Company Directors Disqualification and Insolvency Acts.[38] Other jurisdictions that expressly refer to and regulate shadow directors have defined them in substantially the same terms.[39]

(b) The application of fiduciary duties to shadow directors

It is debatable whether shadow directors are, or should be, subject to fiduciary duties in favour of the companies whose boards of directors they influence or control.

In South African law, shadow directors could attract those duties if they are treated as falling within the 2008 Act's definition of a 'director' or a 'prescribed officer'. Alternatively, they may attract fiduciary duties on the basis that they fulfil the general common-law criteria for the incidence of fiduciary duties.

It has been suggested that shadow directors are a particular kind of *de facto* director and fall within the definition of a 'director' on that basis. I have argued elsewhere that, although there is some support

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[36] Section 251(1) of the English Companies Act 2006.

[37] Section 251(2) of the English Companies Act 2006.

[38] Section 22(5) of the Company Directors Disqualification Act 1986 and s 251 of the Insolvency Act 1986.

[39] For example s 60(1) and (2) of the Australian Corporations Law 2001; s 9 of the Australian Corporations Act 50 of 2002; s 126 of the New Zealand Companies Act 1993; and s 351(2) as read with s 2 of the Hong Kong Companies Ordinance L.N. 139 of 2008. Both the Australian Corporations Law and the New Zealand Companies Act 1993 define a 'shadow director' as 'a person in accordance with whose directions or instructions the directors are accustomed to act'. 'Shadow directors' are then included in the general definition of a 'director', thereby rendering them subject to the same duties, restrictions, liability and general regulation as *de jure* and *de facto* directors. A similar effect is achieved by s 351(2) as read with s 2 of the Hong Kong Companies Ordinance LN 139 of 2008. Although s 251(1) of the English Companies Act 2006 defines a 'shadow director' in identical terms, it does not include 'shadow directors' within its definition of a 'director'.

for this view in the English case law,[40] the better view is that there is an 'essential difference' between shadow and *de facto* directors, that they are alternative and 'in most and … perhaps all cases … mutually exclusive' concepts,[41] although there may be very exceptional cases where 'it may not be entirely straightforward which of the two descriptions is most apposite'.[42]

It is difficult to predict whether the South African courts will recognise shadow directors as 'prescribed officers'. If they do, they will be subject to the same fiduciary and other duties that the 2008 Act imposes on directors.[43] I have explored this issue elsewhere and have expressed the opinion that shadow directors are not 'directors' as defined in the 2008 Act, but that it is unclear whether they fall within the 'prescribed officer' definition.[44]

Insofar as the application of common-law fiduciary duties is concerned, the courts in jurisdictions that expressly recognise shadow directors have generally consistently held that they are not fiduciaries in relation to the company whose directors they influence

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[40] The Court of Appeal in *Re Tasbian Ltd (No 3)* [1991] BCLC 792, for example, did not clearly distinguish the two, simply referring to a particular person as either a *de facto* or shadow director for the purposes of disqualification proceedings. Cooke J at first instance in *Secretary of State for Trade and Industry v Deverell* 1999 WL 1142641 refused to decide whether shadow and *de facto* directors are mutually exclusive concepts, while the Court of Appeal in the same case ([2001] Ch 340 (CA (CivDiv)) appeared to accept a merging of the two concepts. And in *Re Kaytech International plc; Portier v Secretary of State for Trade and Industry* [1999] BCC 390 402, the court said that the distinction between a *de facto* and a shadow director is not always clear-cut.

[41] Per Millett J in *Re Hydrodan (Corby) Ltd* [1994] BCC 161 161. For criticisms of the failure to treat shadow and *de facto* directors as mutually exclusive, see S Griffin 'Problems in the Identification of a Company Director' (2003) 54 *Northern Ireland Legal Quarterly* 43; C Noonan and S Watson 'The Nature of Shadow Directorship: Ad Hoc Statutory Intervention or Core Company Law Principle?' 2006 *Journal of Business Law* 763 772.

[42] *Secretary of State for Trade and Industry v Hollier* [2007] BCC 11 [81].

[43] Primarily ss 75 and 76 of the Companies Act 71 of 2008. See further Idensohn 'The Meaning of "Prescribed Officers" under the Companies Act 2008'.

[44] Idensohn 'The Meaning of 'Prescribed Officers' under the Companies Act 2008' 721–4, 731–4; Idensohn 'The Regulation of Shadow Directors'.

or control and that they therefore do not owe that company any fiduciary duties.[45]

In those cases the emphasis has usually been placed on the structure and wording of the legislation that regulates shadow directors,[46] and on the criteria of trust, confidence or reliance on the part of the company and/or voluntary undertakings of trust, confidence or reliance on the part of the shadow director. Thus it has been held that shadow directors are not fiduciaries because the company does not trust, confide in or rely on the shadow director to act in anyone's interests except his or her own, and the shadow director undertakes no duties or responsibility in consequence of any reliance placed in him or her.[47] It has only been in exceptional cases – where a shadow director voluntarily exercises unusually extensive and direct control over a company's assets,[48] or over one or more of its directors[49] – that the criteria of the placing or assumption of trust, confidence and reliance have been outweighed and a shadow

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[45] There is one Australian case, *Australian Securities Commission v AS Nominees Ltd* (1995) 13 ACLC 1 where it was held, at 596, that a shadow director is a fiduciary, but that finding was based on the fact that the Australian Corporations Act 2001 expressly includes shadow directors in its definition of a 'director'. The better view is that this is not the case in terms of the South African Act.

[46] With the exception of Australia, the statutes in other jurisdictions that expressly refer to shadow directors define a 'shadow director' separately from a 'director' and do not include shadow directors within the 'director' definition for all purposes, or expressly subject them to the statutory fiduciary duties of 'directors'. The argument is thus that, if the legislature intended to equate shadow directors with directors for fiduciary duty purposes, it would either have included them within the definition of a 'director' (at least in the provisions that refer to those duties) or it would have expressly stated that those duties also apply to shadow directors. But where shadow directors are expressly referred to in relation to only certain provisions, the implication is that they were intended to be subject only to those particular provisions. See, for example, *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch).

[47] See, for example, *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch) [1280] where the court referred to the absence of any assumption of 'an obligation of loyalty' on the part of the shadow director; P Loughlan 'Liability for Assistance in a Breach of Fiduciary Duty' (1989) 9 *Oxford Journal of Legal Studies* 260 263.

[48] *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch) [1289].

[49] See, for example, *Canada Safeway Ltd v Thompson* [1951] 3 DLR 295 (BC SC), which referred to a situation where a shadow director has so much control over a director and the latter acts with so little autonomy that the shadow director can be said to have effectively taken it upon him- or herself to act as a fiduciary.

director has been held to be a fiduciary and to owe fiduciary duties to the company.

Another argument that has been made against recognising shadow directors as fiduciaries is that it would not accord with the underlying purpose and rationale of the fiduciary principle. The primary function of fiduciary accountability is to ensure that the beneficiary's interests remain paramount, by prohibiting the fiduciary from acting in any other interests and by imposing strict liability so as to prophylactically deter opportunistic breaches.[50] The primary purpose of shadow director regulation, on the other hand, is to mediate and find a proper balance between the competing interests of the company and the shadow director.

However, although the courts in other jurisdictions have generally concluded that shadow directors cannot properly be classified as fiduciaries, their decisions have been based on a range of incidence criteria and the way in which they are taken into account is largely a matter of judicial discretion. There is thus scope for the South African courts to recognise that fiduciary duties might attach to shadow directors. The existence of express statutory regulation of shadow directors in other jurisdictions and its apparent deliberate exclusion of shadow directors from the regulatory provisions and therefore the fiduciary duties that apply to directors is also a distinguishing factor that may produce a different outcome in South African law.

3. EMPLOYEES WHO ARE 'AGENTS' OF THEIR EMPLOYER

3.1 INTRODUCTION

Employees who act as the agents of their employer will owe their employer-principal fiduciary duties in that agency capacity.

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[50] P Finn 'The Fiduciary Principle', paper presented to the International Symposium on Trusts, Equity and Fiduciary Relationships, Faculty of Law, University of Victoria, British Columbia, Canada, 14 to 17 February 1988 at 36, quoted in Loughlan 'Liability for Assistance in a Breach of Fiduciary Duty' 265.

The relationship of agency may arise in terms of a separate relationship of agency outside of or unrelated to the employment relationship, or it may arise in relation to some particular task, responsibility or function that the employee has in terms of and as part of his or her employment.

3.2 THE DEFINITION OF AN 'AGENT'

It is not entirely clear when an employee will be held to owe his or her employer fiduciary duties on the basis that he or she is the 'agent' of the employer. This is largely due to the fact that 'agent' has no single meaning and, more problematically, can have different meanings for the purposes of the application of the general principles of the law of agency and those relating to fiduciary accountability.[51]

Within the context of the South African law of agency, an 'agent' in the strict technical sense means a person who is authorised or mandated to perform a legal act in relation to a third party on behalf of and in the place of a principal and to bind the principal to that act.[52] An employee who falls within this strict 'law of agency' definition of an agent will be automatically treated as owing his or her employer fiduciary duties in the carrying out of that authority or mandate.[53] Determining whether this is the case is relatively unproblematic in cases where the employee has been given a clear and express mandate (either verbally or in writing) to perform one or more legal acts on behalf of the employer.[54] Difficulties are however more likely to arise in cases where there is an alleged implied relationship of agency. In most cases, the enquiry will be into the mandate requirement and whether the employee was authorised by the

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[51] A Stafford and S Ritchie *Fiduciary Duties: Directors and Employees* (2008) 111 para 3.107.

[52] *Hansen v Martin Hansen Estates* [1996] 7 BLLR 856 (IC); F du Bois, G Bradfield, C Himonga, D Hutchison, K Lehmann, R le Roux, M Paleker, A Pope, CG van der Merwe and D Visser *Wille's Principles of South African Law* 9 ed (2007) 984.

[53] Du Bois et al *Wille's Principles of South African Law*.

[54] This would include the case where the employee is given a power of attorney to act on the employer's behalf, as occurred in *Transvaal Cold Storage Co Ltd v Palmer* 1904 TS 4.

employer to perform the act in question on the latter's behalf, rather than into whether the underlying criteria for the incidence of fiduciary accountability that underlie the agency definition and its fiduciary classification are fulfilled.

There are however other cases in which persons such as attorneys or solicitors are recognised as the 'agents' of others even though they do not have any legal authority to bind those other parties. Despite the fact that they are not agents in the strict 'law of agency' sense, they still attract fiduciary duties.[55] It is clear therefore that for the purposes of the incidence of fiduciary duties, 'agency' is not confined to having the authority to conclude legal acts on behalf of another, and includes broader notions of 'representation' or 'acting for or on behalf of another'. The issue of where on that continuum between 'strict agency' and 'representation' in the broadest sense fiduciary accountability falls was explored in chapter 5 of this thesis and, as suggested there, remains unclear. The solution therefore must be to simply consider the substantive circumstances of the case with reference to the same individual incidence criteria discussed in chapter 5 that are relevant to the incidence of fiduciary duties in any other (and I suggest all other) circumstances, and then to ask whether they give rise to the necessary justified expectation of undivided loyalty proposed in this thesis. Generally, such an expectation is most likely to exist in relation to employees who occupy senior positions and perform functions of a managerial nature.[56]

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[55] Stafford and Ritchie *Fiduciary Duties: Directors and Employees* 111 para 3.107, citing *JD Wetherspoon plc v Van de Berg & Co Ltd and Others* [2007] EWHC (Ch) [19], [20].

[56] *Shepherd's Investment v Walters* [2006] EWHC 836 (Ch); *Canadian Aero Service v O'Malley* (1973) 40 DLR (3d) 371.

3.3 AGENCY IN THE CASE LAW

There are a number of English and South African cases in which employees have been recognised as owing their employers fiduciary duties on the basis that they have acted as the employer's 'agent'.

There are also some earlier cases in which the South African courts appear to have equated all relationships of employment with ones of 'agency', apparently in the strict 'law of agency' sense. In *Jones v East Rand Gold Mining Co Ltd*, for example, the court said that it was 'clear that the plaintiff having been a servant of the company, the principles of the law of principal and agent apply, and a fiduciary relation was constituted between them'.[57] It went on to refer to employment as a 'species of agency', saying that 'the principle is that an agent (including a servant) cannot make a secret profit out of anything which belongs to his principal and which the agent possesses in a merely fiduciary capacity'.[58]

However, the agency concept features most prominently in Canadian law. The Canadian courts have adopted the position that fiduciary duties are applicable only to 'senior' or 'key' employees and not to 'mere' employees, and have used the agency concept as the basis for distinguishing between these two categories of employee. A number of the leading cases reflecting that approach and the meaning they ascribe to 'agent' for that purpose are critically discussed later in this chapter.

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[57] *Jones v East Rand Extension Gold Mining Co Ltd* 1903 TH 325 334.

[58] *Jones v East Rand Extension Gold Mining Co Ltd* 1903 TH 325 334, quoted with approval in a number of cases, including *Peacock v Marley* 1934 AD 1 3; *Transvaal Cold Storage Co Ltd v Palmer* 1904 TS 4 33; *Uni-Erections v Continental Engineering Co Ltd* [1981] 3 All SA 73 (W*),* 1981 (1) SA 240 (W) 253.

4. 'ORDINARY EMPLOYEES'

4.1 INTRODUCTION

There are a number of differences with regard to the general principles applied by the Canadian, English and South African courts in determining the incidence, nature and scope of the fiduciary duties of ordinary employees. In Canada, there are also inconsistencies in the incidence criteria that the courts apply to different levels or types of employees, and between those that they apply within the employment context and those that apply in other non-employment relationships. However, despite these differences (and with the exception of the Canadian cases dealing with 'mere', ordinary employees), there is a significant amount of congruency in both the individual incidence criteria that the courts apply and in the substantive outcomes of their findings.

The general principles applied by the courts on these issues in each jurisdiction are set out below. The focus is on the circumstances in which employees will attract fiduciary duties as 'ordinary employees'. In this context, I use the term 'as ordinary employee' as meaning 'in the capacity of employee' (at any level) and not as 'in some other capacity',(such as that of director, officer or agent) which gives rise to fiduciary duties.

4.2 CANADIAN CASE LAW ON THE INCIDENCE OF ORDINARY EMPLOYEE FIDUCIARY DUTIES

(a) Introduction

The Canadian case law reflects two conflicting approaches to the criteria that govern the incidence of employee fiduciary duties. One is the broader 'vulnerability approach', and the other is the narrower 'senior' or 'key' employee approach.[59]

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[59] Both these approaches are discussed in *Imperial Sheet Metal v Landry* 2007 CarswellNB 298.

(b) The broader 'vulnerability' approach

The broader 'vulnerability' approach is based on the relatively dated case of *Edgar T Alberts Ltd v Mountjoy*[60] and has been favoured in comparatively few decisions.[61]

This approach treats 'vulnerability' on the part of the employer as the primary determinant in the incidence of employee fiduciary duties and, in doing so, is consistent with the leading decisions of the Canadian Supreme Court on the incidence of fiduciary duties in relationships outside of employment.[62] According to this approach, the general principle is that an employee will be subject to fiduciary duties where the employer 'by the nature of his business' is particularly 'vulnerable to loss' through the employee's abuse of position.[63] In *Edgar T Alberts v Mountjoy*[64] the loss and abuse related to the employee's solicitation of the employer's clients.

As with the English approach in *Fishel*[65] and that of the South African Court of Appeal in *Fieldstone*,[66] this permits the possibility that, in principle, any (but not necessarily every) employee of any type and at any level may, in appropriate circumstances, attract fiduciary duties.

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[60] *Edgar T Alberts Ltd v Mountjoy* 1977 Carswell Ont 48 (Ont HC).

[61] *East Coast Lumber v McLean* (1984) 53 NBR (2d) 137; *Canada East Manufacturing Inc v Harvey* (1996) 183 NBR (2d) 293.

[62] *Frame v Smith* [1987] 2 SCR 99; *International Corona Resources Ltd v Lac Minerals Ltd* [1989] 2 SCR 574 (1988) 44 DLR 592 639 (Ont CA); *Hodgkinson v Simms (*1995) 117 DLR (4th) 161, 1994 CarswellBC 438, 97 BCLR (2d) 1, [1994] 3 SCR 377; *Imperial Sheet Metal v Landry* 2006 NBQB 303 (NBQB), [2006] NBJ No 373 / *Imperial Sheet Metal v Landry* 2007 CarswellNB 298, 2007 NBCA 51 [5].

[63] *Edgar T Alberts Ltd v Mountjoy* 1977 Carswell Ont 48 (Ont HC) [31]; *Imperial Sheet Metal v Landry* 2006 NBQB 303 (NBQB), [2006] NBJ No 373 / *Imperial Sheet Metal v Landry* 2007 CarswellNB 298, 2007 NBCA 51 [46].

[64] *Edgar T Alberts Ltd v Mountjoy* 1977 Carswell Ont 48 (Ont HC).

[65] *University of Nottingham v Fishel* [2000] ICR 1462.

[66] *Phillips v Fieldstone Africa (Pty) Ltd and Another* [2004] 1 All SA 150 (SCA), 2004 (3) SA 465 (SCA).

(c) The narrower 'senior' or 'key' employee test

More recent Canadian cases have however adopted a narrower approach that confines the application of fiduciary duties to high-level 'senior' or 'key' employees. The reasons they have given for restricting employee fiduciary accountability in this way are discussed in chapter 8 of this thesis.

The drawing of a distinction between 'senior' and 'mere' employees or 'servants' for the purposes of the potential incidence of fiduciary duties originated in *Canadian Aero Service Ltd v O'Malley* ('*Canadian Aero*').[67]

In that case, which concerned the president and vice-president of a company (both of whom were employees but not directors), the court drew a distinction between 'senior' officials on the one hand and 'mere employees or servants' on the other. It went on to say that fiduciary duties apply only to 'senior' employees or 'officials' who are authorised to act on their employer's behalf and, in particular, to those acting in a managerial capacity. The duty of 'mere employees' however (unless enlarged by contract) consists only of a duty to respect the employer's trade secrets and the confidentiality of its customer lists.[68] The only explanations that the court offered for limiting the application of fiduciary duties in this way were based on the concept of agency and considerations of public policy.

With regard to the agency concept, the court held that 'senior' officers and 'top management', unlike 'mere employees or servants', are authorised to act on the employer's behalf and that 'the distinction ... between agents and servants of an employer is apt here'.[69] It went on to find that, on the facts, the respondents were 'agents' of their employer company because their positions as senior officers of one of the employer company's subsidiaries 'charged

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[67] *Canadian Aero Service v O'Malley* (1973) 40 DLR (3d) 371.

[68] *Canadian Aero Service* [22], [23], [32].

[69] *Canadian Aero Service* [23].

them with initiatives and with responsibilities far removed from the obedient role of servants',[70] and that the existence of fiduciary duties on their part was 'simply a recognition of degree of control which their positions gave them'.[71]

Echoing the arguments of Weinrib[72] the court also referred to the public interest in supplementing the statutory regulation of corporate promoters, directors and managers by way of a fiduciary accountability 'in acknowledgment of the importance of the corporation in the life of the community'.[73]

The narrower *Canadian Aero* 'senior' or 'key' employee approach has been followed in almost all subsequent Canadian cases and appears to have become entrenched in Canadian law. It was, for example, strongly endorsed by the new Brunswick Court of Appeal in *Imperial Sheet Metal v Landry* ('*Imperial Sheet Metal*').[74] In that case the court substituted the *Canadian Aero* concept of a 'senior officer' or 'top manager' with that of a 'key employee', which it defined, with particular reference to an employer's confidential information, as an employee–[75]

> who is: (1) an integral and indispensable component of the management team that is responsible for guiding the business affairs of the employer; (2) necessarily involved in the decision-making process; and (3), therefore, has broad access to confidential information that if disclosed would significantly impair the competitive advantages that the ... employer enjoyed. These employees fall within the categories 'top management', 'senior management' or 'key management'.

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[70] *Canadian Aero Service* [23].

[71] *Canadian Aero Service* [32].

[72] E Weinrib 'The Fiduciary Obligation' (1975) 25 *University of Toronto LJ* 1.

[73] *Canadian Aero Service v O'Malley* [32]..

[74] *Imperial Sheet Metal v Landry* 2006 NBQB 303 (NBQB), [2006] NBJ No 373 / *Imperial Sheet Metal v Landry* 2007 CarswellNB 298, 2007 NBCA 51.

[75] *Imperial Sheet Metal* [63].

Although the court said that this description is not 'a comprehensive code' as to how one goes about deciding who is a fiduciary or key employee,[76] it is clear that the concept is based primarily on the degree of substantive control and decision-making power that an employee has in relation to the employer's business rather than on job title or description.[77] The court also gave a number of reasons for its rejection of the broader 'vulnerability' approach, and thus its rejection of the principle that fiduciary duties may apply to any employee at any level. One reason was that the vulnerability approach conflicts with *Canadian Aero*, which the court considered to be 'the governing decision'.[78] Its other reasons were ones of public policy and included arguments that, in the case of 'mere employees', fiduciary duties are not necessary to protect the employer's interests; applied post-employment, they would unduly infringe on the employee's right to work. Further reasons were that their imposition would result in 'handing out' restraints that are normally negotiated contractually, and that they are unduly strict and onerous to impose on employees 'of humble origin'.[79] Those arguments are critically discussed in chapter 8 of this thesis.

The judgment in *Imperial Sheet Metal* has been followed in a long line of Canadian Cases.[80] In *RBC Dominion Securities Inc v Merrill*

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[76] *Imperial Sheet Metal* [63].

[77] *Imperial Sheet Metal* [60].

[78] *Imperial Sheet Metal* [44].

[79] *Imperial Sheet Metal* [6], [48], [52]–[58].

[80] Including *ADM Measurements Ltd v Bullet Electric Ltd* [2012] 9 WWR 280; *Dr. Robert Hatheway Professional Corp v Instrum* 2011 CarswellNB 396, 2011 NBQB 208; *Carson International Inc v Biggar* 2010 CarswellMan 485, 2010 MBQB 198; *Superior Truss Co v Truss Fab Inc* 2010 CarswellMan 405, 2010 MBQB 179; *Allstate Insurance Co of Canada v Larocque* 2008 CarswellOnt 2152, 165 ACWS (3d) 525 / *Allstate Insurance Co of Canada v Larocque* 2008 CarswellOnt 541, 64 C.C.E.L. (3d) 119; *Restauronics Services Ltd v Forster* (2004) 239 DLR (4th) 98; *Kusy's Electric Ltd v Sullivan* (2007) 305 Sask R 210 [48]; *RBC Dominion Securities Inc v Merrill Lynch Canada Inc* 2008 CarswellBC 2099, 2008 SCC 54 [46].

Lynch Canada Inc[81] the Supreme Court of Canada strongly endorsed the principles and reasoning in *Imperial Sheet Metal*. It also stressed that the test for a 'key employee' is a substantive one that depends on the employee's actual authority or control over the employer's operation rather than on his or her title,[82] and that the law 'does not lightly impose the mantle of a fiduciary on an employee' unless he or she 'has the power to guide and direct' the affairs of the employer.[83]

In *Carsons International v Biggar* the court elaborated on the 'key employee' test, saying that it is not a 'precise filter',[84] that the distinction between a 'key' and a 'non-key' employee is that the former occupies a position of trust, and that '[v]arying degrees of trust, reliance and dependency can suffice to establish a fiduciary duty in an employer/employee relationship, depending on the situation. The issue is one of ultimate power and responsibility.'[85]

Critique of the Canadian 'senior' or 'key' employee approach

The Canadian approach of reserving the potential application of fiduciary duties to 'senior' or 'key' employees is problematic in numerous respects.

Most of the justifications that the Canadian courts have offered for the use of the 'key' employee concept are policy-based and, for the

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[81] *RBC Dominion Securities Inc v Merrill Lynch Canada Inc* 2008 CarswellBC 2099, 2008 SCC 54.

[82] *RBC Dominion Securities Inc v Merrill Lynch Canada Inc* 2008 CarswellBC 2099, 2008 SCC 54 [50].

[83] *RBC Dominion Securities Inc v Merrill Lynch Canada Inc* 2008 CarswellBC 2099, 2008 SCC 54

[62].

[84] *Carson International Inc v Biggar* 2010 CarswellMan 485, 2010 MBQB 198 [57].

[85] *Carson International Inc v Biggar* 2010 CarswellMan 485, 2010 MBQB 198 [61]–[62].

reasons given in chapter 8 of this thesis, are not particularly persuasive.

The 'key' employee classification has also been criticised for being formalistic rather than substantive.[86] This is however only partially true. The courts' descriptions of the concept and the kinds of considerations they take into account in determining whether an employee falls within it are substantive ones. In that respect, it is a 'substantive' concept. However, where it is 'formalistic rather than substantive' is in its indiscriminate and absolute exclusion of all non-key employees from the possibility of fiduciary accountability. This rigidity also fails to cater for changing and *ad hoc* 'atypical' scenarios such as those in which an employee who is normally a 'non-key' employee performs the functions of a 'key' employee on one or a few *ad hoc* occasions or in relation to one or a few *ad hoc* tasks. As Stafford and Ritchie argue, it is, for these kinds of reasons, too much of an 'all or nothing' approach.[87]

The 'key' employee test also appears to be applied largely to (and is a little more compelling in relation to) the post-employment use or disclosure of an employer's confidential information by a former employee, although a principled approach suggests that, if the test does apply, it should be applied consistently both during and after the termination of the relationship. However, in that event, a number of the policy reasons the courts have used to justify it become even less persuasive.

There are also significant theoretical and analytical difficulties with the 'key' employee approach. The concept of a 'key' employee is somewhat vague and provides a nebulous basis for analysis. More problematic, however, is that the introduction of the categories of 'key' employee and 'non-key' employee adds a layer of deflection

[86] Stafford and Ritchie *Fiduciary Duties: Directors and Employees* 111–12 paras 3.106–3.109.
[87] Stafford and Ritchie *Fiduciary Duties: Directors and Employees* 111–12 paras 3.106–3.110.

that unnecessarily complicates and obscures the true purpose of the analysis in the same way as does the ‘categorisation’ approach of classifying certain classes of relationships as ‘fiduciary’ ones. As such, it is subject to the same criticisms that I expressed in chapter 4 in relation to ‘categorisation’.

In terms of Canadian law itself, the use of the ‘key’ employee criterion is also inconsistent with the ‘vulnerability’ criterion that (up until its relegation in *Galambos* to a merely relevant but not necessary or decisive factor) featured prominently in the application of fiduciary duties in all other relationships. The extent to which this inconsistency is substantive (and thus unprincipled) or merely reflects a different emphasis with regard to incidence criteria is not clear. On the one hand, the criteria of authority, control and representation on which the ‘key’ employee’s identification is based are consistent with criteria that the Canadian courts (like those in England and South Africa) apply generally. It is possible therefore to explain the use of the ‘key’ employee concept as simply a means for placing the emphasis on those criteria in employment relationships while placing it on vulnerability or other criteria in other contexts. If so, there is no difference in the actual criteria that are employed, but only in the relative significance afforded to them. As this thesis has argued, that is entirely consistent with the flexibility embodied in both the fiduciary concept itself and in the justified expectation criterion that governs its application. However, there does not seem to be any compelling reason for singling out relationships of employment for differential treatment.

Finally the ‘key’ employee approach is inconsistent with the approaches taken in other Commonwealth jurisdictions, including England and South Africa. It is also inconsistent, I would suggest, with the fact that there are circumstances where there is a justified expectation that a ‘non-key’ employee will act only in the employer’s interests and not self-interestedly. The fact that Canadian law is

unique in its adoption of a different position on these matters is perhaps reflective of its lack of appeal.

4.3 ENGLISH CASE LAW ON THE INCIDENCE OF ORDINARY EMPLOYEE FIDUCIARY DUTIES

The judgment in *Fishel*[88] has become established as the authoritative statement of the general principles that govern employee duties in English law.

(a) University of Nottingham v Fishel [2000] ICR 1462

The facts in *Fishel*

Fishel was a clinical embryologist. He had a contract of employment with the University of Nottingham in terms of which he was employed by the university on a full-time basis, as scientific director of the university's infertility clinic. Fishel also did work at various overseas private clinics for which he received remuneration. He did that other work without obtaining the consent that he was required to obtain in terms of the university's procedures for 'outside' work and in terms of his contract of employment. In addition, he sent other embryologists who were also employed by the university and who were under his supervision to work at the overseas clinics.

By working at the overseas clinics, those other embryologists also breached their contracts of employment. The payment arrangement between Fishel and the overseas clinics was that they paid Fishel for the work he personally did for them, and they also paid Fishel for the work that the other university-employed embryologists did. Fishel then paid the other embryologists in accordance with a private arrangement he had with them. In terms of that arrangement, Fishel paid them less for the work they did for the overseas clinics than the clinics paid him for their services. That meant that Fishel made a personal profit or commission on the work done by the other embryologists for the overseas clinics.

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[88] *University of Nottingham v Fishel* [2000] ICR 1462.

This work that Fishel and the other university-employed embryologists did at the overseas clinics did not prejudice of the university's own clinic in any way. In fact, it benefited the university clinic by contributing to the skills of the embryologists and to the research and development at the clinic.

The relationship between Fishel and the university deteriorated for various reasons and eventually resulted in the university bringing an action against Fishel in which the university alleged that Fishel had breached his contractual and/or his fiduciary duties to the university by undertaking work at the overseas clinics without authorised consent, and for inducing breaches of contract by the other embryologists under his supervision. The university, on those grounds, claimed Fishel's profits from that outside work or, alternatively, restitutionary damages.

The allegation against Fishel on the fiduciary issue was that he owed the university fiduciary duties and that he had breached those duties by working for the overseas clinics for reward, and by profiting from the work that the other university-employed embryologists did for those other clinics. More specifically, the university alleged that this conduct involved a number of specific fiduciary breaches: first, a breach of the conflict of duty and interest rule, which prohibited Fishel from pursuing his own interests when he was duty bound to advance the interests of the university; second, a breach of the no-conflict of duty rule, which prevented him from placing himself in a situation where he owed a duty to another which was inconsistent with the duty of undivided loyalty which he owed to the university; and third, a breach of the obligation not to make a secret profit, which prohibited him from misusing his position to exploit opportunities that came to him in his position as an employee of the university.

The judgment in *Fishel*

(i) The existence of fiduciary duties – general principles

In addressing the question of whether Fishel had breached any fiduciary duties that he owed to the university, the court made a number of general statements regarding the legal principles that govern the existence of those duties.

The court confirmed in this regard Lord Millett's classification of fiduciary relationships into the following three broad categories. The first category is a relationship of influence where one party is in a position of influence over another. (As the court said, the relationship between Fishel and the university did not fall within this category.) The second is a relationship in which one party is in receipt of information imparted in confidence by the other. (Again, this was not relevant to the relationship between Fishel and the university.) The third category is a relationship of trust and confidence. (This was the only type that was potentially relevant to the relationship between Fishel and the university.)

The court then quoted Lord Millett's description of a 'relationship of trust and confidence' as–

> a relationship ... which arises whenever one party undertakes to act in the interests of another or places himself in a position where he is obliged to act in the interests of another. The core obligation of the fiduciary of this kind is the obligation of loyalty.

The court went on to say that, in this context, the duty of 'loyalty' has the precise meaning of not acting contrary to the interests of another. This, said the court, is the fundamental feature that, in this category of fiduciary relationship at least, marks out the relationship as a fiduciary one.

Employment relationships generally are not fiduciary relationships in the classic sense. The relationship of employment–

> is to be contrasted with a number of other relationships which can readily and universally be recognised as 'fiduciary relationships' because the very essence of the relationship is that one party must exercise his powers for the benefit of another. Trustees, company directors and liquidators classically fall into this category.

These classic types of fiduciary relationships typically have two characteristics, apart from the duty on the one party to act in the interests of another. The first is that the fiduciary powers are conferred by someone other than the beneficiary in whose interests the fiduciary must act. Second, those fiduciaries have considerable autonomy over decision-making and are not subject to the control of the beneficiaries.

In terms of those general principles, not all employees automatically or necessarily owe their employers fiduciary duties in all circumstances or at all. There are however circumstances that may arise in the context of employment, or which may arise out of it, that will place the employee in the position of a fiduciary. This will be the case where, for example, the employee is in receipt of confidential information belonging to the employer. Every employee is also under fiduciary duty not to accept a bribe and will have to account for it. The same principles apply to all employees, even an errand boy who has a fiduciary obligation to bring back the employer's change.[89] However, fiduciary duties arise only in particular circumstances and, where they do, they are limited to those circumstances.[90]

With regard to the circumstances that give rise to fiduciary obligations, the general principle is that there must, within the particular relationship concerned, be 'specific contractual obligations which the employee has undertaken which have placed him in a

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[89] *University of Nottingham v Fishel* [2000] ICR 1462 1490–1, citing *Attorney-General v Blake* [1998] Ch 439 (CA), [2001] AC 1.

[90] *University of Nottingham v Fishel* [2000] ICR 1462 1491.

situation where equity imposes these rigorous duties in addition to the contractual obligations'.[91] It is therefore 'necessary to identify ... the particular duties undertaken by the employee and to ask whether in all the circumstances he has placed himself in a position where he must act solely in the interests of his employer'. It follows that fiduciary duties may apply to only part of the employment relationship.[92]

Once an employee has undertaken a specific duty to secure work for his or her employer, for example, he or she cannot pursue that opportunity for him- or herself, even if the third party wished to engage him or her in his or her own right. However, employees do not in general promise to give their employer the benefit of every opportunity falling within the scope of the employer's business and thus do not always attract fiduciary duties.

Where such fiduciary duties are present, they must not be equated or confused with the employee's duty of faith and contractual duties of trust and confidence.

An employee who does owe his or her employer a fiduciary duty will be in breach of that duty only if he or she places him- or herself within the scope and ambit of those duties, in a position where his or her duty and interest may possibly conflict. Where there is such a breach, the only way in which the employee-fiduciary can avoid liability for that breach is by showing that the employer-beneficiary gave properly informed consent to the conduct in question.

The court's judgment

Applying the general principles outlined above, the court found that Fishel was not under any specific duty to secure the work that he did at the overseas clinics for the university. He also did not use his

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[91] *University of Nottingham v Fishel* [2000] ICR 1462 1491.
[92] *University of Nottingham v Fishel* [2000] ICR 1462 1493; *Phipps v Boardman* [1967] 2 AC 46 127; *New Zealand Netherlands Society 'Oranje' Inc v Kuys* [1973] 1 WLR 1126 1130c.

position as an employee of the university in order to obtain the overseas work he personally did or the payments he received for doing that work. As such, he did not owe the university any fiduciary duties in relation to the work he personally did at the overseas clinics and, not being liable for any breach of fiduciary duty, was not accountable to the university for the personal profits he had made from that work.

However, one of Fishel's responsibilities as an employee of the university was to supervise and direct the other embryologists employed by the university in their work for the university. In relation to that aspect of his employment, Fishel did owe the university the fiduciary no-conflict and no-profit duties. The no-conflict duty prohibited him from putting himself in any position in which there was (or was a reasonable possibility of) any conflict between the university's interests and his own personal interests. The no-profit duty prohibited him from using his position as supervisor of the other embryologists for his own benefit.

By arranging for the other embryologists to work at the overseas clinics and by personally receiving payment for the work that they did, he was clearly putting himself in a position where there was a potential conflict between his specific duty to the university to direct the embryologists to work in the interests of the university and his own financial interest in directing them abroad.

In addition, he used his position with the university to further his own interests in order to receive payment for the work that the other embryologists did. It was only by virtue of his position at the university that he had access to a ready supply of embryologists to assist him in the work, and he used that position to secure their services abroad and to obtain a commission for doing so.

Another issue the court referred to was whether the fiduciary's 'profit' (the amount that the beneficiary is entitled to claim) should be reduced to the extent that the fiduciary's own work and skill

contributed to his or her gain. In other words, should there be a deduction from the fiduciary's profits of any amounts attributable to his or her own work and skill? This aspect was discussed in chapter 3 of this thesis.

Some comments on the *Fishel* case

There are only three aspects of the *Fishel* judgment that are of concern in this thesis.

One is the court's reference (and thus implicit acceptance of) the drawing of a distinction between fiduciary relationships *per se* and in fact and the related 'categorisation' approach to 'fiduciary relationships'. As with the *Hodgkinson* judgment, there is no evidence in the judgment that the court was suggesting that the two are governed by different incidence criteria or principles, but simply that the same incidence criteria are present to different degrees and in different combinations. While this is unproblematic (and easily explained with reference to the justified or reasonable expectation criterion) both the distinction itself and categorisation are problematic for all the reasons mentioned elsewhere in this thesis.

Another concern with the judgment is its failure to even consider the justified or reasonable expectation criterion. Whilst this may be attributable to the fact that it was not raised in argument before the court, its growing support in other Commonwealth jurisdictions suggests it may have merited at least some (albeit *obiter*) reference.

Unfortunately the court also did not elaborate further on the kinds of circumstances in which an employee would have undertaken an obligation or placed him- or herself in a position where he or she will incur fiduciary duties. In *Fishel*, it was Fishel's undertaking of the supervision and direction of the other embryologists employed by the university in their work for the university that gave rise to a fiduciary duty to avoid any conflict between his duty to direct those

embryologists to work in the university's interests and his duty not to use that supervisory position for personal gain.[93]

In the subsequent case of *Lonmar Global Risks Limited v Barrie West*[94] it was held that a fiduciary obligation of loyalty can arise only where the employee has a particular contractual obligation 'which requires the law to impose a duty to positively act in the best interests of the employer'. A fiduciary duty will arise only where there is such a duty on the employee to act solely in the employer's interests.[95] This highlights the need for the existence of a positive duty to act in the beneficiary's interests as a prerequisite for the incidence of fiduciary duties, as well as for the conceptual link between the incidence of fiduciary duties and the underlying aim of securing the proper performance of that positive duty discussed in chapter 3 of this thesis. The point is not however of much further assistance in identifying the kinds of circumstances in which such a positive duty (and thus fiduciary duties) will exist.

It is however clear from an overview of other English cases decided subsequent to *Fishel* that there are a variety of circumstantial factors that will give rise to a duty to act solely in the employer's interests, and fiduciary duties will thus be imposed on an employee.

For example, in *Comax Secure Business Services Ltd v Wilson and Others*, the recognition of fiduciary duties on the part of two senior salesmen who were employed to ensure their employer obtained the best rates for the supply of certain machinery to the

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[93] *Fishel* 1498; *Neary v Dean of Westminster* [1999] IRLR 288 290.

[94] *Lonmar Global Risks Limited v Barrie West* [2011] IRLR 138, [2010] EWHC 2878 (QB).

[95] *Lonmar Global Risks Limited v Barrie West* [2011] IRLR 138, [2010] EWHC 2878 (QB).

employer was based on their positions of influence, discretion and control over the placing of orders. The court said in this regard:[96]

> [A]n employee, who is in a position to influence the placing of orders for goods or services by employer, owes a fiduciary duty to the employer not to prefer his own financial interests or those of his associates to the interests of his employer when deciding whether to exercise the influence which he possess and, if so, how.

In *PMC Holdings v Smith*,[97] Smith was the former senior manager of PMC and was a director and 50 per cent shareholder in another company (ISC). While employed by PMC, Smith caused PMC to enter into various transactions with ISC without disclosing his interests in ISC to PMC. In addition, he caused a number of PMC's customers to contract with ISC. The court referred to the terms of Smith's appointment, his senior position, his title of 'operations director' and particularly his functions. It held that he owed PMC fiduciary duties in relation to (at least): the placing, negotiation and approval of sales, purchases and pricing in material transactions with third parties, including ISC; contracting with ISC and the terms of those contracts; and the dealings between ISC and PMC's customers.[98]

In *Ross River and Another v Cambridge City Football Club* the court said that, in determining the extent to which an employee's contract permits self-interested action, the relevant enquiry is–[99]

> [w]hether or not, under the terms of that contract (or a discrete part of it), the employee is permitted to serve his own interests, the parties' joint interests or the employer's sole interest will depend upon of (i) the manner in which and the apparent purpose for which rights, powers, duties and discretions are

[96] *Comax Secure Business Services Ltd v Wilson and Others* (unreported) 21 June 2001.
[97] *PMC Holdings v Smith* [2002] EWHC 1575 (QB).
[98] *PMC Holdings v Smith* [2002] EWHC 1575 (QB) [8]–[9].
[99] *Ross River and Another v Cambridge City Football Club* [2007] EWHC 2115 (Ch) 199..

> allocated by the contract; (ii) the contract's particular commercial or business setting, and (iii) the self-serving actions lawfully open to the employee both under and notwithstanding the contract.

It also appears clear that control over the employer's assets will almost certainly give rise to fiduciary duties in English law.[100] There are also a number of cases in which the English courts have based the incidence of employee fiduciary duties on the existence of decision-making autonomy and discretion on the part of the employee. The greater the employee's autonomy to make decisions and to direct or commit the employer in its activities, the more likely it is that the employee will attract fiduciary duties.[101] In *Fishel*, Elias J listed autonomy of decision-making on the part of the fiduciary and an absence of control on the part of the beneficiary as typical features of a fiduciary relationship.[102] In *PMC Holdings Ltd v Smith*[103] it was the employee's autonomy and discretion in the placement, negotiation and approval of certain transactions for the employer and the employer's absence of control over those activities that gave rise to fiduciary duties. Similar circumstances formed the basis for the recognition of fiduciary duties on the part of the employees in *Comax Secure Business Services Ltd v Wilson*[104] and in *Lewis & Lewis Property Consultants v Chase Midland plc.*[105] In *Helmut Integrated Systems Ltd v Tunnard*[106] the English Court of Appeal referred to the absence of control and resulting vulnerability on the part of the employer as reasons for the existence of fiduciary duties on the part

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[100] *Agip (Africa) Ltd v Jackson* [1990] Ch 265; *Charter plc v City Index Ltd* [2008] 2 WLR 950; Stafford and Ritchie *Fiduciary Duties: Directors and Employees* 125 para 3.163.
[101] Stafford and Ritchie *Fiduciary Duties: Directors and Employees* 129 paras 3.181–3.182.

[102] *University of Nottingham v Fishel* [2000] ICR 1462 1491.

[103] *PMC Holdings v Smith* [2002] EWHC 1575 (QB).
[104] *Comax Secure Business Services Ltd v Wilson and Others* (unreported) 21 June 2001.
[105] *Lewis & Lewis Property Consultants v Chase Midland plc* (unreported) 18 November 2004.
[106] *Helmet Integrated Systems Ltd v Tunnard* [2006] EWCA Civ 1735.

of the employee. And in *Tesco Stores Ltd v Pook* it was the employee's duty to approve invoices for the employer, coupled with the fact that he occupied a position 'just below board level', that subjected him to fiduciary duties.[107] Generally, the higher the level of managerial responsibility an employee has, the more likely it is that he or she will enjoy sufficient autonomy and discretion to attract fiduciary accountability.

4.4 SOUTH AFRICAN CASE LAW ON THE INCIDENCE OF ORDINARY EMPLOYEE FIDUCIARY DUTIES

The *Fieldstone* case (which was discussed in detail in chapter 6 of this thesis) is the most recent and authoritative statement of the general principles that govern employee fiduciary duties in South African law. It is also the only judgment (apart from earlier cases that make a few scattered references to 'agency') that expressly refers to the criteria and circumstantial factors that give rise to fiduciary duties.

As mentioned in the previous chapter, the court (after quoting the *Robinson v Randfontein* description of a fiduciary relationship as one of confidence),[108] described the three *Frame v Smith*[109] criteria (viz. scope for the exercise of some discretional powers; an ability to use that power or discretion unilaterally so as to affect the beneficiary's interests; and 'peculiar vulnerability' on the beneficiary's part to the exercise of that discretion or power) as 'helpful in the identification of ... a [fiduciary] relationship although not decisive'.[110] Although the court did not expressly define them in terms of incidence criteria, the circumstantial features on which it based its own finding of the existence of fiduciary duties were the nature of the defendant's duties, the fact that he acted with a 'considerable degree of

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[107] *Tesco Stores Ltd v Pook* [2004] IRLR 618.

[108] *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 177–80.

[109] *Frame v Smith* [1987] 2 SCR 99 100.

[110] *Phillips v Fieldstone Africa (Pty) Ltd and Another* [2004] 1 All SA 150 (SCA) [33].

independence' and reported to his employer at his discretion, his close integration with the employer and its business, and his expertise that was not shared by the employer's other employees or executives and which, to that extent, left him beyond their direction. Furthermore, the employer was largely dependent on the exercise of his proper judgment and good faith which, in all the circumstances, placed him in a position of trust.

These criteria of power, discretion, autonomy, vulnerability, trust and confidence expressly referred to or implicit in the *Fieldstone* judgment will however now have to be applied with reference to the 'justified reliance' criterion introduced in *Volvo*,[111] as discussed in chapter 6.

Apart from these two relatively recent cases of *Fieldstone* and *Volvo* and some earlier references to 'agency',[112] there is no explanation (or even reference) in the earlier cases dealing with employee fiduciary duties of the criteria that govern the incidence of those duties, or any explanation of why those duties exist.

There are a number of reasons for this. The main one is that most of the earlier cases automatically classify all relationships of employment as 'fiduciary relationships' and, on that basis, automatically assume that all employees owe their employers 'fiduciary' duties.[113] (As will be argued later in this thesis, there is little merit in this class-wide classification of employment as 'fiduciary relationship', or in the assumption that any fiduciary duties that do

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[111] *Volvo (Southern Africa) (Pty) Ltd v Yssel* [2009] JOL 24109 (SCA), 2009 (4) All SA 497 (SCA).
[112] In, for example, *Transvaal Cold Storage Co Ltd v Palmer* 1904 TS 4.

[113] For example, *Premier Medical & Industrial Equipment (Pty) Ltd v Winkler and Others* [1971] 4 All SA 94 (W), 1971 (3) SA 866 (W) ; *Uni-Erections v Continental Engineering Co Ltd* [1981] 3 All SA 73 (W*),* 1981 (1) SA 240 (W) *Peacock v Marley* 1934 AD 1 5; *Transvaal Cold Storage Co Ltd v Palmer* 1904 TS 4 33; *Durand v Louw* 1935 TPD 47; *Meter Systems Holdings Ltd v Venter and Another* [1993] 3 All SA 574 (W) 589; *Lawrence v I Kuper & Co (Pty) Ltd t/a Kupers – A Member of INVESTEC* (1994) 15 *ILJ* 1140 (IC) 1144; *Sappi Novoboard (Pty) Ltd v Bolleurs* (1998) 19 *ILJ* 784 (LAC); [1998] 5 BLLR 460 (LAC) [7]; *Nel v Ndaba and Others* (1999) 20 *ILJ* 2666 (LC) [25]; *Thompson and Samaki Beach Lodge* (2009) 30 *ILJ* 1396 (CCMA) 1418; *Penta Publication (Pty) Ltd v Schoombie and Others* [2000] 2 BLLR 199 (LC), [2001] 2 BLLR 199 (LC) [25].

apply to an employee extend to all aspects of his or her employment.) The judgments have thus focused exclusively on issues of whether those 'fiduciary duties' had actually been breached on the facts of the case, without any explanation of the reasons why they existed. In addition, the courts have used the term 'fiduciary' loosely and there is clear evidence of confusion between 'fiduciary' duties and duties of good faith and fidelity or, at least, the misuse of those terms. As a result, it is not always clear whether the term is being used to describe fiduciary duties in the strict technical sense or only the lesser contractual duty of good faith or 'loyalty'.[114] As such, the judgments reveal very little about the criteria for the incidence of fiduciary duties either generally or specifically in relation to employees.

4.5 THE AUSTRALIAN POSITION

It is interesting, by way of further comparison, to briefly note the Australian position on the existence of employee fiduciary duties.

In the leading case of *Hospital Products*, the Australian High Court held that employees owe their employers fiduciary duties only if they are in 'positions of trust and confidence', are given 'particular powers of discretion', and those powers of discretion are such that the employer is vulnerable to their abuse.[115]

In *Victoria University of Technology v Wilson* (which concerned a university professor and senior lecturer) the Victoria Supreme Court was more expansive in its willingness to recognise the automatic

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[114] For example, *Premier Medical & Industrial Equipment (Pty) Ltd v Winkler and Others* [1971] 4 All SA 94 (W), 1971 (3) SA 866 (W); *Uni-Erections v Continental Engineering Co Ltd* [1981] 3 All SA 73 (W*),* 1981 (1) SA 240 (W) ; *Lawrence v I Kuper & Co (Pty) Ltd t/a Kupers – A Member of INVESTEC* (1994) 15 *ILJ* 1140 (IC) [25]; *Thompson and Samaki Beach Lodge* (2009) 30 *ILJ* 1396 (CCMA) 1418; *Daewoo Heavy Industries (SA) (Pty) Ltd v Banks and Others* 2004 (4) SA 458 (C) [8].

[115] *Hospital Products v United States Surgical Corp* 156 CLR 41 (HCA) [96].

existence of fiduciary duties on the part of 'professional employees', saying:[116]

> [S]ubject to contract, it remains unquestionable that professional employees owe to their employers fiduciary obligations not to profit from their position at the expense of the employer and to avoid conflicts of interest and duty. Accordingly, even if an employee is generally speaking free to work for someone else, he or she must avoid work which could conflict with the interests of the employer that the employee is paid to serve. Correspondingly, in the absence of full and frank disclosure and consent, a professional employee remains bound to account to the employer for gains derived as a result of the employee's fiduciary position and for opportunities of which the employee may learn in the course of employment; lest the employee otherwise be swayed by considerations of personal interest.

In the more recent case of *Bailey Associates Pty Ltd v DBR Australia Pty Ltd* the employee concerned was employed as the 'general manager' of a private company. The only person senior to him was the company's managing director (who was also one of the company's only two directors). The employee was therefore the company's most senior employee. In terms of his job description he had 'significant responsibility' for managing both the staff and the business of the company and, by virtue of that responsibility, had 'significant access' to the company's confidential information, business plans and facilities. He was described by the court as 'virtually in the same position of being a third director'. The company's managing director 'trusted him and had great confidence in his ability', and the company was 'very vulnerable' to any breach by him of his common-law duty of fidelity.[117]

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[116] *Victoria University of Technology v Wilson and Others* [2004] VSC 33 [149].
[117] *Bayley Associates Pty Ltd v DBR Australia Pty Ltd* [2013] FCA 1341 [238].

The Federal Court of Australia said that 'while it seems generally accepted that senior employees with managerial responsibilities will owe fiduciary duties, it is also generally accepted that the same cannot be said of all employees'.[118] Whether or not such duties attach to other employees is a question of degree. Relevant factors include the amount of latitude the employee is afforded by the employer and how vulnerable the employer is to the potential misuse of the position of power granted to the employee. Another way of looking at the matter, said the court, 'is to regard a fiduciary duty as being imposed on the employer/employee relationship if that relationship demands a standard of loyalty exceeding the duty of fidelity prescribed by the relevant employment contract'.[119] It then went on to approve the statement in *Fishel*[120] that, in order to determine whether fiduciary duties do apply, one must identify the particular duties that the employee has undertaken and ask whether, in all the circumstances, he or she has placed him- or herself in a position where he or she must act solely in the interests of the employer.

Applying these principles to the facts of the case, the court held that the employee's relationship with his employer-company was fiduciary in nature. As such, it rendered him subject to fiduciary duties, which the employee had breached by establishing and carrying on business in competition with his employer-company through an 'alter ego' company he had formed, by using information belonging to his employer in the preparation of a tender by that alter ego company to perform valuable work within the scope of his employer's business, by stealing confidential information belonging

[118] *Bayley Associates Pty Ltd v DBR Australia Pty Ltd* [2013] FCA 1341 [231].
[119] *Bayley Associates Pty Ltd v DBR Australia Pty Ltd* [2013] FCA 1341 [232].

[120] *University of Nottingham v Fishel* [2000] ICR 1462.

to his employer, and by diverting clients and business away from the employer to his alter ego company.[121]

5. COMMON CRITERIA AND 'JUSTIFIED EXPECTATIONS OF LOYALTY'

5.1 COMMON CRIERIA FOR THE INCIDENCE OF FIDUCIARY DUTIES

Despite some differences in emphasis and combination, the criteria applied in determining the incidence of fiduciary duties are substantially the same in Canadian and English law and in the few South African cases in point. This is so within the employment context and also as between employees, directors and officers, agents and other actors, with the exception of Canadian law's own internal inconsistency in the criteria applied to relationships of employment and those applied to other relationships.

Within the context of company law, the application of fiduciary duties to directors and officers has been based on a substantive assessment[122] of the presence of various traditional individual incidence criteria. The emphasis however has been on two of them in particular. These are the nature and extent of the actor's discretionary power, ability, authority and responsibility[123] to act on behalf of the company, and control over company property or interests.[124]

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[121] *Bayley Associates Pty Ltd v DBR Australia Pty Ltd* [2013] FCA 1341 [21], [223], [238]–[240].

[122] *Bellairs v Hodnett and Another* 1978 (1) SA 1109 (A) 1130E–F; *Sibex Construction (SA) Ltd v Injectaseal CC* [1988] 4 All SA 190 (T) 201.

[123] Responsibility, within this context, is generally understood as having a meaning that is wider than a directly enforceable legal duty or obligation.

[124] *Robinson v Randfontein Estates Gold Mining Co Ltd* 1920 AD 168 177–8; *Sackville West v Nourse*1925 AD 516 533–4; *Woolworths Ltd v Kelly* (1991) 4 ACSR 431 445 (CA (NSW) ; *Pepper v Litton* 308 US 295 (1939) 306–7; *Hospital Products Ltd v United States Surgical Corporation* (1984) 55 ALR 417 455 (HC of A) . As stated in *Canadian Aero Services Ltd v O'Malley* (1973) 40 DLR (3) 371

The existence of sufficient degrees of such discretionary power, ability, authority, responsibility (which would normally but not necessarily encompass some corresponding trust, confidence or reliance on the part of the company) and control in relation to a company originally prompted and rationalised the recognition of directors as fiduciaries and shaped their common-law fiduciary duties to the company. Similar assessments of these factors have resulted in various company officers and senior managers being subjected to fiduciary duties of the same nature and extent as those of directors in circumstances where they have occupied positions of substantive equivalence to that of a director,[125] and have enjoyed substantially the same nature, extent and level of discretionary power, authority or responsibility. Implicit in all these criteria is a corresponding vulnerability or susceptibility on the part of the company to the risk that the actor may abuse his or her authority, discretion or control by exercising it other than in the company's interests.

In the case of ordinary employees, the individual criteria that feature most prominently are those of power or control over the employer's assets, discretion, autonomy and freedom from employer control and, to a lesser extent, vulnerability on the part of the employer to employee abuse thereof.

The criteria on which the South African Supreme Court of Appeal based its decision in *Phillips v Fieldstone*[126] have already been discussed. In the few other cases in which the South African courts

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382: 'An examination of the case law of this court and in the courts of other like jurisdictions on the fiduciary duties of directors and senior officers shows … [that their] application … is simply recognition of the degree of control which their positions give them in corporate operations'.

[125] As stated in *Sibex Construction (SA) Ltd v Injectaseal CC* [1988] 4 All SA 190 (T) 201: 'Officers of a company, whether defined as such by the Companies Act or not, who are authorised to act on its behalf stand under the same fiduciary relationship and are subject to the same fiduciary duties as the directors of the company'. See also *Phillips v Fieldstone Africa (Pty) Ltd and Another* 2004 (3) SA 465 (SCA).

[126] *Phillips v Fieldstone Africa (Pty) Ltd and Another* [2004] 1 All SA 150 (SCA); 2004 (3) SA 465 (SCA).

have articulated incidence criteria they have focused on factors such as the employee's functions, duties and responsibilities.[127]

Although emphasising the court's warning in *In re Coomber* against the dangers of generalisations in fiduciary cases,[128] Stafford and Ritchie suggest that the criteria most likely to give rise to fiduciary duties on the part of ordinary employees are control over their employer's property, the exercise of a managerial function, autonomy, and interaction with the employer's clients or customers without supervision. In addition, they suggest that an employee who perpetrates a fraud on the employer will ordinarily be found to have owed, and breached, a fiduciary duty to the employer.[129]

They go on to suggest that the question of whether an employee owes his or her employer fiduciary duties in any given case should be determined by way of a three-part enquiry. The first part is to ascertain the express and implied material terms of the employee's contract of employment. The second stage is to identify the duties and tasks to be undertaken by the employee. The final stage enquires into whether, in all the circumstances, the employee was obliged to act solely in the interests of the employer, having regard to the purpose for which those duties and any discretion were conferred on the employee, the extent to which the duty or discretion permits self-interested conduct by the employee, whether the employee's day-to-day activities are subject to the employer's direct supervision, and the extent to which the employee's contract of employment regulates the relationship so precisely that there is no basis for the imposition of a fiduciary relationship.[130] In addition, they suggest that Flannigan's 'limited access' test then be used as a cross-check and,

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[127] See, for example, *Daewoo Heavy Industries (SA) (Pty) v Banks and Others* [2004] 2 All SA 530 (C) [6]–[7].

[128] *Re Coomber; Coomber v Coomber* [1911] 1 Ch 723 729.

[129] Stafford and Ritchie *Fiduciary Duties: Directors and Employees* 128–30 paras 3.178–3.185.

[130] Stafford and Ritchie *Fiduciary Duties: Directors and Employees* 132.

if this cross-check produces a different result, this is an indication 'that something has gone wrong with the analysis'.[131]

These suggestions provide useful guidelines (much like *Frame v Smith's* 'rough and ready guide')[132] for identifying the existence of fiduciary duties. However, like all the individual incidence to which they refer, they do not explain exactly how those criteria are to be understood, their relative importance, and why it is that we impose fiduciary duties when they are present. As this thesis has argued, the only criterion that comes close to doing all of those things is that of a 'justified expectation of undivided loyalty'.

5.2 RECONCILING AND EXPLAINING THE CASES IN TERMS OF THE 'JUSTIFIED EXPECTATION OF UNDIVIDED LOYALTY' CRITERION

None of the Canadian, English or South African cases dealing specifically with the incidence of fiduciary duties on the part of ordinary employees refers to the justified expectation. Assuming that my suggestion that the 'justified reliance' concept introduced by the South African Supreme Court of Appeal in *Volvo*[133] is substantially the same as a 'justified expectation' is correct, there is also nothing in the case law of any of the three jurisdictions that, in principle, precludes its application.

In addition, it is also generally possible to easily explain the outcomes in all the cases in terms of such an expectation. The fact that the courts have employed or emphasised different individual criteria in different cases in reaching those outcomes and without reference to expectations does not detract from the validity of this conclusion. As I argued in the previous chapter, 'justified expectation' is a flexible concept that accommodates the consideration of any individual incidence criteria and combinations thereof that the court

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[131] Stafford and Ritchie *Fiduciary Duties: Directors and Employees* 132 fn 194.

[132] *Frame v Smith* [1987] 2 SCR 99 100.

[133] *Volvo (Southern Africa) (Pty) Ltd v Yssel* 2009 (4) All SA 497 (SCA).

may consider appropriate in the circumstances, and the different emphases afforded to them by the courts in the different jurisdictions. In addition 'justified expectation' has the advantages of providing the 'focal point' for the analysis and, ultimately, of rationalising and explaining the existence of fiduciary duties.

6. CONCLUSIONS

For the reasons given above and in chapters 3 and 4 on the nature of fiduciary duties and the criteria for their general incidence, the general principles laid out in the English case of *Fishel*[134] that not all employees owe their employers fiduciary duties, that they will only do so in certain circumstances, and that employees at all levels can in appropriate circumstances attract fiduciary duties are clearly sound. The Canadian approach of restricting the application of such duties to 'senior' and 'key' employees is fundamentally problematic and undesirable.

With regard to the actual incidence criteria applied in relation to ordinary employees, the *Fishel* requirement of a 'special undertaking' of some obligation or responsibility that gives rise to a duty on the employee to act solely in the employer's interests is unobjectionable. However, in failing to explain how the existence of such an undertaking as an incidence criterion may arise, it does not go far enough in indicating exactly when, or the kinds of circumstances in which, employees attract fiduciary duties. Nor does it explain why we impose those duties in those circumstances. The criteria referred to by the Canadian courts as giving rise to fiduciary duties within their 'senior' or 'key' employee category are also unproblematic in themselves, but again do not go far enough in identifying and explaining when and why fiduciary duties exist. The 'justified reliance' criterion introduced by the South African Supreme Court of Appeal in *Volvo* (which, together with the principles laid down in

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[134] *University of Nottingham v Fishel* [2000] ICR 1462.

Fieldstone, will form the basis for future decisions) is the most compelling and, for all the reasons I suggested in the previous chapter, the most theoretically sound and analytically useful.

Apart from the pervasive misuse of 'fiduciary' terminology and confusion between fiduciary and other employee duties, the only aspect of concern in the South African case law in relation to the incidence of employee fiduciary duties is the pre-*Fieldstone* automatic classification of all employment relationships as 'fiduciary' ones, and the related assumption that all employees owe their employers 'fiduciary' duties. However, the *Fieldstone* judgment, because of the way in which it approached the enquiry into whether the employee in that case was bound by fiduciary duties, now provides authority for a general principle that not all employees owe their employers fiduciary duties. It also provides authority for the general principle that, in appropriate circumstances, any employee at any level can incur fiduciary duties. Rejecting the argument that fiduciary duties are too burdensome to impose on ordinary employees, the court said:[135]

> The South African cases which recognise the duty of an employee to account for profits received in breach of fiduciary duty ... do not lay down that such a duty can only arise in the relationship of managerial employees to their employees. The existence and scope of any employee's fiduciary duties will depend on the facts of the case concerned.

This allows for a more principled and theoretically sound approach to the incidence of employee fiduciary duties than has previously existed in South African law. And, as South African law develops, it will hopefully do so with greater precision in the use of 'fiduciary' terminology, by acknowledging the justified expectation criterion, and

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[135] *Phillips v Fieldstone Africa (Pty) Ltd and Another* [2004] 1 All SA 150 (SCA), 2004 (3) SA 465 (SCA) [33]; *Sibex Construction (SA) (Pty) Ltd v Injectaseal CC* 1988 (2) SA 54 (T) 65F–G.

with greater articulation of and clarity on the individual criteria that would create such an expectation.

CHAPTER 8

EMPLOYMENT AS A 'FIDUCIARY RELATIONSHIP'

1. INTRODUCTION

Chapter 7 considered the circumstances in which the Canadian, English and South African courts have recognised employees as owing fiduciary duties to their employers. This chapter addresses the broader issue of whether all relationships of employment generally ought to be categorised as a class of 'fiduciary relationship'.

The issue is an unsettled one – the Commonwealth courts and commentators have adopted different positions, using different grounds. The chapter begins with an overview of the various arguments that have been advanced for and against a class-wide fiduciary classification of employment. It then suggests some possible meanings for a 'fiduciary relationship' within the context of fiduciary classification, and offers some conclusions on the extent to which the nature of employment within the contemporary workplace corresponds with the principles inherent in that classification.

This builds on the analysis in chapter 7 of the principles that govern the incidence, nature and scope of employee fiduciary duties. It also builds on the discussion in chapter 4 of the significance and consequences of the 'categorisation' of certain types of relationships as classes of 'fiduciary relationships' within the broader context of general fiduciary law and theory. That chapter rejected categorisation as theoretically unsound, unprincipled, of limited analytical value, and as having no significant substantive, evidentiary or other consequences or effects. The categorisation-based nature of the analysis in this chapter is not intended to suggest a departure from those conclusions or to suggest that categorisation is of any merit. Categorisation is however an established aspect of existing

jurisprudence and, while it continues to be so, it is necessary to consider its application to relationships of employment 'on its own terms'. It is for that reason alone that it is used as the conceptual reference point for this chapter.

2. DIFFERENT VIEWS ON WHETHER EMPLOYMENT IS A 'FIDUCIARY RELATIONSHIP'

2.1 THE SOUTH AFRICAN POSITION

Many of the South African cases involving employee fiduciary duties contain broad and unqualified references to the 'fiduciary nature' of the employment relationship and the existence of fiduciary duties on the part of all employees. The authority most frequently cited in this regard is Hiemstra J's statement in *Premier Medical and Industrial Equipment (Pty) Limited v Winkler and Another* that '[t]here can be no doubt that during the currency of his contract of employment the servant owes a fiduciary duty to his master which involves an obligation not to work against his master's interests.'[1] Similarly, in *Penta Publication (Pty) Limited v Schoombie and Others*, the court said that '[e]very employee owes a fiduciary duty to his employer'.[2]

Although general statements such as these suggest that all relationships of employment are fiduciary ones, the South African sources often use the descriptor 'fiduciary' in loose, undefined and ambiguous terms, and there are recurring instances in which it appears to have been used, incorrectly, to describe some other, non-

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[1] *Premier Medical & Industrial Equipment (Pty) Ltd v Winkler and Others* [1971] 4 All SA 94 (W), 1971 (3) SA 866 (W) 867 (H), quoted with approval in, *inter alia*, *Uni-Erections v Continental Engineering Co Ltd* [1981] 3 All SA 73 (W), 86; *Korsten v Macsteel (Pty) Ltd and Another* [1996] 8 BLLR 1015 (IC) 867; *Penta Publication (Pty) Ltd v Schoombie and Others* [2000] 2 BLLR 199 (LC).

[2] *Penta Publication (Pty) Ltd v Schoombie and Others* [2000] 2 BLLR 199 (LC), [2001] 2 BLLR 199 (LC) [41] in which the court said: '[e]very employee owes a fiduciary duty to his employer'.

fiduciary employee duty, such as the duty of trust and confidence,[3] the duty of good faith,[4] the duty of confidentiality,[5] or some other contractual duty.

There is also a notable departure from these broad attributions of fiduciary duties to all relationships of employment in the more recent judgment of the Supreme Court of Appeal in *Phillips v Fieldstone Africa (Pty) Ltd*.[6] In that case the court approached the issue of an alleged breach of fiduciary duty by an employee by first identifying certain criteria for the incidence of fiduciary duties and then applying them to the employee in question. This active, preliminary enquiry into whether fiduciary duties did in fact exist at all within the employment relationship concerned, and not only in relation to the conduct complained of (as opposed to an assumption of their existence), implies that fiduciary duties do not necessarily automatically attach to all employees.

General descriptions in South African sources of employment as a 'fiduciary relationship' or as a relationship that always subjects the employee to fiduciary duties must therefore be treated with some circumspection.

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[3] For example, *Council for Scientific & Industrial Research v Fijen* (1996) 17 *ILJ* 18 (A) 26D–E; *CyberScene Ltd and Others v i-Kiosk Internet and Information (Pty) Ltd* 2000 (3) SA 806 (C). This reflects a general confusion in South African law between fiduciary duties and ones of trust and confidence – see, for example, A Basson, M Christianson, A Dekker, C Garbers, P le Roux, C Mischke, and E Strydom *Essential Labour Law* 5 ed (2009) 44–6. Elias J noted a similar confusion and use of ambiguous terminology in descriptions of employee duties in English law in *University of Nottingham v Fishel* [2000] IRLR 471. See also Sims 'Is Employment a Fiduciary Relationship; [2000] ICR 1462 (QB)' (2001) 30 *Industrial LJ* 101 [1492].

[4] See, for example, *Ganes and Another v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA), [2004] 2 All SA 609 (SCA) [25]–[28].

[5] See, for example, *Penta Publication (Pty) Ltd v Schoombie and Others* [2000] 2 BLLR 199 (LC), [2001] 2 BLLR 199 (LC) [41]–[43].

[6] *Phillips v Fieldstone Africa (Pty) Ltd and Another* [2004] 1 All SA 150 (SCA), 2004 (3) SA 465 (SCA).

2.2 THE ENGLISH POSITION

There are some earlier cases in which the English courts expressly described employment as a 'fiduciary relationship'. In *Attorney-General v Blake*[7] the court said, generally, that '[t]he employer/employee relationship is a fiduciary one'. And, in *Neary v Dean of Westminster*, Lord Jauncey said that 'it has long been recognised that there exists between master and servant a fiduciary relationship of trust and confidence'.[8] However, since the influential judgment in *Fishel*,[9] the English courts have consistently refused to classify all relationships of employment as giving rise to fiduciary duties, or as 'fiduciary relationships'.

In the *Fishel* judgment Elias J made a number of statements of general principle relating to employee fiduciary duties and the application of the fiduciary concept to the employment relationship. He began by interpreting *Attorney-General v Blake* restrictively, saying that 'plainly the court was not ... intending to indicate that the whole range of fiduciary obligations was engaged in every employment relationship. This would be revolutionary indeed, transforming the content of employment beyond all recognition ...'.[10]Although fiduciary obligations may arise out of any employment relationship and in relation to any level of employee, they are 'not inherent in the nature of the relationship itself'. The relationship is 'obviously not a fiduciary relationship in the classic sense'.[11]

These *Fishel* principles have become firmly established and accepted as an accurate description of the general principles

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[7] *Attorney-General v Blake* [1998] Ch 439 (CA).

[8] *Neary v Dean of Westminster* [1999] IRLR 288 [18].

[9] *University of Nottingham v Fishel* [2000] ICR 1462.

[10] *University of Nottingham v Fishel* [2000] ICR 1462 1490.

[11] *University of Nottingham v Fishel* [2000] ICR 1462 1491. The position is the same in Hong Kong – see, for example, *Noble Spirit Ltd v Wong Shu Yuen* 2013 WL 7494 [16]–[19]; *Citipost (Asia) Ltd v Julian Robert Holliday CACV* 111/2004; *Glock (HK) Ltd v Brauner* [2007] HKLRD 852.

governing the incidence of employee fiduciary duties, and of the fiduciary status of employment, in English law.[12] As the English Court of Appeal subsequently said in *Helmut Integrated Systems v Tunnard*, '[i]t is [now] commonplace to observe that not every employee owes obligations as a fiduciary to his employer'.[13]

2.3 THE CANADIAN POSITION

There does not appear to be any direct discussion of the fiduciary status or classification of employment in the Canadian cases. It is however implicit in the courts' exclusive application of fiduciary duties to 'senior' or 'key' employees and their corresponding refusal to recognise fiduciary accountability on the part of all employees that Canadian law does not recognise employment generally as a category of 'fiduciary relationship'.

However, although the English and Canadian courts have reached the same 'end-position' on this issue, they have done so in different ways, and on different grounds. While the English courts have relied on arguments of doctrinal integrity and the absence of particular criteria for class-wide fiduciary categorisation to justify their position, the Canadian courts have relied more heavily on considerations of public policy.

The extent to which these different grounds are persuasive and of assistance in determining the fiduciary status of employment is discussed later in this chapter. Another significant difference between the two jurisdictions is that the English courts have accepted that, in

[12] The *Fishel* judgment has been described as 'illuminating', 'authoritative' and 'masterly' (*Lonmar Global Risks Limited v Barrie West* [2011] IRLR 138, [2010] EWHC 2878 (QB) [149]; *Helmet Integrated Systems Ltd v Tunnard* [2006] EWCA Civ 1735 [37]; *Ranson v Customer Systems plc* [2012] EWCA civ 841, 2012 WL 2191508 [28]) and has been followed in all subsequent English cases on employee fiduciary duties, including, for example, *Helmet Integrated Systems Ltd v Tunnard* [2006] EWCA Civ 1735 [36]–[37]; *Crowson Fabrics Limited v Paul Rider, Warren Stimson, Concept Textiles Limited* [2007] EWHC 2942 (Ch), [2008] IRLR 288 [79]–[81]; *Lonmar Global Risks Limited v Barrie West* [2011] IRLR 138, [2010] EWHC 2878 (QB) [149]–[155]; *Ranson v Customer Systems plc* [2012] EWCA civ 841, 2012 WL 2191508 [22] and in the Scottish case of *Samsung Semiconductor Europe Limited v Docherty* [2011] CSOH 32 [26].

[13] *Helmet Integrated Systems Ltd v Tunnard* [2006] EWCA Civ 1735 [36]. See also *Samsung Semi-conductor Europe Limited v Docherty* [2011] CSOH 32 [26].

appropriate circumstances, any employee, at any level, can attract fiduciary duties. Their statements of principle are, therefore, of direct relevance to the nature and status of all employment relationships. An understanding of the Canadian position on the other hand requires a more 'indirect' analysis. Because the Canadian courts have reserved the application of fiduciary duties to senior or key employees it is necessary to consider the reasons they have given for doing so, and for declining to extend them to ordinary employees, and then to extrapolate that reasoning to employment generally.

2.4 THE AUSTRALIAN POSITION

It is interesting to note, by way of further comparison, that there is some divergence in the Australian case law on whether employment is a category of 'fiduciary relationship'.

In the leading case of *Hospital Products*, Mason J included the employee–employer relationship in his list of examples of 'accepted fiduciary relationships', by which he was clearly referring to fiduciary relationships '*per se*' or 'in law'.

Hospital Products was followed in some subsequent cases,[14] but in other, almost contemporaneous cases, the courts were more constrained in automatically associating fiduciary duties with all employment relationships.[15]

In the recent case of *Bayley Associates Pty Ltd v DBR Australia Pty Ltd*, the Federal Court of Australia, quoting *Hospital Products*,[16] began by saying that employer–employee relationships fall within the

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[14] For example, *Harris v Digital Pulse Pty Ltd* [2003] NSWLR 98, 197 ALR 626 [37].

[15] For example, in *Victoria University of Technology v Wilson and Others* [2004] VSC 33 [149] the court implied that fiduciary duties might not necessarily apply to employees when it said that '[i]t is unquestionable that *professional employees* owe to their employers fiduciary obligations' (my emphasis).

[16] *Hospital Products v United States Surgical Corp* (1984) 156 CLR 41 (HCA) 96–7.

category of accepted fiduciary relationships, and that the courts have repeatedly said that the relationship is 'fiduciary in nature'.[17]

However, in the next paragraph the court immediately confined that statement to 'senior employees with managerial responsibilities', saying that while it is generally accepted that they will owe their employers fiduciary duties, 'the same cannot be said of all employees'.[18] It is clear therefore that the court did not accept the proposition that all relationships of employment are, or ought to be classified as, fiduciary relationships.

2.5 FLANNIGAN'S HISTORICAL ARGUMENT REGARDING THE FIDUCIARY NATURE OF EMPLOYMENT

Flannigan argues that the historical origins of the employee duty of fidelity that English and Canadian law imply into all contracts of employment originated as a fiduciary duty. As discussed in chapter 7, this duty of fidelity prohibits all employees (as ordinary employees) from competing with their employers during the currency of the employment relationship and from at any time using the employers' confidential information.

According to Flannigan, the early courts of Equity originally developed this duty as a fiduciary one, and it is only due to a number of subsequent misperceptions and misinterpretations that it had, by the middle of the twentieth century, been transformed into what is now generally treated as an implied contractual (as opposed to fiduciary) duty that attaches to all employees.[19] Since this duty is applicable to all employees, Flannigan argues, they are all accordingly fiduciaries. However, as mentioned in the previous chapter, South African law does not appear to recognise a separate

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[17] *Bayley Associates Pty Ltd v DBR Australia Pty Ltd* [2013] FCA 1341 [230].

[18] *Bayley Associates Pty Ltd v DBR Australia Pty Ltd* [2013] FCA 1341 [231].

[19] *Imperial Sheet Metal v Landry* 2007 CarswellNB 298, 2007 NBCA 51 [33]; *University of Nottingham v Fishel* [2000] ICR 1462 1492; R Flannigan 'The [Fiduciary] Duty of Fidelity' (2008) 124 *LQR* 2744.

duty of 'fidelity'. As such, this argument is of little (if any) relevance to the South African position. In addition, it is arguable that, even if the employment relationship originated as a fiduciary one, it may well have subsequently evolved and changed into something else.[20]

2.6 OTHER ARGUMENTS IN FAVOUR OF A FIDUCIARY CLASSIFICATION OF EMPLOYMENT

In addition to his historical analysis referred to above, Flannigan also argues that all relationships of employment ought to be classified as a class of status-based fiduciary relationship *per se* because they satisfy the requirements for fiduciary accountability.[21]

This argument is based on his 'limited access' thesis that fiduciary duties arise whenever one party has access in relation to the assets, interests or affairs of another that is subject to a limitation or restriction that such access may not be used other than in the latter's interests. He argues that all employees, regardless of their type or level of employment, fulfil this criterion. All have some form of access to the employer's assets for the purposes of or in connection with their employment. The nature and extent of that access and the assets to which it relates may vary, but whatever form it takes, and however limited it may be, it is still open to opportunistic and self-interested abuse for unauthorised personal ends.[22]

Addressing the concern raised by the court in *Imperial Sheet Metal* about 'too many employees of "humble origin" … being swept into

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[20] M Conaglen *Fiduciary Loyalty* (2010) 42 fn 59; S Deakin 'The Evolution of the Contract of Employment, 1900–1950: The Influence of the Welfare State' in N Whiteside and R Salais (eds) *Governance, Industry and Labour Markets in Britain and France: The Modernising State in the Mid-Twentieth Century* (1998) 212. It is also doubtful whether the duty of disclosure component of the broader duty of fidelity is compatible with the modern conception of fiduciary duties as exclusively proscriptive.

[21] R Flannigan 'The Fiduciary Accountability of Ordinary Employees' (2007) 13 *Canadian Labour & Employment LJ* 283 289.

[22] Flannigan 'The Fiduciary Accountability of Ordinary Employees' 291.

the fiduciary net',[23] he argues that 'humble employees' are as likely as senior and key ones to act opportunistically, and that their humble status is no reason to excuse them when they divert value to themselves.[24] His response to the court's argument that fiduciary duties are too extensive and onerous to be applied to ordinary employees is that, although liability for breach of fiduciary duty is strict, the duties themselves are not. All they require is that the fiduciary refrain from exploiting his or her position for personal gain. Finally, with regard to the *Imperial Sheet Metal* argument that employees should be subject to fiduciary duties only if their employers have contracted for them, he argues that fiduciary accountability is a 'default standard' that is automatically imposed by law. The practice of paying executive and other senior employees to execute non-competition and restraint undertakings is to supplement (rather than create) their existing default duties.[25]

It is true that most, if not all, employees have at least some form of the limited access that Flannigan refers to in relation to their employer's assets or other interests. And it is true that such access carries the risk of its abuse and results in a corresponding vulnerability to the realisation of that risk on the part of the employer. However, as I argued in chapter 5 of this thesis, those features alone are insufficient to give rise to fiduciary duties, unless they co-exist with other circumstantial factors that together give rise to a justified expectation of undivided loyalty on the part of the employee in favour of the employer. The other arguments that Flannigan raises in response to *Imperial Sheet Metal* are addressed elsewhere in this chapter.

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[23] *Imperial Sheet Metal v Landry* 2007 CarswellNB 298, 2007 NBCA 51 [6], [48], [52]–[58].

[24] Flannigan 'The Fiduciary Accountability of Ordinary Employees' 286. For his response to the court's concerns about applying fiduciary duties to employees post-employment, see 286.

[25] Flannigan 'The Fiduciary Accountability of Ordinary Employees' 286.

3. DEFINING THE ANALYSIS – THE MEANING OF A 'FIDUCIARY RELATIONSHIP'

The issue of the fiduciary status of employment is also complicated by the loose and undefined use of the term 'fiduciary relationship' and its lack of a clear and uniform meaning in this context. In order to facilitate analysis it is therefore necessary to first attempt to formulate a description of a 'fiduciary relationship' to provide a benchmark against which employment can be compared. In order to be theoretically sound and to serve its analytical purpose, this description needs to accommodate and explain all the established categories of fiduciary relationships. It also needs to distinguish, and explain the distinction between, those established classes of fiduciary relationships and other individual relationships in which fiduciary duties arise by virtue of their factual nature and surrounding circumstances. It needs, therefore, to be a description of a 'fiduciary relationship' *for the specific purpose of, and with specific reference to, the class-wide fiduciary classification of a given type of relationship*. In other words, it must be 'categorisation-specific' and it must reveal the distinctive characteristics of and the requirements for Canadian law's fiduciary relationship '*per se*' or 'in law', or what the court in *Fishel* called an 'inherently fiduciary relationship' 'in the classic sense'.[26]

Conceptually, a 'fiduciary relationship' can have various possible meanings, which can be based on different definitional criteria. Chapter 4 revealed that, within the context of categorisation, the 'fiduciary relationship' label does not have any significant legal, analytical or substantive effects or consequences. A description based on or defined in terms of consequence or effect can therefore be rejected at the outset.

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[26] *University of Nottingham v Fishel* [2000] ICR 1462 1491.

There are however a number of other definitional criteria that are commonly associated with fiduciary relationships *per se*, both generally and in the more specific context of employment.

4. FACTORS RELEVANT TO THE RECOGNITION OF FIDUCIARY RELATIONSHIPS *PER SE*

4.1 THE EXISTENCE AND PREVALENCE OF CERTAIN INCIDENCE CRITERIA

The courts originally explained the fiduciary recognition of classes of fiduciary relationships on the basis that they are 'analogous to' or sufficiently similar to the paradigm trustee–beneficiary fiduciary relationship to justify the same fiduciary classification. As indicated in Chapter 4, the vagaries of the trust analogy failed to fully reveal or explain either the basis or the rationale for that classification.

Subsequent courts and commentators have described the existing categories of fiduciary relationships *per se* and the potential fiduciary categorisation of employment in terms of the existence and prevalence of particular criteria for the incidence of fiduciary duties. Those most commonly referred to (in different combinations and with differing degrees of emphasis) are the purpose of the relationship, the authority of one party to represent or act on behalf of the other, the degree of control, power, discretion and vulnerability in relation to the other, and the policy considerations relevant to fiduciary accountability.

In the Australian case of *Hospital Products*, Mason J (clearly referring to the established categories of relationships *per se*) described the 'critical feature' of 'accepted fiduciary relationships' as being that–[27]

> 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 in the interests of that other person in a legal or practical

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[27] *Hospital Products v United States Surgical Corp* (1984) 55 ALR 417 (HCA), (1984) 156 CLR 41 (HCA) 96–7.

> sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power of discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position.

In *Fishel*, Elias J described 'classic' inherent fiduciary relationships as ones 'that can readily and universally be recognised as fiduciary relationships' on the basis that 'the very essence of the relationship is that one party must exercise his powers for the benefit of another'.[28] He went on to say the following:[29]

> [T]ypically there are two characteristics of these relationships, apart from the duty on the [fiduciary] office holder, to act in the interests of another. The first is that the powers are conferred by someone other than the beneficiaries in whose interests the fiduciary must act, and the second is that these fiduciaries have considerable autonomy over decision-making and are not subject to the control of those beneficiaries.

Applying these criteria to employment, he held that employment is 'obviously not a fiduciary relationship in the classic sense', for although fiduciary obligations may arise out of the employment relationship, they are not typical of 'or inherent in the nature of the relationship itself'.[30] He gave a number of reasons for this. First, the purpose of employment is not to place the employee in a position where he or she is obliged to pursue the employer's interests at the expense of his or her own. Second, the employment relationship is a contractual one and the employee's powers are conferred on him or her by the employer and not by someone else. Third, the scope of the employee's powers is determined by the terms of his or her employment contract and the employer can, by virtue of control over the framing of those terms, place him- or herself in a position of being

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[28] *University of Nottingham v Fishel* [2000] ICR 1462 1491, referring to P Finn *Fiduciary Obligations* (1977).

[29] *University of Nottingham v Fishel* [2000] ICR 1462 1491.

[30] *University of Nottingham v Fishel* [2000] ICR 1462 1491.

able to exercise considerable control over the employee's exercise of the decision-making powers that the employee might have. As such, and although fiduciary duties may arise out of the employment relationship, they do not arise 'as a result of the mere fact that there is an employment relationship'. They arise only in circumstances where the employee has placed him- or herself in a particular position, has undertaken specific obligations, or has some specific role or function that requires him or her to act solely in the employer's interests.[31]

In *Hodgkinson v Simms*, the Supreme Court of Canada described fiduciary relationships *per se* as relationships that have 'as their essence discretion, influence over interests, and an inherent vulnerability'. The court went on to say that for them, there is a rebuttable presumption that one party has a duty to act in the best interests of the other.[32]

Brodie, writing specifically on the status of employment, argues that, in order to qualify for fiduciary classification, a relationship must have the following general features: (1) the purpose of the relationship must be to further only the beneficiary's interests, (2) the beneficiary must place trust and confidence in, and rely on the making of decisions by, the beneficiary on a continual basis, and (3) there must be an imbalance or disparity of power that renders the beneficiary 'peculiarly vulnerable to' or 'at the mercy of' the fiduciary. It is, primarily, the absence of any such 'peculiar vulnerability' on the part of most employers that renders employment an essentially non-fiduciary relationship.[33]

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[31] *University of Nottingham v Fishel* [2000] ICR 1462 1491–3, approved in, *inter alia*, *Crowson Fabrics Limited v Paul Rider, Warren Stimson, Concept Textiles Limited* [2007] EWHC 2942 (Ch), [2008] IRLR 288 [79]; *Helmet Integrated Systems Ltd v Tunnard* [2006] EWCA Civ 1735 [36]; *Lonmar Global Risks Limited v Barrie West* [2011] IRLR 138, [2010] EWHC 2878 (QB) [151]–[152].

[32] *Hodgkinson v Simms* 1994 CarswellBC 438, 97 BCLR (2d) 1, [1994] 3 SCR 377 [31].

[33] D Brodie 'The Employment Relationship and Fiduciary Obligations' (2012) 16(2) *Edinburgh LR* 198 204–8.

These specific criteria, while relevant to the incidence of fiduciary duties, are not the defining features of fiduciary relationships *per se*. As discussed in chapter 5, they are (both individually and in combination with each other) all too over-inclusive and/or under-inclusive to identify and distinguish such relationships.

Particularly problematic are references to 'vulnerability' as an essential and defining feature of fiduciary relationships *per se.* Brodie, for example, argues that a fiduciary relationship *per se* is one in which there is a 'peculiar vulnerability' on the part of the beneficiary, and it is because this essential criterion is not ordinarily present in relationships of employment that they cannot be properly classified as fiduciary relationships.[34] Vulnerability within the employment relationship was also referred to in *Fishel*, where the court said:[35]

> The question in every case is whether the duties undertaken by the employee were such that he put himself in the position where he had to act solely in the interests of the employer … This can be looked at by considering whether the employer could control what the employee did or, conversely, was vulnerable to misuse by the employee of his position.

The English Court of Appeal again referred to vulnerability in the subsequent employment case of *Helmet Integrated Systems*, where it approved Lord Millett's statement that vulnerability is 'a defining characteristic of a fiduciary relationship':[36]

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[34] The 'peculiar vulnerability' criterion was originally formulated by Wilson J in *Frame v Smith* [1987] 2 SCR 99.

[35] *University of Nottingham v Fishel* [2000] ICR 1462 1493.

[36] *Helmet Integrated Systems Ltd v Tunnard* [2006] EWCA Civ 1735 [45] referring to Sir Peter Millett 'Equity's Place in the Law of Commerce' [1998] *LQR* 214 219.

References such as these require qualification, and the extent to which they are valid depends on the sense in which ‘vulnerability’ is understood. Brodie’s reference to the need for a ‘peculiar vulnerability’ for fiduciary relationships *per se*, for example, could be a reference to the fact that some vulnerability always exists (and must always exist) in such a relationship. Alternatively, the reference could be meant as requiring a vulnerability of a more extreme nature and extent than that typically present in other relationships. Brodie himself however seems to use the term in the sense of a vulnerability that results from a commercial and bargaining power imbalance.

However, as I have argued in chapter 5 of this thesis, it is only if vulnerability is understood as a susceptibility on the part of the beneficiary to the risk of opportunistic and self-interested abuse by the fiduciary of his or her position or powers that it correctly describes a necessary feature of relationships in which fiduciary duties exist. The position is however the same for both fiduciary relationships *per se* and in fact. Vulnerability in this sense of susceptibility to the risk of self-interested abuse is present in all of them. It cannot therefore be the distinguishing feature of fiduciary relationships *per se.* And, in the absence of further clarity on the nature and extent of the vulnerability that is necessary, it does not provide much assistance in determining whether all relationships of a given type can properly be categorised as a class of ‘fiduciary relationship’. The better approach, advanced in this thesis, is that vulnerability (like all other incidence criteria) can give rise to fiduciary duties only when it, within all the circumstances of the case, is such as to give rise to a justified expectation of undivided loyalty on the part of one of the parties in favour of the other. With regard to the issue of fiduciary categorisation, the only potential distinguishing feature of fiduciary relationships *per se* is that vulnerability (in the sense of susceptibility to the risk of abuse referred to above) is invariably present in all those relationships. Such vulnerability is ordinarily inherent in the very nature, structure and purpose of the

relationship, and is often necessary for the proper fulfilment of that purpose (although the parties may alter the position by, for example, implementing control measures to protect the beneficiary). As I explained in chapter 4, most fiduciary relationships *per se* require a large measure of discretion on the part of the beneficiary, which results in a corresponding and structurally necessary vulnerability on the part of the beneficiary. It is only if vulnerability is understood along these lines that it is relevant to the issue of categorisation.

There do appear to be some other definitional criteria that underpin the concept of a fiduciary relationship *per se* that are more instructive regarding the basis for, and requirements for, the class-wide fiduciary categorisation of certain types of relationships.

4.2 THE DISTINGUISHING FEATURES OF THE ESTABLISHED CATEGORIES OF FIDUCIARY RELATIONSHIPS *PER SE*

It seems to me that there are four inter-related characteristics in particular that combine to make fiduciary relationships *per se* something 'more than' and distinguishable from other individual relationships in which fiduciary duties exist.

These are the degree of certainty as to the existence of fiduciary duties within the relationship, the purpose of the relationship, the extent of coverage or 'reach' of fiduciary duties over the underlying relationship as a whole, and various policy considerations that reflect our perceptions and expectations of the nature and purpose of the relationship and the respective roles of the parties within it.

(a) The degree of certainty as to the existence of fiduciary duties

There is a somewhat obvious connection between the categorisation of relationships as 'fiduciary' ones and the degree of certainty as to the existence of fiduciary duties within those relationships. The established fiduciary relationships are the kinds of relationships in which fiduciary duties typically and, in the absence of highly extraordinary circumstances in isolated cases, definitely exist.

They are therefore more than relationships in which such duties 'might exist' or even 'are more than likely to exist'. Any such lesser degrees of certainty as to the incidence of fiduciary duties are too over-inclusive and fail to differentiate those relationships that qualify for class-wide fiduciary categorisation from those that, although they give rise to fiduciary duties, do not.

There are two prerequisites for the fulfilment of this necessary degree of certainty regarding the incidence of fiduciary duties. Since categorisation occurs on a class-wide basis, one prerequisite is that it can be applied only to relationships that are sufficiently homogenous in their essential features to constitute a discernible 'class' or 'type' of relationship in the same way as, for example, relationships of agency or partnership, by definition, have certain common *essentialia*. As will be discussed later in this chapter, developments within the workplace are resulting in a wide variety of forms of remunerated work and are altering our conceptions of 'employment'. It may well be that this has produced, or may produce in the future, forms of 'work' and 'employment' that are too diverse in nature to be grouped together as a 'type' or 'species' of legal relationship. This does not however present a problem for the purposes of this analysis. This thesis is only concerned with 'employees' as defined in the South African Labour Relations Act[37] who, by virtue of their compliance with that definition, are a sufficiently homogenous 'type' of relationship for categorisation purposes.

In order to meet the required level of certainty as to the incidence of fiduciary duties on a class-wide basis, the other, related prerequisite is that (except in highly exceptional individual cases) all relationships of the type in question must typically always give rise to fiduciary duties. Applied to employment, this means that all ordinary relationships of employment would have to usually and ordinarily give rise to fiduciary duties. Whether or not they actually do depends on

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[37] Section 200A of the Labour Relations Act 66 of 1995.

whether they fulfil the general and categorisation-specific incidence criteria discussed in this and previous chapters.

(b) The purpose of the relationship

Another feature that appears to be peculiar to the established categories of fiduciary relationships *per se* concerns the purpose of the relationship as a whole, and the purpose of the position and powers of one of the parties within it.

Fiduciary relationships *per se* are all relationships that exist not simply for the purpose of protecting or promoting the paramountcy of the interests of one of the parties, but rather to secure such paramountcy. They are relationships 'whose very natures are such that the law as a matter of course characterises one party's purpose as being to act in the interests of the other, or their joint interests, to the exclusion of his own several interests'.[38] Although, as discussed in chapter 5, this purpose is one of the general criteria for the incidence of fiduciary duties and therefore relevant to the existence of those duties in any relationship, it features more extensively in fiduciary relationships *per se*. In those relationships, the protection or promotion of one party's interests is not simply one of a possible number of purposes. It is the essential and dominant purpose of the relationship, and the very reason for its existence. It is also the primary purpose or reason for one party's position and role within the relationship, and for the powers and authorities that he or she enjoys by virtue of that position and role.

This is clearly evident in the paradigm trustee–beneficiary fiduciary relationship. Trusts and trustees 'exist for the benefit of the beneficiaries'.[39] And all the 'rights, powers and duties exist ... not for his own benefit, but to further the purpose of the relationship – the

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[38] P Finn 'The Fiduciary Principle' in T Youdan (ed) *Equity, Fiduciaries and Trusts* (1989) 1 32.
[39] Finn 'The Fiduciary Principle' 33, citing *Letterstedt v Broers* (1884) 9 App Case 371.

promotion of the beneficiary's interests'.[40] Similarly, the function of company directors is to serve their company's interests.[41] The same is true of agents, who exist for the purpose of furthering the principal's interests through the fulfilment of the agency mandate, and of the other established categories of fiduciary relationships.

The significance of purpose in distinguishing fiduciary relationships *per se* from individual ones 'in fact' is often emphasised by the English courts. In *Fishel*, for example, Elias J said that in the former, 'the very essence of the relationship is that one party must exercise his powers for the benefit of another'.[42]

This does not however require that there be absolutely no permissible element of self-interest on the part of the fiduciary. There are aspects of most fiduciary relationships *per se* in which the fiduciary has a personal interest and is entitled and expected to act self-interestedly. Such areas of 'legitimate self-interest' would include, for example, a trustee or director's right to negotiate and receive fees or other remuneration, and the agent's right to do likewise in relation to commissions.

The existence of such areas of legitimate, personal interest does not, however, detract from the fact that the essential, core purpose of the relationship is to further the beneficiary's interests. The relationship is not established and does not exist for the purpose of furthering the fiduciary's financial or other personal interests. Those interests are merely tangential or secondary to the protection or promotion of the beneficiary's interests, which remains the *conditio sine qua non* of or the *raison d'etre* for the relationship.

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[40] Finn 'The Fiduciary Principle' 34.

[41] Finn 'The Fiduciary Principle' 33.

[42] *University of Nottingham v Fishel* [2000] ICR 1462 1491.

(c) The extent of 'coverage' of fiduciary duties in the underlying relationship

It seems to me that another distinguishing feature of the established categories of fiduciary relationships *per se*, which flows from the fact that they exist for the purpose of furthering the sole interests of the beneficiary, is the extent of coverage or 'reach' that fiduciaries have over the relationship as a whole.

Fiduciary duties attach to those aspects of a relationship in relation to which the fiduciary is required to forego all personal and other interests and act solely in the interests of the beneficiary. It follows therefore that where the purpose of the whole relationship is essentially to further the sole interests of the beneficiary and the fiduciary is required to act accordingly, fiduciary duties will cover substantially the whole of the relationship and the fiduciary's position, powers and behaviour within it (apart from the areas of legitimate self-interest referred to above). In fiduciary relationships in fact, by contrast, fiduciary duties may apply only in relation to a small aspect of the underlying relationship. As the English Court of Appeal said in *Ranson v Customer Systems plc*, the established 'fiduciary relationship' is one 'that gives rise to a wide-ranging and single-minded duty of loyalty'.[43] Although this statement was made with specific reference to the company–director relationship, it is in principle equally applicable to all other established fiduciary relationships *per se*. Trustees and company directors, for example, are subject to fiduciary duties in everything that they do as trustee or director, and in the exercise of all the powers, authorities and functions that are given to them in those capacities. Agents are also bound by their fiduciary duties in relation to everything that falls within the ambit of their mandate and in the exercise of all of their powers and authority as agents.

[43] *Ranson v Customer Systems plc* [2012] EWCA civ 841 [24].

(d) Policy considerations

It is also clear that considerations of public policy play a pivotal, if not decisive, role in the class-wide recognition of particular types of relationships as fiduciary ones.

As discussed in previous chapters, the fiduciary principle is inherently normative and policy-based. Its application reflects the law's assessment, the views and perceptions that society has of the purpose of certain kinds of relationships, and of the parties' respective roles in them, and of the kinds of behaviour that society requires within them. Its function is to maintain the integrity and utility of those relationships in which the role of one party is considered to be to serve the sole interests of the beneficiary and to act with undivided loyalty in that service.[44]

I have argued in chapter 5 that the nature and role of policy considerations in the application of the fiduciary principle are best understood in terms of a justified expectation of undivided loyalty. The essence of such an expectation provides a rationalisation and explanation for the way in which policy considerations influence the determination of the purpose of the relationship and the parties' role in it and, in combination with other appropriate incidence criteria, the existence of fiduciary accountability. It is not however necessary to accept the justified expectation explanation in order to acknowledge the significance of policy considerations and their role in the recognition of the existence of fiduciary duties.

5. THE FIDUCIARY STATUS OF EMPLOYMENT

5.1 INTRODUCTION

Whether ordinary employment relationships constitute, or ought to be recognised as, a class of fiduciary relationship depends on

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[44] Finn 'The Fiduciary Principle'42.

whether they have the general features of fiduciary relationships *per se* outlined above. That, in turn, depends largely on our perceptions and expectations of the purpose and kinds of behaviour that are required within the relationship, together with an application of the other specific criteria for the incidence of fiduciary duties that the courts have highlighted as being particularly significant in the employment context.

5.2 CERTAINTY AS TO THE EXISTENCE OF FIDUCIARY DUTIES

In order to meet the categorisation requirement of certainty as to the existence of fiduciary duties on a class-wide basis it is necessary to consider the nature, course and scope of the 'typical' relationship of ordinary employment and the extent to which it complies with this requirement. Whether or not it is fulfilled depends on whether the typical relationship of ordinary employment fulfils the more specific criteria for the incidence of fiduciary duties. It is only if every such relationship clearly does give rise to fiduciary duties that employment as a whole class of relationships could possibly be given a fiduciary classification.

5.3 COMPLIANCE WITH SPECIFIC INCIDENCE CRITERIA

Chapter 5 discussed the incidence criteria that the courts have referred to and that commentators have suggested be applied in the recognition of fiduciary duties generally. Chapter 7 considered those criteria that the courts have emphasised in relation to employment in particular. In that chapter I argued in favour of the general principle laid down in *Fishel* that the criteria for the incidence of fiduciary duties ought to be the same for all employees, regardless of their level of seniority, and that there is no merit in the Canadian approach of distinguishing between 'senior' or 'key' employees and 'mere' employees in this regard. I also argued that the general requirement for the existence of such duties is a justified expectation that the employee will act solely and exclusively in the employer's interests.

As the court in *Fishel* said, employment relationships always give rise to a contractual duty of loyalty on the part of the employee. They do not however always, or usually, fulfil the general criteria for the existence of such a justified expectation of the single-minded and exclusive loyalty that is the hallmark of a fiduciary relationship.[45] Such an expectation will arise only in circumstances in which the employee has some special power, control or discretion in relation to the employer's assets or other interests, some 'special role or status',[46] or has undertaken some specific obligation of the nature referred to in *Fishel* that places him or her in a position where he or she must act solely in the interests of the employer.[47] Such circumstances will not always exist in the ordinary course and scope of every employment relationship and, where they do, the fiduciary duties will only attach to those 'exceptional' aspects.

I have suggested that fiduciary relationships *per se* are ones in which all individual relationships of the type concerned typically, and in the absence of extraordinary circumstances, definitely give rise to fiduciary duties, and that those duties cover the whole or a large proportion of the relationship concerned. If that is correct, then the absence of the related features of compliance with specific criteria for the incidence of fiduciary duties and certainty that the relationship definitely does give rise to fiduciary duties are in themselves sufficient to render employment ineligible for class-wide fiduciary classification.

5.4 THE PURPOSE OF THE EMPLOYMENT RELATIONSHIP

As already explained, the purpose of the employment relationship and the position and role of one of the parties within it is a significant

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[45] *Helmet Integrated Systems Ltd v Tunnard* [2006] EWCA Civ 1735 [36].

[46] *Crowson Fabrics Limited v Paul Rider, Warren Stimson, Concept Textiles Limited* [2007] EWHC 2942 (Ch), [2008] IRLR 288 [79].

[47] *University of Nottingham v Fishel* [2000] ICR 1462 1491, 1493.

factor in fiduciary characterisation. The judicial assessment of these purposes is strongly influenced by considerations of public policy and should reflect the views and expectations that society has of the nature and purpose of the kind of relationship concerned. Given this close and inextricable link between the determination of that purpose and issues of public policy, both are discussed simultaneously below.

5.5 POLICY CONSIDERATIONS RELATING TO THE NATURE AND PURPOSE OF EMPLOYMENT

(a) Introduction

The courts in England and Canada have relied on various policy-based justifications for their refusal to recognise employment as a category of fiduciary relationship. This is particularly evident in the cases in which the Canadian courts have declined to recognise fiduciary duties on the part of ordinary employees. As mentioned above and on my analysis, these policy considerations, together with other incidence criteria, determine whether there is the justified expectation of undivided loyalty necessary to found fiduciary accountability.

(b) Fiduciary duties are not necessary to protect the employer's interests

One argument against the imposition of fiduciary duties on ordinary employees is that the employee's implied contractual duties of good faith and of trust and confidence provide a sufficient restraint on the employee and sufficient protection for those interests of the employer that warrant protection.[48] Additional protection, where necessary, is also provided by the principles of tort (delict) and, in South African law, by unjustified enrichment remedies.

The extent to which those other, non-fiduciary mechanisms do produce a desirable balance between employee-restriction and

[48] *RBC Dominion Securities Inc v Merrill Lynch Canada Inc* 2008 CarswellBC 2099, 2008 SCC 54 [37]; *Sims v Craig Bell & Bond* [1991] 3 NZLR 535.

employer-protection depends on the ways in which they are construed and the scope of application they are afforded. As mentioned in chapter 7, while they do not prohibit exactly the same behaviour as do fiduciary duties, or do not prohibit the behaviour in the same way, they do cover much of the same conduct and behaviour as do fiduciary duties. And even if they do not, the employer has the ability to control the employee through other, supplementary, express contractual terms in order to provide adequate deterrents against misconduct and protection for the employer's interests.[49]

There is therefore no need to subject employees to fiduciary liability. It is only in circumstances where the employee's duties cannot be adequately regulated through contractual terms (such as where they are, for example, necessarily discretionary or open-ended in nature) that fiduciary accountability may be necessary, provided no other effective control mechanisms are available.[50] Fiduciary duties are justified only when necessary, and they are necessary only where, without them, the integrity of a relationship and the legitimate interests of one of the parties within it would be inadequately protected.[51]

(c) Fiduciary duties unduly infringe upon the employee's right to work

Another argument against employee fiduciary accountability is that fiduciary duties unduly infringe upon the employee's fundamental right to work.

In the Canadian case of *Imperial Sheet Metal*, for example, the court's 'basic or fundamental reason' for refusing to recognise employees as bound by fiduciary duties was that the courts should

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[49] V Sims 'Is Employment a Fiduciary Relationship? *University of Nottingham v Fishel* [2000] IRLR 471; [2000] ICR 1462 (QB)' (2001) 30 *Industrial LJ* 101.
[50] *Sims v Craig Bell & Bond* [1991] 3 NZLR 535.

[51] S Worthington *Equity* 2 ed (2006) 141.

be constrained in displacing the employee's fundamental right to pursue meaningful employment and earn a livelihood.[52] Although the argument is generally made in relation to the imposition of fiduciary duties post-employment, it is also of some relevance during the currency of employment, particularly where, for example, the employment is of a part-time nature and the employee has (or requires) more than one simultaneous employment relationship.

Again, there is merit in this argument, particularly when coupled with the debatable extent to which fiduciary duties are necessary to provide adequate and desirable levels of employer protection. Personal freedom should be restricted only when necessary, and to the extent necessary, to prevent harm to the legitimate interests of others.[53]

(d) Other policy-based arguments

Various other policy-based arguments have been made against a class-wide fiduciary classification of employment.

In *Imperial Sheet Metal*, for example, the court said that courts should not read into contracts of employment restrictive terms (such as fiduciary-type restraints) that could have been negotiated by the parties. This would amount to 'handing them out for free' when 'the titans of finance and industry pay millions in return for the executives executing non-competition clauses'.[54]

It is difficult to discern the logic in this reasoning. Many terms that are restrictive in nature (such as the duties of good faith and trust and confidence) and that could have been negotiated and included by the parties are nonetheless implied in the contract of employment. The fact that there is a practice of employers paying their employees

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[52] *Imperial Sheet Metal v Landry* 2006 NBQB 303 (NBQB), [2006] NBJ No 373 [57]–[58].

[53] Worthington *Equity* 141.

[54] *Imperial Sheet Metal v Landry* 2006 NBQB 303 (NBQB), [2006] NBJ No 373 [6], [58].

for restraints is also not a persuasive argument against employee fiduciary accountability. Paid-for restraints are not necessarily the same in nature, scope or extent as those afforded by fiduciary duties. And, since executive employees are exactly the ones most likely to be automatically subject to fiduciary duties, there is less need for supplementary regulation by way of contractual restraint.

Another argument, referred to by the court in *Imperial Sheet Metal*, is that fiduciary duties are too unduly strict and onerous to be applied to ordinary employees and would result in 'too many employees "of humble origin" ... being swept into the fiduciary net'.[55] The English cases have used the same argument. In *Helmet Integrated Systems Ltd v Tunnard*, for example, the court said that fiduciary duties are onerous and will not be imposed lightly, not least because of the equitable remedies that flow from the finding of a breach.[56]

Although, as mentioned in chapter 5, fiduciary duties do require an exacting standard of behaviour and do so in unique ways, it is debatable whether they are more 'rigorous' or 'stricter' than other kinds of duties. The only aspect in which they are 'strict' is in relation to breach and liability. Breach of fiduciary duty and liability does not require any form of *mens rea* or proof of loss to the beneficiary. This is however no stricter or more onerous than the strict liability that attaches to breaches of other kinds of non-fiduciary duties. And, unlike claims for damages for breach of contract or in delict (tort), the fiduciary disgorgement remedies merely require the fiduciary to surrender unauthorised gains made pursuant to the breach rather than any assets that belong to him or her personally. Furthermore, the beneficiary's claim for damages is based on substantially the same principles as a claim in delict (tort).

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[55] *Imperial Sheet Metal v Landry* 2006 NBQB 303 (NBQB), [2006] NBJ No 373 [6], [48], [58].

[56] *Helmet Integrated Systems Ltd v Tunnard* [2006] EWCA Civ 1735 [36]; *Lonmar Global Risks Limited v Barrie West* [2011] IRLR 138, 152; *Attorney-General v Blake* [1998] Ch 439 (CA), [2001] AC 1; *Norberg v Wynrib* (1992) 92 DLR (4th) 449 [481].

(e) New realities, perceptions and paradigms of work

The most compelling arguments against a fiduciary classification of employment relate however to the ways in which both the substantive reality and the legal conception of 'employment' and 'work' have shifted and evolved beyond traditional paradigms that were more closely aligned with the fiduciary concept.

Employment and other forms of work for remuneration are becoming increasingly diverse and non-standard.[57] Workers are more transient and mobile, engagement for remuneration is less long-term and permanent, terms of work are more flexible, and casual, part-time and 'multiple' employment are becoming more common, acceptable and desirable. As *Simms* points out, there are few relationships within this new mix that embody the degree of allegiance associated with fiduciary relationships. We no longer perceive work in terms of the traditional master–servant model of dominant, superior employer and subordinate, subservient and dependent employee. Employees and other workers are no longer construed as largely de-individualised commodities who exist solely for the purposes of serving and advancing the employer's interests, but rather as autonomous individuals with interests and aspirations that are legitimately divergent from those of their employers. Although not all these new ways of working constitute 'employment' in the strict legal sense or as defined for the purposes of this thesis, they do reflect the general public perceptions and expectations of the nature and purpose of employment and the employee's position that ultimately determine the shape of the incidence of fiduciary accountability.

Many of these movements have been recognised, formalised and advanced in developments in labour and employment law, and in its

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[57] For a comprehensive overview of different forms of 'work' in the South African context, see R le Roux 'The World of Work: Forms of Engagement in South Africa' Institute of Development and Labour Law Monographs, University of Cape Town, 02/2009.

conception and construction of the 'employment relationship'. The contract model with its assumption of greater parity of bargaining power between the parties has replaced earlier models of inherent inequality and the subjugation of the employee's interests to those of the employer. Employees also now have formalised legal rights to pursue their own interests. In many cases these, such as the right to engage in collective bargaining, allow them to do so in ways that are in direct conflict with the employer's interests. The right to participate in lawful strike action goes even further by formally sanctioning the causing of actual harm to the employer. These shifts towards greater employer–employee egality are also evident in the ways in which the courts (particularly those in England) have developed and configured the mutual duty of trust and confidence between employer and employee so as to equalise and mediate the parties' respective interests.[58] In *Malik v Bank of Credit and Commerce International SA*,[59] for example, the English Court of Appeal referred to the 'greater diversity of situations in which a balance needs to be struck between the interests of an employer and the employee's interests in not being unfairly or improperly exploited'. And, in *Fishel*, Elias J said that it is implicit in the mutual duty of trust and confidence that 'each party must have regard to the interests of the other but not that either must subjugate his interests to those of the other'.[60]

It has been suggested that these developments reflect a 'unitary' view of industrial relations in which common interest and partnership, rather than conflict and subordination, are emphasised.[61] The joint or mutual interest embodied in such a model would bring employment closer to the kinds of relationships, such as partnerships and joint

[58] For a consideration of these developments in the mutual duty of trust and confidence in English law, see L Clarke 'Mutual Trust and Confidence, Fiduciary Relationships and the Duty of Disclosure' (1999) 28(4) *Industrial Law Journal* 348.

[59] *Malik v Bank of Credit and Commerce International SA* [1998] AC 20 46.

[60] *University of Nottingham v Fishel* [2000] ICR 1462 1483..

[61] B Napier 'Judicial Attitudes Towards the Employment Relationship – Some Recent Developments' (1997) 6 *Industrial LJ* 1 17.

ventures, in which mutual fiduciary accountability has been recognised, and thus closer to potential fiduciary classification.[62]

There is however little evidence of the recognition of such a 'unitary' model. The legal developments that have occurred in relation to employment have been more concerned with recognising the employee's individual, several rights and interests, and balancing the divergence and conflict between them and the employer's several interests. In doing so, those developments have moved employment further from, rather than closer to, a 'fiduciary relationship'. The fiduciary doctrine's purpose and rationale are to ensure that the interests of one of the parties to a relationship remain paramount.[63] The principles of labour and employment law do not have that purpose. They are concerned with mediating and balancing the parties' respective, several and competing interests, rather than securing the paramountcy of those of the employer. Their rationale is therefore fundamentally different from and incongruent with the rationale that underpins and determines the incidence of fiduciary accountability.

6. CONCLUSIONS

This chapter has argued that a 'fiduciary' classification of any given class or type of relationship is appropriate only where each relationship within that given class or type typically fulfils the general requirements for the incidence of fiduciary duties. In order to do so, the primary purpose of each such relationship must be to protect or promote the sole interests of one party which, together with the existence of certain other incidence criteria, gives rise to a justified expectation that the other party will forego self-interested behaviour

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[62] Clarke 'Mutual Trust and Confidence, Fiduciary Relationships and the Duty of Disclosure'.

[63] P Loughlan 'Liability for Assistance in a Breach of Fiduciary Duty' (1989) 9 *Oxford J of Legal Studies* 263.

and remain undivided in his or her loyalty to the fulfilment of that purpose.

For the various reasons given in this chapter, employment does not fulfil these requirements. While there is little doubt that we do expect employees to be loyal to their employers, the kind and the extent of the loyalty we expect of them differs from that which is 'the hallmark of a fiduciary relationship'. As the English Court of Appeal said in *Helmut Integrated Systems v Tunnard*,[64] the ordinary employee acting in the ordinary course and scope of his or her employment–

> owes an obligation of loyalty to his employer but he will not necessarily owe that exclusive obligation of loyalty, to act in his employer's interest and not his own that is the hallmark of any fiduciary duty ... The distinguishing mark of the obligation of a fiduciary ... is not merely ... a duty of loyalty but of single-minded or exclusive loyalty.

The conclusion must therefore be that employment does not qualify for recognition as a class of 'fiduciary relationship'. Individual relationships of ordinary employment at every level are however potential fiduciary relationships 'in fact' and will be recognised as such where there are special circumstances of the nature referred to in *Fishel*, for example, where the employee has undertaken some obligation or position that does give rise to a justified expectation of undivided loyalty. The circumstances in which this is likely to be the case were discussed in the preceding chapter.

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[64] *Helmet Integrated Systems Ltd v Tunnard* [2006] EWCA Civ 1735 [36].

CHAPTER 9

CONCLUSION

1. GENERAL

This thesis has explored the fiduciary concept and the duties to which it gives rise in South African common law, both generally and more particularly in relation to 'ordinary employees', with comparative reference to English and Canadian jurisprudence.

The thesis has shown that the concept developed historically as an equitable mechanism to prevent unconscionable self-interested behaviour in certain relationships in which one party has some power or discretion that enables him or her to affect the other's property or other legal or practical interests, and the latter is 'vulnerable' or susceptible to the risk of the former's abuse of that power or discretion. In certain circumstances, and subject to the presence of appropriate incidence criteria (as discussed below), the law seeks to protect the vulnerable party ('the beneficiary') by recognising a duty on the part of former ('the fiduciary') to act in the interests of the beneficiary. In addition, and in order to support that duty and to maintain the integrity of the relationship, a number of other duties (including, for example, a duty of good faith) are simultaneously imposed on the fiduciary in his or her fiduciary capacity. Of these duties there are only two that are 'fiduciary' duties in the true sense. These are the no-conflict duty, which requires the fiduciary to avoid all actual and reasonably likely conflicts between the beneficiary's interests and the fiduciary's own interests or duties to any other person, and the no-profit duty, which prohibits the fiduciary from using his or her position for unauthorised gain. They are thus duties that require the fiduciary to forego all self-interest, thereby seeking to secure the paramountcy of the beneficiary's interests and the fiduciary's undivided loyalty to their service.

Fiduciary duties have traditionally been (and in South Africa continue to be) exclusively associated with particular types of relationships that have become established as categories or classes of 'fiduciary relationships'. In this thesis I have argued in favour of the proposition that in principle and in keeping with growing numbers of English and Canadian judgments and the South African Supreme Court of Appeal's judgment in *Volvo*,

[1] fiduciary duties are applicable to any given relationship that fulfils the proper criteria for their incidence. I have also argued that there is no merit or utility in categorising certain kinds of relationships as 'fiduciary' ones, and that to approach fiduciary duties in that way is unduly restrictive and both theoretically and analytically unsound. As Finn suggests, the fiduciary concept transcends legal taxonomy. It exists throughout the legal system as an over-arching standard of behaviour that, in appropriate circumstances, is of potential application to any relationship in any area of law.[2]

The courts have applied a variety of criteria (and combinations of criteria) for identifying the circumstances in which the recognition of the existence of fiduciary duties is appropriate. The more prominent of these include criteria of 'representing' or acting on behalf of another; trust, confidence and reliance, and undertakings thereof; power, discretion and control; vulnerability; and various expectation-based criteria.

I have argued in this regard that fiduciary duties exist in any relationship (or in part of any relationship) in which there is a justified expectation that one party will act only in the interests of the other. Fiduciary duties also exist *because* there is a justified expectation that one party will act only in the interests of the other. I have also suggested that this justified expectation criterion is capable of

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[1] *Volvo (Southern Africa) (Pty) Ltd v Yssel* [2009] JOL 24109 (SCA), 2009 (4) All SA 497 (SCA).

[2] P Finn 'The Fiduciary Principle' in T Youdan (ed) *Equity, Fiduciaries and Trusts* (1989) 1 3–4, 55–6.

conceptual reconciliation with the 'reasonable expectation' variation favoured in other jurisdictions, and is substantially the same as the 'justified reliance' measure formulated by the Supreme Court of Appeal in *Volvo*.[3]

Whether such an expectation exists in any given relationship depends on whether the nature and purpose of that relationship and the alleged fiduciary's role in it are sufficiently closely aligned with the alleged beneficiary's interests to justify an expectation that the former will act only in the interests of the latter. This requires an objective assessment of the actual dealings and expectations of the parties themselves, the expectations that the community is considered to have of the nature and purpose of the relationship and behaviour within it, considerations of public policy that may call for the regulation of one party's conduct and the according of a primacy to the interests of the other,[4] the more specific 'primary' incidence criteria referred to earlier, and any other facts that the court may consider relevant. A 'justified expectation' is thus the product of an appropriate combination of 'primary' incidence criteria such as representation, trust, confidence, reliance, power, discretion and vulnerability; actual expectations; and normative and policy-based considerations. Although it does not identify exactly when fiduciary duties arise, it does, by explaining *why* they arise, provide the focus and framework for the analysis. Furthermore, it does so in a way that recognises the fiduciary concept as an inherently normative and flexible instrument of public policy.

I have also provided a critical analysis of the principles that govern the nature, scope and operation of fiduciary duties. I have explained that where there are only certain aspects of a relationship that fulfil the ultimate incidence criterion of a justified expectation of undivided loyalty, fiduciary duties will attach to only those aspects. As Conaglen

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[3] *Volvo (Southern Africa) (Pty) Ltd v Yssel* [2009] JOL 24109 (SCA), 2009 (4) All SA 497 (SCA).
[4] Finn 'The Fiduciary Principle' 1 5, 42, 46–48.

argues, where they do apply, the truly fiduciary no-conflict and no-profit duties arise as 'subsidiary' duties to enhance the prospects of the proper performance of the positive, primary duty on the part of the fiduciary to act only in the beneficiary's interests.[5] The duties perform this function by prohibiting the fiduciary from engaging in any behaviour or being in any position in which he or she prefers, or may be tempted or influenced to prefer, his or her own interests or any duties that he or she may owe to any other person over the beneficiary's interests. A breach of these fiduciary duties results in, *inter alia*, strict liability on the part of the fiduciary to account to the beneficiary for all unauthorised gains obtained pursuant to the breach.

I have also shown that fiduciary duties are structurally, functionally and ideologically unique, and differ from other kinds of duties in a number of respects. They require a standard of loyalty that is more exacting than that required by other duties, and they are 'subsidiary' duties that focus directly on decision-making processes and on supporting and encouraging the proper fulfilment of other 'primary' duties. They also proscriptively regulate a wide range of behaviour of a self-interested or opportunistic nature, prophylactically protect against both actual harm and the risk thereof, and, if breached, give rise to unique disgorgement remedies that are not dependent upon proof of *mens rea*, loss or harm. All these features combine to produce duties that are significantly different from and often more attractive to potential claimants that those in contract or delict (tort), and that provide a unique, prophylactic form of protection against the kinds of self-interested behaviour that are not adequately regulated by other duties.

One of the main propositions that I have advanced in this thesis is that all the afore-mentioned principles relating to the incidence, nature, scope and operation of fiduciary duties are general, generic

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[5] M Conaglen *Fiduciary Loyalty: Protecting the Due Performance of Non-fiduciary Duties* (2010).

principles. They are equally and indiscriminately applicable to any given relationship, regardless of whether it falls within or outside of any of the established categories of fiduciary relationships.

Applying these general principles to relationships of employment, I have argued that there is no merit in distinguishing between different levels or types of employees in relation to the incidence of fiduciary duties. Similarly, there is no merit in referencing any of the established categories of fiduciary relationships into which employees often fall in determining that incidence in any given case. In principle, fiduciary duties will attach to any employee whenever the employment relationship or any aspect of it gives rise to a justified expectation that the employee will act with undivided loyalty, solely and exclusively, in the protection or promotion of the employer's interests.

In determining whether such an expectation exists, regard must be had to the express and implied terms of the employee's contract of employment and to the nature of the tasks and responsibilities that he or she has undertaken. Generally, the greater the degree of access, power or control over the employer's assets or affairs, and the greater the degree of managerial responsibility, authority, autonomy and discretionary decision-making power that the employee has, the more likely it is that such an expectation will be found to exist. While this is most likely in relation to more senior employees in managerial positions, fiduciary duties can, in principle, apply to any employee at any level and with any job description. As with all relationships, the only enquiry is whether, in all the circumstances, the employee can justifiably be expected to act only in the interests of the employer.

However, although fiduciary duties are potentially applicable to any employee, there is no merit in, or need to, classify employment generally as a category or class of 'fiduciary relationship'. This is partly because of the general difficulties with categorisation discussed in this theses, and also because such a classification

would, I argue, be incongruent with contemporary legal conceptions and societal perceptions about the nature and purpose of the employment relationship and, more particularly, the role of the employee within it. While we may well justifiably expect all employees to comply with a lesser, distinguishable, contractual duty of 'loyalty', 'faithfulness' or 'fidelity' and a general duty of good faith, we do not usually expect them to forego all personal interests to act with the absolute and undivided loyalty that is the essence of the fiduciary obligation.

2. THE CONTRIBUTIONS OF THIS THESIS

The issues and principles considered in this thesis are almost entirely unexamined and unacknowledged in South African law. Fiduciary duties continue to be associated almost entirely with, and discussed only in the context of, the traditional categories of 'fiduciary relationships' and, within those categories, are often misunderstood and confused with other non-fiduciary duties. It is only relatively recently and only in a couple of cases that the South African courts have been called upon to consider their application in relationships outside of those categories. However, apart the judgments in *Fieldstone*[6] and *Volvo*,[7] in which the court briefly discussed the issue of incidence criteria, the South African courts have not been called upon to consider broader issues of fiduciary principle. There is also a complete absence of any published academic commentary on fiduciary duties outside of the established categories, and even where they are discussed on a category-specific basis, almost no attention has been given to their theoretical nature, distinguishing features, or broader application. As a result, there is very little (if any) awareness in South African law of a general fiduciary concept and its

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[6] *Phillips v Fieldstone Africa (Pty) Ltd and Another* [2004] 1 All SA 150 (SCA), 2004 (3) SA 465 (SCA).
[7] *Volvo (Southern Africa) (Pty) Ltd v Yssel* [2009] JOL 24109 (SCA), 2009 (4) All SA 497 (SCA).

latent regulatory and protective potential in a wide range of relationships across the legal system, or of the comparative attractions of its remedial regime. The extent of this potential, and the comparative attractions, are clearly evident in the increasing numbers of cases in which fiduciary duties are being alleged and recognised in other Commonwealth jurisdictions.

This thesis therefore explores and draws attention to an almost entirely unexamined and under-utilised aspect of South African law. This is also an area that could have significant implications for South African law, if properly recognised, understood and appreciated. For potential claimants it offers an alternative source of protection and an enforcement and remedial regime that is in a number of respects more user-friendly than those available in contract and delict (tort). On a broader level, it offers a regulatory mechanism to guard against self-interested conduct in a range of relationships in which there is a justified expectation that one party should act solely and exclusively, and with undivided loyalty, in the other's interests. In guarding against such self-interested conduct (whether in the form of the acceptance of bribes or secret commissions or other unauthorised gains), it also holds significant potential for addressing increasing levels of corruption in South Africa. With regard to employment in particular, both employers and employees need to be aware of these duties, when they apply as 'default rules', what they require, and the liabilities and remedies that flow from their breach. There is also a need for an appreciation of their ability to modify or, if they are not already applicable, create such duties by agreement. And, again from a broader regulatory perspective, they have the potential to contribute to the reduction of employee corruption.

Ultimately, it is my hope that this thesis, in drawing attention to this area of South African law, will facilitate a greater awareness of the nature and potential of the fiduciary concept, and will assist in the construction of a theoretically sound set of principles for its future

development and application, both generally and specifically in relation to employees.

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