

**SOLICITORS AND THE DUTY TO DISCLOSE:
HILTON V BARKER BOOTH & EASTWOOD
(A FIRM) [2005] UKHL 8; [2005] 1 WLR 567**

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Solicitors owe their clients fiduciary obligations. One of the questions that has concerned fiduciary law for some time is whether these fiduciary obligations include a positive duty to disclose information to a client. Suppose a solicitor knows information from an independent source that will impact on the client's decision to proceed with a transaction. Is the solicitor under a *fiduciary* obligation to disclose the information, so that a failure to make disclosure will lay the solicitor open to a remedy in equity?

Fiduciary duties require loyalty in performance. In the Anglo-Australian tradition, the identification of obligations that are fiduciary in nature has involved separating proscriptive duties from prescriptive duties. Fiduciary duties fall on the *proscriptive* side of that division, and are characterised by spelling out what a fiduciary *cannot* do. On this basis, fiduciary obligations are encompassed in two rules,¹ the profits and conflicts rules.² Nolan notes the inherent irony in the prescriptive/proscriptive divide that determines fiduciary duties:

Though it is the nature of his activity, or potential activity, that leads to the identification of a person as a fiduciary, fiduciary duties are proscriptive in nature: though a

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¹ Uncertainty has attached to the question whether the conflicts and profits rule are one rule or two. Despite dicta of the highest standing (see *Boardman v Phipps* [1967] 2 AC 46, 123 (Lord Upjohn)) the better view appears to be that there are two rules having separate operation: *Warman International Ltd v Dwyer* (1995) 69 ALJR 362, 372. See also A J McClean, 'The Theoretical Basis of the Trustee's Duty of Loyalty' (1968–69) 7 *Alberta Law Review* 218; J Glover, *Equity, Restitution and Fraud*, (2004) 179. Clearly there is a high degree of overlap in application of both rules.

² A fiduciary cannot make an unauthorised profit from the fiduciary position, and cannot allow a conflict of interest and duty, or duty and duty, to exist.

fiduciary exists to act, if at all, for the benefit of another, fiduciary duties do not tell any fiduciary how he should act, but rather they define acts from which a particular fiduciary must abstain.³

This understanding of fiduciary law has extensive academic support⁴ and has been endorsed by Australian courts.⁵ The result is that if there are prescriptive duties incumbent upon a fiduciary, those duties fall to be enforced by other branches of law, such as contract, trust and tort. This view would clearly exclude a fiduciary duty to disclose, because that would be a positive, rather than a negative, duty. Nevertheless, there is some disquiet about this outcome. Rickett, for example, has suggested a reworking of the fiduciary obligation to an acceptance of some positive duties.⁶ The concept of loyalty could have been interpreted so as to include prescriptive duties.⁷ Despite what is said above, is there any positive duty, any prescriptive duty which is a fiduciary duty?

If there are any positive duties, the most likely candidate is the possible duty to disclose. This would make some sense. Finn says that the purpose of fiduciary law is to encourage disclosure;⁸

³ Richard Nolan, 'A Fiduciary Duty to Disclose?' (1997) 113 *Law Quarterly Review* 220, 222.

⁴ P Birks, 'The Content of Fiduciary Obligation' (2002) 16 *Trust Law International* 34, 37; D Hayton, 'Fiduciaries in Context: An Overview' in P Birks (ed) *Privacy and Loyalty* (Oxford, Clarendon Press, 1997) 286–292. Cf. R Teele, 'The Search for a Fiduciary Principle: A Rescue Operation' (1996) 24 *Australian Business Law Review* 110, 112.

⁵ *Breen v Williams* (1996) 186 CLR 71, 108 (Gaudron and McHugh JJ); *Pilmer v Duke Group Limited (in liq)* (2001) 207 CLR 165, 199 (McHugh, Gummow, Hayne and Callinan JJ).

⁶ Charles E F Rickett, 'Equitable Compensation: Towards a Blueprint?' (2003) 25 *Sydney Law Review* 31, 55; Professor Charles Rickett, 'Understanding Breach of Trust' [2003] *New Zealand Law Journal* 225, 228.

⁷ As is the case in other jurisdictions such as Canada.

⁸ 'The fiduciary law's object is not to ban actions as such, it is to compel disclosure of certain types of actions so that consent can be given to it, notwithstanding there is a conflict of interest or a conflict of duty or whatever. It operates savagely, particularly in its remedies, by and large simply to coerce disclosure.' – Evidence to *Senate Standing Committee on Legal and Constitutional Affairs*, Parliament of Australia, Canberra, 10 March, 1989, 172 (Prof. Paul Finn). This position is supported by N P Beveridge Jr, 'The Corporate Director's Fiduciary Duty of Loyalty:

a positive duty to disclose might well achieve that purpose. Some already feel there is such a duty.⁹ The fiduciary's responsibility to disclose is often expressed as a positive duty, and has been 'for well over 100 years',¹⁰ even where the writer concerned accepts the hegemony of the proscriptive duties. Justice Gummow is typical: 'The breach of duty in these cases essentially will be failure to make full disclosure of conflict'.¹¹ This language clearly implies the existence of a positive duty.

However, this note argues that there is no fiduciary duty to disclose. If a fiduciary is positively required to make disclosure on any given facts, it is because he or she is otherwise in breach of contract or in breach of a duty of care.¹² Indirect support for this proposition can be found in the recent House of Lords decision, *Hilton v Barker Booth & Eastwood*.¹³

Hilton had been a client of the defendant firm of solicitors (BBE) for many years. Bromage was also one of the firm's clients, and to the firm's knowledge had been found guilty of a variety of offences involving fraud. (BBE had acted for Bromage in his criminal matters). Hilton and Bromage eventually met, and BBE acted for both Hilton and Bromage in a subsequent property developing transaction. BBE never disclosed to Hilton the information in their possession concerning Bromage. Inevitably, a conflict arose that required the firm to stop acting for Hilton. Hilton suffered loss from the collapse of the transaction, and when he failed to recover from Bromage, he sued BBE.

The trial judge held that the firm was not in a position to pass on confidential information concerning one client to another, and

Understanding the Self-Interested Director Transaction' (1992) 41 *De Paul Law Review* 655, 659.

⁹ Teele, above, n 4, 112; Matthew Conaglen, 'Equitable Compensation for Breach of Fiduciary Dealing Rules' (2003) 119 *Law Quarterly Review* 246, 253. Cf Paul Finn, 'Fiduciary Law and the Modern Commercial World' in E McKendrick (ed) *Commercial Aspects of the Trust and Fiduciary Obligations* (1992) 25; Glover, above, n 1, 197-9.

¹⁰ *Fitzwood Pty Ltd v Unique Goal Pty Ltd (in liq)* (2001) 188 ALR 566, 576.

¹¹ Mr Justice Gummow, 'Compensation for Breach of Fiduciary Duty' in T G Youdan (ed) *Equity, Fiduciaries and Trusts* (Toronto, Carswell, 1989), 89. However, see *Breen v Williams* (1996) 186 CLR 71, 137-8 (Gummow J).

¹² See Hayton, above, n 4, 291.

¹³ [2005] 1 WLR 567.

that their breach of duty to Hilton lay in continuing to act for him, while in a position of conflict of duty and duty. Hilton was therefore entitled to be placed in the same position he would have held had a non-conflicted solicitor acted for him. As the hypothetical independent solicitor would not have had knowledge of Bromage's convictions, Hilton had not established the causal link between his loss and BBE's breach of duty. In that hypothetical situation, Hilton would have not been informed about Bromage's lack of trustworthiness, and would have gone ahead with the transaction. Therefore, his claim failed. This decision was upheld in the Court of Appeal, but was unanimously overturned in the House of Lords.

This note concerns one aspect of the decision in the House of Lords. What is of interest is that their Lordships effectively assigned the duty BBE had to disclose all the information in its possession to contract law, rather than insist that the obligation only existed in equity. This was in part because, surprisingly, Hilton did not plead a breach of fiduciary duty. Two judgments were delivered, by Lord Scott of Foscote and Lord Walker of Gestingthorpe, the balance of the House concurring. Each of the delivered judgments made it clear that the solicitor's duty to disclose information was a contractual obligation.

Lord Walker of Gestingthorpe delivered the more detailed judgment. He noted that, in addition to its other sins, BBE had a direct personal conflict of interest in the transaction, which would have qualified as a breach of fiduciary obligation. However, his Lordship also explained the solicitor's duties to a client as 'primarily contractual', existing in the context of a fiduciary relationship. For Lord Walker, the contractual duty to disclose information had its genesis in the relationship of trust and confidence between solicitor and client;¹⁴ it is a duty that is 'both contractual and fiduciary'.¹⁵ The solicitor was liable for breaching the contractual duty owed to the client. However, in

¹⁴ This allows a distinction to be drawn between *Hilton* and *Kelly v Cooper* [1993] AC 205, where it was held that a real estate agent was under no duty to disclose information in its possession concerning one client to another client, because the nature of the agent/vendor relationship was such that there was no expectation that this type of information would be passed on. See also J Getzler, 'Inconsistent Fiduciary Duties and Implied Consent' (2006) 122 *Law Quarterly Review* 1, 7.

¹⁵ [2005] 1 WLR 567, 579.

reaching this position, his Lordship relied heavily on *Moody v Cox and Hatt*.¹⁶

This is somewhat confusing, given that *Moody* is generally seen as involving a solicitor with inconsistent *fiduciary* obligations to two parties. In *Moody*, a solicitor who was a trustee contracted to sell trust property to a client, thereby placing himself in a position where his duties to the trust and his duty to his client could conflict. The trial judge found there was a fiduciary relationship between a solicitor and client that had been breached when the solicitor did not tell the client what he knew about the value of the property the client was purchasing. On appeal, Lord Cozens-Hardy MR and Warrington LJ made specific reference to the fiduciary aspect of the duty. Neither mentioned any contractual liability. The third member of the court, Scrutton LJ appeared to characterise the relationship between the parties as one of presumed undue influence. The relationship between solicitor and client is one in which it is presumed that undue influence may be used by the solicitor over the client, so that transactions between them may be set aside. When *Hilton* was in the Court of Appeal, Sir Andrew Morritt VC distinguished *Moody* on the grounds that it had concerned a duty which arose from the fiduciary relationship between the solicitor and the client,¹⁷ (which, of course, was not alleged in *Hilton*).

However, in the *Hilton* appeal in the House of Lords, Lord Walker instead explained *Moody* as factually a case where the solicitor “owed a (purely) fiduciary duty to his beneficiaries and a duty to his client which was ... both contractual and fiduciary”.¹⁸ Lord Scott of Foscote also adopted *Moody* in reaching his decision, and characterised the *Moody* breach as depending ‘on the failure by the solicitors to disclose to their client information that it was their contractual duty to him to disclose’.¹⁹ This led him to conclude that in *Hilton* ‘the solicitors had put themselves in a position in which they owed to their two

¹⁶ [1917] 2 Ch 71.

¹⁷ [2002] EWCA Civ 723, [15].

¹⁸ [2005] 1 WLR 567, 579.

¹⁹ *Ibid*, 570.

clients ... contractual duties that were inconsistent with one another,²⁰ which they proceeded to breach.

Lord Scott appears to have treated this contractual duty to disclose as inherent in all solicitor/client arrangements, unless altered explicitly or by necessary implication.²¹ His Lordship disagreed with the Court of Appeal that any such implied limitation existed.²² Lord Walker's judgment is to similar effect. Their Lordships did not directly discuss the content of such a contractual duty; however, the fact that it has its genesis in the trust and confidence found in the solicitor/client relationships indicates it has much the same content level as a fiduciary relationship.

If a solicitor owes a client a contractual duty to disclose relevant information possessed, the need to recognise a positive fiduciary duty to make such disclosure largely evaporates. Yet Lord Walker was clear that the obligation could be both contractual and fiduciary in nature. How then is one to distinguish between the fiduciary and contractual applications of a duty to disclose? The question may have some importance, on different facts.²³ The answer appears to lie in a return to the fiduciary obligations contained in the profits and conflicts rules.

Although the contractual and fiduciary duty to disclose may have much the same content, the duties arise in different contexts. Fiduciary breaches involve breaches of the profits and conflicts rules. The solicitor is disloyal if he or she makes an undisclosed profit from fiduciary responsibilities. That lack of loyalty attracts equity's supervision. It is relatively easy to identify a failure to disclose information resulting in a profit to the fiduciary as a *fiduciary* breach. It is somewhat harder to distinguish a *fiduciary* conflict involving non-disclosure of information from a *contractual* failure to disclose information. This is because conflicts of interest are factually usually entwined with the duty

²⁰ Ibid.

²¹ Ibid.

²² Ibid.

²³ An example would be on facts analogous to those in *Nocton v Lord Ashburton* [1914] AC 932, where a client's claim in negligence against a solicitor had become statute-barred, while a fiduciary action remained possible.

of disclosure.²⁴ It is possible to characterise virtually every conflicts rule case as exhibiting failure by the fiduciary to disclose information of some kind.²⁵ But a contractual failure to disclose information does not *per se* cover the same field as disloyal failure. If a solicitor fails to disclose an important matter to a client, (such as the fact that the property the client is purchasing is about to be resumed for a freeway) the solicitor is in breach of contractual or a tortious duty of care, but is not disloyal. Failure to disclose, without more, is not a fiduciary breach merely because it is generally accepted that he or she (as a solicitor acting for a client) is a fiduciary. What makes the failure disloyal in the context of the conflicts rule is preference given over the duty owed to the client to some other interest.

In Anglo-Australian law, disclosure is a form of protection²⁶ against fiduciary liability. A fiduciary must take action to avoid being caught by the conflicts rule. If a fiduciary makes full disclosure of the conflicting interest and obtains the principal's informed consent, he cannot be said to be acting disloyally. Full disclosure of the relevant information and the informed consent of the principal constitute a defence to an allegation of breach of fiduciary duty.

(T)hat which is often regarded as a fiduciary obligation of disclosure should not be seen as a positive duty resting on the fiduciary, but a means by which the fiduciary obtains the release or forgiveness of a negative duty; such as the duty to avoid a conflict of interest or the duty not to make a secret profit.²⁷

A solicitor's failure to disclose necessary information to a client is a breach of contract; failure to disclose information where the solicitor/fiduciary is in a position of conflict is indicative of the continuance of a conflict. If a solicitor is in a position where he fails to make disclosure, *fiduciary* liability does not arise due to a

²⁴ L Hoyano, 'The Flight to a Fiduciary Haven' in P Birks (ed) *Privacy and Loyalty* (Oxford, Clarendon Press, 1997) 212.

²⁵ Thus, *Nocton v Lord Ashburton* [1914] AC 932 can be described as a case where the solicitor failed to disclose his personal interest; *Stewart v Layton* (1992) 111 ALR 687 as the solicitor failing to disclose his second client's true financial position; *McKenzie v McDonald* [1927] VLR 134 as the agent failing to disclose the true value of the two properties, etc.

²⁶ Nolan, above, n 3, 223.

²⁷ *Fitzwood Pty Ltd v Unique Goal Pty Ltd (in liq)* (2001) 188 ALR 566, 576.

positive duty to disclose, but due to a breach of the negative obligation not to permit a conflict to go unresolved. Disclosure is the basis of the exception to the profits and conflicts rule, namely the defence of informed consent. If there was a positive *fiduciary* 'duty to disclose', the exception would be conflated with rule.

As *Hilton* shows, the obligation to make disclosure, although it may spring from the trust and confidence inherent in the solicitor/client relationship, is also contractual in nature. Contract law is capable of compensating the client for breach of the positive contractual obligation, and equitable intervention is simply not needed. In those situations where the solicitor has breached both a contractual obligation to disclose information, and has been in a conflicted position so that fiduciary liability arises, the client is at liberty to pursue either or both common law and equitable relief.

On its facts, the *Hilton* decision is limited to fiduciaries who are solicitors, and thus owe contractual duties of disclosure to their clients. However, the principle should hold good for fiduciaries who are not solicitors. If a non-solicitor/fiduciary has a contractual obligation to disclose information, liability is in contract. Fiduciary obligations will not be breached unless the non-solicitor/fiduciary's breach of contract occurs in a situation where he or she makes an unauthorised profit, or is in a position of conflict.

The decision in *Hilton v Baker Booth & Eastwood* represents a major impediment to arguments that fiduciary obligations do or should include a positive duty to disclose information in England, and supports current Australian understandings of fiduciary duties.