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Prologue

The word 'fiduciary' recurs frequently in legal discussion, but the understanding of the meaning of the word is very confused. Anthony Mason famously described the fiduciary relationship as 'a concept in search of a principle'.[1] The clearest message to be taken from judicial pronouncements regarding the fiduciary concept is that it is concerned with the 'undivided loyalty' of the fiduciary:[2] as Millett LJ said in his judgment in *Bristol & West Building Society v Mothew*, which has been described as 'a masterly survey of the modern law of fiduciary duties',[3] the 'distinguishing obligation of a fiduciary is the obligation of loyalty'.[4] The concept of loyalty is now well established as the core—indeed the defining—concept of fiduciary doctrine.[5] The difficulty is that the precise meaning of the concept of loyalty remains unclear in the fiduciary context. It is that difficulty which this book seeks to address. In other words, the purpose of the book is to identify within equity's case law a more precise view as to the nature and function of the concept of fiduciary loyalty. Is the concept of fiduciary loyalty a helpful

[1] AF Mason, 'Themes and Prospects' in PD Finn (ed), *Essays in Equity* (Sydney, Law Book Co, 1985) 242, 246. See also *Frame v Smith* [1987] 2 SCR 99, 135; *Lac Minerals Ltd v International Corona Resources Ltd* [1989] 2 SCR 574, 643–44.

[2] *Boulting v Association of Cinematograph Television and Allied Technicians* [1963] 2 QB 606, 636 (CA). See also *Farrington v Rowe McBride & Partners* [1985] 1 NZLR 83, 90 (CA).

[3] *Johnson v EBS Pensioner Trustees Ltd* [2002] EWCA Civ 164 at [37], [2002] Lloyd's Rep PN 309. See also *Popek v National Westminster Bank plc* [2002] EWCA Civ 42 at [32].

[4] *Bristol & West Building Society v Mothew* [1998] Ch 1, 18.

[5] See, eg, *Hodgkinson v Simms* [1994] 3 SCR 377, 452; *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664, 680–81 and 687 (CA); *Williams v The Minister, Aboriginal Land Rights Act 1983* [1999] NSWSC 843 at [726]; *KLB v British Columbia* [2003] SCC 51 at [48], [2003] 2 SCR 403; *Chirnside v Fay* [2004] 3 NZLR 637 at [51]; *Hilton v Barker Booth & Eastwood (a firm)* [2005] UKHL 8, [2005] 1 WLR 567 at [30]; *Sinclair Investment Holdings SA v Versailles Trade Finance Ltd* [2005] EWCA Civ 722 at [20], [2006] 1 BCLC 60; *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch) at [1286]; *Southern Cross Mine Management Pty Ltd v Ensham Resources Pty Ltd* [2005] QSC 233 at [579]; *Gibson Motorsport Merchandise Pty Ltd v Forbes* [2006] FCAFC 44 at [11], (2006) 149 FCR 569; *P & V Industries Pty Ltd v Porto* [2006] VSC 131 at [23], (2006) 14 VR 1; *Také Ltd v BSM Marketing Ltd* [2006] EWHC 1085 (QB) at [93], not addressed on appeal: [2009] EWCA Civ 45; *Amaltal Corp Ltd v Maruha Corp* [2007] NZSC 40 at [21], [2007] 3 NZLR 192; *Australian Securities and Investments Commission v Citigroup Global Markets Australia Pty Ltd (No 4)* [2007] FCA 963 at [289], (2007) 160 FCR 35; *Hageman v Holmes* [2009] EWHC 50 (Ch) at [52]; *Premium Real Estate Ltd v Stevens* [2009] NZSC 15 at [67], [2009] 2 NZLR 384.

analytical tool, or is it empty rhetoric? What marks fiduciary duties out from other categories of legal duty such that they attract a different name and different remedies? Are they in fact a different kind of duty or rather merely another example of the kinds of duties that we recognise in the fields of contract law or the law of torts? If fiduciary duties are a different kind of duty, as their name suggests, how do they interact with the better known duties owed in contract and tort?

This analysis is important for several reasons. First, at a theoretical level, the proper classification of doctrines is important in understanding their interrelationship and, consequently, legal doctrine in general. While the historical origins of legal concepts and doctrines are undeniably important in understanding those concepts and doctrines, the ultimate goal of doctrinal legal analysis is to understand the doctrines themselves more fully. In that regard, the historical origins of doctrines are becoming less important than the substance of obligations.[6] Understanding the substance of obligations is further developed by reference to the differences between types of legal doctrine: those differences are much more than a matter of mere semantics.[7] Thus, there is merit in examining fiduciary doctrine, to seek to identify and analyse the theoretical similarities and differences between it and various other doctrines. Several law and economics scholars have argued that fiduciary duties are simply examples of implied, or default, contractual obligations.[8] Others have suggested that they are properly categorised as torts.[9] If fiduciary duties are to be distinguished from other kinds of duties by the fact that they demand loyalty, a more developed understanding of what that means is necessary.

Furthermore, the iterative nature of common law development means that a theoretical understanding of fiduciary doctrine is also important at the more practical level in indicating how we should approach the resolution of disputes about currently unsettled aspects of fiduciary doctrine. For example, as will be

[6] See, eg, *Mothew* (above n 4) 16; *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145, 205; *Aquaculture Corp v New Zealand Green Mussel Co Ltd* [1990] 3 NZLR 299, 301; *Lockwood Buildings Ltd v Trust Bank Canterbury Ltd* [1995] 1 NZLR 22, 26; *Bank of New Zealand* (above n 5) 686–87; AF Mason, 'The Place of Equity and Equitable Remedies in the Contemporary Common Law World' (1994) 110 *Law Quarterly Review* 238, 258; J Maxton, 'Equity and the Law of Civil Wrongs' in P Rishworth (ed), *The Struggle for Simplicity in the Law: Essays for Lord Cooke of Thorndon* (Wellington, Butterworths, 1997) 91, 94; A Tipping, 'Causation at Law and in Equity: Do We have Fusion?' (2000) 7 *Canterbury Law Review* 443, 448.

[7] *Mothew* (above n 4) 17.

[8] See, eg, H Butler and L Ribstein, 'Opting Out of Fiduciary Duties: A Response to the Anti-Contractarians' (1990) 65 *Washington Law Review* 1, 19, 30 and 32; F Easterbrook and D Fischel, 'Contract and Fiduciary Duty' (1993) 36 *Journal of Law and Economics* 425, 427 and 431; MJ Whincop, 'Of Fault and Default: Contractarianism as a Theory of Anglo-Australian Corporate Law' (1997) 21 *Melbourne University Law Review* 187, 189, 199–200 and 207.

[9] See, eg, PBH Birks 'Definition and Division: A Meditation on *Institute* 3.13' in PBH Birks (ed), *The Classification of Obligations* (Oxford, Oxford University Press, 1997) 1, 14 (referring to them as 'meta-torts'); PBH Birks, 'The Concept of a Civil Wrong' in D Owen (ed), *Philosophical Foundations of Tort Law* (Oxford, Oxford University Press, 1995) 31, 35; A Burrows, *Understanding the Law of Obligations: Essays on Contract, Tort and Restitution* (Oxford, Hart Publishing, 1998) 14 and 31.

seen, it is currently unclear whether and to what extent the remedy of equitable compensation might be available for a breach of fiduciary duty. 'The nature of the obligation determines the nature of the breach',[10] which in turn determines the nature and range of the remedies available in respect of that breach. A clearer understanding of the relationship between fiduciary duties and other types of duties where compensatory remedies clearly are available helps to resolve the question whether compensation ought to follow a breach of fiduciary duty. It also helps to answer questions about what types of loss can be said to flow from a breach of fiduciary duty, and whether a fiduciary should be able to rely on the principal's contributory fault to defend, in whole or in part, a claim for breach of fiduciary duty. Similarly, criticisms of the strictness of the duties imposed by fiduciary doctrine can only be evaluated properly in the light of an understanding of the purposes that fiduciary doctrine seeks to achieve.

The manner in which fiduciary doctrine operates also calls for elucidation. Why, for example, are fiduciary duties said to be proscriptive rather than prescriptive in nature?[11] Why does the scope of fiduciary duties depend upon the particular circumstances of each relationship?[12] How does that proposition correspond to the idea that fiduciary duties are inflexible in nature?[13] Why must a fiduciary get fully informed consent from his principal in order to act in a way that would otherwise be in breach of fiduciary duty, instead of merely needing to obtain an ordinary contractual consent?[14] Such questions cannot be answered adequately without resort to a proper understanding of the nature and function served by fiduciary doctrine. Similarly, a deeper understanding of what purpose is served by fiduciary duties provides some assistance in the practical determination of when the recognition of such duties is appropriate.[15]

The answers that the book provides to these sorts of questions are also timely, in the light of the recent global financial crisis and especially the recession in the United Kingdom. As Stephen Lennard has noted, 'the mass of claims that arose in the 1990s out of the previous market crash from 1989 to 1993 customarily alleged either negligence or fraud . . . and, in addition, cases against solicitors frequently included claims for equitable relief based on breaches of trust or fiduciary duty.'[16] There is a strong prospect that the earlier prevalence of such claims will be renewed in the current economic climate. It is time to take stock of the lessons about the nature of fiduciary liability that can be drawn from the case law.

[10] *Mothew* (above n 4) 18.

[11] See, eg, *Breen v Williams* (1996) 186 CLR 71, 113.

[12] See, eg, *New Zealand Netherlands Society 'Oranje' Inc v Kuys* [1973] 1 WLR 1126, 1130 (PC).

[13] See, eg, *Bray v Ford* [1896] AC 44, 51.

[14] See, eg, *Oranje* (above n 12) 1131–32.

[15] See also RP Austin, 'Moulding the Content of Fiduciary Duties' in AJ Oakley (ed), *Trends in Contemporary Trust Law* (Oxford, Oxford University Press, 1996) 153, 159; PBH Birks, 'The Content of Fiduciary Obligation' (2000) 34 *Israel Law Review* 3, 4 (republished at (2002) 16 *Trust Law International* 34).

[16] S Lennard, 'An Unwelcome Arrival?' (2008) 212 *Property Law Journal* 22, 22. See also M Willis and C Bending, 'A Damoclean Sword' (2008) 158 *New Law Journal* 83.

The central thesis advanced in this book is that the fiduciary concept of 'loyalty' is a convenient encapsulation of a series of legal principles, rather than a duty in its own right. These principles provide a subsidiary and prophylactic form of protection for non-fiduciary duties. The purpose of that protection is to enhance the chance of proper performance of those non-fiduciary duties by seeking to avoid influences or temptations that are likely to distract the fiduciary from providing such proper performance. It is frequently observed that fiduciary doctrine operates in a prophylactic manner, which is undoubtedly the case. However, the argument developed here is that fiduciary doctrine is prophylactic in its very nature, rather than simply in the methodology that it employs. It is designed to make breaches of non-fiduciary duties less likely by protecting them from inconsistent temptations that have a tendency to distract the fiduciary away from due performance of those non-fiduciary duties. This also indicates the subsidiary nature of fiduciary doctrine, in that it is designed to assist with ensuring proper performance of non-fiduciary duties. In that sense fiduciary duties are subsidiary to the protected non-fiduciary duties.

The clearest example of this prophylactic and subsidiary form of protection is found in the principle that prohibits fiduciaries from acting in situations in which their personal interest conflicts with the non-fiduciary duties that they have to perform. The existence of such a personal interest increases the risk that the fiduciary will be drawn away from, and so not deliver, proper performance of those non-fiduciary duties. Fiduciary doctrine therefore prohibits a fiduciary from acting in situations that involve conflicts of that nature, unless he makes full disclosure to the principal of all material facts and obtains the principal's fully informed consent. In other words, a fiduciary should only act in such a situation if his principal is made aware of the extraneous influences that are competing with the fiduciary's obligation to perform his non-fiduciary duties, and the principal has decided that he nonetheless wishes to proceed. The possibility of obtaining such consent also shows that fiduciary doctrine respects the autonomy of a *sui iuris* person, but only when the fiduciary has complied with safeguards designed to ensure that its protection is not inappropriately circumvented.

This protective conceptualisation of fiduciary doctrine is developed throughout the book, and it is argued that it provides an important reference point from which to answer the various questions raised above. It explains, for example, why the scope of fiduciary duties is moulded to the particular relationship in each case, and it provides a sound theoretical foundation for the proposition that fiduciary duties are proscriptive in nature rather than prescriptive. It is also important in understanding fully the relationship between fiduciary and non-fiduciary duties, and it emphasises the practical importance of careful consideration of *both* kinds of duties when addressing arguments about fiduciary liability. Such careful consideration is also fundamental when addressing currently unsettled issues regarding remedies for breach of fiduciary duty, such as what loss might be said to flow from a breach of fiduciary duty and whether a fiduciary

ought to be able to plead the principal's contributory fault in an attempt to reduce an award of equitable compensation for breach of fiduciary duty.

The book begins, in chapters two and three, by laying out the approach that will be taken in scrutinising fiduciary doctrine. This is important in that it makes clear what material forms the basis of the analysis offered in the rest of the book. Commentary concerning fiduciary doctrine is often unclear about the reference points from which the arguments are developed. In many instances, commentators talk past one another as their analyses arise out of different premises which are neither articulated nor defended. Thus, chapter two explains that the analysis is focused on duties that are peculiar to fiduciaries and justifies that approach, and chapter three seeks to isolate the duties that match that criterion. Having done so, in chapter four it is possible to explain how strong evidence can be found in the cases for the view that the fiduciary conflict principle is designed to provide a subsidiary and prophylactic form of protection for non-fiduciary duties. The remedies that are made available following a breach of that principle are also consistent with the protective function that fiduciary doctrine performs vis-à-vis non-fiduciary duties.

Chapter five then defends this instrumentalist understanding of fiduciary doctrine against an alternative view which suggests that fiduciary doctrine is concerned with exacting high moral standards of conduct from fiduciaries. Several doctrines that perhaps appear at first sight to support a moralistic understanding of fiduciary doctrine are considered in detail, as is an argument that the history of fiduciary doctrine supports a moralistic understanding of its nature and function. When they are considered carefully, the doctrines and the history are consistent with the instrumentalist understanding of fiduciary doctrine advanced in this book and thus provide no support for a moralistic understanding of the fiduciary concept of loyalty.

Chapter six considers further evidence for the protective view of fiduciary doctrine, focusing on the fiduciary rules applicable in situations in which a fiduciary acts for multiple principals and owes them inconsistent, or potentially inconsistent, non-fiduciary duties. Again, the fiduciary rules that apply in such situations are by and large consistent with and explained by the protective thesis, although one aspect of those rules is difficult to explain in that way. One cannot necessarily expect the common law—and equity is no different in this regard—to be perfectly conceptually pure, given the doctrines have been formed by numerous judges over hundreds of years. What is perhaps most impressive in that respect is the remarkable degree of conformity in purpose that one can identify in the cases that consider and apply fiduciary doctrine.

After analysis come the implications of that analysis. Chapter seven considers a number of important tenets within fiduciary doctrine concerning the relationship that fiduciary duties bear to non-fiduciary duties. It shows that the basis for these propositions can helpfully be located in the protective function that fiduciary doctrine serves as a whole. This emphasises the importance of paying close attention to both fiduciary and non-fiduciary duties when determining

whether fiduciary liability has been made out. Chapter eight concentrates on more conceptual implications of the protective thesis, assessing the degree to which it provides helpful insights into the arguments advanced by other commentators about the similarities and differences between fiduciary doctrine on the one hand and contract and tort on the other. The unique protective function of fiduciary doctrine provides a good reason for it not to be lumped in with those other forms of legal doctrine. It is also possible to comment on whether other legal doctrines, whose categorisation is more contentious, should be treated as fiduciary doctrines. There are solid, albeit not irrefutable, reasons for treating undue influence and the doctrine of confidence as distinct from the fiduciary concept of loyalty.

Chapter nine then addresses the vexed question of when fiduciary duties arise. Although the protective conceptualisation of fiduciary loyalty does not directly answer that question, it is relevant in that fiduciary duties are often justified on the basis that it was legitimate to expect that they would be complied with in the circumstances of the case at hand. The legitimacy of such expectations is inherently linked to the content of and the function served by the duties generated by the expectation. Finally, chapter ten gathers together the main lessons to be drawn from the book, while also indicating areas where further research could profitably be developed in connection with the analysis that the book offers.