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COMMERCIAL EQUITY: FIDUCIARY RELATIONSHIPS

By John Glover

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A marked feature of modern academic writing is the publication of monographs on particular topics as distinct from the survey of more general fields. The subject selected by Mr Glover has received more general treatment by Finn in 1977, Shepherd in 1981, and the contributors to McKendrick's book in 1992; more recently there have been works on related subjects such as Cope's *Constructive Trusts* and Bean's *Fiduciary Obligations and Joint Ventures.* AJ Ayer said his *Language, Truth and Logic* solved all the problems of philosophy, so that henceforth the subject was a dead one. This cannot be said of Mr Glover's predecessors in the field of fiduciary duty. Mr Glover has made a stimulating contribution to the literature.

The work divides fiduciary relationships into three categories: those based on trust, those based on relationships of influence, and those relating to breach of confidence. Each category is analysed by reference to an identification of when it exists, what its scope is, what breach consists in, and what remedies lie.

The heart of the book is to be found in the six chapters dealing with fiduciary relationships of trust.

Chapter 3 grapples with the central theoretical difficulty in the law: by what criteria a fiduciary relationship is to be identified and separated from others? Mr Glover proceeds through criteria of undertaking, entrustment, reliance and discretionary power. He contends that it is not necessary to find common elements in every fiduciary relationship, least of all one of these four. But he does suggest that in novel cases a fiduciary conclusion depends on the legitimacy of analogical reasoning from the fiduciary characteristics found in former cases. He then proceeds to a detailed analysis of the authorities in Australia, England, New Zealand, Canada and the United States, and the relevant literature, by reference to the four characteristics.

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Chapter 4 then turns to analyse the scope of fiduciary relationships - to the question of the extent to which the affairs of parties subject to some fiduciary duty are regulated by fiduciary standards. The analysis is conducted in turn by reference to employment, partnership and joint ventures, and corporations and their officers.

Chapter 5 then analyses the nature of fiduciary duties from the angle of breach. After a discussion of the rule that conflicts must be avoided and the rule against making a profit from fiduciary offices, the discussion is applied to two particular cases - the fiduciary duty of company directors, and solicitors faced with conflicts. The latter is a matter which the size of contemporary mega-firms and of the conglomerate businesses for whom they act has made one of almost daily investigation. The fiduciary duty of company directors, too, has been subjected to a squall of activity, some of it since Mr Glover's manuscript was completed. The duty of directors to act bona fide for the benefit of the company as a whole, discussed in paragraph 5.90, received further examination by the High Court in *Gambotto v WCP Ltd* .[1] Mr Glover says of company directors that the "duty of care and diligence" is not an equitable duty, but a common law duty only. Though he not unreasonably criticises another work for being "surprisingly cryptic" in sourcing these duties in the fiduciary relationship, he himself, like virtually all authors, offers no analysis at this point. These gaps have since been filled by the majority and minority reasons in the subsequently decided Court of Appeal case about AWA Ltd, *Daniels v Anderson*.[2] Clarke and Sheller JJA[3] upheld the view of the trial judge, by adopting a position somewhat different from Mr Glover's, and so far as it goes, superior to it, in that they treated the duty as being concurrent, both equitable and legal, thus permitting a breach of it to be characterised as tortious for the purposes of statutory contribution between joint tortfeasors. Powell JA, dissenting on this point,[4] decided that the duty lay in equity, not at common law. The reasoning of Powell JA may be thought preferable. On the other hand, Mr Glover's view has some subsequent support from *Henderson v Merrett Syndicates Ltd*,[5] where Lord Browne-Wilkinson said that the "liability of a fiduciary for the negligent transaction of his duties is not a separate head of liability but the paradigm of the general duty to act with care imposed by law on those who take it upon themselves to act for or advise others". But that view is open to considerable criticism based on considerations of both history and principle.

Chapter 5 concludes with a discussion of the defences to fiduciary claims - consent, ratification and excuse, and exemption clauses. It is at this point, or perhaps in chapter 6 (in the course of discussing remoteness of loss), that a further problem might have been discussed. Can a fiduciary be heard to say that if breach lies in failure to give the principal certain advice - of the existence of a conflict for example - there should be no liability

1 (1995) 182 CLR 432.
2 (1995) 37 NSWLR 438.
3 At 488-505.
4 At 587-608.
5 [1995] 2 AC 145 at 205.

where the principal would have adopted the same course whatever advice had been given? The Privy Council decision in *Brickenden v London Loan & Savings Co* [6] returns a negative answer. That case, though little noticed for many years, and though contradicted by some Australian and New Zealand cases, has recently been approvingly cited on several occasions. Its validity is before the High Court at the time of writing.

Chapters 6 and 7 deal with remedies: Chapter 6 with remedies against fiduciaries and Chapter 7 with remedies against third parties. These difficult topics are discussed in a lively fashion.

Chapters 8 and 9 deal respectively with the doctrine of undue influence and the protection of confidential information. Though these two topics are subjects which lie close to the field of fiduciary relationships, particularly where remedies are under analysis, it is questionable whether they are strictly speaking part of it. Some relationships of influence may on the facts have fiduciary elements (eg solicitor-client relationships). Some disclosures of confidential information may be made by a principal to a fiduciary. But to treat these two categories as fiduciary tends to beg the question and to attach a fifth wheel to the coach. Indeed Mr Glover admits (para 8.1) that in relation to undue influence the "fiduciary concept is used a little differently. It is only a background fact to a wrong." And there is no real attempt to characterise the protection of confidential information as fiduciary, save in a limited respect discussed in paragraph 1.16. This passage suggests the question: "Need the relationship of the parties be characterised as fiduciary before the information in question will be protected?"

It may be noted, however, that one particular prediction of Mr Glover's, namely that equitable compensation is available as a remedy for undue influence has come to pass: *Mahoney v Purnell*.[7]

All interested in the academic or practical consideration of fiduciary duties will be able to extract value from the meritorious analysis which Mr Glover has offered of the problems and arguments he has identified.

6 [1934] 3 DLR 465 at 469.
7 [1996] 3 All ER 61.