

# Modern indicia of fiduciary relationships in a commercial setting and the interaction of equity and contract

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Justice Ashley Black

## Introduction

The topic of this session invokes a theme that will be familiar to many, and is a subset of wider discussions as to the scope of equity in commercial settings. Writing in 1985, Sir Anthony Mason observed that:

“One element of the latest developments in equity is the increasing penetration of equitable doctrine into contract and commercial law, notwithstanding the strength of the countervailing philosophies and attitudes”<sup>1</sup>

In a note published in the next year, 1986<sup>2</sup>, Dr Austin identified, without necessarily endorsing, several objections that could be advanced to the intrusion of fiduciary principles within commercial relationships, on the basis that they may “invalidate agreements and therefore upset commercial expectations” or “produce proprietary rights, giving a party which might otherwise be unsecured an advantage in the context of an insolvency or a contest for priority”.

Writing in 1989, Professor Finn observed that the pressure for expansion of fiduciary duties, including in respect of commercial relationships had been limited not only, possibly, by a commitment to orthodoxy, but also by the availability of relief in unconscionability at general law and by statute and the availability of statutory claims for misleading and deceptive conduct to address issues as to disclosure. Professor Finn also observed that:

“Fiduciary law, for [Australia] at least, is designed to have a very modest role in refurbishing and supplementing contract doctrine. But the impression should not be given that it has thus been made a quite unimportant player in regulating contractual activity. The contrary is the case. With society increasingly dependent upon agents, brokers, advisers and service providers (‘reliance’ relationships) and with commercial activity commonly being conducted through cooperative business arrangements (‘partnership’ relationships) a significant part of modern contractual activity occurs in context, or results in relationships, which can attract fiduciary responsibility.”<sup>3</sup>

Nearly 10 years later, in 1998, Lord Millett observed that:

“Equity’s place in the law of commerce, long resisted by commercial lawyers, can no longer be denied. What they once opposed through excessive caution they now embrace with excessive enthusiasm.”<sup>4</sup>

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<sup>1</sup> AF Mason, “Themes and Prospects” in P.D. Finn (ed), *Essays in Equity*, 1985, p 242; see also D.K. Malcolm, “The Penetration of Equitable Principles into Modern Commercial Law” (1987) 3 *Australian Bar Review* 185 (Pt 1), (1988) 4 *Australian Bar Review* 1, (Pt 2); J. Gill, “A Man Cannot Serve Two Masters: The Nature, Existence and Scope of Fiduciary Duties” (1989) 2 *JCL* 115.

<sup>2</sup> RP Austin, “Commerce and Equity – Fiduciary Duty and Constructive Trust” (1986) 6 *OJLS* 444 at 452

<sup>3</sup> PD Finn, “Contract and the Fiduciary Principle”, (1989) 12 *UNSWLJ* 76 at 82.

<sup>4</sup> P Millett, “Equity’s Place in the Law of Commerce” (1998) 114 *LQR* 214.

In the same year, Gleeson CJ also identified several examples of a trend to “individualise justice” including the expansion of the concept of fiduciary relationships into commercial areas<sup>5</sup>.

The same questions arguably still arise nearly twenty years later. In this paper, I will start with what may be some very familiar propositions as to when fiduciary duties arise, or are imposed; then turn to the present state of the law in respect of the imposition of fiduciary duties in commercial settings; then to the somewhat controversial question of the extent to which such duties are excludable in contract; and finally to an open question as to the scope of the conflict of interest rule. These questions are of obvious practical importance. The circumstances in which it may be necessary to determine whether a commercial relationship is fiduciary in character will include situations where, for example, one party diverts a profitable business opportunity to itself or an associated entity, in a manner which would amount to a breach of the no conflict or no profit rule if the relationship was fiduciary; one party obtains a concealed benefit, which would again breach those rules; or one party makes a gain or uses information obtained from the venture.<sup>6</sup> That question will also arise where, as commonly, a party seeks to establish a fiduciary duty in order to rely on potentially less exacting principles of causation in equity, or to obtain an account of profits or seek to establish a constructive trust, the latter having particular attraction in circumstances of insolvency or potential insolvency with the defendant entity.

### **When a fiduciary duty arises**

To start with the obvious, a fiduciary duty can arise in several relationships which are traditionally recognised as giving rise to such duties. Traditional examples of such relationships include that between trustee and beneficiary, agent and principal, director and company, solicitor and client, and at least in some circumstances, an employee and his or her employer.<sup>7</sup>

A fiduciary duty may also arise within a fact-based (or “ad hoc”) fiduciary relationship, in the circumstances of the relationship. The earlier case law establishing this proposition is well known but I should briefly refer to it. In *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41; [1984] HCA 64 (“*Hospital Products*”), Gibbs CJ observed (at 68) that the case law provided “no comprehensive statement of the criteria by reference to which the existence of a fiduciary relationship may be established”. Mason J observed (at 96–97) that “the critical feature” of the traditional fiduciary relationship was the undertaking or agreement by the fiduciary to “act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense” and that:

“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 ... It is partly because the fiduciary’s exercise of the power or discretion can adversely affect the interests of the person to whom the duty is owed and because the latter is at the mercy of the former

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<sup>5</sup> M. Gleeson, “The Future of Civil Justice – Adjudication or Dispute Resolution?” in H Dillon (ed), *Advocacy and Judging: Selected Papers of Murray Gleeson*, 2017, p 224

<sup>6</sup> J.J. Doyle, “Commentary” in P. Finn, *Equity and Commercial Relationships*, 1987, p 211.

<sup>7</sup> *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41; [1984] HCA 64 per Gibbs CJ at 68.

that the fiduciary comes under a duty to exercise his power or discretion in the interests of the person to whom it is owed ...”

Deane J similarly observed (at 141–142) that, although no single test would identify a fiduciary relationship:

“There is, however, the notion underlying all the cases of fiduciary obligation that inherent in the nature of the relationship itself is a position of disadvantage or vulnerability on the part of one of the parties which causes him to place reliance upon the other and requires the protection of equity acting upon the conscience of that other ...”

In *Breen v Williams* (1996) 186 CLR 71 (“*Breen v Williams*”) at 106–107, Gaudron and McHugh JJ similarly observed that Australian courts have consciously refrained from adopting a general test for the existence of a fiduciary relationship, and pointed to matters that may suggest the existence of a fiduciary relationship, including a relation of confidence, inequality of bargaining power, an undertaking by one party to perform a task or fulfil a duty in the interests of the other party, the unilateral exercise of a discretion or power by one party which may affect the interests of the other, or dependency or vulnerability which causes reliance on the other.

In *Bristol & West Building Society v Mothew* [1998] Ch 1 (dealing with whether a solicitor’s conduct amounted to breach of fiduciary duty), Millett LJ similarly observed (at 18) 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. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of the fiduciary.”

That observation has since been applied in numerous cases in the United Kingdom including by the United Kingdom Supreme Court in *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45 at [5].<sup>8</sup>

In *ASIC v Citigroup Global Markets Australia Pty Ltd (No 4)* (2007) 160 FCR 35; 62 ACSR 427 (dealing with whether an investment bank owed fiduciary duties to its takeover bidder client) (“*Citigroup*”), Jacobson J referred, inter alia, to *Hospital Products* and observed (at [272]) that:

“Apart from the established categories, perhaps the most that can be said is that a fiduciary relationship exists where a person has undertaken to act in the interests of another and not in his or her own interests but all of the facts and circumstances must be carefully examined to see whether the relationship is, in substance, fiduciary ...”

In *John Alexander’s Clubs Pty Limited v White City Tennis Club Limited* (2010) 241 CLR 1; [2010] HCA 19 at [87] (“*John Alexander’s Clubs*”), a unanimous High Court identified the ‘critical feature’ of fiduciary relationships as being that:

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<sup>8</sup> For other cases, see *Global Container Lines v Bonyad Shipping Co* [1998] 1 LI Rep 528 at 546; *Arklow Investments Ltd v Maclean* [2000] 1 WLR 594 at 599; *Brandeis (Brokers) Ltd v Black* [2001] 2 All ER (Comm) 980 at [32]; *Daraydan Holdings Ltd v Solland International Ltd* [2004] EWHC 622 (Ch); [2005] Ch 119 at [ 55]; *Sinclair Holdings SA v Versailles Trade Finance Ltd* [2007] EWHC 915 (Ch) at [78]; [2007] 2 All ER (Comm) 993; *JD Wetherspoon plc v Van de Berg & Co Ltd* [2009] EWHC 639 (Ch) at [74].

“the fiduciary undertakes or agrees to act *for or on behalf of or in the interests of* another person in the exercise of a *power or discretion* which will affect the interest of that other person in a legal or practical sense.’ From this power or discretion comes the duty to exercise it in the interests of the person to whom it is owed.”

In *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296; [2012] FCAFC 6, the Full Court of the Federal Court (Finn, Stone and Perram JJ) observed (at [177]) (referring, inter alia, to *Hospital Products* and Professor Conaglen’s work<sup>9</sup>) that a fiduciary duty may exist:

“when and insofar as that person has undertaken to perform such a function for, or has assumed such a responsibility to, another as would thereby reasonably entitle that other to expect that he or she will act in that other’s interest to the exclusion of his or her own or a third party’s interest.”

Their Honours also noted (at [174]) that the relevant fiduciary duties were:

“concerned with the setting of standards of conduct for persons in fiduciary positions. Its burden, put shortly, is with exacting disinterested and undivided loyalty from a fiduciary – hence, for example, its focus on conflicts between duty and undisclosed personal interest, conflicts between duty and duty and misuse of a fiduciary position for personal gain or benefit.”

The question when fiduciary duties are, or should be, recognised at general law has also given rise to voluminous academic literature.<sup>10</sup> By way of illustration, Professor Finn has argued that fiduciary duties arise from a duty of loyalty that reflects “higher community standards or values” and give rise to a “legitimate expectation that the other party will act in the interests of the first party or at least in the joint interests of the parties and not solely self-interestedly”. He argues that factors relevant to the existence of such an expectation are the importance of the client interest involved in the relationship, so that the protection of the client’s physical or financial well-being justifies the imposition of a fiduciary relationship; the societal significance of the role of the service provider; community expectations as to the standard of probity to be expected of a service provider of that type; and whether the nature of the service is one in which the service provider could be expected to be promoting a separate interest of his or her

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<sup>9</sup> M Conaglen, *Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary Duties*, 2010.

<sup>10</sup> For a modest selection from a vast literature, see AW Scott, “The Fiduciary Principle” (1949) 37 *Cal L Rev* 539; LS Sealy, “Fiduciary Relationships” (1962) 20 *Cambridge LJ* 69; PD Finn, *Fiduciary Obligations*, 1977; T Frankel, “Fiduciary Law” (1983) 71 *Calif L Rev* 795; PD Finn, “The Fiduciary Principle” in T Youdan (ed), *Equity, Fiduciaries and Trusts*, 1989; PD Finn, “Contract and the Fiduciary Principle”, note 3 above; R Cooter & D Freedman, “The Fiduciary Relationship: Its Economic Character and Legal Consequences” (1991) 66 *NYU Law Rev* 1045; JR Macey and GP Miller, “An Economic Analysis of Conflict of Interest Regulation” (1997) 82 *Iowa LR* 965; DA Demott, “Beyond Metaphor: An Analysis of Fiduciary Obligation” (1998) 37 *Duke LJ* 879; S Worthington, “Fiduciaries: When is Self-Denial Obligatory?” (1999) 58(3) *Camb LJ* 500; M Conaglen, “The Nature and Function of Fiduciary Loyalty” (2005) 121 *LQR* 452; M Conaglen, “Fiduciary Regulation of Conflicts between Duties” (2009) 125 *LQR* 111; M Leeming “The scope of fiduciary obligations: How contract informs, but does not determine, the scope of fiduciary obligations” (2009) 3 *J Eq* 181; M Conaglen, *Fiduciary loyalty: Protecting the due performance of non-fiduciary duties*, 2010; PD Finn, “Fiduciary Reflections” (2014) 88 *ALJ* 127. For an ambitious attempt to extend the reach of fiduciary duties in a novel direction, see also S Degeling & M Legg, “Fiduciaries and Funders: Litigation Funders in Australian Class Actions” (2017) 36(2) *CJQ* 244–264. See also *Oliver Hume South East Queensland Pty Ltd v Investa Residential Group Pty Ltd* [2017] FCAFC 141 at [236]ff, where Greenwood J undertook a comprehensive review of the academic literature concerning the imposition of fiduciary duties.

own.<sup>11</sup> He also suggests that a service relationship will be fiduciary if “the actual circumstances of a relationship are such that one party is entitled to expect that the other will act in his interests in and for the purpose of the relationship” and that:

“The critical matter in the end is the role that the alleged fiduciary has, or should be taken to have, in the relationship. It must so implicate that party in the other’s affairs or so align him with the protection or advancement of that other’s interests that foundation exists for the fiduciary expectation”.<sup>12</sup>

In a more recent article, Professor Finn has described the basis for a fiduciary relationship as that:

“A person will be in a fiduciary relationship with another when that other is reasonably entitled to expect that he or she will act in the other’s interest (or their joint interest) to the exclusion of his or her own several interest, for a purpose, or for some or all purposes, of their relationship.”<sup>13</sup>

On the other hand, Professor Conaglen argues that fiduciary principles provide specific and prophylactic protection for non-fiduciary duties and that their purpose is to enhance the proper performance of non-fiduciary duties by seeking to avoid influences or temptations likely to distract the fiduciary from the proper performance of those duties.<sup>14</sup> This explanation may be straightforward in circumstances involving conflicts of duty and interest, since a non-fiduciary duty is likely to be necessary to give rise to a conflict in the first place. He summarises this position as follows:

“The view that fiduciary doctrine offers a subsidiary and prophylactic form of protection for non-fiduciary duties clarifies what the various principles of fiduciary doctrine are concerned to achieve, which is important in considering whether it is appropriate for fiduciary doctrine to apply. The view that fiduciary duties are protective of other non-fiduciary duties indicates the need for non-fiduciary duties to exist in order that fiduciary duty can serve its protective function vis-a-vis those non-fiduciary duties.”<sup>15</sup>

Justice Edelman, writing extra-judicially and prior to his appointment, has in turn argued that fiduciary duties arise as obligations based on the manifestation of a voluntary undertaking to another person, and are not duties imposed by law and are not referable to relationship or status, but are based upon contract. He argues that that approach explains why contract can modify fiduciary duties, why they cannot be imposed on a contract to alter its intended operation and why fiduciary duties arising in the context of a contractual undertaking cannot survive termination of the contract.<sup>16</sup>

Notwithstanding the continuing debate in the academic literature, it seems to me that the case law to which I have referred above provides reasonably clear guidance to courts and practitioners as to the analytical approach to be adopted in determining whether a fiduciary duty arises, or is imposed, on an ad hoc basis. It does not

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<sup>11</sup> PD Finn, “The Fiduciary Principle” in T Youdan (ed), *Equity, Fiduciaries and Trusts*, 1989.

<sup>12</sup> *Ibid* pp 46–47.

<sup>13</sup> PD Finn, “Fiduciary Reflections”, note 10 above at 137.

<sup>14</sup> M Conaglen, *Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary Duties*, 2010, p 4.

<sup>15</sup> *Id* p 245.

<sup>16</sup> J Edelman, “When do fiduciary duties arise” (2010) 126 *LQR* 302; see also J Edelman “The importance of the fiduciary undertaking” (2013) 7 *J Eq* 128. There is a degree of controversy as to exclusion of fiduciary duties by contract which I will address below. The proposition that fiduciary duties cannot survive termination of the contract was left open in *John Alexander’s Clubs Pty Limited v White City Tennis Club Limited* (2010) 241 *CLR* 1; [2010] *HCA* 19.

necessarily make the result of the application of that approach predictable in a particular case. That proposition is illustrated by the differing views as to the existence of and scope of the fiduciary duty at first instance and appellate levels in several cases dealing with commercial relationships which I will address below, including *Hospital Products, John Alexander's Clubs and Streetscape Projects (Australia) Pty Ltd v City of Sydney* (2013) 92 ACSR 417; [2013] NSWCA 2 ("*Streetscape*").

## Partnerships and joint ventures

Turning now toward commercial settings, there are also well-known examples of fiduciary duties imposed in the context of partnership, which are largely uncontroversial on the basis that partnership is a form of mutual agency, although the partners' duties inter se can be modified by contract.<sup>17</sup>

The case law also recognises that a fiduciary duty may also arise in a "joint venture", recognising that term is more useful as a commercial than a legal description, although the better view is that will depend not on the characterisation of the relationship but on the nature of the obligations which the parties have undertaken.<sup>18</sup> On this approach, the essential question is whether the functions and obligations undertaken by a participant in a particular venture themselves attract fiduciary duties. In an appropriate case, fiduciary duties may also exist between those negotiating towards joint ventures prior to their reaching formal agreement.<sup>19</sup>

In *United Dominions Corporation Ltd v Brian Pty Ltd* (1985) 157 CLR 1; [1985] HCA 49 ("*Brian*"), the High Court considered whether fiduciary duties arose from the dealings between the parties to a proposed joint venture. The majority (Mason, Brennan and Deane JJ) observed (at 10) that the reference to a "joint venture" was not determinative and that:

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<sup>17</sup> *Birtchnell v The Equity Trustees, Executors and Agency Company Limited* (1929) 42 CLR 384; *Chan v. Zacharia* (1983) 154 CLR 178; *Glandon Pty Ltd v Tilmunda Pastoral Co Pty Ltd* [2008] NSWSC 218.

<sup>18</sup> PD Finn, 'Fiduciary Obligations of Operators and Co-Venturers in Natural Resources Joint Ventures', *Australian Mining & Petroleum Law Association Yearbook*, p 161; *Walden Properties Ltd v Beaver Properties Pty Ltd* [1973] 2 NSWLR 815; *United Dominions Corporation v Brian* above; *Murad v Al-Saraj* [2004] EWHC 1235 (Ch); *Edmonds v Donovan Edmonds v Donovan* (2005) 12 VR 513; [2005] VSCA 27; *Lawfund Australia Pty Ltd v Lawfund Leasing Pty Ltd* (2008) 66 ACSR 1; [2008] NSWSC 144; *Ross River Ltd v Waverley Commercial Ltd* [2013] EWCA (Civ) 19.

<sup>19</sup> *United Dominions Corporation Ltd v Brian Pty Ltd* above; *Fraser Edmiston Pty Limited v AGT (Qld) Pty Ltd* [1986] 2 Qd R 1; *Ravinder Rohini Pty Limited v Krizaic* (1991) 30 FCR 300, 105 ALR 593; *Harrison v Schipp* [2001] NSWCA 13; *Burger King Corporation v Hungry Jack's Pty Ltd* [2001] NSWCA 187; *Cassis v Kalfus (No 2)* [2004] NSWCA 315 at [11]; *GM & AM Pearce & Co Pty Ltd v Australian Tallow Producers & Palmer* [2005] VSCA 113; *Liquor National Wholesale Pty Ltd v Red Rock Co Pty Ltd* [2007] NSWSC 392. As Professor Finn observes, the extension of fiduciary duties to anticipated joint ventures operates, obviously enough, as a protection for parties who have negotiated for, but have not reached formal agreement about, a relationship which will itself be fiduciary, whether as a partnership or as a joint venture which would have fiduciary character: P.D. Finn, "Contract and the Fiduciary Principle" note 3 above at 79. Professor Finn there also described the position in respect of negotiations toward a partnership or joint venture that would itself be fiduciary as follows:

"Here the relationship negotiated for is itself seen as contriving such trust as one party is entitled to have in the conduct of the other in advance of formal agreement. While allowing for self-interest in the formulation of and commitment to the bargain, the Courts have been prepared to intrude fiduciary law into the pre-contract arena to prevent deceptive conduct or the usurpation [sic] of the business opportunity the subject of the negotiations" (p 95).

“The most that can be said is that whether or not the relationship between joint venturers is fiduciary will depend upon the form which the particular joint venture takes and upon the content of the obligations which the parties to it have undertaken.”

In that case, the agreement involved joint participation in a commercial enterprise with a view to profit; profits were to be shared; the property which was the subject of the venture was to be held upon trust; and the policy of the venture was to be reached by joint decision. The majority observed (at 11) that ‘[a]part from the absence of any reference in the agreement to ‘partnership’ or ‘partners’, the relationship between the participants under the agreement exhibited all the indicia of, and plainly was, a partnership’. The reasoning which led to the joint venture in *Brian* being classified as a partnership would not have direct application to joint ventures of a different form, including a joint venture involving the splitting of product as distinct from the sharing of profit.

Even where fiduciary obligations arise in some aspects of a joint venture, a party may be free to pursue its own interests in particular respects. In *Noranda Australia Ltd v Lachlan Resources NL* (1988) 14 NSWLR 1, a joint venturer argued that another joint venturer had acted in breach of fiduciary duty by selling its interest in the joint venture project secretly and without notice to the other co-venturers. The Joint Venture Agreement provided that the “general nature” of the parties’ relationship should be fiduciary and none should derive an unfair advantage from another. Bryson J held that this provision did not affect the specific provisions dealing with the sale of interests in the joint venture and the fiduciary relationship was limited to areas of mutual concern which excluded the separate property interests of the joint venturers in their shares in the venture. His Honour observed (at 15) that it:

“is ordinarily to be expected that a person under a fiduciary obligation to another should be under that obligation in relation to a defined area of conduct, and exempt from that obligation in all other areas. Except in that defined area, a person under a fiduciary duty retains his own economic liberty.”

Two parties to a mining joint venture were held to be subject to fiduciary duties in *Pacific Coal Pty Ltd v Idemitsu (Queensland) Pty Ltd* (1992) ASC 56–160, where Ryan J held the fiduciary relationship arose from the terms of the agreement between the parties, without it being necessary to determine whether the relationship was one of partnership.

In *Gibson Motor Sport Merchandise Pty Ltd v Forbes* (2006) 149 FCR 569; [2006] FCAFC 44 at [16], Finn J (with whom Sundberg and Emmett JJ agreed) distinguished between cooperative action, including the sharing of resources or interdependent conduct, which could colloquially be described as a “joint venture”, and a fiduciary duty owed in the context of a joint venture or anticipated joint venture and observed that:

“Rarely, though, will there be anything fiduciary about the arrangements themselves as they will not envisage a form or forms of cooperation which is or are particularly fiduciary in character (eg the sharing of control or of profits and losses; the creation of a commonly owned vehicle to effectuate what is agreed, the assumption of similar rights and obligations etc).”

In *Red Hill Iron Ltd v API Management Pty Ltd* [2012] WASC 323, Red Hill Iron Ltd (“Red Hill”) and API Management Pty Ltd (“API”) were joint venturers to iron ore rights in the Pilbara region, by which API could spend money on Red Hill's tenements and earn an interest in them. The arrangement was governed by a joint venture agreement and Red Hill was funding exploration and other costs. Red Hill claimed a breach of the

relevant agreements and of fiduciary duty in respect of expenditure by API to investigate transport infrastructure charged by API to the joint venture, where API subsequently continued the investigation on its own account and for a different joint venture. API admitted the alleged conduct but contended that the joint venture agreements were inconsistent with a fiduciary duty applicable to the assessment and development of transport infrastructure generally. That defence was successful and Red Hill's claim was dismissed.

Beech J reviewed (at [363] – [380]) the cases holding that the relationship of the parties is determined by the agreement contained in the relevant contract and observed (at [365]) that:

“the relationship will be fiduciary to the extent, and only to the extent, that the fiduciary has agreed or undertaken to exercise powers or discretions for the principal or, in the case of a horizontal relationship, for the parties jointly”.

His Honour also noted (at [375]) that the relationship between the manager of a joint venture and the joint venturers must always be subject to the terms of any relevant contract and will only be fiduciary to the extent that the manager is entrusted with powers and authorities to be exercised for and on behalf of the joint venturers, and that “invites attention to the scope of the powers and authorities of the manager to act on behalf of the venturers.” His Honour then determined the scope of any fiduciary duty in respect of the joint venture by a close analysis of the terms of the joint venture agreement and held that the alleged fiduciary duty could not extend beyond the limited scope of the joint venture.

In *Baraka Energy & Resources Ltd v Statoil Australia Theta BV* (2014) 100 ACSR 340; [2014] WASC 198, the plaintiff unsuccessfully sought an interlocutory injunction in respect of oil and gas joint ventures in the Northern Territory, where there was a dispute as to the work program and budget and consequential claims for contribution. Edelman J noted that no authority had been cited for the proposition that fiduciary obligations arose merely because of the characterisation of the arrangement as a joint venture and also referred to the contractual exclusion of a fiduciary characterisation under the terms of the operating agreement.

The scope of fiduciary duties within a “joint venture” was also recently considered by Sackar J in a novel context In *King v Adams* [2016] NSWSC 1798, in determining whether members of a former lottery syndicate owed a fiduciary duty to another member who was not included in a group who purchased a winning lottery ticket. The plaintiff's primary case was that he was entitled to participate in the winning syndicate and his alternative case was that a joint venture existed in respect of the earlier syndicate and gave rise to fiduciary obligations, and that the defendants had breached their duty by excluding the plaintiff from the winning syndicate and held a portion of the prize money on constructive trust for him. Sackar J observed (at [50]) that the existence of a joint venture is not enough to establish a fiduciary obligation, because the existence and scope of any such obligation must be determined by the character and purpose of the relationship. His Honour held (at [355]) that the organiser of the syndicate(s) was not under a fiduciary duty and had not breached it and observed (at [342]) that:

“...the simple fact that one party in a relationship subjectively trusted another is neither necessary nor conclusive of the existence of a fiduciary relationship. Further, a fiduciary relationship, however created, is rarely fiduciary for all purposes. It will cease when the relevant person no longer occupies the position to which the fiduciary duty applies.”



His Honour held that the organiser of the syndicate(s) only assumed a fiduciary office when he received money for a participant or undertook to buy a ticket for a participant without receiving money and also rejected the submission that a joint venture arose from the earlier syndicate such that all tickets subsequently purchased were held for that syndicate. An appeal from that decision was recently dismissed, albeit largely on factual grounds ([2017] NSWCA 277).

In another recent decision in *Blong Ume Nominees Pty Ltd v Semweb Nominees Pty Ltd* [2017] SASC 137, Parker J referred to *Gibson Motor Sport Merchandise Pty Ltd v Forbes* above as authority that a joint venture may give rise to fiduciary obligations where the participants have associated for a common end and the relationship between them is based on mutual confidence that they will engage in particular activities or transactions only for their joint advantage. His Honour held that a fiduciary duty had arisen between three companies, which had invested in property to provide office accommodation for their respective principals; but held that a breach of fiduciary duty was not established on the facts. Breach of fiduciary duty was also not established, in respect of a proposed joint venture, in *Noble Earth Technologies Pty Ltd v Hampic Pty Ltd (in liq) (t/as Cyndon Chemicals)* [2017] NSWSC 502, where Robb J held that the prospective venture had not advanced to the point where the parties became obliged to act in their joint interests rather than their own commercial interests.

### **Other commercial relationships**

Outside the context of partnerships and joint ventures, the imposition of fiduciary duties in essentially commercial relationships involves difficulties of principle and of policy. The competing principles include, on the one hand, equity's commitment to holding the fiduciary to his undertaking to act in the interests of his beneficiary and the desirability of securing standards of commercial morality<sup>20</sup> and, on the other hand, the principle that the parties to a contract ought to be able to define and limit their obligations in their dealings with each other by the terms of their contract; and contrary to imposing such obligations, the possibility that the strictness of fiduciary obligations would unduly restrict the ability of commercial parties to serve their own interests and would consequently be contrary to a social policy favouring commercial enterprise. Writing in 1989, Professor Finn rightly distinguished, in the contractual setting, between conduct undertaken for another's benefit, as much conduct in respect of a contract might in one sense be, and acting in another's interests, in the sense of imposing a standard of loyalty on one or both parties to it.<sup>21</sup> He also observed that, ordinarily, a contractual relationship may benefit one or both parties, but it does not involve either party committing to serve the interests of the other party, or their joint interests, in preference to its own; that the position will differ in contracts that relate to traditional fiduciary relationships, such as agency; and that a distributorship or franchise generally will not be structured in a way that involves mutuality, as distinct from each party advancing their own interests and their own profit by a successful relationship, and would not ordinarily be fiduciary.<sup>22</sup>

The competing principles have been recognised in the case law. In *Moorgate Tobacco Co Ltd v Phillip Morris Ltd (No 2)* (1984) 156 CLR 414, Deane J (with whom the other

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<sup>20</sup> EJ Weinrib, "The Fiduciary Obligation" (1985) 25 *University of Toronto Law Journal* 1, 6-7.

<sup>21</sup> Finn, "Contract and the Fiduciary Principle", note 3 above, 83.

<sup>22</sup> Finn, "Contract and the Fiduciary Principle", note 3 above, 91.

members of the High Court agreed) held that the relationship between a licensor and licensee was not fiduciary in nature, observing (at 436) that:

“The rights and obligations of the parties were as defined by the agreement and neither party was under a general obligation to avoid any conflict between its own interests on the one hand and the interest of the other party or the joint interests of them both on the other or to prefer the interests of the other party or the joint venture to its own interests if and when any such conflict arose.”

The leading decision is of course still *Hospital Products*, where the majority (Gibbs CJ, Wilson, Deane and Dawson JJ) held that a distributorship of surgical stapling products did not impose fiduciary obligations upon the distributor (“HPL”) in favour of the manufacturer (“USSC”). The majority characterised the relationship between USSC and HPL as that of a distributorship entered into at arm’s length. Gibbs CJ observed (at 70) that:

“... the fact that the arrangement between the parties was of a purely commercial kind and that they had dealt at arm’s length and on an equal footing has consistently been regarded by the Court as important, if not decisive, in indicating that no fiduciary relation arose.”

His Honour also noted that the nature of the relationship was not such that conflicts of interest were necessarily to be resolved in favour of USSC. Wilson J similarly observed (at 118) that the relationship of manufacturer and distributor was not one which would ordinarily be productive of a fiduciary duty and that his Honour was reluctant to import such an obligation where the parties were dealing at arm’s length and there was no credible suggestion of undue influence. Dawson J held (at 144) that it was not appropriate to impose an equitable obligation in a distributor relationship, where the distributor will pursue its own economic interests without regard to the supplier’s interests.

Mason J, in the minority, did not accept that the categorisation of a relationship as commercial was sufficient in itself to exclude obligations of a fiduciary nature. His Honour observed (at 99-100) that:

“There has been an understandable reluctance to subject commercial transactions to the equitable doctrine of constructive trust and constructive notice. But it is altogether too simplistic, if not superficial, to suggest that commercial transactions stand outside the fiduciary regime as though in some way commercial transactions do not lend themselves to the creation of a relationship in which one person comes under an obligation to act in the interests of another. The fact that in the great majority of commercial transactions the parties stand at arms’ length does not enable us to make a generalization that is universally true in relation to every commercial transaction. In truth, every such transaction must be examined on its merits with a view to ascertaining whether it manifests the characteristics of a fiduciary relationship.”

His Honour also noted that commercial relationships may in particular circumstances allow “the creation of a relationship in which one party comes under an obligation to act in the interests of another’ and that fiduciary obligations may exist at the same time as and consistently with the terms of a contractual relationship, so that “every such transaction must be examined on its merits with a view to ascertaining whether it manifests the characteristics of a fiduciary relationship”. His Honour’s reasoning differed from that of the majority in his pointing to a change in the nature of commerce over time, and to the value of imposing fiduciary duties in complex commercial transactions in order to allow equitable remedies to the aggrieved party, noting:

“The need in appropriate cases to do justice by making available relief in specie through the constructive trust, the fiduciary relationship being the means to that end.”

His Honour would have held that the dealings between USSC and HPL had established a limited fiduciary relationship in respect of the production and promotion of USSC’s product goodwill, and that a breach of that limited fiduciary duty had been established, allowing the imposition of a limited constructive trust in favour of USSC over the gains from that breach.

Also in the minority, Deane J accepted (at 122) that “[t]he relationship between a manufacturer and a distributor is not, in itself, ordinarily a fiduciary one even in a case where the distributor enjoys sole rights of distribution in a particular area”, but qualified that conclusion to allow that a restricted fiduciary duty may arise with respect to particular matters within the scope of a distributorship, observing (at 123) that:

“The continuing relationship of manufacturer and distributor might well provide a context in which it would be easier to imply an undertaking by one party to act as a fiduciary in relation to a particular matter than would be the case if that relationship did not exist.”

His Honour would have granted equitable relief on other grounds “rather than as arising from a breach of some fiduciary duty flowing from an identified fiduciary relationship”.

In *Paul Dainty Corp v National Tennis Centre* (1990) 22 FCR 495, the proprietors of an entertainment centre appointed a ticketing service, Bass, to be the exclusive agent for the sale of tickets at the venue. Paul Dainty alleged that Bass had acted in breach of a fiduciary duty arising under that relationship on the basis that it held moneys payable to Paul Dainty. The Court held that a fiduciary relationship was not established where both parties were substantial corporations with equal bargaining power and each had entered into arm’s length contracts from a position of equality. The Full Federal Court (Woodward, Northrop and Sheppard JJ) observed (at 515-516) that:

“The authorities make it clear that equity will not impose fiduciary obligations on parties who have entered into ordinary and arm’s length commercial relationships, which fully prescribe the respective powers and duties of the parties. This is particularly so where the parties involved are substantial corporations, having equal bargaining power. There is simply no need for the intervention of equity to imply fiduciary responsibilities in such circumstances.”

In *News Ltd v Australian Rugby Football League* (1996) 139 ALR 193, the Australian Rugby League contended that clubs which had joined the “Super League” competition had breached a fiduciary duty arising from the association between the ARL and the clubs. The Full Court of the Federal Court held that fiduciary obligations were not established, noting that the League did not place confidence in the clubs but exercised control over them; policy was dictated by the board of the League, independent of the clubs’ wishes; confidential information did not flow freely to the clubs; the clubs owned separate assets that they used independently of the League; the clubs had a contractual right to leave the League and there was considerable competition between the clubs as separate business entities; and profits and goodwill were not pooled and were only distributed at the League’s discretion.

The question whether a complex commercial arrangement gave rise to fiduciary obligations again arose in *John Alexander’s Clubs* above. In February 2005, JACS and White City Tennis Club (“WCTC”), which operated a tennis club on the land under licence, had entered into a memorandum of understanding (“MOU”) which provided for

JACS to negotiate for the purchase of, or an option to purchase, the whole or part of the land by a new company, White City Holdings Pty Ltd (“WCH”) and provided that existing members of the tennis club and members of the public would be able to subscribe for shares in WCH. The MOU also provided for JACS to exercise that option to purchase that land on behalf of WCH, with WCH simultaneously to lease the land back to an entity related to JACS for 99 years and enter into an operating agreement in respect of the new Club, and that JACS promised to seek to procure a further option exercisable by the Club if it did not exercise or was unable to exercise that option. JACS and WCH then entered into subsequent agreements which contemplated that JACS would acquire an option to purchase the land but did not expressly provide for JACS to exercise that option on behalf of WCH or for a long term lease to WCH. JACS terminated the MOU in April 2006 and an associated entity (“Poplar”) then exercised the option.

WCTC contended that the exercise of that option was in breach of fiduciary duty and also amounted to equitable fraud or unconscionable conduct, and sought a constructive trust on terms that it pay Poplar the amount that Poplar had paid to purchase the land. That claim was unsuccessful at first instance, successful on appeal, and unsuccessful on a further appeal to the High Court. At first instance, Young CJ in Eq held that a fiduciary relationship was not established since WCTC was not affected by any special vulnerability and had not relied on JACS to protect its interests, those running it were experienced in business and were advised by independent solicitors and it had equal bargaining power with JACS. His Honour also held that, even if fiduciary duties had arisen from the MOU, the valid termination of the MOU had terminated those duties and JACS was then free to acquire the land. The Court of Appeal overturned that decision and held that WCTC was entitled to relief on the basis of unconscionability, although it also held that there was a fiduciary relationship between JACS and WCTC.

The High Court reversed the Court of Appeal’s decision. The Court observed (at [44]) that, as the Court of Appeal had recognised, a description of an arrangement as a “joint venture” did not have any particular legal consequences and the rights and obligations of the parties remained to be determined by examination of the details of what they had agreed and done. The Court also pointed (at [88] - [89]) to the late Justice Lehane’s observation that the proposition that a fiduciary was a person acting “for or on behalf of” another person must be understood strictly, because otherwise it could become circular, and that commercial transactions often fall outside accepted categories of fiduciary relationship because they do not meet the criteria for such relationships.<sup>23</sup> The Court approved (at [91]) the observation of Mason J in *Hospital Products* that, where contract provides the foundation for a fiduciary relationship, then any fiduciary relationship “must accommodate itself to the terms of the contract so that it is consistent with, and conforms to, them”. The Court held that neither vulnerability nor reliance was established to support a fiduciary duty, where WCTC had entered subsequent contractual arrangements that contemplated that JACS would obtain an unconditional option to acquire the land, and WCTC’s only vulnerability was to a breach of contract, giving rise to contractual remedies. The Court also noted (at [103]) but did not resolve a question whether the duties arising out of a fiduciary relationship can come to an end if the relationship has broken down without being terminated formally by the innocent party.<sup>24</sup>

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<sup>23</sup> JRF Lehane, “Fiduciaries in a Commercial Context” in PD Finn (ed), *Essays in Equity*, 1985, p 104.

<sup>24</sup> For commentary, see J Knowler and C Rickett, “The Fiduciary Duties of Joint Venture Parties – When Do They Arise and What Do They Comprise?” (2011) 42 *VUWLR* 134.

The circumstances in which a fiduciary duty might arise in a commercial relationship were again considered in *Streetscape Projects (Australia) Pty Ltd v City of Sydney* above. The City of Sydney and Streetscape Projects (Australia) Pty Ltd (“Streetscape”) had entered into a detailed licence agreement for “smart pole” technology in 2002, as varied in 2007. The City of Sydney brought claims against Streetscape for breach of contract, breach of fiduciary duty, breach of confidence and a contravention of s 52 of the *Trade Practices Act 1974* (Cth), arising from Streetscape’s dealing with that technology in breach of the licence agreement, and also sought relief against the sole director of Streetscape Projects as an accessory to the alleged breach of fiduciary duty.

Barrett JA (with whom Meagher and Ward JJA agreed) allowed an appeal against the trial judge’s finding that Streetscape Projects had breached a fiduciary duty to the City of Sydney and its director was knowingly concerned in that duty. Barrett JA (with whom Meagher and Ward JJA agreed) recognised (at [97]) that a fiduciary duty may in a contractual setting; (at [99]) that such a duty must accommodate itself to the terms of the contract; and (at [100]) that:

“The contractual terms are paramount. A fiduciary duty cannot detract from or contradict them. The two types of obligation – contractual and fiduciary – will, in general, co-exist if and only to the extent that the sanctions available for breach of contract (including any implied terms) are insufficient to deal with some possibility of unconscionable conduct to which one party is exposed.”

Barrett JA also observed (at [107]) that:

“[t]he adequacy of remedies for breach of contract is therefore, in general, the determinate of whether there is scope for equity to play a supplementary role by way of the imposition of a fiduciary duty upon a contracting party; and the fact that one party puts trust in another is not sufficient for that purpose.”

This observation may be more restrictive than the case law generally, so far as it looks not only to any inconsistency between the terms of the contract and the suggested fiduciary duty but to the practical adequacy of the contractual relief.

Barrett J referred (at [121]) to the observation of the Supreme Court of Canada in *Galambos v Perez* [2009] SCC 48; (2009) 3 SCR 247 that a fact based fiduciary duty cannot arise unless one party undertakes, expressly or impliedly, to act in a particular factual context solely in the interests of the other. His Honour also emphasised the word “solely” in that proposition and observed (at [121]) that:

“That essential requirement shows why fiduciary duties, of their nature, do not ordinarily attend bargains struck at arm’s length between sophisticated parties with equal bargaining power who, in pursuing their own financial ends, take care to document their respective rights and obligations in a comprehensive way. A person of that kind who makes such a bargain in that way safeguards his or her own interests and aims to achieve the particular advantage sought for the person’s own benefit. The contract may import implied duties of good faith performance. One party may have a clear interest in fostering the ability of the other to perform and in seeing that other derive the advantages that the contract is intended to confer. A relationship with a contented counterparty is usually more productive than a relationship with a hostile one. But none of this alters the reality that each party’s role is a selfish role, not one of self-denial and subordination of personal interest.”

His Honour held (at [124]) that the City of Sydney’s only vulnerability, in a detailed contract, was to breach of that contract by the other party giving rise to contractual

remedies and pointed (at [127]) to the need emphasised in *John Alexander's Clubs* “to identify some foundation for a finding of fiduciary obligation going beyond the mere vulnerability to breach of contract that is the lot of every contracting party”. His Honour held (at [128]) that there was no need for equity to supplement the contract, by fiduciary obligations, where the circumstances in which the contract was made and its performance required did not indicate remedies for breach of contract were not adequate to vindicate the parties’ rights and protect their interests.

Professor Finn has criticised that decision, suggesting that the proposition that a fiduciary duty only arises if contractual relief is insufficient contains “the seeds of real heterodoxy” and arguing that a question arose (although it may or may not have been raised in the case) as to whether Streetscape was a fiduciary in consequence of its limited right to use the Council’s intellectual property under the relevant licence agreement.<sup>25</sup> However, special leave to appeal from that decision was refused.

In *DFD Rhodes Pty Ltd v Hancock Prospecting Pty Ltd* [2015] WASC 105, Le Miere J considered a strikeout application relying on *Streetscape*. The plaintiff, DFD Rhodes, alleged that two other entities owed fiduciary duties to it as a result of the entry into tenement agreements. The defendants argued that the alleged fiduciary duty either rewrote the contract and could not be established or, if the plaintiff’s construction of the contract was established, would not be imposed as an adequate remedy existed in damages. Le Miere J held that, despite the defendants’ reliance on *Streetscape*, the plaintiff’s contentions were not so unarguable to support summary dismissal. His Honour also declined to make an order for summary dismissal in respect of allegations of prescriptive or positive, rather than proscriptive, fiduciary duties in that case.

It is always a mixed blessing when another appellate decision is delivered shortly before the paper is to be delivered, and I am in that position. On 8 November 2017, the Court of Appeal of the Supreme Court of Victoria (Santamaria JA, with whom Kaye and Ashley JJA agreed) delivered its decision in *Adventure Golf Systems Australia Pty Ltd v Belgravia Health & Leisure Group Pty Ltd* [2017] VSCA 326, concerning the question whether fiduciary obligations arose in a commercial relationship governed by contract. I will deal with this case here, although it appears primarily to have been put as a “joint venture” case.

In that case, Adventure Golf Systems Australia Pty Ltd (“AGS”) and Belgravia Health & Leisure Group Pty Ltd (“Belgravia”) had entered contractual arrangements in 2000 for the construction and operation of a 37 hole “adventure golf course”, which provided for AGS to design, construct and landscape that golf course at its own cost and for the subsequent sharing of revenue after the deduction of expenses. That agreement was expressed to continue so long as Belgravia occupied the site “in accordance with” a management agreement between Belgravia and Parks Victoria. The agreement expressly provided that the relationship between the parties was not that of partnership or agency, and that neither party had the right to enter into commitments or incur liabilities on behalf of the other. The management agreement between Belgravia and Parks Victoria expired in November 2015 and Belgravia then occupied the site under a short term arrangement with Parks Victoria, did not enter any new agreement with AGS and retained all revenue generated by the adventure golf business.

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<sup>25</sup> PD Finn “Fiduciary Reflections”, note 10 above; and, for a defence of the decision, see A Eastwood & L Hastings “A response to Professor Finn’s ‘Fiduciary Reflections’” (2014) 98 *ALJ* 314. For commentary, see also L Aitken, “Contract, Confidence, and the fiduciary relationship” (2013) 87 *ALJ* 425.

AGS's case at trial was that "joint venture" arrangement existed between it and Belgravia, the parties owed each other fiduciary obligations and Belgravia could not take the benefit of any further contract with Parks Victoria for itself. AGS relied on *United Dominions Corporation Ltd v Brian Pty Ltd* for that proposition. The County Court of Victoria dismissed that claim. The Court of Appeal granted an application for leave to appeal from a decision of the County Court in respect of the claim for breach of fiduciary duty, but dismissed the appeal. The County Court held that no fiduciary duty arose in the relevant circumstances.

On appeal, AGS relied on aspects of the arrangements between the parties to contend that the relationship was a "horizontal" joint venture, where the parties undertook to act exclusively for their mutual benefit. AGS also contended that the circumstances of the relationship was such that each party was entitled to expect that the other would act in its interests and for the purposes of the relationship, and that it was vulnerable to Belgravia so far as the management agreement between Belgravia and Parks Victoria underpinned the relevant relationship. AGS also relied, not surprisingly, on correspondence in which Belgravia had referred to the parties as "partners in the business" or "working in partnership".

Santamaria JA observed (at [119]–[120]) (omitting citations) that:

"The essence of a fiduciary relationship is that one party to the relationship is obliged to act in the interests of another party (or, in the case of a partnership or joint venture, their joint interest) to the exclusion of the former's self-interest. As a result, the fiduciary is prevented from entering into any engagement in which the fiduciary has, or could have, a personal interest conflicting with that of his or her principal; nor is the fiduciary allowed to retain any benefit or gain obtained or received by reason of or by use of its fiduciary position or through some opportunity or knowledge resulting from it.

There is no single test for determining whether a fiduciary relationship exists in any given case. Courts will readily infer that certain relationships give rise to fiduciary duties, such as the relationship between trustee and beneficiary, director and company, agent and principal, solicitor and client, employee and employer, and partners inter se. The categories of relationships giving rise to fiduciary duties are not closed. The features that are common to the established relationships which give rise to fiduciary duties will inform the question whether such duties arise outside those relationships. Thus, 'we have to distil the essence or the characteristics of the relationships from the illustrations which the judicial decisions provide'."

His Honour referred to Mason J's observations as to the nature of a fiduciary relationship in *Hospital Products* above, to the observations of Gaudron and McHugh JJ as to matters that point towards the existence of such a relationship in *Breen v Williams* above and also referred to *John Alexander's Clubs* above and also observed (at [125]) that:

"More often than not, commercial transactions which were negotiated at arm's length between self-interested and sophisticated parties on an equal footing do not give rise to fiduciary duties. Similarly, equity will not lightly impose fiduciary duties on parties to a well-defined contractual relationship in which the parties have prescribed in detail their rights and obligations. The reluctance of equity to intervene in these situations is understandable: the relationship between the parties is far removed from those relationships which tend towards the existence of fiduciary duties and exhibit such features as an undertaking to act for or on behalf of another, a representative character, loyalty, dependency, ascendancy, vulnerability, reliance and so on."

His Honour noted (at [126]) that it was not the case that a commercial relationship can never be fiduciary in character; that part of a commercial relationship may be fiduciary in character; and, where the commercial relationship is governed by a contract, the ordinary rules of contractual construction apply in determining the existence of any fiduciary relationship and the scope of any fiduciary obligations. His Honour also noted (at [129]) that, consistent with the authorities, vulnerability is not in itself determinative of the existence of fiduciary obligations. His Honour pointed (at [130]) to the availability of contractual remedies if AGS had established that Belgravia had breached its agreement with AGS in respect of the use of the property and also pointed out (at [132]) that AGS had known that it would be open to Belgravia and Parks Victoria to enter a new agreement that would bring an end to the agreement between them. His Honour also referred to the specific rights and obligations on the part of AGS and Belgravia in respect of the management, maintenance, obligation and development of the relevant facility, which he observed were difficult to reconcile with a wider obligation that one party act for or on behalf of or in the interests of the other, other than by performing the relevant agreement in accordance with its terms. His Honour also observed (at [134]) that:

“There is also no evidence of any inequality of commercial experience between AGS and Belgravia. While the relationship may be described as collaborative and in the nature of a joint venture, these features are insufficient to take it outside the realms of an ordinary contractual relationship in which each party was entitled to expect the other to perform its end of the bargain. In this context, it can hardly be said that there existed an obligation of loyalty.”

His Honour concluded (at [136]) that:

“...objectively viewed, the relationship between AGS and Belgravia was not one in which AGS could reasonably have expected Belgravia to act in AGS’s interests for the purposes of the relationship”.

For completeness, I should note that his Honour also observed that the contractual exclusion of a relationship of partnership or agency was not conclusive, and that such a clause must give way to an analysis of the agreement in its entirety and the parties conduct. His Honour nonetheless noted that that clause tended in favour of the conclusion that no fiduciary relationship existed in that case, and against an argument that the relationship was one of the established categories of fiduciary relationships. His Honour also treated the reference by Belgravia in correspondence to “partners” or “working in partnership” as colloquial and not as sufficient “to deem the relationship between the parties to be something which it is not”.

Pausing to summarise the position here, the case law has plainly recognised the potential for commercial relationships to give rise to a fiduciary relationship, or a limited fiduciary relationship in respect of particular aspects of the relationship (for example, the treatment of goodwill noted by Mason J in *Hospital Products* and by Professor Finn in his comments on *Streetscape*). However, even before we reach the question of contractual exclusion of such a relationship, the cases indicate that such duties may rarely arise, as matter of fact, outside partnership relationships and joint ventures involving the sharing of profit.

### **The scope of the fiduciary obligation**

A contract governing the relationship between the fiduciary and the beneficiary may define the nature of the relationship and obligations between the parties in a way which



limits the scope of any fiduciary duty. In *Hospital Products Ltd v United States Surgical Corporation* above at 97, Mason J observed that, where a contract regulates the rights and liabilities of the parties:

“the fiduciary relationship, if it is to exist at all, must accommodate itself to the terms of the contract so that it is consistent with, and conforms, to them. The fiduciary relationship cannot be superimposed on the contract in such a way as to alter the operation as the contract was intended to have according to its true construction.”<sup>26</sup>

In *Chan v Zacharia* (1984) 154 CLR 178 at 196, Deane J noted that it was conceivable that a partnership agreement could exclude a fiduciary relationship between the parties. In *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145; [1994] 3 All ER 506 at 543–544, Lord Browne-Wilkinson similarly observed that:

“The extent and nature of the fiduciary duties owed in any particular case fall to be determined by reference to any underlying contractual relationship between the parties. Thus, in the case of an agent employed under a contract, the scope of his fiduciary duties is determined by the terms of the underlying contract. ... The existence of a contract does not exclude the co-existence and current fiduciary duties: but the contract can and does modify the extent and nature of the general duty that would otherwise arise.”

In *News Ltd v Australian Rugby Football League Ltd* above (at FCR 539), the Full Federal Court observed that:

“In a relationship constituted by contract, the nature of the fiduciary obligations owed by the parties - and indeed whether there are any fiduciary obligations at all - may be determined by the terms of the parties’ agreement.”

In *Breen v Williams* above at 132-133, Gummow J observed that a contractual term may be so precise in its regulation of what a party may do that there is no scope for the creation of a fiduciary duty.

A fiduciary obligation will arise only in relation to that part of the relationship which is fiduciary in character<sup>27</sup> and the duty owed by a fiduciary will be limited to the scope of the service which it undertakes to provide.<sup>28</sup> For example, in *Howard v Commissioner of Taxation* (2014) 309 ALR 1; [2014] HCA 21, Mr Howard had received equitable compensation from other participants in a joint venture, following the diversion of an opportunity that was pursued by that joint venture, and claimed to hold that compensation on trust for a company of which he was a director, which at one point was to participate in that business opportunity. Mr Howard argued that he was not liable for a tax on a judgment in his favour because he had received the relevant amount as constructive trustee for a company for which he was a director. The High Court held that, where he had not obtained any gain or benefit by use of his position as a director, there was no conflict and no substantial possibility of conflict between his personal interest and his duty to the company and no basis for a constructive trust. French CJ and Keane J observed (at [34]) that the limits of fiduciary duties were to be determined

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<sup>26</sup> See also *News Ltd v Australian Rugby Football League Ltd* above at 539; *Breen v Williams* above per Gummow J at 132–133; *Eric Preston Pty Ltd v Euroz Securities Ltd* (2010) 77 ACSR 135; [2010] FCA 97, aff’d (2011) 274 ALR 705; [2011] FCAFC 11.

<sup>27</sup> *Birchnell v Equity Trustees Executors and Agency Co Ltd* (1929) 42 CLR 384 at 408 per Dixon J; *New Zealand Netherlands Society ‘Oranje’ Inc v Kuys* [1973] 1 WLR 1126 at 1130 per Lord Wilberforce.

<sup>28</sup> *Aequitas v AEFC* (2001) 19 ACLC 1006 at [307].

by the character of the relationship, the parties' express agreement and their course of dealings and that:

“[t]he scope of the fiduciary duty generally in relation to conflicts of interest must accommodate itself to the particulars of the underlying relationship which give rise to the duty so that is consistent with and conforms to the scope and limits of that relationship”.

The parties to a relationship may also expressly agree that their relationship is not fiduciary in character, although the effectiveness of such a term has been controversial in the case law and the academic literature. In *South Sydney District Rugby League Football Club Ltd v News Ltd* (2000) 177 ALR 611 at [134] – [135], Finn J observed that the parties may cast their relationship in a form that excludes a particular category, but that mere labelling will not achieve that result, although the label is an indication of the parties' intent to be given “proper weight in relation to the rest of their agreement and such other relevant circumstances as evidence the true character of the relationship”. That proposition is measured and logical but leaves open the possibility that a contractual provision can exclude a characterisation of a relationship as fiduciary, if the reality of that relationship does not contradict it.

On the other hand, in *Citigroup* above, Jacobson J observed that it was open to the parties to contract to exclude or modify the operation of fiduciary duties. His Honour gave effect to a term in the mandate letter which provided that the Citigroup was engaged:

“as an independent contractor and not in any other capacity including as a fiduciary.”

His Honour referred to the view expressed by the UK Law Commission that, with limited exceptions, nothing prevented a fiduciary from contracting out of or modifying its fiduciary duties, particularly if no prior fiduciary relationship existed and the contract sought to define the duties of the parties.<sup>29</sup> His Honour held that the exclusion in the particular case was effective to prevent a fiduciary obligation from arising (at [337]) although he also noted (at [397]) that the position may differ if a fiduciary relationship pre-existed the relevant contract, so that informed consent to the excluding provision may be required.<sup>30</sup>

Professor Finn subsequently criticised the recognition of contracting out of the fiduciary relationship in *Citigroup*, at least by a broad contractual exclusion, although he recognised that the parties to a relationship which is otherwise fiduciary can agree that specified conduct may be lawfully engaged in with disclosure and informed consent. That criticism may depend on a controversial assumption that the functions performed by financial and corporate advisers are “usually fiduciary”, where such relationships are not recognised fiduciary relationships, absent agency.<sup>31</sup> It is at least arguable that such exclusions should more readily be accepted where they are consistent with the fact that a relationship is not of a traditional character, and unless a party has acted to assume

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<sup>29</sup> UK Law Commission, *Fiduciary Duties and Regulatory Rules*, Law Com No 236, 1995, [2.11]

<sup>30</sup> *Law Society of New South Wales v Foreman* (1994) 34 NSWLR 408; *Morris Fletcher & Cross Bill of Costs* [1997] 2 Qd R 228; *Symonds v Raphael* (1998) 148 FLR 171; *McNamara Business & Property Law v Kasmerides* [2007] SASC 90.

<sup>31</sup> P Finn, “Fiduciary Reflections”, note 10 above; see also A Eastwood & L Hastings “A response to Professor Finn’s ‘Fiduciary Reflections’” note 25 above; M Leeming, “The scope of fiduciary obligations: How contract informs, but does not determine, the scope of fiduciary obligations” (2009) 3 *J Eq* 181.

responsibility for the other's interest in a manner that contradicts the disclaimer of that responsibility.

The recent decision in *Ryde Developments Pty Ltd v The Property Investors Alliance Pty Ltd (No 4)* [2017] NSWSC 436 ("*Ryde Developments*") provides another example of narrowing of the scope of a fiduciary duty arising from the structure of the relevant relationship. Ball J there held that a fiduciary relationship did not arise from negotiations between a developer and real estate agent which was to acquire the relevant properties for itself, but acting on behalf of its Chinese clients, where the parties' interests in the negotiations, including as to the price of the units, were necessarily opposed. His Honour held that, in the unusual circumstances, although the estate agent was the developer's agent in selling the units, it was also the purchaser or potential purchaser from the developer, and was not acting for the plaintiff in that capacity and, once an agreement was reached, the agent was selling the property for its own benefit not for the plaintiff's benefit.

### **Authorisation, informed consent and ratification**

Alternatively, the contract may authorise an act that would otherwise be a breach of fiduciary duty, so as to narrow the scope of that duty, or amount to informed consent or ratification.<sup>32</sup> The giving of "informed consent" can operate to narrow the scope of a fiduciary duty to avoid a breach of duty. Associated concepts include ratification which typically occurs after a breach and waiver and/or excusing a breach.

Informed consent generally requires that a fiduciary disclose to the beneficiary all information in his or her possession in relation to the proposed transaction that was relevant to the beneficiary's consideration of whether or not to consent to it, and at least the material facts, and it is not sufficient for a fiduciary to disclose information which is sufficient only to "put the principal on inquiry".<sup>33</sup> The nature of existing legal rights between the parties may be material circumstances in respect of such consent.<sup>34</sup> In *Commonwealth Bank of Australia v Smith* (1991) 42 FCR 390; 102 ALR 453 at 477–478, Gummow J observed that:

"It frequently is said that the fiduciary will be absolved by the giving of fully informed consent to the existence of what otherwise would be a conflict. There is no precise formula which will determine in all cases if fully informed consent has been given; it is a question of fact in all the circumstances of each case: *Re Pauling's Settlement Trusts* [1962] 1 WLR 86 at 108 per Wilberforce J, whose judgment on this issue was untouched by the Court of Appeal, [1964] Ch 303. Turner LJ had spoken to the same effect in *Life Association of Scotland v Siddal* (1861) 3 De GF & J 58 at 73; 45 ER 800 at 806, and also had there said that the question was whether the party had been fully informed of his rights "and of all the material facts and circumstances of the case".

In *Maguire v Makaronis* (1997) 188 CLR 449 at 455, the majority in the High Court (Brennan CJ, Gaudron, McHugh and Gummow JJ) similarly observed that

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<sup>32</sup> For example, *National Nominees Ltd v Agora Asset Management Pty Ltd (No 2)* [2011] VSC 425.

<sup>33</sup> *Boardman v Phipps* [1967] 2 AC 46 at 93, 98, 112; *New Zealand Netherlands Society 'Oranje' Inc v Kuys* [1973] 2 NZLR 163; 1 WLR 1126; 2 All ER 1222 at 1227; *Spellson v George* [1992] NSWCA 254; (1992) 26 NSWLR 666 at 670 per Handley JA; at 685 per Young AJA.

<sup>34</sup> *Short v Crawley (No 30)* [2007] NSWSC 1322 at [619].

“[w]hat is required for a fully informed consent is a question of fact in all the circumstances of each case and there is no precise formula which will determine in all cases if fully informed consent has been given”.

In *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89; [2007] HCA 22 at [107], the plurality of the High Court also noted that disclosure sufficient to establish informed consent could be made “at different times and in different ways” and that “the sufficiency of disclosure can depend on the sophistication and intelligence of the persons to whom disclosure must be made.” Their Honours emphasised that, in that case, the principals of Say-Dee had much business experience and intelligence and were shrewd and astute, and pointed to the glaring improbability that they would not readily have deduced relevant matters from their own experience and the information which had been provided to them.

In *Re McGrath & Anor (In their capacity as liquidators of HIH Insurance Ltd)* (2010) 78 ACSR 405; [2010] NSWSC 404, Barrett J noted that “the task of explanation inherent in a request to be excused from a fiduciary requirement is an onerous and exacting one.” In *Blackmagic Design Pty Ltd v Overliese* [2011] FCAFC 24; (2011) 191 FCR 1; 276 ALR 646 at 668 [110], Besanko J (with whom Finkelstein and Jacobson JJ agreed) observed that:

“There is no doubt that the disclosure required to avoid the consequences of a conflict is a full and frank disclosure of all material facts. The identification of the precise information which must be disclosed so that the fiduciary’s principal is kept “fully informed of the real state of things” (*Gray v New Augarita Porcupine Mines Ltd* [1952] 3 DLR 1 at 14 per Lord Radcliffe) is likely to depend on the particular facts of the case before the court. It seems to me that the material facts in this case are the facts which give rise to the conflict ...”

I also addressed these principles in *Barescape Pty Ltd as trustee for V’s Family Trust v Bacchus Holdings Pty Ltd as trustee for Bacchus Holdings Trust (No 9)* [2012] NSWSC 984, a case concerning a partnership, and have drawn on that judgment for the observations that appear above.

The question of disclosure also arose in *Oliver Hume South East Queensland Pty Ltd v Investa Residential Group Pty Ltd* [2017] FCAFC 141, where entities within the Investa Group brought proceedings against the real estate agency (“Oliver Hume”), its director (“Barclay”) and a senior employee of Investa’s parent company (“Nankervis”) in respect of the acquisition of two plots of land by entities in which Nankervis had an interest or association. On appeal, the Full Court of the Federal Court held that Nankervis owed fiduciary duties both to the parent company, Investa Properties, and its subsidiary, Investa Residential, on the basis that Investa Residential’s assets were under Investa Properties’ control and Nankervis had assumed an obligation to promote Investa Residential’s interests as well as performing his duties as an employee of Investa Properties. Disclosure by Oliver Hume and Barclay to Nankervis of their interests was not sufficient, where the latter was held to be complicit in the relevant breach.

## **The no conflict rule**

The “no conflict” rule requires a fiduciary to avoid and not merely “manage” a conflict of interest or prioritise one interest over another. The test for when a conflict arises has been expressed in various ways in the cases, but the shorthand “real [and] sensible possibility” is often applied. In *Boardman v Phipps* [1967] 2 AC 46 at 124, Lord Upjohn formulated the test for whether a conflict exists as whether a:

“reasonable man looking at the relevant facts and circumstances of the particular case would think that there was a real sensible possibility of conflict; not that you could imagine some situation arising which might, in some conceivable possibility in events not contemplated as real sensible possibilities by any reasonable person, result in a conflict.”

In *Chan v Zacharia* (1984) 154 CLR 178 at 198, the test was expressed as “a conflict ... or significant possibility of such conflict”. In that case, Deane J (with whom Brennan and Dawson JJ agreed) also referred to an observation of Sir Frederick Jordan in *Chapters in Equity in New South Wales* (6<sup>th</sup> ed 1947, p 115) that:

“It has often been said that a person who occupies a fiduciary position ought to avoid placing himself in a position in which his duty and his interest, or two different fiduciary duties, conflict.

This is rather a counsel of prudence than a rule of equity; the rule being that a fiduciary must not take advantage of such a conflict if it arises.”

His Honour also noted (at 198) that that formulation, even as an unqualified counsel of prudence, may be inappropriate in some circumstances and that:

“The equitable principle governing the liability to account is concerned not so much with the mere existence of a conflict between personal interest and fiduciary duty as with the pursuit of personal interest by, for example, actually entering into a transaction or engagement ‘in which he has, or can have, a personal interest conflicting ... with the interests of those whom he is bound to protect’ (per Lord Cranworth L.C., *Aberdeen Railway Co v Blaikie Brothers* [1854] 1 Macq 461 at p 471) or the actual receipt of personal benefit or gain in circumstances where such conflict exists or has existed.”

In *Hospital Products Ltd v United States Surgical Corp* above at 103, Mason J also referred to Sir Frederick Jordan’s observation and noted that:

“the fiduciary’s duty may be more accurately expressed by saying that he is under an obligation not to promote his personal interest by making or pursuing a gain in circumstances in which there is a conflict or real or substantial possibility of a conflict between his personal interests and those of the persons whom he is bound to protect ...”

That formulation places emphasis upon the fiduciary’s conduct in making or pursuing a gain, and not merely upon his or her occupying a position where a conflict or potential conflict exists.

On the other hand, in *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165 at 199; [2001] HCA 31, the plurality of the High Court formulated the no conflict rule as follows:

“the fiduciary is under an obligation, without informed consent, not to promote the personal interests of the fiduciary by making or pursuing a gain in circumstances in which there is ‘a conflict or a real or substantial possibility of a conflict’ between personal interests of the fiduciary and those to whom the duty is owed ... Similar reasoning applies where the alleged conflict is between competing duties, for example, where a solicitor acts on both sides of a transaction.”

A duty to avoid conflicts of interest only arises in that part of a relationship between a fiduciary and his or her beneficiary that is fiduciary in character.<sup>35</sup> That proposition also applies to the scope of a director's duties.

The scope of the no conflict rule has been considered in recent cases concerning directors. In *Coope v LCM Litigation Fund Pty Ltd* [2016] NSWCA 37; (2016) 333 ALR 524, Payne JA (with whom Gleeson and Leeming JJA agreed) summarised the no conflict and no profit rule as follows (at [105]):

“A fiduciary is under an obligation, without informed consent, not to promote the personal interests of the fiduciary by making or pursuing a gain in circumstances in which there is a conflict, or a real or substantial possibility of a conflict, between the personal interest of the fiduciary and those to whom the duty is owed ... A conflict arises if there is a real and sensible possibility that the personal interests of the fiduciary divide the loyalty of the fiduciary with the result that he or she could not properly discharge their duties to the beneficiary. ...”

The Court there accepted that there was no positive obligation of disclosure upon a senior executive who was negotiating separation arrangements with the company, with the intention of joining a significant competitor, but that disclosure was the only defence to a breach of his fiduciary duty in those circumstances. The Court there found that the extent of information disclosed by that senior executive was not sufficient to comply with his disclosure obligations in order to achieve informed consent.

The application of the no conflict rule in a particular case can raise difficult questions of judgment, which would make it more difficult to predict the outcome of litigation. This difficulty was recognised in *Australian Careers Institute Pty Ltd v Australian Institute of Fitness Pty Ltd* [2016] NSWCA 347; (2016) 116 ACSR 566, where Bathurst CJ (at [4]; Sackville AJA to similar effect at [133]) referred to the High Court's decisions in *Pilmer v Duke Group Ltd (in liq)* above and *Howard v Federal Commissioner of Taxation* above and observed that:

“[D]ifferent minds may reach different conclusions as to the presence or absence of a real possibility of conflict between duty and interest or duty and duty and the doctrine cannot be inexorably applied without regard to the particular circumstances of the relationship.”

The Court there upheld a finding at first instance that actions by a director in setting out a rival business could adversely affect a company in the conduct of its business, and that conduct had placed the director in a position where his duty to the company conflicted with his interests in establishing and promoting the new business.

The no conflict rule has a strict application in the sense that, if a transaction has occurred in conflict of interest, a fiduciary cannot avoid a breach of that rule by asserting the fairness of the transaction or that it was in the principal's best interests or that the fiduciary was not acting with subjective dishonesty.<sup>36</sup> However, there are differing views as to whether the duty is breached by the existence of a position of conflict, or only by

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<sup>35</sup> *Birtchnell v Equity Trustees Executors and Agency Co Ltd* (1929) 42 CLR 384 at 408 per Dixon J; *New Zealand Netherlands Society 'Oranje' Inc v Kuys* [1973] 1 WLR 1126 at 1130 per Lord Wilberforce.

<sup>36</sup> M Scott Donald, “Managing the Possibility of Conflict” (2015) *Australian Superannuation Law Bulletin* 89.

the pursuit of a fiduciary's personal interest while it is in a position of conflict.<sup>37</sup> There will often be little practical difference between the two approaches. In the cases where the wider view has been expressed, the fiduciary has generally acted in a position of conflict in any event.

## Conclusion

I commenced this paper by noting the several concerns that have been identified as to the “intrusion” of fiduciary principles in contractual settings, and noted the circumstances in which the existence of fiduciary duties may be of real practical importance in commercial disputes, particularly in the context of causation and proprietary remedies. I then referred, briefly, to the circumstances in which a fiduciary duty can arise, in traditional fiduciary relationships and on a fact-based (or “ad hoc”) basis and to several of the well-known cases and the extensive academic commentary. I noted that the principles were well established, but there was still substantial room for differing views as to their application in particular cases.

I then turned to the position in commercial relationships, starting with partnerships and “joint ventures” in the commercial usage of that term. Again, the early cases, particularly *Brian*, are reasonably well-known but I have also referred to more recent case law in the context of mining ventures and two recent cases in this Court, one involving a lottery syndicate and another the negotiation of a prospective joint venture. I also noted the early case law dealing with other commercial relationships, notably that of manufacturer and distributor in *Hospital Products*, and the more recent decisions dealing with complex commercial relationships in *John Alexander's Clubs*, *Streetscape* and, in the context of a strikeout application, *DFD Rhodes*. I noted the importance of defining the scope of the fiduciary duty, recognised in *Hospital Products* and *Citigroup* and recently applied in this Court in *Ryde Developments*. The question of scope of the duty overlaps with the questions of authorisation, informed consent and ratification, recently considered by the Full Court of the Federal Court of Australia in *Oliver Hume*. Finally, I addressed the scope of the no conflict rule and noted an open question as to the nature of the conduct which is required to breach the no conflict rule.

There seems to me to have been a degree of stability in these principles and their application, at least since *Hospital Products*, with occasional controversies of a limited character, as arose in respect of *Citigroup* and *Streetscape*. The stability of the principles does not, however, make their application in particular cases either easier, or necessarily predictable, for practitioners or courts. There also seem to be relatively few cases where successful claims are advanced on the basis of breach of fiduciary duty in a commercial setting, at least outside the context of a partnership or joint venture that falls just short of partnership. Such claims are still likely to be brought, even if their success is the exception rather than the rule, given the compelling attractions of the remedies that may follow from success.

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<sup>37</sup> *Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9)* [2008] WASC 239; (2008) 39 WAR 1; 70 ACSR 1 at [4503]–[4504]; *Agricultural Land Management Ltd v Jackson (No 2)* [2014] WASC 102; (2014) 48 WAR 1; 98 ACSR 615; *Re Colorado Products Pty Ltd (in prov liq)* [2014] NSWSC 789; (2014) 101 ACSR 233; R Teele Langford, “Directors’ Duties: Conflicts, Proactive Disclosure and s 181 of the Corporations Act” (2015) 33(3) *C&SLJ* 205; J Campbell, “Fiduciary Relationships in a Commercial Context”, Sydney Law School, Legal Studies Research Paper, No 14/26; R Teele Langford & I M Ramsay, “Directors’ conflicts: Must a conflict be pursued for there to be a breach of duty?” (2015) 9 *J Eq* 281.