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KEEPING FIDUCIARY LIABILITY WITHIN ACCEPTABLE LIMITS

Fiduciary law now covers a wide range of situations, in the commercial as well as the property areas, that are far removed from its origin in the law of express trusteeship. It is feared for its uncertainty of application, which is in part due to the generalizations in which the law that governs conflict of duty and interest on the part of trustees is couched. A different approach is needed for the variety of fiduciaries which exist in the modern law. It is necessary that the response of fiduciary law to situations which it is dealing with must be proportionate. It will also be suggested that the parties are able to regulate and limit their obligations under it through the law of contract.

I. Introduction

FIDUCIARY liability is an important and necessary component of modern law. Where statute has not intervened, it supplements the common law by emphasizing factors such as loyalty and vulnerability. But it is feared for its unpredictability and the severe consequences which can ensue if a fiduciary obligation is broken. Such fears are not groundless. The liability is judge-inspired, and on occasions the courts can let their enthusiasm for it overtake their judgment. Certainly in Canada the liability has been taken rather far.[1] Courts in other jurisdictions, and particularly Australia,[2] have been developing the liability more cautiously however. And in a number of jurisdictions there are strong indications that new methods of determining liability under fiduciary law are emerging. Although it would be premature to assert that a new approach to the subject is being fashioned, it is not premature to assert that a law is being developed which will keep fiduciary liability within acceptable bounds.

These indications fall under two main heads. First, the origin of fiduciary liability in the law of express trusteeship is ceasing to govern its future development. Second, the proximity of a number of fiduciary duties to

[1] *Hodgkinson* v *Simms* (1995) 117 DLR (4th) 161, *Norberg* v *Wynrib* (1992) 92 DLR (4th) 449, *Taylor* v *McGillivray* (1994) 110 DLR (4th) 64. The motive behind expanding fiduciary law in some cases is a wish to circumvent a Limitation Act.

[2] In addition to the cases discussed in this paper, see *Breen* v *Williams* (1996) 138 CLR 259.

common law duties, and sometimes their coexistence, is being reflected in the manner in which fiduciary breaches are remedied.

The liability of trustees is rigorous. But the fact that it is rigorous means that no great uncertainty is caused by it being stated in rather generalized terms. When translated into the context of non-trustee fiduciaries however, generalizations such as the "possibility of conflict between duty and interest" do lead to uncertainty. The extent of the duties imposed on the wider range of fiduciaries who exist in modern law varies according to circumstances. Determination of liability will often turn on particular facts. It gives insufficient guidance to advisers and courts in subsequent cases merely to refer to generalizations. What is needed is a careful scrutiny of the facts of cases; and the facts which are crucial one way or the other should be specified. In this way fiduciary law will become predictable in its operation. Yet generalizations linger in use in the non-trustee fiduciary context, though it has been clear for years[3] that the liability imposed on trustees is stricter than that imposed on fiduciaries. Often this makes it difficult to estimate how far liability will be made to reach by the judges.

Critics of this more factual approach will of course allege that it only substitutes one form of uncertainty for another. But I do not believe that such a criticism has force. It is worth paying the price of the degree of uncertainty involved in the examination of particular facts if the examination is focussed on the issues which are truly relevant. The price of relying on generalizations is higher, for it does not allow the right issues to emerge.

Proportionateness of the law's response to a fiduciary breach is also essential; and here again the force of history must be prevented from playing too dominant a role. The draconian consequences which ensue when a trustee commits a fiduciary breach are not appropriate wherever such breaches are committed by other fiduciaries. It is no accident that it is in Canada, where fiduciary liability has been so extended in recent years, that the need to avoid such a result was first appreciated. Remedies must reflect not only the degree of duty involved but the nature of the breach, and also the existence of duties which may arise on the same facts at common law. Where this is the case, the response of fiduciary law, though different to the common law response, must not be out of proportion to it.

The object of this paper is to illustrate these themes. In addition, the relevance and impact of contract law will be brought into the picture. Parties do not lack the means of regulating and limiting the liabilities that can rest upon them under fiduciary law. This is a further important element

[3] Certainly since *Re Biss* [1903] 2 Ch 40.

in making fiduciary law acceptable to both the legal and the commercial communities.

II. Trustees

Nevertheless, one must begin with trustee law. In *Keech* v *Sandford,*[4] a case decided as long ago as 1726, a trustee held a valuable commercial lease on behalf of an infant. The lease was approaching its end, and the trustee made determined efforts to secure its renewal for the benefit of the trust. But the lessor refused, pointing out that difficulties in enforcing obligations arose when an infant was involved. No suggestion was made that the trustee had used less than his best endeavours to obtain the lease's renewal for the trust. But when the lessor remained adamant on the point, the trustee asked the lessor whether the lease could be renewed in his own favour beneficially; and that the lessor was happy to do. Later it was contended that the trustee must hold the lease as a constructive trustee, and Lord Chancellor King agreed with the proposition. It was a period when watchful eyes had to be kept on trustees and corruption, and the Lord Chancellor took a cynical view of the matter, saying "I see very well, if a trustee, on the refusal to renew, might have a lease to himself, few trust estates would be renewed".[5] The mere possibility of conflict between duty and interest was enough to attract Equity's intervention. Trustees must not be provided with even a chance of making a profit from their trust. It was not necessary to show a breach of duty in any specific sense. The opportunity to obtain the lease had arisen from the holding of office. The trustee was thus the one person who was unable to acquire the lease. The result was that he was relieved of his profits and of his obligations under the lease – and the lessor got the beneficiary he did not want.

That the law has not changed in two hundred years is demonstrated by *Williams* v *Barton.*[6] A stockbroker's clerk introduced business into his firm from an estate, of which he was a trustee, which needed valuation work done. The clerk did not do the valuation work himself, nor did he fix the fee, but his terms of employment entitled him to half the fee earned by the firm. It was not suggested that the work was not properly carried out, or that the fee charged was out of the ordinary. Nevertheless it was held that the trustee held the commission he had received for the benefit of the

[4] (1726) 25 ER 223.

[5] *Ibid*. One of the Lord Chancellor's first tasks on appointment was to preside over the trial of his immediate predecessor, Lord Macclesfield, for corruption.

[6] [1927] 2 Ch 9.

estate. It was not a question of abuse of office, but of an opportunity having arisen out of an office. So the estate had the work done for half price. Moreover, had the clerk become bankrupt, the estate would have taken its bonus in priority to his general creditors, for the remedy of constructive trust is proprietary.

I do not wish to argue that the rule governing trustees and executors should be changed, though I have doubts about it. Trustees may well have accepted office on the basis that they owe exclusive duties to their trusts. But the rule is not one that is suitable for other classes of fiduciary. What then becomes necessary is to identify the alternative rules which are suitable, and to assess the form in which they are best expressed.

III. Accepted Classes of Fiduciaries

I start with an illustration taken from an accepted class of fiduciary. Though it concerns breach rather than extent of obligation, it affords one of the best examples of generalizations not providing the guidance that is needed for the determining of later cases. In *Regal (Hastings) Ltd* v *Gulliver,*[7] still regarded as a leading case on the fiduciary liability of company directors, a company in the cinema business wanted to expand, and formed a subsidiary company through which to do so. Leases of two further cinemas were negotiated, but then a difficulty arose. The main company's finances were not strong, the subsidiary company was not fully paid up, and the lessor indicated that personal guarantees from the directors were needed. They were not anxious to give them, and the difficulty was overcome in another way. The directors and secretary of the main company, together with nominees of the managing director, subscribed for shares in the subsidiary company, the result being that the ordinary shareholders of the main company held only part and not the whole of the equity in the subsidiary. Within a month, the companies were disposed of at a considerable profit. But the purchasing company, which now owned the enterprise as a whole, sued to recover the profits made on the sale of the shares that had been subscribed for. The action succeeded against the directors, but not against the secretary (who was able to shelter behind the resolution of the board) or the nominees of the managing director. The Court of Appeal had taken the view that the *bona fide* decision of the board of the main company that it did not itself have the resources with which to finance the whole enterprise, concluded the matter. The House of Lords, rightly, did not agree. But none of the opinions delivered identify the real reason why the defendants should have

[7] [1942] 1 All ER 378.

to disgorge their profits. The opinions vary in emphasis between "possibility of conflict" and identifying those gains which "arise in the course of execution of office". The heritage from law of trusts is obvious, and it is unhelpful. Possibility of conflict between duty and interest is inherent in the office of company director. Insufficient guidance is given by merely referring to it. Nor does "in the course of execution of office" yield any better a criterion. When a director makes an improper gain, the gain will ordinarily arise from the exercise of the powers of his office. But that does not help in determining whether the gain was an improper one. A much closer analysis of the facts is needed. In some instances it may be sufficient to say that a serious enough possibility of conflict is inherent in the situation. Sailing too close to the wind of advantage can distort judgment and itself constitute a breach of fiduciary obligation. But to provide fiduciary law with the degree of precision that it needs, it is desirable to indicate more precisely what a fiduciary did that was wrong. On the facts of *Regal* it is not at all difficult to discern, and it is a pity that it was not stated. The wrong lies in the rapidity with which the directors moved from their no doubt correct view of the company's finances to their putting their hands into their own pockets in order to remedy the deficiency. Alternatives, including raising money elsewhere or making the circumstances and the opportunity known to the shareholders generally, should have been canvassed. So the decision of the House of Lords was correct. The nature of the constructive trust remedy makes for a strange result, however. The plaintiff company had purchased the cinema enterprise at what was presumably thought to be a fair price, but the consequence when the action succeeded was that it acquired the enterprise at a reduced price; while the ordinary shareholders, the real losers, received no compensation at all.

IV. Recognising that a Fiduciary Obligation has Come into Being

I turn next to situations outside the ordinarily accepted classes of fiduciary. This is the area which raises the most awkwardness, particularly in commercial situations. Fiduciary law can turn an individual or an institution not under any fiduciary obligation as a transaction commences into one which is so burdened. Such a transformation is sometimes necessary. But the law should be in such a form that a prediction can be given of when it will happen. The parties and their advisers need to be able to appreciate the significance of what is occurring. The apparatus of the law does not make it easy to do so. The traditional method of considering the matter has been to try and identify the characteristics of accepted fiduciary relations – loyalty, vulnerability, *etc*, – and transpose them into the new setting. I think this confuses. Those who need to appreciate that a fiduciary obligation

may have come to rest upon them do not think in that way. They are not metaphysicians. A better approach is to look at the facts as they develop step by step.

Generalisations can lead to fiduciary obligations being imposed too readily. I believe this occurred in *Phipps* v *Boardman.*[8] A trust held a substantial holding in a private company which, in the view of one of the principal beneficiaries and the solicitor who advised the trust, was being inefficiently run. They failed in their first attempt to secure control of the company, and the trust lacked the power to add to its holding of the shares. So the beneficiary and the solicitor themselves acquired shares in it, disclosing what they were doing to all but one of the trustees (who was of very advanced age). In this way control of the company was obtained, and it was re-organised to the financial gain of everyone concerned. Then the plaintiff, another beneficiary, asserted that they should not have made a personal gain out of the opportunity that had presented itself to them, claiming that they held their shares on constructive trust. In the House of Lords a bare majority, who were not united in their reasons, agreed with the plaintiff's contention. It was held that the defendants only acquired the opportunity through their position within the trust, and that this was sufficient for liability. Much reliance was placed in two of the majority judgments on traditional formulations of liability derived from trust law. Lord Upjohn adopted a different approach. His judgment has been much more extensively cited than the other judgments have been, and anticipates by twenty-five years present day formulation of the law by the courts. The defendants started off by being under no fiduciary obligation to the plaintiff. In Lord Upjohn's view, it was necessary to establish how they had acquired one. He went through the facts step by step to see if at any time a position had been reached at which it would be right to say that they had come under a fiduciary obligation. He concluded that at no time had they been guilty of an abuse, and that at no time had a position been arrived at where there was a "real serious possibility of conflict"[9] between their duty and their interest. This approach protects a plaintiff from unspecific charges. In my view it should be followed in future cases. The majority judgments fail to provide the guidance of which this area of law stands in need.

[8] [1967] 2 AC 46.

[9] Which is how Lord Upjohn puts it at 124 in a passage that has been constantly cited ever since.

An example of how well Lord Upjohn's approach works is provided by the Australian decision of *Commonwealth Bank* v *Smith.*[10] For twenty-four years a branch of the bank at a small town in South Australia had advised the two plaintiffs, who were local business men, on their financial affairs. The plaintiffs were neither very rich nor experienced, and the advice the bank gave them extended to commercial projects in which they became interested from time to time. At this stage the bank, through its bank manager, is under no fiduciary obligation to the plaintiffs. They are the bank's clients in a range of transactions which has not generated a fiduciary duty of loyalty between bank and customer. But over the years the plaintiffs had come to place reliance on what the bank manager said, and that made all the difference. Some time after that stage had been reached, the plaintiffs consulted him about the purchase, as an investment, of a hotel in a neighbouring town. The bank manager gave them advice, while warning them that the owner was one of his customers. But the advice was not as full and complete as it could have been, given his knowledge of the business operation of the hotel. Furthermore, he more or less discouraged them from taking external advice before completing the purchase. In the event, they paid too high a price for the hotel and sued for breach of fiduciary duty. The bank was held liable to compensate them for their loss.

The crucial findings are of fact; the plaintiffs relied on the bank manager to communicate everything that was relevant to the purchase, and he must have realised that this was so. A fiduciary duty arose, either to communicate all that he knew about the hotel's profitability, which was considerable, or to counsel in a positive way that external advice be taken. The conclusion follows from the facts, not from a supposed "concept" of a "fiduciary relationship". This factual approach is the one to adopt. It leads to readier identification both of the existence of the obligation, and of the means of satisfying it. This is particularly important for cases in a commercial context, where a degree of self-interest is to be assumed.

V. Extent of Fiduciary Duty

Commonwealth Bank v *Smith* also demonstrates that the duty resting on a fiduciary may be a particular one. Fiduciary responsibility existed in relation to the advice given when the purchase of the hotel was being contemplated. It would not have affected other advice, such as stock market advice which

[10] (1991) 102 ALR 453. This case has been cited with approval in the United Kingdom, by Millett LJ for instance in *Bristol & West Building Society* v *Mothew* [1996] 4 All ER 698 at 714.

the plaintiffs sought from the bank manager, and on which he possessed no special or private knowledge. The particularity of the duty makes it easier to spot. It is not difficult to imagine the moment at which the bank manager should have said to himself – "I have reached a position in which I can proceed no further without making full disclosure". Nor should advisers or courts have difficulty in detecting it, or advisers in indicating what to do about it.

The question of the extent of the duty resting on a fiduciary also arises when he belongs to an accepted class of fiduciary. It is necessary to protect all non-trustee fiduciaries against the menacing generalisations derived from trust law by measuring what they have done against the extent of their fiduciary obligations.[11] The point can be illustrated by *Chan* v *Zacharia.*[12] Two doctors were partners in a medical practice and held jointly the lease of the premises where they practised. The lease contained an option to renew, which was valuable as the premises were in an area much sought after by professional people. One doctor proposed joint renewal of the lease but the other played difficult to get, and the time by which the option was to be exercised passed. Just before that date, the reluctant doctor commenced a negotiation to secure a renewal of the lease for himself alone, and succeeded in obtaining it. He was held to have breached a fiduciary obligation. But the court reached its conclusion only after an examination of the detailed arrangements under which the doctors practised and held the lease, coming to a decision that the option to renew was within the partnership assets and so subject to fiduciary obligation. That again is the right way of doing it.

VI. Consequences of a Breach

The consequences in law that ensue from a fiduciary breach should reflect the reasons why a fiduciary obligation was imposed and be proportionate to them. This point, which is of particular importance when fiduciary and common law obligations co-exist, will be illustrated in three ways.

(a) Not all breaches by a fiduciary of his obligations will be fiduciary breaches. Ipp J, in the Supreme Court of Western Australia, was the first judge to put the matter clearly:

[11] *Cf* the judgment of the High Court of Australia in *Maguire* v *Makaronis* (1997) 71 ALJR 781 at 788.

[12] (1984) 154 CLR 178.

> It is essential to bear in mind that the existence of a fiduciary relationship does not mean that every duty owed by a fiduciary to the beneficiary is a fiduciary duty. ... The director's duty to exercise care and skill has nothing to do with any position of disadvantage or vulnerability on the part of the company. It is not a duty that stems from the requirements of trust and confidence imposed on a fiduciary. In my opinion, that duty is not a fiduciary duty ...[13]

Ipp J's view was soon adopted by Millett LJ in the Court of Appeal in England in *Bristol & West Building Society* v *Mothew.*[14] The Society had retained a firm of solicitors to help with the processing of loans, and the firm was under a fiduciary obligation as it acted both for the Society and the borrower. But all that had happened in the case was that the firm had provided the Society with inaccurate information, which led to a loan being made which subsequently produced a loss. The inaccurate information was due just to incompetence and was only a breach of the firm's duty to use skill and care. The consequences of such a breach are those attached by common law. Fiduciary liability does not suck in breaches which are in substance breaches of common law obligations.

(b) Even where a fiduciary breach has occurred, the consequences when the breach is by a non-trustee fiduciary will be different to those that follow breach by a trustee. This affects issues of causation and remoteness and measure of loss, and again it is necessary to start off from the rule which governs the liability of trustees. A trustee whose breach has led to the trust suffering a loss must make that loss up to the trust. His liability is restitutionary, and issues of causation and remoteness of loss were said many years ago to be irrelevant.[15] A more recent affirmation that this is so is to be found in the oft-quoted New South Wales decision of *Re Dawson.*[16] But courts are beginning to express doubts on the extent of the rule. Recently, in *Maguire* v *Makaronis,*[17] the High Court of Australia noted that the rule derives from cases of "... failure to observe the rules for due administration [of trusts] rather than ... disloyalty and conflict between interest and duty"; the implication must be that it might not apply to the latter.

[13] *Permanent Building Society* v *Wheeler* (1994) 14 ASCR 109 at 157.
[14] *Supra*, note 10, at 711.
[15] See *Caffrey* v *Darby* (1801) 31 ER 1159.
[16] [1996] 2 NSWLR 211.
[17] *Supra*, note 11, at 793.

That the law governing non-trustee fiduciaries is different was first established by the Supreme Court of Canada in *Canson Enterprises Ltd* v *Boughton & Co.*[18] In the course of negotiating the acquisition of a piece of land for development, a solicitor breached his fiduciary obligations by taking a bribe. The plaintiff, the company that purchased the land, was entitled to rescind the contract but events occurred which made rescission impossible. The plaintiff was seeking pecuniary compensation instead, and the question was whether the compensation extended to losses which ensued while the land was being developed. An incompetent geological survey failed to reveal that the land could not support a large building, and partially constructed buildings had to be demolished; a contractor's negligence also added to the loss. It was held by the whole court, though the judges differed in their reasoning, that the fiduciary's liability did not extend to losses attributable to such events rather than to the fiduciary breach. What was involved was a fiduciary breach, but the losses were too remote from it. Not all the risk was on the fiduciary, as earlier formulations of the law in relation to trustees would seem to imply. There had to be a "link" of some sort between the breach and the loss, though the court was able to offer no more precise indication of how it should be recognised than to say that it depended upon "a common sense view of causation".[19] It is in fact much easier to feel instinctively that a loss is too remote than to say what a link is.

This less rigorous approach has found favour in the Court of Appeal in Singapore,[20] and an example of it is provided by the recent United Kingdom case of *Swindle* v *Harrison.*[21] A mother, Mrs Harrison, owned a house subject only to a small charge. She was persuaded by a son to mortgage it for a much larger sum to enable a hotel and restaurant to be purchased for the family to run as a business. There was a substantial shortfall between the purchase price and the total sum that the family had in the event been able to borrow, however, and attempts to bridge the gap failed. By this time Mrs Harrison was due to complete the purchase, and her 20% deposit of 44,000 pounds was at risk. At the very last moment her solicitor, Mr Swindle, provided the solution on terms which were held to be not unfair. His firm had an arrangement with a bank under which money would be made available to the firm to fund a loan, and this facility produced the second loan that was needed. There was no time for proper advice (though another of the firm's partners was brought into the discussion) and Mrs

[18] (1991) 85 DLR (4th) 129.

[19] *Ibid*, at 163 *per* McLachlin J.

[20] *Ohm Pacific Sdn Bhd* v *Ng Hwee Cheng Doreen* [1994] 2 SLR 576 especially at 585.

[21] [1997] 4 All ER 705. The three judgments delivered vary in reasoning and in the language in which they are couched, but agree in result.

Harrison took the loan and completed the purchase. It was accepted that she had no viable alternative. But the result was a worse disaster than forfeiting the deposit would have been; the business did not succeed, the first lender took possession of her house, and the value of the hotel property slumped. Mrs Harrison sought to find Mr Swindle's firm liable for a proportion of her losses. The firm was held to have been negligent in not communicating to Mrs Harrison the knowledge which it had acquired at an earlier stage that there were going to be difficulties in obtaining a second loan. The firm was also held to be liable for breach of fiduciary duty, for it did not disclose to Mrs Harrison the fact that it would be making a profit, albeit only a very small one, out of the loan funded by the bank. But did Mrs Harrison suffer losses consequent on either breach? To recover at common law for the negligent performance of its contract by the firm, it would be necessary to show that the loss flowed from the breach, and as it had been found that Mrs Harrison had had external advice at the earlier stages and that she was quite determined to proceed with the purchase if she could, this could not be demonstrated. But it was contended that such an examination of cause and effect was irrelevant in fiduciary law and that the test of liability for loss, assuming a fiduciary breach to have occurred, was whether the loss would not have happened "but for" the breach. No clearer case of a loss which would not have occcurred without the fiduciary's involvement can be imagined for, without the loan facility provided by Mr Swindle, the purchase could not have been completed. But the Court of Appeal rejected the contention, and adopted an approach yielding a result which is not dissimilar to that which prevailed in Canada. The firm had committed a breach of fiduciary duty, but was not to be responsible for all the losses that followed the completed purchase. Although the measure of compensation was restitutionary, compensation was not to extend beyond those losses which were attributable to the breach. The extent of the particular duty involved and the manner in which it had been broken had to be examined. And on that basis, Mrs Harrison's losses were due to her determination to proceed with the purchase if she possibly could, rather than to the breach. Mummery LJ concluded that it would be "contrary to common sense and fairness to put the whole risk of the purchase transaction"[22] on the firm. The approaches of common law and equity yield a similar result in that they both require compensation to be proportionate to the wrong in question.[23]

[22] *Ibid*, at 735.

[23] The decisions of the House of Lords in *Target Holdings Ltd* v *Redfern*s [1996] 1 AC 421 and *South Australia Management Corp* v *York Montague Ltd* [1997] AC 191 provide a background. It is clear that the courts are not going to allow comparatively minor breaches of duty to lead to defendants bearing losses really attributable to other factors, including especially a slump in property values.

(c) An issue arises when a plaintiff who successfully alleges breach of fiduciary obligation is found to have been less than assiduous in looking after his own interests than he could have been. Contributory negligence as applied at common law is irrelevant, but that is no reason why equity should not, where it is appropriate, employ a rule to similar effect. In *Day* v *Mead,*[24] a solicitor advised the plaintiff on two occasions to purchase shares in a company in which the solicitor had an interest himself. The solicitor was held to be in fiduciary breach to the plaintiff. But after the first purchase the plaintiff interested himself in the affairs of the company and, by the time of the second purchase, was in a position to appreciate that further investment involved a distinct risk. The Court of Appeal in New Zealand decided that the amount of his compensation in respect of the second purchase should be reduced by half.

VII. The Relevance and Impact of Contract Law

One point has been made already – that the proximity of fiduciary duties to duties in contract and tort makes it desirable to ensure that the more extensive response of fiduciary law to a breach is not disproportionate to the common law response. A number of further points can be made.

(a) It is important that courts should not be too ready to imply or discover a fiduciary obligation in a transaction. This is particularly necessary when a party alleged to be vulnerable could have provided himself with adequate protection if he had thought about it. The court in *Industrial Development Consultants Ltd* v *Cooley*[25] may have given insufficient attention to this factor. The defendant was the plaintiff company's general manager. Among his other activities on behalf of the company, he endeavoured to interest a gas board in retaining the plaintiff to advise on a project. But the gas board was more interested in the defendant personally than in the services the company could provide, and offered the defendant employment on terms that he felt he could not refuse. Then he made a fatal error of judgment: instead of coming out with the truth, he feigned ill health and prevaricated. But the truth came out and the plaintiff asked the court to declare the defendant to be a constructive trustee of the gains he had made under his service contract with the board. Roskill J did so, but I doubt whether such a decision was justified. If the plaintiff had wanted to protect itself against the defendant moving from his employment, it could easily have done so. Its contract

[24] [1987] 2 NZLR 443.
[25] [1972] 2 All ER 162.

with him could have included a clause which, provided it satisfied the law on restraint of trade, would have provided effective protection. No such clause seems to have existed and, if the defendant had simply resigned, it is difficult to see what the plaintiff could have done save sue for damages at common law. To imply the trump card of a fiduciary obligation would seem unduly generous to a plaintiff that was a thoroughly competent commercial organisation. It was what the High Court of Australia rightly refused to do in *US Surgical Corp* v *Hospital Products Ltd*.[26] An entrepreneur, Blackman, had negotiated an exclusive distributorship contract with the plaintiff company to market its goods in Australia. Once he had acquired sufficient inside information on how the goods were manufactured however, he set up the defendant company to market the goods to his own greater profit. He had had it in mind to do so from the beginning, and negotiated his contract with the plaintiff with such skill that, on its breach, the plaintiff was able to sue only for the damages that represented its loss. The High Court refused to find a fiduciary obligation which would have led to the impounding through a constructive trust of the defendant's gains. The reason why the defendant lacked the protection it would have liked was because Blackman was the better negotiator. The difference between Blackman and Cooley was that the former intended his dirty trick from the start while the latter only succumbed to temptation later.

(b) As a matter of contract law, the High Court also refused to imply into the contract terms that would have enabled the plaintiff to recover fuller compensation. But if terms are expressly inserted into a contract to achieve this end, they should be given effect. A clearly expressed provision that a profit made in breach of a term is recoverable by a plaintiff should be enforceable through a constructive trust; it should not be regarded as a penalty. It would be odd if foresightedness were not rewarded, and only implication (as in *Cooley*) could provide the remedy needed. What is necessary therefore is that parties and their advisers should consider spelling out the full extent of the obligations that the contract is expected to impose and any special consequences of a breach.

(c) Conversely, it must be possible to prevent fiduciary obligations from arising. It is common to limit the effect of fiduciary responsibilities

[26] (1984) 156 CLR 41. The plaintiff might have had better fortune if it had based its action on wrongful use of confidential information.

in trusts set up in a will or a deed.[27] Doing so in commercial transactions must be possible also. Parties may be missing the opportunity of doing so out of sheer unfamiliarity with fiduciary law.

VIII. Conclusion

Attention has been drawn to the possibilities under fiduciary law of parties safeguarding their own positions, as well as to aspects of the law that continue to cause concern. Much progress has been made in clarifying fiduciary law in recent years but a watch has to be kept upon it. If however its extent is kept within reasonable bounds in the manner suggested, and proper limitations are placed on the consequences of a fiduciary breach, the subject need arouse less fears among practitioners, especially practitioners in commercial law, than it does at present.

JD Davies*

[27] *Armitage* v *Nurse* [1997] 2 All ER 705. Another peculiarity is that in most jurisdictions a trustee can be relieved of liability by a court, while no comparable power exists in relation to fiduciaries. They can be rewarded for their efforts if *bona fide* however – see *Phipps* v *Boardman, supra*, note 8 and *Guinness* v *Saunders* [1990] 2 AC 663.

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