

COMMERCIAL RELATIONSHIPS AND THE BURGEONING FIDUCIARY PRINCIPLE

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Judges in Australia, Canada and New Zealand have historically been reluctant to apply the exacting standards of fiduciary law to commercial relationships. More recently, courts in Canada and New Zealand have shown a greater willingness to impose such standards on commercial actors. The availability of alternative doctrines of redress in Australia, such as unconscionability, has resulted in a more cautious approach to the application of fiduciary principles in commercial settings in this country. The expansive application of fiduciary principles to commercial relationships in Canada and New Zealand, together with the development of doctrines such as unconscionability in Australia, reflects a common judicial concern for higher standards of conduct in commercial dealings.

Introduction

The fiduciary duty is classically considered to be proscriptive in nature and to demand an exacting standard of loyalty. This very high standard has meant that the courts of Australia, New Zealand and Canada have traditionally been reluctant to extend the fiduciary duty into commercial relationships. However, over the past decade, that reluctance has been dissipating at a remarkable rate in Canada. The flexibility of remedies available in equity and the absence of any other suitable grounds of liability have been significant factors in the recent jurisprudence of the Supreme Court of Canada in this area.

In Australia, the High Court has adopted a far more cautious approach to the imposition of a fiduciary duty in commercial relationships. It will be suggested that this narrow approach can be explained by a developing unconscionability doctrine, and the intervention of statute. The Court of Appeal of New Zealand has not been as ready to find a fiduciary relationship in commercial dealings as the Supreme Court of Canada but has arguably been more activist than the Australian High Court. Explicit recognition of the mingling of law and equity (and the greater remedial flexibility implied by this) and the availability of appeals to the Privy Council have been important factors in New Zealand jurisprudence in this area.

It will be argued in the latter part of this article that the development of the fiduciary duty in commercial settings is just one strand in a wider process

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of renovation occurring in the law of obligations. Whether it be through development of the fiduciary principle, or some other standard, such as unconscionability, the courts in all three jurisdictions are increasingly preoccupied with substantively just outcomes. The boundaries of contract, tort and equity are not as secure as they were once thought to be, and a rigidly doctrinal approach can no longer be invoked if the price to be paid is an inequitable outcome.

The Fiduciary Principle Meets Commercial Practice

The basis of the fiduciary principle can be found in public policy. It reflects a commitment to social behaviour considered desirable and necessary in circumstances where one party acts in the service of another party's interests. It aims to uphold the integrity and utility of those relationships by insisting upon a high degree of loyalty from the dominant party to the vulnerable party.¹ In legal terms, it is often reflected in two overlapping proscriptions: a fiduciary cannot use his or her position to his or her own advantage or to a third party's possible advantage, and a fiduciary cannot, in any matter within the scope of his or her service, have a personal interest or an inconsistent engagement with a third party (unless freely and informedly consented to or authorised by law).² What are the implications of this proscriptive approach, imposing a very high standard of loyalty, for the application of the fiduciary principle in a commercial context?

It has long been accepted that 'commercial' relationships are capable of being fiduciary. A trust, agency or partnership may all arise in a commercial context yet they are nonetheless fiduciary in nature. At issue is the willingness of the courts to find, in a commercial setting, a fiduciary relationship outside the accepted categories. Traditionally, the courts have resisted imposing such a strict duty on commercial parties. As Mason suggests:

There has been a natural reluctance to impose upon parties in a commercial relationship who are in a relatively equal position of strength the higher standards of conduct which equity prescribes. One manifestation of this reluctance is the disinclination of judges to find a fiduciary relationship when the arrangement between the parties is of a purely commercial kind and they have dealt with each other at arm's length and on an equal footing.³

¹ See P Finn, 'The Fiduciary Principle' in T Youdan (ed) (1989) *Equity, Fiduciaries and Trusts*, Carswell, p 27 and P Finn, 'Contract and the Fiduciary Principle' (1989) 12 *UNSWLJ* 76, p 84.

² See, for instance, the judgment of Deane J in *Chan v Zacharia* (1984) 154 CLR 178.

³ A Mason, 'The Place of Equity and Equitable Remedies in the Contemporary Common Law World' (1994) 110 *LQR* 238, p 245. See also R Meagher et al. (1992) *Equity: Doctrine and Remedies*, 3rd edn, Butterworths, pp 132-33; M Evans (1993) *Outline of Equity and Trusts*, 2nd edn, Butterworths, p 109; Mr Justice G Kennedy, 'Equity in a Commercial Context' in P Finn (ed) (1987)

The reasons for this reluctance are almost always expressed in terms of a concern that the strictness of the fiduciary standard would lead to uncertainty in commercial practice and would impede the ability of commercial parties to serve their own interests. Such outcomes, it is suggested, would be contrary to a social policy favouring commercial enterprise.⁴ Respect for this policy can be traced back to the view which developed in the nineteenth century, particularly in England, that equity and commerce were inherently incompatible.⁵ While equity was committed to holding the fiduciary to his or her undertakings, the common law was committed to the principle that parties should be free to define and limit their obligations to each other by the terms of their contract.⁶ In a climate of *laissez-faire* liberalism, the courts uniformly favoured the concerns of the common law, upholding the principles of certainty of contract and sanctity of contract.⁷

Following the passage of the *Judicature Acts*, and especially in the last 20 to 30 years, equity has been undergoing something of a resurrection. Sir Anthony Mason has commented that: 'One aspect of the latest developments in equity is the increasing penetration of equitable doctrine into contract and commercial law, notwithstanding the strength of the countervailing philosophies and attitudes.'⁸ Glover suggests that: 'Breach of fiduciary relationship has undoubtedly become the fastest-growing commercial wrong of the 1990s, reflecting North American developments.'⁹ Underpinning this

Equity and Commercial Relationships, Law Book Co, especially pp 2–7; and, generally, J Lehane, 'Fiduciaries in a Commercial Context' in P Finn (ed) (1985) *Essays in Equity*, Law Book Co, p 95.

⁴ For a more detailed account of such arguments see, generally, E Weinrib, 'The Fiduciary Obligation' (1975) 25 *U Tor LJ* 1. See also D Waters, *Lac Minerals Ltd v International Corona Resources Ltd* (1990) 69 *Can Bar Rev* 455, p 457. Such arguments are also critically examined, and found to be wanting, in R Flannigan, 'Commercial Fiduciary Obligation' (1998) 36 *Alberta L Rev* 905.

⁵ See J Glover (1995) *Commercial Equity — Fiduciary Relationships*, Butterworths, pp 3–4.

⁶ See A Black, 'Joint Ventures, Partnerships and Fiduciary Duties: *United Dominions Corporation Ltd v Brian Pty Ltd*' (1986) 15 *MULR* 708, p 725.

⁷ The classic expression of these principles is the statement of Jessel MR, in *Printing and Numerical Registering Co v Sampson* (1875) LR 19 Eq 462 at 465, that 'contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of Justice. Therefore you have this paramount public policy to consider — that you are not lightly to interfere with this freedom of contract.' It should not be surprising, therefore, that: 'Fiduciary relationships in commerce were once thought to be an improbable thing. The heart of commerce was conceived as certainty and dispatch — which left little room for conscientious obligations and the balancing of rival equities.': Glover (1995) p xi, n 5.

⁸ A Mason, 'Themes and Prospects' in P Finn (ed) (1985) *Essays in Equity*, Law Book Co, p 242.

⁹ Glover (1995) p xi, n 5. Mason (1994) p 245, n 3, puts forward a similar view, stating that: 'The fiduciary relationship has been the spearhead of equity's incursions into the area of commerce, notwithstanding that courts are still mindful ... of the dangers of applying equitable doctrines to commercial transactions.' See

growth are changes in commercial life, such as increasing complexity and professionalisation, as well as an increasing awareness on the part of commercial actors of the potential advantages of pleading breach of fiduciary duty.¹⁰ The judiciary, in particular the Canadian Supreme Court, has been increasingly active in developing the application of the fiduciary principle to commercial relationships.

Canadian Jurisprudence: Explosive Development of the Fiduciary Principle

Since 1984, the Canadian Supreme Court has considered the nature of fiduciary obligations in at least nine cases. As Ogilvie suggests: 'Fiduciary obligation has exerted a more powerful attraction for the Supreme Court of Canada over the past decade than for any other top court in a common law country.'¹¹ The cases cover a variety of contexts, including the relationships between the Crown and Indians,¹² solicitor and client,¹³ doctor and patient¹⁴ and parent and child.¹⁵ The two most relevant cases considering commercial relationships, *Lac Minerals Ltd v International Corona Resources Ltd* ('*Lac Minerals*')¹⁶ and *Hodgkinson v Simms* ('*Simms*'),¹⁷ were therefore decided in a context of considerable judicial interest in the fiduciary principle.

In *Lac Minerals*, the plaintiff, Corona, had approached the defendant, Lac Minerals, with a view to a possible joint venture or partnership. In the course of negotiations, Corona revealed sensitive mining results from a site adjacent to land it already owned and was mining. Corona attempted to acquire the mining rights in the adjacent property, but Lac put in a successful competing bid and developed the mine on its own account. The Supreme Court

also R Austin, 'The Corporate Fiduciary: *Standard Investments Ltd v Canadian Imperial Bank of Commerce*' (1986-87) 12 *Can Bus LJ* 96, p 100: 'What is new, or at any rate much more to the forefront, in recent years, is the extent to which fiduciary relationships are being asserted and sometimes established in commercial relationships which are outside the traditional fiduciary categories.'

¹⁰ P Millett, 'Equity's Place in the Law of Commerce' (1998) 114 *LQR* 214, pp 216-17.

¹¹ M Ogilvie, 'Fiduciary Obligations in Canada: From Concept to Principle' [1995] *JBL* 638, p 638. Waters (1990) p 456, n 4, notes that the law in Canada in this area 'has been expanding at an almost incredible rate within recent years'. Smith states that '[f]iduciary law is developing rapidly in Canada. The most visible part of that development is in the form of the extension of the fiduciary relation to new situations': L Smith, 'Fiduciary Relationships — Arising in Commercial Contexts — Investment Advisers: *Hodgkinson v Simms*' (1995) 74 *Can Bar Rev* 714, p 714.

¹² *Guerin v The Queen* (1984) 13 DLR (4th) 321.

¹³ *Canson Enterprises Ltd v Boughton & Co* (1991) 85 DLR (4th) 129.

¹⁴ *McInerney v MacDonald* (1992) 93 DLR (4th) 415; *Norberg v Wynrib* (1992) 92 DLR (4th) 449.

¹⁵ *KM v HM* (1992) 96 DLR (4th) 161.

¹⁶ (1989) 61 DLR (4th) 14.

¹⁷ (1994) 117 DLR (4th) 161.

unanimously held that there had been a breach of confidence on the part of Lac. A majority held that the appropriate remedy was an account of profits and imposition of a constructive trust, in favour of Corona, over the mining operation. The Ontario Court of Appeal had also unanimously held that a fiduciary duty was owed by Lac to Corona in the pre-contractual stage of the negotiations. The Supreme Court split three to two on this issue, the majority (led by Sopinka J) finding no fiduciary duty, while the minority (led by La Forest J) would have found such a relationship.

In *Simms*, the plaintiff, Hodgkinson, approached the defendant, Simms, for advice on how to invest his income so as to minimise his tax liabilities. Simms advised investment in building project developments but failed, contrary to rules of professional conduct, to disclose a relationship with the developers under which he received payment from the developers when his clients invested in their projects. Hodgkinson invested in the building project developments recommended by Simms, and lost money when they declined in value due to a general decline in real estate values. The majority of the Supreme Court, led by La Forest J, found that a fiduciary duty was owed by Simms to Hodgkinson and that this duty had been breached. Hodgkinson was entitled to recover his full loss, including consequential damages. The minority, led by Sopinka J, held that the relationship was not a fiduciary one. Simms was liable for breach of contract, and damages should be limited according to contract principles.

There do not appear to be significant doctrinal differences of opinion between the majority and the minority in either *Lac Minerals* or *Simms*.¹⁸ Yet if this is so, the question remains as to why it was that a split decision in each case (along the same lines although with a different result) was reached. One possible explanation is to be found in differing judicial perceptions of dependency and vulnerability. As Ogilvie suggests:

it is difficult to avoid the conclusion that the assessment of whether or not a plaintiff is really completely at the mercy of the defendant is subjective. A judge temperamentally and politically inclined towards welfarism will probably find dependency whereas a judge inclined toward personal autonomy will not.¹⁹

Thus it would be said that La Forest J is more inclined toward welfarism, Sopinka J toward personal autonomy. This realist argument is plausible but may be too simplistic, failing to do justice to the position elaborated by La Forest J. La Forest J was the only justice in either *Lac Minerals* or *Simms* to consider in a detailed way the principles underpinning the fiduciary duty and the purpose which the duty serves. For La Forest J, what was at stake was the

¹⁸ See Waters (1990) p 477, n 4 and Smith (1995) pp 723–24, n 11. Ogilvie (1990) p 643, n 11 states that: ‘Despite the different outcomes from the application of the test for fiduciary obligation in the majority and minority decisions respectively, there would appear to be no substantial difference in the understanding of the entire court of the essential nature of a relationship which is fiduciary in law.’

¹⁹ Ogilvie (1990) p 643, n 11.

protection of the 'reasonable expectations' of a party. The degree of vulnerability of a party does not depend on some hypothetical ability to protect oneself, but on the nature of the expectations of that party. This is grounded in considerations of social policy. His Honour stated:

The desire to protect and reinforce the integrity of social institutions and enterprises is prevalent throughout fiduciary law. The reason for this desire is that the law has recognized the importance of instilling in our social institutions and enterprises some recognition that not all [business] relationships are characterized by a dynamic of mutual autonomy, and that the marketplace cannot always set the rules.²⁰

It may therefore be argued that, in the opinions led by La Forest J in *Lac Minerals* and *Simms*, there was a greater willingness to import notions of 'morality', based on the idea of observance of reasonable expectations, into commercial relationships.²¹ As Waters suggests, 'courts in Canada today, reflecting as they do contemporary society's concern with "community standards of commercial morality", are turning to the fiduciary concept ... Canadian courts are not prepared to accept that community standards are for the legislature, not for the courts, to adopt.'²²

Questions of morality inevitably raise the issue of punishment. The extensive nature of the remedies available for breach of fiduciary duty²³ is a crucial factor in the continued expansion of the fiduciary principle in Canadian law. As Finn suggests, finding a breach of fiduciary duty 'holds out the prospect of a flexible, often bountiful, remedy system'.²⁴ Traditionally, imposition of a constructive trust, proprietary in nature and providing more extensive relief than any other equitable remedy, has required demonstration of breach of a fiduciary duty.²⁵ As well, equitable compensation has traditionally

²⁰ *Simms*, p 186, n 17.

²¹ See K Farquhar, '*Hodgkinson v Simms*: The Latest on the Fiduciary Principle' (1994) 29 *UBCL Rev* 383, pp 387-88.

²² Waters (1990) pp 481, n 4.

²³ These include rescission, injunction, compensation, account of profits and constructive trust.

²⁴ P Finn, 'The Fiduciary Principle' in T Youdan (ed) (1989) *Equities Fiduciaries and Trusts*, Carswell, p 56. Klinck states 'an action based on breach of fiduciary duty is advantageous from the point of view of remedy': D Klinck, 'The Rise of the "Remedial" Fiduciary Relationship: A Comment on *International Corona Resources Ltd v Lac Minerals Ltd*' (1988) 33 *McGill LJ* 600, p 602. Teele suggests that 'the fiduciary principle is constantly employed in order to exploit its connection with proprietary remedies': R Teele, 'The Search for the Fiduciary Principle: A Rescue Operation' (1996) 24 *ABLR* 110, p 112. Waters (1990) p 469, n 4 states a crucial development in the expansion of the fiduciary principle 'was the realisation by litigants that the fiduciary relationship potentially brought into play a range of equitable remedies (rescission, injunction, equitable damages, and *in rem* restitution)'.²⁵

²⁵ Thus Teele (1996) p 113, n 24 states that 'a plaintiff who can prove a breach of fiduciary duty has a considerable chance of being awarded a constructive trust. It

been attractive because of an equitable presumption of full restitution in favour of the plaintiff unencumbered by common law notions of causation and remoteness.

The remedial significance of finding a breach of fiduciary duty is illustrated vividly by the judgments in *Simms*. As highlighted above, the majority found breach of a fiduciary duty and awarded full equitable compensation, including damages for consequential loss. On the other hand, the minority found a breach of contract. Applying common law principles of causation and remoteness they would have restricted damages to a level much lower than the compensation awarded by the majority.

Importantly, it would seem that the decision in *Canson Enterprises Ltd v Boughton & Co* ('*Canson*')²⁶ will not significantly diminish the remedial significance of the fiduciary duty. The majority in *Canson* held that the fusion of law and equity permits the introduction of common law concepts such as causation and remoteness into the assessment of equitable compensation. In *Simms*, however, the majority stated that *Canson* merely decided that a court exercising equitable jurisdiction is not precluded from considering common law damages concepts. It does not signal a retreat from the presumption of full restitution where a fiduciary duty is breached.²⁷

Another significant factor in the expansion of the fiduciary duty into commercial relationships in Canada is the recognition that it may offer 'a basis of attack where the elements necessary to contract or tort are lacking'.²⁸ In other words, the fiduciary principle will be relied on in near-contract or near-tort situations where no specific doctrine is available. Finn argues that 'if one cannot find a specific doctrine appropriate to the circumstances, but if one is committed to exacting a protective responsibility, the lure to fiduciary law becomes almost irresistible'.²⁹ La Forest J implicitly recognises this point in his judgment in *Lac Minerals* when he warns that an implied term of good faith can offer relief only when there is a contract between the parties. As Waters points out: 'If there was no contract in place when the self-serving act occurred ... or there was no contract at any time, as in this case [*Lac Minerals*], then fiduciary obligation *may* be the only way in which the self-serving act can remedially be reached.'³⁰

is for this reason that the fiduciary relationship has been described as the gateway to a constructive trust.'

²⁶ (1991) 85 DLR (4th) 129.

²⁷ It may be, as Davies suggests, that the extent of recovery should be commensurate with the breach of the fiduciary duty in question. The more culpable the breach, the greater should be the recovery: J Davies, 'Equitable Compensation: Causation, Foreseeability and Remoteness' in D Waters (ed) (1993) *Equity, Fiduciaries and Trusts*, Carswell, p 297.

²⁸ Klinck (1988) p 601, n 24 and see Teele (1996) n 24.

²⁹ Finn (1989) p 24, n 24.

³⁰ Waters (1990) p 479, n 4 (original emphasis).

Australian Jurisprudence: A Cautious Approach

By contrast with the Canadian experience, the High Court of Australia has been much less willing to impose a fiduciary relationship in commercial settings. It is noteworthy that the key case in this area, *Hospital Products Ltd v United States Surgical Corporation* ('*Hospital Products*'),³¹ was decided more than sixteen years ago. There have been few decisions of real significance on the fiduciary principle since this time. Clearly, the fiduciary principle has not proved to be a 'powerful attraction' for the High Court in the way that it has for the Supreme Court of Canada.

Hospital Products involved a dispute between an American manufacturer of surgical products, United States Surgical Corporation (USSC), and its Australian distributor, Hospital Products of Australia (HPI). USSC claimed that HPI had 'reverse engineered' its products, constructed copies, and was supplying customers in Australia with HPI-labelled products. In the High Court, Gibbs CJ, Wilson and Dawson JJ held that there was no fiduciary duty owed by HPI to USSC, and that consequently USSC's relief was confined to recovery of damages for breach of contract. Mason J found a fiduciary duty and would have imposed a constructive trust for its breach. Deane J did not find a fiduciary duty but would also have allowed a constructive trust in favour of USSC on the basis of equitable fraud.

The reasons put forward by members of the majority for not finding a fiduciary relationship echo themes highlighted earlier — the need for certainty in business transactions and the inappropriateness of the high fiduciary standard. For instance, Dawson J stated that:

To invoke the equitable remedies sought in this case would, in my view, be to distort the doctrine and weaken the principle upon which those remedies are based. It would be to introduce confusion and uncertainty into the commercial dealings of those who occupy an equal bargaining position in place of the clear obligations which the law now imposes upon them.³²

In a judgment strongly reminiscent of more recent Canadian jurisprudence, Mason J recognised that the fiduciary principle may have a place in commercial settings, and explicitly articulated the remedial 'pull' of the fiduciary relationship:

The disadvantages of introducing equitable doctrine into the field of commerce, which may be less formidable than they were, now that the

³¹ (1984) 156 CLR 41.

³² *Hospital Products*, *ibid.* at 149. Gibbs CJ, at 70, stated that 'the fact that the arrangement between the parties was of a purely commercial kind and that they had dealt at arm's length and on an equal footing has consistently been regarded by this Court as important, if not decisive, in indicating that no fiduciary relation arose'. Similarly, Wilson J stated, at 118, that: 'The courts have often expressed a cautionary note against the extension of equitable principles into the domain of commercial relationships.'

techniques of commerce are far more sophisticated, must be balanced against the need in appropriate cases to do justice by making available relief in specie through the constructive trust, the fiduciary relationship being the means to that end. If, in order to make relief in specie available in appropriate cases it is necessary to allow equitable doctrine to penetrate commercial transactions, then so be it.³³

In a case decided soon after *Hospital Products, United Dominions Corporation Limited v Brian Pty Ltd* ('Brian'),³⁴ the High Court was willing to find breach of a fiduciary duty in the context of two commercial parties negotiating a joint venture agreement. However, as Austin suggests, although 'Brian shows that equity does play a role in commerce, notwithstanding the negative observations in *Hospital Products* ... the case does not expressly tell us about the attitude we should take to equitable excursions into the commercial arena'.³⁵ More recently, the High Court has continued to demonstrate a cautious approach to fiduciary law. In *Breen v Williams*,³⁶ a case in which the High Court strongly rejected a general fiduciary basis for the relationship between doctor and patient, members of the court were highly critical of fiduciary law developments in Canada. For instance, Gaudron and McHugh JJ stated:

With great respect to the Canadian courts, however, many cases in that jurisdiction pay insufficient regard to the effect that the imposition of fiduciary duties on particular relationships has on the law of negligence, contract, agency, trusts and companies in their applications to those relationships. Further, many of the Canadian cases pay insufficient, if any, regard to the fact that the imposition of fiduciary duties often give rise to proprietary remedies that affect the distribution of assets in bankruptcies and insolvencies.³⁷

³³ *Hospital Products*, *ibid.* at 100. For a useful discussion of the position taken by Mason J in this case, see C Hodgekiss, 'Equity — Fiduciary Relationship in a Commercial Context — Remedies for Breach of Fiduciary Duties' (1985) 59 *ALJ* 670; and A Black, 'Dworkin's Jurisprudence and *Hospital Products*: Principles, Policies and Fiduciary Duties' (1987) 10 *UNSWLJ* 8.

³⁴ (1985) 157 CLR 1.

³⁵ R Austin, 'Commerce and Equity — Fiduciary Duty and Constructive Trust' (1986) 6 *OJLS* 444, p 448. See also L Griggs, 'Joint Ventures, Partnership and Fiduciary Obligations' (1994) 24 *QLSJ* 77, p 84.

³⁶ (1996) 186 CLR 71.

³⁷ *Breen v Williams*, *ibid.* at 113. Similarly strong criticisms were made by Dawson & Toohey JJ (at 95). All four justices express concern that in Canada the fiduciary obligation is being used to displace the role previously played by contract and tort. Similar sentiments can also be found in academic commentary. For instance, Sealy states that courts in Australia, unlike those in Canada, have shown 'a commendable reluctance to allow commercial arrangements to be undermined by judicially imposed obligations of altruism based on a questionable finding of a

In *Maguire v Makaronis*,³⁸ a case concerning failure by solicitors to disclose a relevant interest to its clients, no dispute arose as to the existence and breach of a fiduciary duty. The majority judgment, however, made passing reference to recent expansive developments in fiduciary law, suggesting that in 'various decisions in recent years there appear attempts to throw a fiduciary mantle over commercial and personal relationships and dealings which might not have been thought previously to contain a fiduciary element'.³⁹ This confirms a sceptical view on the part of the High Court to development of the fiduciary principle in a commercial context. *Maguire v Makaronis* is also significant for another reason. Unlike the Canadian Supreme Court, the High Court rejects the application of common law principles of causation to remedies for breach of fiduciary duty.⁴⁰

Why have courts in Australia been comparatively reluctant to find a fiduciary relationship in commercial settings? It is contended that the central reason is the availability of other grounds of liability. First, unconscionable dealing in this country is now an independent cause of action.⁴¹ As Finn suggests, 'the revitalisation of the unconscionable dealings doctrine and the more general elaboration of an unconscionability principle have paralleled growing judicial preparedness to scrutinise the propriety of conduct in contract formation and performance'.⁴² It is also relevant to note in this regard the willingness of the High Court to grant an unconscionability constructive trust.⁴³ As Mason puts it: 'we have discovered that there are other grounds, such as breach of a duty of confidence and unconscionable conduct, which will attract the remedial constructive trust. That discovery has taken pressure off the fiduciary relationship as a passport to proprietary relief.'⁴⁴

Second, pressure on the fiduciary principle to require disclosure in commercial dealings is eased, if not entirely removed, by the availability of section 52 of the *Trade Practices Act 1974* (Cth). Finn argues that 'appreciation of the possibilities of section 52 ... has obviated in considerable degree the need to resort to contrivances to sustain intervention in relationships and dealings'.⁴⁵ In what amounts to a duty to disclose, it is now well established that silence may constitute misleading or deceptive conduct for the

fiduciary relationship': L Sealy, 'Fiduciary Obligations, Forty Years On' (1995) 9 *JCL* 37, p 39.

³⁸ (1997) 188 CLR 449.

³⁹ *ibid.* at 463–64.

⁴⁰ *ibid.* at 467–70.

⁴¹ *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447.

⁴² P Finn, 'Contract and the Fiduciary Principle' (1989) 12 *UNSWLJ* 76, p 82. For a detailed discussion of the development of unconscionable conduct in Australia see P Finn, 'Unconscionable Conduct' (1994) 8 *JCL* 37.

⁴³ See, for instance, *Muschinski v Dodds* (1984) 160 CLR 583 and *Baumgartner v Baumgartner* (1987) 164 CLR 137.

⁴⁴ Mason (1994) p 248, n 3.

⁴⁵ P Finn, 'Contract and the Fiduciary Principle' (1989) 12 *UNSWLJ* 76, p 82.

purposes of section 52.⁴⁶ Importantly, liability under the *Trade Practices Act* attracts a range of discretionary remedial outcomes perhaps even more flexible than those associated with breach of fiduciary duty.⁴⁷

New Zealand Jurisprudence: Domestic Adventure and Imperial Restraint

The Court of Appeal in New Zealand has considered the fiduciary principle in commercial relationships in a handful of cases over the past decade. In perhaps the most expansive of these cases, *Elders Pastoral Ltd v Bank of New Zealand* ('*Elders*'),⁴⁸ the Court of Appeal held that Elders Pastoral, the stock agents for a farmer, was a fiduciary *vis-à-vis* the Bank of New Zealand, whom it had persuaded to lend money to the farmer. This decision has been strongly criticised, with one group of commentators stating that '[t]he steps in the reasoning are by no means readily apparent and the conclusion is, it is suggested, very difficult to justify'.⁴⁹

In *Liggett v Kensington*,⁵⁰ part of the business of a bullion trader was selling bullion to the public. Purchasers could either take immediate delivery of the bullion or have the trader keep it in its custody for a period of at least seven days. The majority of the Court of Appeal held that the trader was a fiduciary. This decision was overturned on appeal to the Privy Council,⁵¹ where it was held that the relationship between the trader and purchasers was fundamentally contractual in nature.

Other decisions have produced equally mixed results. *Artifakts Design Group Ltd v NP Rigg Ltd* ('*Artifakts*')⁵² concerned a stationary distributorship arrangement. The defendant distributor, despite assurances to the contrary, began producing stationary in its own name. In a decision based on *Hospital Products*, it was held that there was no fiduciary relationship between the parties. By contrast, in *Watson v Dolmark Industries Ltd* ('*Watson*'),⁵³ another distributorship case, the opposite result was reached. The defendant, Dolmark, was manufacturer and sole distributor of plastic storage trays for the plaintiff, Watson. Dolmark, in breach of the distributorship agreement, suppressed sales figures in order to avoid payment of royalties to Watson and, using that income, began to manufacture trays in its own name. The Court of Appeal held that the parties were in a fiduciary relationship and that Dolmark had breached its duty.

⁴⁶ *Demagogue v Ramensky* (1993) ATPR ¶41–203.

⁴⁷ See ss 82 and 87.

⁴⁸ [1989] 2 NZLR 180.

⁴⁹ Meagher et al. (1992) p 133, n 3.

⁵⁰ [1993] 1 NZLR 257.

⁵¹ *Re Goldcorp Exchange Ltd (in rec): Kensington v Liggett* [1994] 3 NZLR 385 ('*Goldcorp*').

⁵² [1993] 1 NZLR 196.

⁵³ [1992] 3 NZLR 311.

It should be clear that, while the Court of Appeal has been prepared to recognise a fiduciary relationship in commercial settings in situations where the High Court of Australia has not, it nonetheless has probably not been quite so adventurous as the Canadian courts. There are at least two important factors at work in the New Zealand jurisprudence. The first is that appeals to the Privy Council from the Court of Appeal are still allowed. Given the generally very strict approach adopted in England to development of equitable doctrine,⁵⁴ it might be argued that, while development of a distinctive New Zealand jurisprudence has not been suppressed by this enduring tie (as demonstrated by *Watson and Elders*), nonetheless it may be having a significant dampening effect (as demonstrated by *Artifakts* and *Goldcorp*).

The second important feature of New Zealand jurisprudence in this area is the recognition by the Court of Appeal that fusion between law and equity means that a full range of remedies should be available as appropriate, no matter whether an obligation arises in common law, equity or under statute.⁵⁵ It could be expected that this may ease the pressure to find a fiduciary relationship in order to reach a desired remedy. It may also be the case that section 9 of the *Fair Trading Act* 1986 (NZ), a prohibition against misleading or deceptive conduct, is having the same liberating effect that section 52 of the *Trade Practices Act* 1974 (Cth) is having in Australia.

Conclusion: Decline of Doctrinal Dogma and the Rise of Standards

The extension of the fiduciary duty into commercial relationships, particularly in Canada and New Zealand, has led many judges and commentators to suggest that the fiduciary principle is being distorted in order to fill gaps in the law and to serve remedial ends.⁵⁶ The 'gap' most often highlighted — at least by commentators — is the lack of a distinct doctrine of good faith.⁵⁷ It is suggested that many of the commercial cases arguing a breach of fiduciary duty would have been more appropriately resolved on the basis of a breach of

⁵⁴ See, for instance, Mason (1994) n 3.

⁵⁵ Per Cooke P in *Aquaculture Corporation v New Zealand Green Mussel Co Ltd* [1990] 3 NZLR 299 at 301. See also *Day v Mead* [1987] 2 NZLR 443 and *Mouat v Clark Boyce* [1992] 2 NZLR 559.

⁵⁶ For instance, see the recent criticism of Canadian developments by the High Court in *Breen's* case, *above* n 37 and accompanying text; Waters (1990) p 481, n 4; Finn (1989) p 24, n 24; Teele (1996) pp 110, 112 and 114, n 24; Sealy (1995) p 39, n 37; and D Conaglen and R Hollyman, 'Fiduciary Relationships in Commercial Settings: Some Thoughts on Recent New Zealand Cases (Part II)' (1996) *NZLJ* 54, p 56. Lord Browne-Wilkinson disparagingly refers to this distortion as 'the reach me down a fiduciary syndrome': cited in Mr Justice P Young (ed), 'Current Issues — Equity in a Fast Changing World' (1996) 70 *ALJ* 674, p 674.

⁵⁷ As Finn suggests, 'with fiduciary law being ordinarily an alien presence in commercial contracts ... in some number of Commonwealth countries ... debate is now being waged as to whether or not courts should commit themselves to a doctrine of good faith': P Finn, 'Fiduciary Law' in E McKendrick (ed) (1992) *Commercial Aspects of Trusts and Fiduciary Obligations*, Clarendon Press, p 16.

good faith. Thus Finn argues that; 'Until good faith is given independent recognition ... One can only expect the contortion of existing doctrine. And one cannot be surprised at the steady, often questionable, streams upon fiduciary law.'⁵⁸

Even if an independent doctrine of good faith were recognised,⁵⁹ this would not necessarily lessen the demands on the fiduciary principle. This is because the key issue is one of remedial flexibility.⁶⁰ If the fiduciary duty continues to offer the most attractive remedies, then it will continue to be exploited by litigants. If this point is accepted, it is clear that resolution of the 'fusion debate' will be a critical factor in the further development of the fiduciary principle.⁶¹ As highlighted above, the Supreme Court of Canada⁶² and the Court of Appeal in New Zealand⁶³ have relied on a fusion of law and equity to provide greater flexibility in applying remedies. Importantly, the High Court of Australia has so far not been prepared to embrace fusion.⁶⁴

At a broader level, it is arguable that development of the fiduciary principle, together with ideas of unconscionability and good faith, reflects — in all three jurisdictions — a growing judicial preoccupation with standards of behaviour in voluntary or consensual dealings, including commercial relationships. The law of civil obligations is increasingly being expressed in standards of conduct rather than rules of law.⁶⁵ Finn suggests that a hierarchy of overlapping standards is emerging, with the fiduciary standard at the highest end, followed by the good faith standard and the unconscionability standard.⁶⁶ Importantly, the emergence of these standards reflects the shortcomings of established common law doctrines in achieving basic standards of fair dealing in commercial relationships.

The expansive application of standards such as the fiduciary principle have important implications for the law of obligations in a wider sense. The

⁵⁸ Finn (1989), p 24, n 24.

⁵⁹ Consideration of the merits or otherwise of such a step is outside the scope of this article.

⁶⁰ Finn (1989), p 56, n 24 finishes his comprehensive treatise on the fiduciary principle with the sentence: 'Of the two, principle or remedy, perhaps it is the latter after all which should be engaging our attention.'

⁶¹ For a comprehensive consideration of this debate see F Burns, 'The "Fusion Fallacy" Revisited' (1993) 5 *Bond LR* 161.

⁶² *Canson Enterprises Ltd v Boughton & Co* (1991) 85 DLR (4th) 129.

⁶³ *Aquaculture Corporation v New Zealand Green Mussel Co Ltd* [1990] 3 NZLR 299, *Day v Mead* [1987] 2 NZLR 443 and *Mouat v Clark Boyce* [1992] 2 NZLR 559.

⁶⁴ Cf Deane J in *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, arguing that law and equity have become one system of modern law.

⁶⁵ For a discussion of the ideological shift which this may represent — from possessive individualism to altruism — see D Kennedy, 'Form and Substance in Private Law Adjudication' (1976) 89 *Harv L Rev* 1685.

⁶⁶ Finn (1989) pp 3–4, n 24.

realm of the traditional common law doctrines becomes less certain.⁶⁷ At the same time, as Smith suggests, standards of conduct might provide a more coherent basis for a law of obligations:

The developments in the law relating to fiduciary obligations, unconscionability and implied terms in contracts reveal [a] moral theme. The reasonable expectations which arise from or are concomitants of certain kinds of relationships provide a unifying rationale for standards of conduct in doctrinally distinct areas of the law.⁶⁸

In a world dominated by a concern for oneself, it would seem that the courts in Australia, Canada and New Zealand are accepting the role of providing a counter-balance, increasingly intervening in 'consensual' relationships, including commercial dealings, to uphold a regard for others. The underlying values of equity are driving this change, and they are traversing the boundaries of formerly rigid common law doctrines such as contract.

⁶⁷ Aitken states that '[c]onventionally, the dichotomy has been between claims in contract/tort. Once we add fiduciary obligations to the discussion, it is difficult to see on what basis to resolve the difficulty in keeping distinct the various claims, and remedies they evoke': L Aitken, 'Developments in Equitable Compensation: Opportunity or Danger?' (1993) 67 *ALJ* 596, p 601.

⁶⁸ K Smith, 'Themes in the Liability of Banks and Lending Institutions' (1990) 64 *ALJ* 331, p 335. For a discussion of the moral theme underpinning changes in contractual doctrine in the late twentieth century see P Finn, 'Commerce, the Common Law and Morality' (1987) 17 *MULR* 87.