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Conflicts of Interest: The Interplay Between Fiduciary and Confidentiality Law

G E Dal Pont*

SUMMARY

Inherent in the fiduciary concept is the notion of conflict of interest. Yet many conflicts of interest in this respect involve the misuse of information communicated for a limited purpose, that is, for the purposes of the fiduciary relationship. This raises the issue as to what relationship exists between fiduciary duties and duties attaching to the confidentiality of information. There is no doubt that considerable overlap exists to this end, not surprising given the common origin of each such doctrine. Yet it is the differences between the doctrines, and in particular the extent to which a duty of confidentiality can be less or more extensive than a fiduciary duty, which has created some challenges for the courts. Aligned to this are variations in remedial responses to breaches of such duties. It is the object of this paper to note some of those distinctions, and make suggestions as to ways in which the law may develop to this end in a more principled fashion.

FIDUCIARY DUTIES

The notion of conflicts of interest arises in various areas of law, perhaps the seminal and most obvious use of the terminology arises in fiduciary law, given that the fundamental principle underlying fiduciary duties is the avoidance of a conflict of interest. In fact, the High Court of Australia in 1996, in *Breen v Williams*,[1] conclusively determined that in Australian law, as contrasted with its Canadian counterpart, fiduciary duties are founded upon two proscriptive

* B Com LLB (Hons) (Tas), LLM (Mich), CPA, FTIA, Solicitor of the Supreme Court of New South Wales, Associate Professor, Faculty of Law, University of Tasmania. Thanks are to be extended to Ms Lisa Butler, of the Faculty of Law, University of Tasmania, for her comments on a draft of this paper.

[1] (1996) 186 CLR 71.

notions: the no-conflict rule, and the no-profit rule. The first of these dictates that a person who owes fiduciary duties to another must not act in a position where his or her own interest, or the interests of a third person to whom he or she owes a legal or equitable duty, conflict with his or her duty to the principal. The no-profit rule dictates that a person who owes fiduciary duties must not make an unauthorised profit from his or her position.

A few things should be noted regarding the foregoing. *First*, I speak in terms *not* of fiduciary relationships, but rather of relationships which may give rise to fiduciary duties. There is a reason for this, namely that to speak in terms of fiduciary relationships may convey the incorrect impression that all duties owed by a person termed a "fiduciary" are in fact fiduciary duties. This the High Court went to some lengths to dispel in *Breen v Williams*,[2] for instance, by remarking that duties of skill and care are not fiduciary, even though commonly owed by persons termed "fiduciaries", but rather tortious or contractual duties. *Second*, and this flows from the first, fiduciary duties have a distinct nature not replicated by duties imposed or attracted by other areas of law, principally contract and tort. There is sense in this, because when fiduciary duties are found, there are superimposed upon an existing legal (or other) relationship between the parties. There is arguably little need to superimpose such duties if they already exist.

Third, the nature of fiduciary duties is *proscriptive*, not prescriptive.[3] They prohibit rather than compel, and are designed to foster *loyalty* by one person (the fiduciary) to another (often termed the "principal"). The wholly proscriptive nature of fiduciary duties is a little misleading, in that the flipside of the proscriptive duties is that fiduciaries must make complete disclosure of any conflict of interest to their principal, and to this end, there is a prescriptive aspect to fiduciary duties. Moreover, some speak in terms of a duty to act in the interests of the principal, which prima facie appears a prescriptive rather than a proscriptive duty. Yet in the sense that a fiduciary must *not* act in a conflict of interest situation, it presupposes that he or she must act in the interests of another. *Fourth*, the no-profit rule, though often identified as a separate rule, can be seen as a sub-set of the no-conflict rule,[4] in that a person who, contrary to a fiduciary duty owed

[2] (1996) 186 CLR 71 at 93 per Dawson and Toohey JJ, at 111 per Gaudron and McHugh JJ. There still remains some confusion in terminology in some courts to this end, most commonly regarding solicitor-client and director-company relationships: see, for example, *Lowy v Alexander* (2000) 10 BPR [97841] at 18,218 per Windeyer J (SC(NSW)) ("The fiduciary duty to the client [of a solicitor] is to act competently and honestly in the client's interests").

[3] *Breen v Williams* (1996) 186 CLR 71 at 113 per Gaudron and McHugh JJ. This was repeated by the High Court in *Pilmer v Duke Group Ltd (in liq)* (2001) 75 ALJR 1067 at 1082 per McHugh, Gummow, Hayne and Callinan JJ, at 1092 per Kirby J.

[4] *Boardman v Phipps* [1967] 2 AC 46 at 123 per Lord Upjohn.

to his or her principal, makes an unauthorised profit from his or her position, automatically has placed his or her own interests, which are in conflict with those of the principal, ahead of the principal's. Hence, when I speak of conflict of interest in the context of this paper, I am speaking generally of fiduciary duties.

Even with what may appear, arising out of *Breen v Williams*, a simplification, or at least a clarification, of the law and an apparent restriction on the availability of remedies premised upon a breach of fiduciary duty, however, there remains considerable uncertainty regarding fiduciary law. At the most fundamental level there is the problem of determining when fiduciary duties are attracted. Much has been written on this field, and some the subject of previous AMPLA presentations, and so I will avoid recalling this material. Suffice it to say that Sir Anthony Mason's observation that fiduciary law is a "concept in search of a principle"[5] is by no means inaccurate. What underlies it is the notion that the law must intervene in certain circumstances to prevent one person from taking advantage of his or her position vis-á-vis another person where the latter has recourse to no other (adequate) protection.

Problems that necessarily arise are problems of degree; indicia identified as underscoring the existence of fiduciary duties cannot be taken at face value. For instance, over the years courts have spoken of relationships which exhibit characteristics of trust[6] and confidence, vulnerability or inequality, or an undertaking to act in the interests of another as indicia of relationships which attract fiduciary duties. Yet not only have Australian courts rightly resisted the temptation to set one of these as the seminal indicia, but have also had to grapple with the fundamental problem that it is not every relationship which exhibits trust and confidence, vulnerability or inequality, or an undertaking to act in the interests of another, that necessarily should attract fiduciary duties, however strictly applied.[7] To speak in terms of a relationship where one party is entitled to *expect* that the other will act in his or her interests in and for the purposes of the relationship, as Professor (now Justice) Finn has suggested,[8] with respect provides little refinement to

[5] Sir Anthony Mason, "Themes and Prospects" in P D Finn (ed), *Essays in Equity* (Law Book Co, 1985), p 246. See also PD Finn, *Fiduciary Obligations* (Law Book Co, 1977), p 1 (describing the term "fiduciary" as "one of the most ill-defined, if not altogether misleading terms in our law"); *LAC Minerals Ltd v International Corona Resources Ltd* (1989) 61 DLR (4th) 14 at 26 per La Forest J ("There are few legal concepts more frequently invoked but less conceptually certain than that of the fiduciary relationship").

[6] The term "fiduciary" being derived from the Latin word for "trust" (fiducia).

[7] See *Pilmer v Duke Group Ltd (in liq)* (2001) 75 ALJR 1067 at 1094-5 per Kirby J; G E Dal Pont and D R C Chalmers, *Equity and Trusts in Australia and New Zealand* (2nd ed, LBC Information Services, 2000), pp 76-82.

[8] P D Finn, "The Fiduciary Principle" in T G Youdan (ed), *Equity, Fiduciaries and Trusts* (Carswell Co, 1989), p 46.

the question of degree. Finn himself qualifies his statement by recognising that it represents a description rather than a definition.

CONFLICTS OF INTEREST AND CONFIDENTIALITY

I mention the foregoing not to conduct an analysis, but to note at the outset that even the most basic notion underlying the attraction of general law duty to avoid conflicts of interest is hardly a paragon of clarity, or of general agreement. Much of the academic argument in this sense has focused precisely on this issue,[9] and for good reason, as it is the most fundamental question or inquiry. What I wish to investigate in more detail in this paper, however, is premised upon the assumption that fiduciary duties are (or have been) attracted; that is, that a person (a fiduciary) owes a fiduciary duty to another (the principal). I wish to delve a little into what is meant by the fiduciary duty in this context, identified above as the duty to avoid a conflict of interest and duty.

When I gave some thought to what is meant by conflict of interest and duty – and the attached duty not to make an unauthorised profit – two things struck me in the case law. Cases involving alleged breaches of this duty seemed to focus (though not necessarily exclusively) on two main types of scenario. One such scenario was one where the fiduciary has allegedly used information derived as a result of his or her position for his or her own benefit (conflict between interest and duty), or for the benefit of a person to whom the fiduciary owed some other legal or equitable duty (sometimes termed conflict between duty and duty).[10] The second scenario is where because of the fiduciary's position – placed in that position by virtue of the agreement or other relationship with his or her principal – he or she had apparent authority to effect a transaction with a third party which was inconsistent with the interests of the principal.[11]

[9] See, for example, E J Weinrib, "The Fiduciary Obligation" (1975) 25 UTLJ 1; P D Finn, "The Fiduciary Principle" in T G Youdan (ed), *Equity, Fiduciaries and Trusts* (Carswell Co, 1989), p 1; B H McPherson, "Fiduciaries: Who Are They?" (1998) 72 ALJ 288.

[10] See, for example, *Lowy v Alexander* (2000) 10 BPR [97841] at 18,217 per Windeyer J (SC(NSW)) (in the context of a conflict between duty and duty). In fact, the Ontario Court of Appeal in *International Corona Resources Ltd v LAC Minerals Ltd* (1987) 44 DLR (4th) 592 at 639 stated: "a fiduciary relationship between parties may co-exist with a right of one of the parties to an obligation of confidence with respect to information of a confidential nature given by that party to the other party. It is indeed difficult to conceive of any fiduciary relationship where the right of confidentiality would not exist with respect to such information."

[11] See, for example, *Green v Bestobell Industries Pty Ltd* [1982] WAR 1 at 4-6 per Burt CJ (making it clear that on a claim for an account of profits for breach of fiduciary duty, it is not necessary to prove that the fiduciary has used information gained in the fiduciary position, but it is enough to show (as had been shown on the facts) that the fiduciary had derived a benefit by placing himself or herself in a position where his or her duty and interest conflicted or where there was a real and sensible possibility of such a conflict).

Each of these is, interestingly enough, derived from another recognised area of law, namely in the first scenario, the law of confidentiality, and in the second scenario, the law of agency. It should not, however, be assumed that these two categories are mutually exclusive: in many of the cases which may be said to fall within the second category, there is an element of the first: the fiduciary in addition to, or as part of, (mis)using the authority conferred by virtue of his or her position, (mis)uses information that is communicated for the limited purpose of the relationship in question.[12] In fact, a case of the second category which exhibited no overlap, at least to some degree, with the first would be uncommon in practice. For this reason, I wish to focus on the first of these categories in the context of this paper, also because it has generated some confusion jurisprudentially in the case law of late: the parameters of the doctrine are being questioned. In particular, the relationship and interplay between fiduciary duties, and duties of confidentiality recognised by the equitable doctrine of breach of confidence (and also, or alternatively, by contractual confidentiality clauses), deserves discussion.

A convenient way of contextualising this relationship or interplay, at least at the outset, is by way of case illustration. The case I have selected, both for its treatment of this issue and because of its subject matter dealing with mining and petroleum law, is the well known Canadian Supreme Court's decision in *LAC Minerals Ltd v International Corona Resources Ltd*.[13] There the respondent (Corona) owned mining rights over certain land on which it was in the process of drilling exploratory holes. The established and well-financed appellant (LAC), with a view to effecting a joint venture, approached Corona, in response to which the latter disclosed the results of its exploratory drilling. These results showed that an adjacent property was likely to contain mineral-bearing deposits. Corona sought to acquire the mining rights to this property, but failed to do so by reason of LAC's competing bid. LAC developed the mine on its own account. Corona argued that LAC owed it fiduciary duties which it had breached by using the information in question for its own benefit rather than for their joint benefit.

A majority of the court, per Sopinka J, with whom Lamer and McIntyre JJ concurred, held that no fiduciary relationship arose between the parties because Corona was not in a position of vulnerability. This ingredient was found to be lacking on the facts, and its absence could not be replaced by the fact that: (i) LAC had sought out Corona; (ii) the geochemical program constituted an embarkation on a joint venture; (iii) Corona had divulged confidential

[12] See, for example, *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41.
[13] (1989) 61 DLR (4th) 14.

information to LAC; (iv) a practice in the mining industry supported theexistenceofafiduciaryrelationship;and(v)thepartieswerenegotiating towards a common object.[14] The majority concluded that:[15]

> "While it is perhaps possible to have a dependency of [a physical or psychological nature] between corporations, that cannot be so when…dealing with experienced mining promoters who have ready access to geologists, engineers and lawyers…If Corona placed itself in a vulnerable position because LAC was given confidential information, then this dependency was gratuitously incurred."

Sopinka J did, however, find that LAC had misused confidential information communicated by Corona.[16] His Honour remarked, to this end, that the fact that confidential information is obtained and misused could not of itself create a fiduciary obligation, but conceded that "one of the possible incidents of a fiduciary relationship is the exchange of confidential information and restrictions on its use".[17] The confidentiality of the information conveyed by Corona to LAC did not attract a fiduciary duty because Corona, having disclosed it without obtaining any contractual protection, had "gratuitously incurred" the vulnerability.[18]

Wilson and La Forest JJ dissented on this point. Though finding no ongoing fiduciary relationship between the parties – by virtue of their arm's length negotiations towards a mutually beneficial commercial

[14] *LAC Minerals Ltd v International Corona Resources Ltd* (1989) 61 DLR (4th) 14 at 64-8. These factors led La Forest J, in dissent, to conclude that the relationship between Corona and LAC was fiduciary: at 35-42.

[15] *LAC Minerals Ltd v International Corona Resources Ltd* (1989) 61 DLR (4th) 14 at 68-9.

[16] *LAC Minerals Ltd v International Corona Resources Ltd* (1989) 61 DLR (4th) 14 at 71-3.

[17] *LAC Minerals Ltd v International Corona Resources Ltd* (1989) 61 DLR (4th) 14 at 64. See also *MacLean v Arklow Investments Ltd* [1998] 3 NZLR 680 at 690 per Gault J ("The fact that confidential information is obtained and misused does not of itself create a fiduciary relationship, though communications in confidence may be an incidence of such a relationship"), at 733 per Thomas J (in dissent) ("The relationship of trust and confidence which arises whenever a party places him or herself in a position where they receive information is likely to embrace the concept of confidentiality. Confidential information may well be imparted and may, depending on the circumstances, be indicia of a fiduciary relationship. Consequently, both a duty not to act contrary to the interests of the other party and an obligation to retain and not misuse confidential information may arise and overlap in the same case. It is accepted…that the imparting of the confidential information does not of itself give rise to a fiduciary obligation. Where a fiduciary obligation is found to exist the scope of the relationship may be quite narrow. Indeed, it may extend to little more than keeping confidences, although it is hard to imagine a fiduciary relationship where there are no other obligations"). Cf *Cadbury Schweppes Inc v FBI Foods Ltd* (1999) 167 DLR (4th) 577 at 593 per Binnie J (SCC) (remarking that in some sense, "disclosure of almost any confidential information places the confider in a position of vulnerability to its misuse", and that "[s]uch vulnerability, if exploited by the confidee in a commercial context, can generally be remedied by an action for breach of confidence or breach of a contractual term, express or implied").

[18] *LAC Minerals Ltd v International Corona Resources Ltd* (1989) 61 DLR (4th) 14 at 69. On this point see also *Visagie v TVX Gold Inc* (2000) 187 DLR (4th) 193 at 204-7 per Charron JA (CA(Ont)).

contract for the development of the mine – Wilson J held that a fiduciary *duty* arose in LAC when Corona made available to LAC its confidential information concerning the adjacent property, thereby placing itself in a position of vulnerability to LAC's misuse of that information.[19] At that point, according to Wilson J, LAC became subject to a duty not to use that information for its own exclusive benefit, which it had breached. La Forest J noted that the law of confidence and fiduciary law are not co-extensive – the doctrines do not share the same elements[20] – but nor were they, in his view, completely distinct, especially given the origin of fiduciary law in the law of confidence.[21] His Honour found a breach of confidence had occurred by LAC approaching the owner of the adjacent land with a view to acquiring her property, and then acquiring it.[22]

Notwithstanding the varying views in *LAC Minerals*, it would appear that all judges agreed that although the communication of confidential information can attract fiduciary duties, this is not automatically so. In essence, using the indicia of vulnerability in the fiduciary context, the vulnerability to which a confider is exposed by communicating confidential information to a confidant is not in all cases sufficient to justify the court imposing upon the latter fiduciary duties. To this end, there are relationships recognised as having a "fiduciary" character, such as the relationship between solicitor and client, which carry with them duties of confidentiality (whether from equity, contract or professional rules). There are, conversely, relationships to which the highest degrees of confidentiality attach but which are not presumed to attract fiduciary duties, such as the relationship between doctor and patient.[23] Yet in that it would a rare case in which a person held to owe fiduciary duties would not be possessed in some way of confidential information pertaining to his

[19] *LAC Minerals Ltd v International Corona Resources Ltd* (1989) 61 DLR (4th) 14 at 16.

[20] La Forest J also remarked that, unlike fiduciary duties, duties of confidence can arise outside a direct relationship, such as where a third party has received confidential information from a confidant in breach of the confidant's obligation to the confider: *LAC Minerals Ltd v International Corona Resources Ltd* (1989) 61 DLR (4th) 14 at 36. He characterised it a misuse of the term to suggest that the third party stood in a fiduciary position to the original confider. However, in that fiduciary law may make third parties accountable as constructive trustees (whether personally or proprietarily) through accessory and recipient liability, this may not be so conclusive a distinction.

[21] *LAC Minerals Ltd v International Corona Resources Ltd* (1989) 61 DLR (4th) 14 at 35-6. See, for example, *Tate v Williamson* (1866) LR 7 Ch App 55 at 61 per Lord Chelmsford LC ("Wherever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed").

[22] *LAC Minerals Ltd v International Corona Resources Ltd* (1989) 61 DLR (4th) 14 at 24-5.

[23] *Breen v Williams* (1996) 186 CLR 71 at 82-3 per Brennan CJ, at 92-5 per Dawson and Toohey JJ, at 107-8 per Gaudron and McHugh JJ. Cf at 134-5 per Gummow J.

or her principal, some have queried the need for separating the doctrines. The notion of loyalty underlying each such doctrine, it is argued, is equivalent.[24] In the words of a senior Canadian barrister:[25]

> "There does not appear to be any basis upon which one can fairly reach the conclusion that a confidant in a relationship of confidence owes any different degree of loyalty to the confider than does any other fiduciary in respect of that which has been entrusted. The plain fact is that information has been given which cannot be used except for the 'limited purpose'. That being so, the recipient is obliged to act in just the same way as any other fiduciary; in accordance with the terms of the trust and not in his or her unbridled self interest. The confidant in a relationship of confidence, like any other fiduciary, is obliged to forego self-interested behaviour and, upon a failure to do so, the court will intervene. It seems of small importance to distinguish…between whether the court's action is motivated by a desire to ensure that the beneficiary's interests are being served or by a desire to maintain the fidelity to the beneficiary. It is usually much simpler than that; the court intervenes to stop or adjust a situation where the recipient of a trust and confidence in respect of some 'thing' is proposing to act or has acted in a self-interested fashion."

Perhaps more tellingly, the nature of the conflict of interest arising in each such case differs little, given the earlier point that many alleged fiduciary breaches involve no more than the misuse of information derived in the course, or resulting from the position, of being a fiduciary. It is in the misuse of information against the interests of another principal by a fiduciary that the point has most challenged the courts (what earlier was termed a "duty-duty conflict"). The conflict is between the interests of two or more principals, although this should not be divorced from the personal interests of the fiduciary, who may wish (usually because he or she is being remunerated) to act for those principals. It is in two particular contexts which this issue has raised some debate, at least in so far as concerns the interplay between fiduciary and confidentiality law: the extent to which implied contractual obligations of confidentiality can mollify strict fiduciary duties, and the extent to which duties of confidentiality can temporally outlast fiduciary duties. There is then the related issue of the appropriate remedial response which a court should give to each such breach of duty. These points are each addressed in turn below.

[24] Compare *Arklow Investments Ltd v Maclean* [2000] 1 WLR 594 at 600 per Henry J (PC) ("Characterising the duty to respect confidential information as fiduciary does not create particular duties of loyalty, which are imposed as a result of the nature of the particular relationship and the circumstances giving rise to it").

[25] J L McDougall, "The Relationship of Confidence" in D W M Waters (ed), *Equity, Fiduciaries and Trusts* (Carswell, 1993), p 170 (footnote omitted).

IMPLIED CONTRACTUAL CONFIDENTIALITY OBLIGATIONS

It is sometimes said that a person who owes fiduciary duties must use the information at his or her disposal, whether confidential or otherwise, for the exclusive benefit of the principal.[26] Although such a duty appears on its face prescriptive, it can be subsumed, for practical purposes to a considerable extent, within accepted proscriptive fiduciary duties. The reason for this is that if that person does not use such information for the exclusive benefit of his or her principal, it presupposes that it is being used either for the fiduciary's own benefit or for the benefit of another person to whom the fiduciary owes legal or equitable duties. Either way the fiduciary standard of undivided loyalty is imperilled, and a conflict of interest or duty arises.

Yet in that fiduciary duties are ordinarily superimposed upon an existing contractual relationship, or upon a relationship that attracts a tortious duty of care, the duties must not be inconsistent with that relationship. It follows that, for instance, contractual terms can serve to deny the existence of a fiduciary duty, or to reduce the strictness with which such a duty applies. One would have thought that the most likely case in which this may occur is where the relationship is not one presumed to give rise to fiduciary duties and the contract in question contains an express term inconsistent with an undertaking of fiduciary responsibility. On the other hand, the least likely such candidate, one would have thought, is in respect of a relationship presumed to give rise to fiduciary duties coupled with the vehicle of contractual implication.

Even in this latter scenario, however, courts have shown a willingness to relax the strictness of fiduciary responsibility, particularly so far as the use or disclosure of information is concerned. The typical, but not sole, such illustration relates to an agent who acts as an intermediary or facilitator for multiple principals. In such a case, an agent may potentially represent two or more principals whose interests may conflict, and yet not be required to disclose to a principal information communicated by another principal for whom the agent acts. An example is found in *Kelly v Cooper*.[27] Both the plaintiff and the owner of a property adjacent to the plaintiff instructed the defendant estate agents to sell their properties. In presenting a purchase offer to the plaintiff, the defendants did not disclose that the offeror had purchased the adjacent property. This offer was accepted by the plaintiff, who upon discovering these facts, sued the defendants for failing to disclose to him material information and placing themselves in a position where their duty to him

[26] *Tombill Gold Mines Ltd v Hamilton* [1954] OR 871 at 882 per Gale J (HC(Ont)) (in the context of agency).
[27] [1993] AC 205.

conflicted with their interests in securing a commission. Lord Browne-Wilkinson, delivering the speech of the Privy Council, rejected the plaintiff's claim, reasoning that:[28]

> "In a case where a principal instructs as selling agent for his property or goods a person who to his knowledge acts and intends to act for other principals selling property or goods of the same description, the terms to be *implied* into such agency contract must differ from those to be implied where an agent is not carrying on such general agency business. In the case of estate agents, it is their business to act for numerous principals: where properties are of a similar description, there will be a conflict of interest between the principals each of whom will be concerned to attract potential purchasers to their property rather than that of another. Yet, *despite this conflict of interest*, estate agents must be free to act for several competing principals otherwise they will be unable to perform their function. Yet it is normally said that it is a breach of an agent's duty to act for competing principals. In the course of acting for each of their principals, estate agents will acquire information confidential to that principal. It cannot be sensibly suggested that an estate agent is contractually bound to disclose to any one of his principals information which is confidential to another of his principals. The position as to confidentiality is even clearer in the case of stockbrokers who cannot be contractually bound to disclose to their private clients inside information disclosed to the brokers in confidence by a company for which they also act. Accordingly in such cases there must be an implied term of the contract with such an agent that he is entitled to act for other principals selling competing properties and to keep confidential the information obtained from each of his principals."

His Lordship held that *as the plaintiff was well aware that the defendants would be acting also for other vendors of comparable properties and in so doing would receive confidential information from those other vendors*, "the agency contract between the plaintiff and the defendants cannot have included either (a) a term requiring the defendants to disclose such confidential information to the plaintiff or (b) a term precluding the defendants acting for rival vendors or (c) a term precluding the defendants from seeking to earn commission on the sale of the property of a rival vendor".[29] Thus the defendants' failure to disclose the identity of the offeror constituted no breach of duty, whether

[28] *Kelly v Cooper* [1993] AC 205 at 214 (author's emphasis).

[29] *Kelly v Cooper* [1993] AC 205 at 215. It has been argued that because there is authority to the effect that there is no contract between vendor and estate agent until the agent performs the act for which he or she is remunerated (a proposition which I refute in another context: see G E Dal Pont, *Law of Agency* (Butterworths, 2001), at [1.16]), there were no grounds for the Privy Council to engage in contractual implication: I Brown, "Divided Loyalties in the Law of Agency" (1993) 109 LQR 206 at 209.

contractual or fiduciary. Clearly this would not be the outcome had the agent created a *reasonable expectation* in the principal that the agent acted for the principal alone, impartially and independently. Moreover, *Kelly v Cooper* would have been decided differently had the agent been the purchaser of the adjoining property. In such a case the agent could not have shielded behind confidentiality to another principal, but would have been required to disclose to the principal all relevant facts which could have impacted on the value of the property.

Kelly v Cooper may have even broader ramifications, which reflect the reality of real estate agency business, if the following observations of Young J in *Gonslaves v Debreczeni* correctly reflect the law:[30]

> "Traditionally, the real estate agent is the agent of the vendor and owes fiduciary duties to the vendor alone…[T]he practice of real estate agents in New South Wales in the present decade is that many do have as well a fiduciary relationship to the purchaser. Not only is it standard practice…for vendors' agents to try and interest the vendor in other property, but also a commercially astute agent will realise that if the purchaser purchases a property and appreciates the agent, when the purchaser in turn seeks to sell the property he or she may very well retain the same agent. Accordingly, it may well be that an estate agent's duty to the vendor may, under the *Kelly v Cooper* type principle, be cut down if a vendor knows sufficient of the market to be aware that this practice goes on so as to expect the estate agent within reason to also keep confidences of the purchaser. Accordingly, there is nothing really unusual in an estate agent owing fiduciary obligations to the purchaser and the fact that a purchaser may also have a fiduciary relationship to the same estate agent as a vendor does not really affect the matter."

The main difficulty with such an approach to the relevant law is that it provides no useful guidance for the boundaries of the "fiduciary" duty to vendor and purchaser, aside any knowledge in the vendor of standard market practices. That too is problematic, for it is contrary to fiduciary principle to tailor a fiduciary's duties – ordinarily so clear at general law – or the scope of such duties merely by reference to the knowledge of an individual principal. It also does not address the practical reality that agents do commonly represent to their principals, namely vendors, that they act in the vendor's

[30] (1998) 9 BPR [97747] at 16,702. In fact, it may be said that any agent acting for a principal who is remunerated by way of commission upon effecting a transaction for the principal may be in a position of inherent conflict of interest and duty, in that his or her interest is that the transaction be effected, whether the terms be the most advantageous to the principal or not, for the agent's remuneration rests upon this: see G E Dal Pont, *Law of Agency* (Butterworths, 2001), at [12.37]. This largely explains why lawyers as fiduciaries are prohibited from accepting retainers upon a percentage fee basis: see G E Dal Pont, *Lawyers' Professional Responsibility in Australia and New Zealand* (2nd ed, LBC Information Services, 2001), pp 396-403.

interests. Even if a vendor knows that the agent will of necessity have dealings with prospective purchasers, this does not attract an expectation that the agent will favour the interests of such persons, by maintaining a confidence at his or her expense.

Notwithstanding, it would appear that the duty of loyalty applicable to some "fiduciaries" is not as strict as in respect of others. To this end, *Kelly v Cooper* has been criticised as negating the fiduciary standard by "setting the agent's duties at a level no higher than that of business competitors dealing at arm's length".[31] The concern is the extent to which any duty of loyalty remains after the said contractual implication, which again highlights the centrality of confidential information to aspects of fiduciary duty. The law does not, for instance, tolerate solicitors acting for multiple clients (principals) whose interests may conflict, and this extends also to successive (former client) conflicts, a point discussed in more detail below. Courts have strictly resisted any notion that solicitors can use information derived in the course of one retainer from client A in another retainer against client A. Yet where a solicitor acts as a mere intermediary or facilitator, say where he or she is in the business of bringing together a lender and a borrower (a typical mortgage investment), assuming there is any fiduciary responsibility, is the position any different to *Kelly v Cooper*? Similar observations may be made in respect of the less strict fiduciary duties imposed in the case of multiple directorships.[32]

What the foregoing shows is that, *even within the confines of any existing relationship which gives rise to fiduciary duties*, such of those duties which relate to the use of confidential information may, even though they go to the core of the fiduciary standard of loyalty, be modified by contractual implication (a process the courts are ordinarily loathe to engage in), at least in so far as duties to other principals are concerned.

CORRESPONDING DURATION OF FIDUCIARY AND CONFIDENTIALITY DUTIES

If fiduciary duties attaching to confidentiality within a fiduciary relationship can be modified, the question arises as to the extent to which duties of confidentiality can be more extensive than fiduciary duties. There is no doubt that this can be so, for, as noted earlier, not all relationships where confidential information is imparted are

[31] I Brown, "Divided Loyalties in the Law of Agency" (1993) 109 LQR 206 at 210.

[32] *Rosetex Company Pty Ltd v Licata* (1994) 12 ACSR 779 at 782-3 per Young J (SC(NSW)); J Lawrence, "Multiple Directorships and Conflicts of Interest: Recent Developments" (1996) 14 CSLJ 513.

relationships which attract fiduciary duties. Yet in that, again as noted earlier, many "fiduciary relationships" are evidenced by the communication of confidential information, or at least exhibit this as a characteristic – thus generating an overlap – the question arises as to the parameters of each such duty.

It is the temporal parameters of the doctrines which has attracted the courts' attention to this end. Stated by the High Court of Australia in generic terms, in a case where an accountant-client fiduciary duty was rejected: "The fact that dealings are completed will ordinarily demonstrate that any interest or duty associated with those dealings is at an end."[33] Expressed in fiduciary language, the English Court of Appeal has rejected "the concept of a fiduciary obligation which continues notwithstanding the determination of the particular relationship which gives rise to it".[34] In other words, if this is correct, it appears that fiduciary duties end once the relationship giving rise to those duties ends. The logic is that once the relationship giving rise to those duties is terminated, there should be no continuing loyalty owed by the former fiduciary to his or her principal. As the said relationship is often constituted by contract, this approach has the advantage of drawing, with some precision, a dividing line between the existence and non-existence of fiduciary duties.

No such obvious precision applies in respect of confidential information, whether communicated within the boundaries of a fiduciary relationship or not. In equity duties of confidentiality end once the information becomes public knowledge, or once the confider releases the confidant from the obligation of confidence.[35] When confidential information is imparted in the course of a fiduciary relationship, it can survive the termination of that relationship *because it is not derived from it*.[36] To this end, although fiduciary duties and duties of confidentiality may, and often do, co-exist between the same parties at the same time, their duration may be different, and, as noted by the English Court of Appeal, "[i]t is impermissible to attach to one relationship an obligation which is properly derived from another".[37]

This point has been most fully ventilated in the case law dealing with the solicitor-client relationship in so far as successive (former

[33] *Pilmer v Duke Group Ltd (in liq)* (2001) 75 ALJR 1067 at 1084 per McHugh, Gummow, Hayne and Callinan JJ.

[34] *Attorney-General v Blake* [1998] 1 All ER 833 at 841 per Lord Woolf MR.

[35] There may also be a plea of justification for the disclosure of confidential information in the public interest, this operating as a defence: see G E Dal Pont and D R C Chalmers, *Equity and Trusts in Australia and New Zealand* (2nd ed, LBC Information Services, 2000), pp 167-75.

[36] *Attorney-General v Blake* [1998] 1 All ER 833 at 842 per Lord Woolf MR.

[37] *Attorney-General v Blake* [1998] 1 All ER 833 at 842 per Lord Woolf MR (endorsed in *MacLean v Arklow Investments Ltd* [1998] 3 NZLR 680 at 688 per Gault J).

client) conflicts are concerned. The House of Lords in *Prince Jefri Bolkiah v KPMG (a firm)*[38] noted that in the case of a concurrent (current client) conflict, it is fiduciary law which serves as the barrier "for a fiduciary cannot act at the same time both for and against the same client". The focus is loyalty: an existing client is owed a fiduciary duty of loyalty. Yet according to Lord Millett, who delivered the leading judgment, "[w]here the court's intervention is sought by a former client…the position is entirely different" because the court's intervention is founded "on the protection of confidential information".[39] His Lordship explained the latter point as follows:[40]

> "The court's jurisdiction cannot be based on any conflict of interest, real or perceived, for there is none. The fiduciary relationship which subsists between solicitor and client comes to an end with the termination of the retainer. Thereafter the solicitor has no obligation to defend and advance the interests of his former client. The only duty to the former client which survives the termination of the client relationship is a continuing duty to preserve the confidentiality of information imparted during its subsistence."

This led Lord Millett to state that it is incumbent on a plaintiff who seeks to restrain his or her former solicitor from acting in a matter for another client to establish: (i) that the solicitor possesses information confidential to the plaintiff and to the disclosure of which he or she has not consented; and (ii) that the information is or may be relevant to the new matter in which the interest of the other client is or may be adverse to the plaintiff's own interest.[41] This essentially means that, upon the termination of the retainer, the cause of action in an aggrieved client *changes* from breach of fiduciary duty to breach of confidence, even though in each case the complaint may focus on the (mis)use of confidential information. The latter dictates that each such cause of action co-exists when the retainer is on foot, and may explain, at least in part, why it is easier to disqualify a lawyer acting in a concurrent conflict than in a successive conflict case.

The extent to which this translates into Australian law is, however, unclear. There is no doubt that courts in this jurisdiction are willing to intervene in the successive conflict scenario on the grounds of alleged misuse of confidential information.[42] The difficulty arises in the courts' continued reference to the twin planks of conflict of interest between solicitor and client,[43] and the perception of impropriety arising out of the

[38] [1999] 2 WLR 215 at 224 per Lord Millett. The case involved a firm of accountants providing litigation services, to which the House of Lords held the same principles as solicitors applied.
[39] *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 2 WLR 215 at 224, 225.
[40] *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 2 WLR 215 at 225.
[41] *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 2 WLR 215 at 225.
[42] See, for example, *Spincode Pty Ltd v Look Software Pty Ltd* [2001] VSCA 248 at [61] per Ormiston JA.
[43] See, for example, *Yunghanns v Elfic Ltd* (unreported, SC (Vic) 3 July 1998, Gillard J), at 6.

court's jurisdiction to exercise authority over its own officers.[44] The former retains strong shades of fiduciary duty, whereas the latter focus on some amorphous notion of public confidence in the legal system, being guided by the concern is that "justice should not only be done but should appear to be done".[45] The former does not sit well with the notion that fiduciary-type duties end with the termination of the retainer, and the latter arguably has specific application only to persons who are officers of the court.

It must be queried whether, given the protection and justification for curial intervention provided by the law of confidentiality, there is any need for these two additional planks. This is especially so given that the first has the potential to confuse the distinction between confidentiality and the fiduciary duty, and the second serves to complicate the law by creating a special rule for lawyers.

The complication is exemplified by the recent judgment of Brooking JA in *Spincode Pty Ltd v Look Software Pty Ltd*,[46] who, after citing *Prince Jefri*, considered that Australian law has diverged from that of England "and that the danger of misuse of confidential information is not the sole touchstone for intervention where a solicitor acts against a former client". According to his Honour, another possible basis for an interdict is that "it may be said to be a breach of duty for a solicitor to take up the cudgels against a former client in the same or a closely related matter".[47] This duty Brooking JA sourced from either:[48] (i) an equitable obligation of "loyalty", which obligation is not observed by a solicitor who acts against a former client in the same matter; (ii) an implied term in contract of retainer; or (iii) some fiduciary obligation enduring beyond the termination of the fiduciary relationship.

Each of these grounds is problematic. As to the alleged equitable obligation of "loyalty", which his Honour favoured, it is unclear to what extent any such obligation is independent of a fiduciary obligation. In equity fiduciary duties represent the vehicle to give effect to duties of loyalty, and so it is by no means evident why equity should recognise

[44] See, for example, *Murray v Macquarie Bank* (1991) 105 ALR 612 at 615 per Spender J ("The integrity of the legal profession and the perception of that integrity by the public is in large measure a consequence of the fidelity which a legal practitioner shows to his client and conduct which has a tendency to jeopardise that perception to faithful commitment to the interests of the client should be prevented"); *Wan v McDonald* (1992) 105 ALR 473 at 494 per Burchett J. The importance of "the confidence of the public in the integrity of the profession and in the administration of justice" has also been recognised by the Supreme Court of Canada: *MacDonald Estate v Martin* (1990) 77 DLR (4th) 249 at 270 per Sopinka J.

[45] *Thevenaz v Thevenaz* (1986) FLC 91-748 at 75,447 per Frederico J.

[46] [2001] VSCA 248 at [52].

[47] *Spincode Pty Ltd v Look Software Pty Ltd* [2001] VSCA 248 at [52].

[48] *Spincode Pty Ltd v Look Software Pty Ltd* [2001] VSCA 248 at [53]-[55]. Ormiston JA based his decision on misuse of confidential information, reserving his position as to the other bases (at [61]). Chernov JA took the same view, though he considered that Brooking JA had made a compelling case as to the other bases (at [63]).

some additional or supervening duty to the same effect. Equity has not traditionally recognised any such obligation independent of fiduciary law, nor has the common law independent of contractual protection. Brooking JA's favoured explanation also omits to explain why such a duty of loyalty should not apply beyond the solicitor-client relationship, such as to the relationship between director and company. The upshot of this is that a solicitor may be disqualified from acting against a former client *even in the absence of any proof of a likelihood of any danger of misuse of confidential information*.[49] One wonders whether this unjustifiably impinges upon the freedom of a client to instruct his or her solicitor of choice, and upon the freedom of solicitors generally. It essentially dictates that each such freedom is at the whim of a judge who, absent any actual or likely proof of conflict, refers to a general perception, which by its nature knows few precise boundaries.

The second explanation, based on contractual implication, has merit except that it is difficult to appreciate what term a court would be willing to imply into the retainer that is independent of what would otherwise adhere to the boundaries of the doctrine of confidentiality. It is difficult to believe that a court would imply a term which would serve to protect non-quantifiable or provable interests of a client.

It is the third such explanation which deserves closer attention, because it is this one which is most at odds with other case authority: the duration of fiduciary duties. Brooking JA justified the continuation of duties of a fiduciary nature beyond the termination of the relationship given rise to those duties by reference to the "purchase rule" in trusts law, and a by-product of that rule, the corporate opportunity doctrine in company law. As to the former, his Honour noted that authority dictates that a trustee cannot retire from the trust for the purpose of circumventing the rule preventing trustees from purchasing trust property.[50] Jacobs J cited the justifications for this proscription in *Gould v O'Carroll* as follows:[51]

[49] In *Spincode Pty Ltd v Look Software Pty Ltd* [2001] VSCA 248 at [38] Brooking JA stated that there is a good deal of authority for this view, but limited his references to other Victorian cases (such as *McVeigh v Linen House Pty Ltd* [1999] 3 VR 394 at 398 per Batt JA), older authority applied in the Family Court cases (which can be criticised in any case: see G E Dal Pont, *Lawyers' Professional Responsibility in Australia and New Zealand* (2nd ed, LBC Information Services, 2001), pp 215-17; *Mullins v Rothschild* (2001) 120 A Crim R 574 at 577-8 per Cox CJ (SC(Tas))) and to New Zealand authority pre-dating *MacLean v Arklow Investments Ltd* [1998] 3 NZLR 680 [affd *Arklow Investments Ltd v Maclean* [2000] 1 WLR 594 (PC)]. Cf *Waiviata Pty Ltd v New Millenium Publications Pty Ltd* [2002] FCA 98 at [10] per Sundberg J, who remarked that "[i]t may be that an unusual case could arise when there is no threatened misuse of confidential information and no breach of the solicitor's duty of loyalty, yet it is appropriate to grant relief, but this is not such a case".

[50] As to this rule see G E Dal Pont and D R C Chalmers, *Equity and Trusts in Australia and New Zealand* (2nd ed, LBC Information Services, 2000), pp 632-4.

[51] [1964] NSWR 803 at 805.

> "First, in the ordinary case, the fact that he retires in order to effect that purpose means that the decision to effect that purpose has been taken during the period of his trusteeship when he was actually performing the duties of a trustee; in other words the decision to deal with the trust is his own. Secondly, the trustee who has been actively managing the trust has all the advantage of the information and knowledge which comes to him as trustee and which he should use in no way for his own benefit, but purely for the benefit of the beneficiaries."

Brooking JA in *Spincode* characterised the first of these bases as independent of the second,[52] but surely the fact that the retirement is effected to purchase the trust property is precisely because of information derived in the trustee's capacity as trustee. The grounds are, far from independent, instead interdependent.[53]

Cases in which a company director[54] has derived information regarding a corporate business opportunity in his or her capacity as director, which opportunity the company elects not to pursue and has then resigned as director and pursued that opportunity personally, can be seen as an application of the trustee purchase rule. In the absence of approval by the company board (or general meeting), or at least acquiescence, the former directors who have pursued that opportunity have been held accountable as constructive trustees for gains derived as a consequence. A leading case, the Canadian Supreme Court's ruling in *Canadian Aero Service Ltd v O'Malley*,[55] is often cited as authority for the proposition that "a fiduciary duty may continue after a director's resignation, particularly in circumstances where that resignation may fairly be said to have been prompted or influenced by the desire to obtain the corporate opportunity".[56]

If this is indeed an application of a director's fiduciary duty, one must query whether indeed those duties can be said to end with the termination of the relationship giving rise to them. One way of rationalising this with the *Prince Jefri* approach is to adopt a "reverse relation-back" doctrine, requiring the court to inquire into whether the opportunity in question derived from the director's office to which fiduciary duties attach, and to relate fiduciary duties *forward* to that

[52] *Spincode Pty Ltd v Look Software Pty Ltd* [2001] VSCA 248 at [56].

[53] Compare J Glover, "Is Breach of Confidence a Fiduciary Wrong? Preserving the Reach of Judge-made Law" (2001) 21 *Legal Studies* 594 at 613-14.

[54] The cases are not limited to company directors, but can extend to other company officers who hold positions of sufficient seniority to attract the relevant duties: see G E Dal Pont and D R C Chalmers, *Equity and Trusts in Australia and New Zealand* (2nd ed, LBC Information Services, 2000), pp 88-9.

[55] (1973) 40 DLR (3d) 371.

[56] *Natural Extracts Pty Ltd v Stotter* (1997) 24 ACSR 110 at 141 per Hill J (FCA).

moment. Yet it is unclear what this adds to the protection which in any case is furnished by the law protecting the unauthorised use of information communicated for a limited purpose. If indeed the relevant inquiry is whether or not the opportunity came to the knowledge of the director in his or her capacity as director, it appears that conflicts of interest inherent in any misuse of information can post-date the termination of directorship. As in the case of solicitor-client successive conflicts,[57] there can be raised a quasi-presumption that if the opportunity in question concerns a matter *related* to company business, that confidential information has been sourced for this purpose in the former directorial capacity. Certainly, whatever doctrine is adopted, one should seek to avoid any need to inquire into a director's *motivation* for resigning, as proof of motivation is problematic.

This may require some re-analysis, both academically and curially, of the basis upon which directors are to be made accountable for corporate business opportunities personally pursued. The role of the doctrine of confidentiality, potentially an expanded doctrine to this end, should be considered, and this, as noted below, must impact upon the appropriate remedies for breach of duty. Consistency in principle and approach may be seen as justifying such a re-thinking of the matter. In this respect, I express agreement with Glover, who opines that "[a]ttempts to extend the duration of fiduciary obligations doing the work of confidentiality claims by corporate opportunity doctrine are harmful to the development of both fiduciary and confidentiality categories".[58]

It may be noted to this end that the successive solicitor-client conflict scenario can be contrasted with that of directors usurping corporate business opportunities, in that the former involves an apparent conflict between duty and duty whereas the latter is between interest and duty. That the impact of the doctrine of confidentiality should differ because of this is not self-evident, however. Can it truly be said that fiduciary duties end with the termination of the relationship which gives rise to the duties *only* where the former fiduciary plans to act for a third party inconsistently with the duty of confidentiality to the former principal, but that the fiduciary duties continue after the relationship which gave rise to them has terminated if the former fiduciary aims to benefit himself or herself. Such a distinction is arguably not grounded in principle: either fiduciary duties come to an end with the termination of the said relationship, or they do not.

To suggest that they may come to an end for some purposes, but not for others – or more accurately in some contexts but not in others – is

[57] See G E Dal Pont, *Lawyers' Professional Responsibility in Australia and New Zealand* (2nd ed, LBC Information Services, 2001), pp 228-9 (in the context of Chinese walls).
[58] J Glover, "Is Breach of Confidence a Fiduciary Wrong? Preserving the Reach of Judge-made Law" (2001) 21 *Legal Studies* 594 at 617.

to draw a line which, I submit, is not defensible. After all, a "fiduciary" who representing a new principal in an alleged successive conflict scenario also acts in his or her own interests, which ordinarily equate to his or her interests in being remunerated. Duty-duty conflicts and interest-duty conflicts are not consequently as discrete as first impressions might suggest.

REMEDY-BASED DISTINCTIONS

Remedy-wise, a drawback of the doctrine of confidentiality is that because many assume that the subject matter to which it attaches – information – is not property,[59] it is said to follow that there should be no form of proprietary relief available for breach of confidence. The same may be said where it is a contractual confidentiality stipulation that has been breached, with the added "justification" that a breach of an equitable duty "is in a different and higher category than a claim which merely sounds in damages at common law",[60] such as a breach of contract. Moreover, nor may relief via the process of tracing be available when dealing with actions for breach of confidence or breach of contractual confidentiality, tracing in equity being premised upon proof of a fiduciary breach.[61]

What the foregoing overlooks is that where there has been a misuse of information within the confines of a fiduciary relationship, the courts have shown no such reticence to resort to proprietary relief.[62] It is difficult to appreciate why a plaintiff succeeding in an action for breach of confidence should, unlike a plaintiff who establishes a breach of fiduciary duty, be denied relief by way of constructive trusteeship if it is appropriate in the circumstances, especially given that the causes of action have the same genesis.

Presumably the way to deal with the point is either to broaden the boundaries of fiduciary duties, or to broaden the relief available for

[59] Regarding the debate as to whether information is property see S Ricketson, "Confidential Information – A New Proprietary Interest" (1977-78) 11 MULR 223; J Stuckey, "The Equitable Action for Breach of Confidence: Is Information Ever Property?" (1981) 9 Syd LR 402; A S Weinrib, "Information and Property" (1988) 38 UTLJ 117; N E Palmer, "Information as Property" in L J Clarke (ed), *Confidentiality and the Law* (Lloyd's of London Press Ltd, 1990), Ch 5. Cf *Koo v Hing* (1992) 23 IPR 607 at 632, 633 per Bokhary J (SC(HK)) ("There is a proprietary interest in confidential information; and there is jurisdiction in the courts to intervene to preserve such interest or award compensation for harm done to it"; "[a] man's confidential information is his property").

[60] *Re Dawson (deceased)* [1966] 2 NSWR 211 at 214 per Street J. See also *Bank of New Zealand v Guardian Trust Co Ltd* [1999] 1 NZLR 664 at 681 per Gault J (who also gave the judgment of Richardson P, Henry and Blanchard JJ), at 686-8 per Tipping J.

[61] Whether this should remain so can be queried: see G E Dal Pont and D R C Chalmers, *Equity and Trusts in Australia and New Zealand* (2nd ed, LBC Information Services, 2000), pp 1002-3.

[62] See, for example, *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134; *Boardman v Phipps* [1967] 2 AC 46.

breach of confidence (or breach of contractual confidentiality). In fact, in *LAC Minerals*,[63] La Forest J remarked that the existence of fiduciary duties are relevant only if remedies for breach of fiduciary duty differ from those available for a breach of confidence. If the remedies available are the same, then there is little need to extend fiduciary duties beyond their legitimate confines just to broaden potential avenues for relief. Many of the cases alleging the existence of fiduciary duties have, to this end, been argued precisely for remedy reasons, and this is not something of which the courts are unaware.[64] In fact, even La Forest J, notwithstanding the tide of ever-expanding "fiduciary relationships" discovered by Canadian courts, has rightly stated that to use the "fiduciary" concept as "merely instrumental or facultative in achieving what appears to be the appropriate result", "reads equity backwards", and is a "misuse of the term".[65] His Honour considered that this will only be eliminated if the courts give explicit recognition to "the existence of a range of remedies, including the constructive trust, available on a principled basis even though outside the context of a fiduciary relationship".[66]

Consistent with La Forest J's observations, the tenor of courts in Canada, England, New Zealand, as well as Australia, is heading for a broadening of remedies approach. As noted earlier, the unprincipled remedy-led expansion of fiduciary duties attracted little support in the High Court in *Breen v Williams*.[67] In *LAC Minerals*,[68] by majority, the Supreme Court of Canada gave effect to this notion by upholding the availability of the constructive trust as a remedy for a breach of confidence *independent of a co-existing fiduciary relationship*. Wilson J imposed constructive trusteeship on LAC, reasoning as follows:[69]

[63] (1989) 61 DLR (4th) 14 at 25.

[64] A court will not superimpose fiduciary duties on common law duties merely to improve the nature or extent of the remedy (*Norberg v Wynrib* (1992) 92 DLR (4th) 449 at 481 per Sopinka J; *State of South Australia v Peat Marwick Mitchell & Co* (1997) 24 ACSR 231 at 266 per Olsson J) – "[t]he finding of fiduciary obligations is not remedy-led" (*MacLean v Arklow Investments Ltd* [1998] 3 NZLR 680 at 690 per Gault J, delivering the judgment of Richardson P, Gault and Keith JJ). The court will only recognise fiduciary *duties* in circumstances where the *nature of the relationship* between the persons in issue justifies the imposition of the fiduciary standard on dealings between them.

[65] *LAC Minerals Ltd v International Corona Resources Ltd* (1989) 61 DLR (4th) 14 at 30.

[66] *LAC Minerals Ltd v International Corona Resources Ltd* (1989) 61 DLR (4th) 14 at 32.

[67] (1996) 186 CLR 71.

[68] (1989) 61 DLR (4th) 14.

[69] *LAC Minerals Ltd v International Corona Resources Ltd* (1989) 61 DLR (4th) 14 at 17. See also at 25-6, 45-7 per La Forest J (with whom Lamer J concurred on this point). Contra per McIntyre and Sopinka JJ in dissent, who argued that *only* where the breach of confidence *also* involves a breach of fiduciary duty should the constructive trust be available as a remedy, in which case equity would be remedying the breach of fiduciary duty, not the confidential information per se. Sopinka J opined that constructive trusts are ordinarily reserved for those situations where a right of property is recognised; as confidential information did not exhibit all the characteristics of property, a constructive trust ought not be imposed over property acquired from the misuse of confidential information: at 75.

> "Since the result of LAC's breach of confidence…was its unjust enrichment through the acquisition of the [adjacent] property at Corona's expense, it seems to me that the only sure way in which Corona can be fully compensated for the breach in this case is by the imposition of a constructive trust on LAC in favour of Corona with respect to the property…I believe that the remedy of constructive trust is available for breach of confidence as well as for breach of fiduciary duty. The distinction between the two causes of action as they arise on the facts of this case is a very fine one. Inherent in both causes of action are concepts of good conscience and vulnerability."

The main reasons for the majority's view were that, *first*, the confidential information related to unique land rather than an opportunity to compete more generally in the market place; *second*, monetary compensation for the loss of the opportunity to develop a gold mine was particularly difficult to assess; *third*, the protection of an innocent plaintiff was better safeguarded by a remedy in rem; and *fourth*, a remedy in rem was a more effective *deterrent* than compensation to a defendant minded to breach a confidence on its own advantage rather than pursue a negotiation in good faith to the advantage of itself or another.[70]

La Forest J, also in the majority and with whom Lamer J concurred regarding the appropriate remedy, held that the constructive trust should not be reserved for situations where a right of property is recognised, as this would limit the constructive trust to its institutional function, and deny to it the status of a remedy, which he identified as "its more important role".[71] According to his Honour, it is not in all cases that a pre-existing right of property will exist when a constructive trust is ordered, as the imposition of a constructive trust "can both recognize and create a right in property". This did not mean that the constructive trust is an automatic remedy in this context: it will only be awarded once the right to relief is established,[72] which his Honour considered would *not* be in the vast majority of cases. In his opinion, "a constructive trust should only be awarded if there is reason to grant the plaintiff the additional rights that flow from recognition of a right of property",[73] such as to receive priority accorded to the holder

[70] See further S Wheeldon, "Reflections on the Concept of 'Property' with Particular Reference to Breach of Confidence" (1997) 8 Auck ULR 353 at 370-2.

[71] *LAC Minerals Ltd v International Corona Resources Ltd* (1989) 61 DLR (4th) 14 at 50.

[72] Compare A J Penk, "Confidential Information in a Commercial Context: An Analysis of 'Use' of Confidential Information and the Availability of a Proprietary Remedy for Breach of Confidence" (2001) 9 Auck ULR 470 at 484, to the effect that the precision of the remedy of constructive trust may only be a valid justification "if there is one unique, identifiable asset at stake. In contrast, if what is involved is the use of confidential information to gain entry into a competitive marketplace, a constructive trust may be an impractical and unsuitable remedy". Yet this fails to recognise that a constructive trust *has been used* as a remedy in the context of breaches of fiduciary duty in the latter context: see, for example, *Timber Engineering Co Pty Ltd v Anderson* [1980] 2 NSWLR 488.

[73] *LAC Minerals Ltd v International Corona Resources Ltd* (1989) 61 DLR (4th) 14 at 51.

of a right in property in a bankruptcy. This approach was subsequently endorsed by the same court in *Cadbury Schweppes Inc v FBI Foods*,[74] to the effect that "whether a breach of confidence in a particular case has a contractual, tortious, proprietary or trust flavour goes to the *appropriateness* of a particular equitable remedy but does not limit the court's *jurisdiction* to grant it".

The foregoing sits not uncomfortably with the incidents of the remedial constructive trust recognised by the Australian High Court. In that context the court has been willing to recognise a proprietary interest under the doctrine of the remedial constructive trust even though the alleged contribution to property which forms the foundation of that trust is at best only indirect.[75] It has also noted that the constructive trust is not automatically granted: the court will not grant constructive trust relief if "there is an appropriate equitable remedy which falls short of the imposition of a trust".[76] More generally, Australian courts have on occasion spoken in terms of the need to do practical justice via a remedial response,[77] and this is consistent with the recognition of the remedy most appropriate to the facts in question.

The broadening of remedies approach is likewise evident regarding remedies for the contractual protection of confidential information. Recently the House of Lords ordered a restitutionary remedy – an account of profits – for a breach of a contractual obligation of confidence. The case, *Attorney-General v Blake*,[78] dealt with a former spy the publication of whose memoirs the Attorney-General sought to restrain. In the courts below, the claim on the grounds of breach of fiduciary duty was rejected because any fiduciary duty owed by the defendant to the English Government had terminated with the defendant leaving the employ of the government. Breach of confidence failed as a cause of action, as the information in question was already in the public domain. The claim for breach of contract – the defendant had in 1944 signed an undertaking not to divulge any official information gained as a result of his employment – was upheld at Court of Appeal level but only nominal damages were awarded because the Attorney-General could not establish loss. The House of Lords held that it could order account of profits

[74] (1999) 167 DLR (4th) 577 at 590 (emphasis in original).

[75] See, for example, *Baumgartner v Baumgartner* (1987) 164 CLR 137 at 150 per Mason CJ, Wilson and Deane JJ (crediting, for the purposes of determining the equitable interests under the constructive trust, to the woman of the earnings which she *would have made* during the period of three months when she was having and caring for the child of the relationship). See further M Bryan, "Constructive Trusts and Unconscionability in Australia: On the Endless Road to Unattainable Perfection" (1994) 8 TLI 74.

[76] *Giumelli v Giumelli* (1999) 196 CLR 101 at 113 per Gleeson CJ, McHugh, Gummow and Callinan JJ.

[77] See, for example, *Vadasz v Pioneer Concrete (SA) Pty Ltd* (1995) 184 CLR 102 at 112 per Deane, Dawson, Toohey, Gaudron and McHugh JJ (partial rescission).

[78] [2000] 3 WLR 625.

(restitutionary equitable relief) for that breach of contract (common law action). Lord Nicholls, who gave the leading judgment, reasoned as follows:[79]

> "there seems to be no reason, in principle, why the court must in all circumstances rule out an accounts of profits as a remedy for breach of contract…Remedies are the law's response to a wrong (or, more precisely, to a cause of action). When, exceptionally, a just response to a breach of contract so requires, the court should be able to grant the discretionary remedy of requiring a defendant to account to the plaintiff for the benefits he has received from his breach of contract. In the same way as a plaintiff's interest in performance of a contract may render it just and equitable for the court to make an order for specific performance or grant an injunction, so the plaintiff's interest in performance may make it just and equitable that the defendant should retain no benefit from his breach of contract."[80]

His Lordship added that the law recognises that damages are not always a sufficient remedy for breach of contract, this being the foundation for the court's jurisdiction to grant the remedies of specific performance and injunction, and that sometimes the injured party is given the choice of either compensatory damages or an account of the wrongdoer's profits (such as in the case of a breach of confidence).[81] This led him to state that if confidential information is wrongfully divulged in breach of a contract, "it would be nothing short of sophistry to say that an account of profits may be ordered in respect of the equitable wrong but not in respect of the breach of contract which governs the relationship between the parties".[82] Thus it represented only a modest step for the law to openly recognise that, exceptionally, an account of profits may be the most appropriate remedy for breach of contract.

[79] *Attorney-General v Blake* [2000] 3 WLR 625 at 638. Lord Steyn (at 645) agreed with Lord Nicholls, but made the confusing statement that "[i]f the information was still confidential, Blake would in my view have been liable as a fiduciary". Contra at 652 per Lord Hobhouse in dissent, stating that an order for account is "a remedy based on proprietary principles when the necessary proprietary rights are absent", presumably because, in his view, information did not equate to property. See generally S Doyle and D Wright, "Restitutionary Damages – The Unnecessary Remedy?" (2001) 25 MULR 1. Cf *Town & Country Property Management Services Pty Ltd v Kaltoum* [2002] NSWSC 166 (where Campbell J declined to order an account of profits for a breach of contract).

[80] Compare *Frank W Snepp III v United States* (1980) 62 L Ed 704 where the United States Supreme Court upheld the imposition of a constructive trust over the profits stemming from the sale of a book published by a former CIA agent in breach of confidence, reasoning that if no such trust were imposed it would leave the United States with no reliable deterrent against similar breaches of security.

[81] *Attorney-General v Blake* [2000] 3 WLR 625 at 638-9.

[82] *Attorney-General v Blake* [2000] 3 WLR 625 at 639.

CONCLUSION

Conflicts of interest arising in the context of fiduciary responsibility frequently involve the misuse of information communicated for the limited purpose of the relationship. This raises the question of the extent to which any doctrine protective of such information overlaps with accepted fiduciary law. The greater the overlap or commonality between two doctrines, the lesser the justification for judges to complicate the law by continuing to recognise their separate existence, particularly if the doctrines have a common heritage. It also suggests that any such commonality, to the extent that the doctrines do remain separate, should be reflected remedially.

There are reasons, it is suggested, for maintaining each such doctrine, for although there is overlap, the conflict of interest in each arising may exhibit different parameters. Yet if the courts countenance complete temporal confluence between the doctrines, this does little to justify this differentiation, and can have the adverse effect of confusing the doctrines. The alternative of creating specific rules for certain relationships (such as the lawyer-client, or director-company, relationships) should be rejected unless they cannot be properly accommodated within the existing legal framework.

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