CONTRACT AND THE FIDUCIARY PRINCIPLE

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I. INTRODUCTION

Modern legal history has been unkind to contract law. The nineteenth and early twentieth century gave to it an apparent integrity and internal coherence in doctrine, but a straightened compass and concern.[1] In a legal environment which exalted individual responsibility and self-reliance, which had a spartan regard for the consequences of one's actions upon others,[2] this contrived body of law could insist upon its own imperatives and could be relatively indifferent to the casualties of that insistence. But the world changed. The twentieth century explosion in the law of negligence with the 'neighbourhood' idea at its core, saw to that. How one conducts oneself towards another and the consequences thereof have become a pervasive concern.[3] Contract law facilitated social and commercial interaction, but it little addressed the conduct to be expected of parties engaged in that interaction. It was intolerant of fraud. It expected binding promises to be kept or else damages paid if they were not. It proscribed a limited variety of impositions on a contracting party.[4] And it exacted certain minimal standards of probity and fairness.[5] However, its

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1 These last are evidenced in a number of spheres: *e.g.* in the contraction in liability based on representation and reliance: see P.D. Finn (ed.), *Essays on Equity* (1985), *62ff*; in the insistence upon consideration and privity; in the twentieth century reluctance to allow third party enforcement through the trust device; in narrow mistake rules; etc.

2 *E.g. Ward* v. *Hobbs* (1878) 4 App Cas 13; *Derry* v. *Peek* (1889) 14 App Cas 337; *Allen* v. *Flood* [1898] AC 1, 46.

3 For an explicit recognition of this see *e.g. Nicholson* v. *Permakraft (N.Z.) Ltd* (1985) 3 ACLC 453, 459.

4 *E.g.* penalties, forfeitures and unconscionable dealings.

5 *E.g.* in the misrepresentation doctrine and in terms implied by law.

doctrines remained for the most part immune to those considerations of care and of responsibility to or for others that so characterised emerging tort doctrine. An asymmetry had developed between the respective ethos informing two important bodies of law. And if one was out of harmony with evolving social and legal policy, it was contract's.

It is trite to note the tension there is in contracting. It is at once a selfish and a cooperative endeavour.[6] The reconciliation of these often antagonistic pressures is an issue of contemporary moment. But it is not one confined to contract though its significance there is a heightened one. It is merely part of a more general concern in the law with the standards of conduct which should be expected of persons and enterprises in, or in consequence of, their relationships and dealings with others. What limits are to be set to advantage taking, to prejudicial action? The question is not one we alone are asking. It resonates in the laws of Canada, New Zealand, the United States and, more mutedly, England. England apart, there are marked similarities in the substance of the answers being given. It is a heightened insistence upon fair dealing. The doctrinal vehicles used to express those answers, though, differ markedly. Confining attention to contractual and near contractual relationships and disregarding the direct impact of tort law, a quartet of common law (or common law derived)[7] doctrines and, in Australia, a statutory innovation have provided the law's tools. The common law doctrines are unconscionable dealing (and in Australia a more general but still indeterminate unconscionability principle), estoppel, fiduciary law and the implied term (particularly that of good faith and fair dealing[8] and its more specific surrogates).[9] The statutory jurisdiction is section 52 of the Trade Practices Act 1974 (Cth) - a provision the potential of which could marginalise the importance of much legal doctrine. The uses of, and emphasis upon, these 'tools' vary as between the countries of the common law world. While the concern of this article is with one alone - the fiduciary principle in Australia - it is useful to begin with a comparative perspective noting in particular the uses and abuses of that principle in the cause of exacting fair dealing.

II. COMPARISONS

To the extent that the major common law jurisdictions are registering interest in the standards of conduct to be expected of contracting parties, four problem areas of relevance to the concerns of this article have attracted particular attention.[10] A common difficulty experienced in

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6 This tension is reflected in the central pillar of contract law - the consideration doctrine.
7 To the extent that these may now have statutory justification.
8 In the United States.
9 In Commonwealth countries.
10 The specific and important question of negligence in contract performance is not treated in what follows.

formulating satisfactory responses in them has been a purely doctrinal one. What body of law can adequately express and justify the appropriate reaction to be made? Fiduciary law - but not only fiduciary law - has regularly had this burden cast upon it, usually quite inappropriately.

A. CAVEAT EMPTOR AND NONDISCLOSURE[11]

A rigid insistence upon the caveat emptor rule is now acknowledged to be capable of producing "singularly unappetizing"[12] results in some instances. As a consequence there is an emerging trend to insist upon disclosure to prevent undue advantage taking in dealings and this in recognition of the view that there is a widening "array of contexts where one party's superior knowledge of essential facts renders a transaction without disclosure inherently unfair."[13] But if, in some circumstances, disclosure is to be coerced, what doctrinal vehicle can best accomplish this? Those few established doctrines we have which required disclosure in specific contexts - insurance proposals,[14] suretyship agreements[15] and vendor-purchaser transactions[16] - provided no useful basis for greater generalisation. United States jurisdictions, seeing in fiduciary law a ready made disclosure obligation in dealings between fiduciary and beneficiary, were prepared with varying enthusiasm to exploit the 'fiduciary relationship' to exact disclosure in contracting. That relationship ran the risk of becoming as fluid as the circumstances warranting disclosure:[17] it began to look like an "accordion term".[18] More recently some jurisdictions have severed this nexus with fiduciary law and have gone directly to a limited tort of nondisclosure in 'business transactions' to complement their more developed contractual doctrine of unilateral mistake.[19] To the extent that Australian and Canadian law has used equitable doctrine for this purpose it has, in the main, relied upon the unconscionable dealings jurisdiction, the lack of relevant knowledge of one party being but one of the composite of factors invoked to make out the position of special disadvantage required by that jurisdiction.[20] Equally Canada, though not Australia, has shown some propensity here to be cavalier with fiduciary

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11 For more detailed treatment see P.D. Finn (ed.), *Essays on Torts* (1989), Ch.7; P.D. Finn, "The Fiduciary Principle", in T.M. Youdan (ed.), *Equity, Fiduciaries and Trusts* (1989).
12 Prosser and Keeton, *The Law of Torts*, (5th ed., 1984), 738.
13 *Chiarella* v. *United States* 445 US 222, 248 (1980) *per* Blackmun J.
14 In the *uberrimae fidei* doctrine.
15 *E.g. Behan* v. *Obelon Pty Ltd* [1984] 2 NSWLR 637.
16 *E.g. Tsekos* v. *Finance Corp. of Australia* [1982] 2 NSWLR 347.
17 See *e.g.* the formulations in *Denison State Bank* v. *Madiera* 640 P 2d 1235 (1982).
18 See F. Kessler and E. Fine, "*Culpa in Contrahendo*, Bargaining in Good Faith and Freedom of Contract: A Comparative Study", (1964) 77 *Harv L Rev* 401, 444.
19 See *Restatement, Second, Torts*, S.551; *Restatement, Second, Contracts*, S.161.
20 See *e.g. Commercial Bank of Australia Ltd* v. *Amadio* (1983) 151 CLR 447; *National Australia Bank Ltd* v. *Nobile* (1988) ATPR 40-856.

relationships.[21] For the purposes of Australian law pressure on the fiduciary principle to sanction nondisclosure in ordinary contractual dealings seems now unlikely and this for the reason that we have discovered that section 52 of the Trade Practices Act 1974 (Cth) is more than equal to this burden as well.[22]

B. PREJUDICIAL ACTION TAKEN BEFORE AGREEMENT

Parties may so conduct themselves in anticipation of agreement being reached between them as to make it unfair and unjust for one, by terminating negotiations or otherwise, to act to his own advantage or to the other's prejudice without attracting some measure of legal responsibility to that other. The issues we now more readily perceive to arise here are ones of risk allocation and of protecting reasonable expectations or reliance. The two major bodies of law which are assuming roles in remedying such injustice as can arise are estoppel[23] and restitution (or unjust enrichment).[24] The matter germane to fiduciary law which warrants note in this context is that in this decade we have witnessed its invocation to protect parties who have negotiated for, but have not formally agreed upon, a relationship which itself will be fiduciary (usually a partnership or a fiduciary joint venture).[25] Equally, as is now well accepted, fiduciary law will in the guise of the action for breach of confidence protect confidential information disclosed in and for the purposes of contractual negotiations.[26]

C. ADVANTAGE TAKING IN CONTRACTING

The contractual paradigm presupposes the bargaining of independent parties competent to preserve their own interests. Acknowledging that the

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21 See *Standard Investments Ltd* v. *C.I.B.C.* (1985) 22 DLR (4th) 410 - an influential decision.

22 See *e.g. Henjo Investments Pty Ltd* v. *Collins Marrickville Pty Ltd* (1988) ATPR 40-850; *Finucane* v. *New South Wales Egg Corporation* (1988) 80 ALR 486; *Aliotta* v. *Broadmeadows Bus Service Pty Ltd* (1988) ATPR 40-873; and *cf. Kabwand Pty Ltd* v. *National Australia Bank Ltd* (1989) ATPR 40-950.

23 See *e.g. Crabb* v. *Arun District Council* [1976] Ch 179; *Walton Stores (Interstate) Ltd* v. *Maher* (1988) 164 CLR 387 *Drennan* v. *Star Paving Co.* 333 P 2d 757 (1958); see also *Waverley Transit Pty Ltd* v. *Metropolitan Transit Authority,* unreported Supreme Court of Victoria, 19 August 1988; *Austotel Pty Ltd* v. *Franklins Selfserve Pty Ltd* (1989) 16 NSWLR 582.

24 See *e.g. Sabemo Pty Ltd* v. *North Sydney Municipal Council* [1977] 2 NSWLR 880; *Dickson Elliot Lonergan Ltd* v. *Plumbing World Ltd* [1988] 2 NZLR 608.

25 See *e.g. United Dominions Corp. Ltd* v. *Brian Pty Ltd* (1985) 157 CLR 1; *Fraser Edmiston Pty Ltd* v. *A.G.T. (Qld) Pty Ltd* [1988] 2 Qd R 1; *Marr* v. *Arabco Traders Ltd* (1987) 1 NZBLC 102, 732; *Van Dijk* v. *McCracken,* unreported, High Court of New Zealand, 30 June 1987; but *cf. Lac Minerals Ltd* v. *International Corona Resources Ltd,* unreported, Supreme Court of Canada, 11 August 1989.

26 See *e.g. Seager* v. *Copydex Ltd* [1967] 1 WLR 923; *Talbot* v. *General Television Corp. Pty Ltd* [1980] VR 224; *A.B. Consolidated Ltd* v. *Europe Strength Food Co. Pty Ltd* [1978] 2 NZLR 515; *Lac Minerals Ltd* v. *International Corona Resources Ltd, ibid.*

reality is often otherwise has produced a greater sensitivity in the law to the possible exploitation or manipulation of one party by the other in the contracting process itself. The translation of that sensitivity into effective legal doctrine has been by no means a happy one in some countries (notably in England). The reason for this is that those doctrines capable of useful revitalisation (the unconscionable dealings jurisdiction in particular) had languished friendless for many years.[27] In the event, unconscionable dealing, fiduciary law and undue influence (if the latter is not merely an exemplification of the former)[28] have all been used and, in some countries, confused in ways which, for Australian purposes, makes the use of foreign authority hazardous in this sphere. English law is the most difficult. In reaction to the unfortunate reasoning of the Court of Appeal in *Lloyds Bank Ltd* v. *Bundy*,[29] unconscionable dealing and undue influence have been merged in an uncertain way[30] and this mix in turn has been divorced from any association with fiduciary law though the two, it is said, can overlap in some circumstances.[31] The English position has little to recommend it. It is more the product of unhappy appellate ruling than of sound and convincing principle. Canada flirted briefly with fiduciary law before accepting its limitations in this context.[32] It now for the most part is content to exploit its own version of unconscionable dealing.[33] In Australia little use has been made of fiduciary law in remedying exploitation and manipulation in contractual dealings save in those cases where, on orthodox grounds, a fiduciary relationship can be found between the parties.[34] Aided by two comprehensive decisions of the High Court,[35] we have been able to use unconscionable dealing in a principled way to provide relief to the specially disadvantaged in their contracting. Within its limited sphere, the law of penalties has been similarly so used.[36]

D. THE PREJUDICIAL EXERCISE OF RIGHTS AND POWERS

The issue here can be put simply. Though authorised or entitled for his own benefit to take a decision or action which bears directly upon the

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27 Such was not the case in Australia largely as a result of the important decision of the High Court in *Blomley* v. *Ryan* (1956) 99 CLR 362.

28 See Finn, "The Fiduciary Principle", note 11 *supra*, 43-6.

29 [1975] QB 326. Put in terms of modern Australian law a relatively straighforward case of unconscionable dealing was decided on highly questionable fiduciary grounds.

30 See *National Westminster Bank PLC* v. *Morgan* [1985] AC 686.

31 *Bank of Credit & Commerce International S.A.* v. *Aboody* [1989] 2 WLR 759, 777-9.

32 See *e.g. First Calvary Financial Savings & Credit Union Ltd* v. *Meadows* (1989) 66 Alta LR (2d) 7.

33 See *e.g. Bertolo* v. *Bank of Montreal* (1986) 57 OR (2d) 577.

34 *E.g. Daly* v. *Sydney Stock Exchange Ltd* (1986) 60 ALJR 371; see also *Westmelton (Vic.) Pty Ltd* v. *Archer* [1982] VR 305.

35 *Commercial Bank of Australia Ltd* v. *Amadio* note 20 *supra; Blomley* v *Ryan* note 27 *supra.*

36 *E.g. Esanda Finance Corp. Ltd* v. *Plessnig* (1989) 84 ALR 99.

interests of the other party, should a contractor be obliged in any circumstances to have regard to the interests of that other in addition to his own and, if necessary, desist from or modify the proposed course of action in consequence where not to do so could be said to be unfair? Put in more concrete terms should rights be able to be exercised, for example, so as to nullify the reasonable expectations of the other;[37] so as to obtain a windfall advantage at the other's expense;[38] in a way that occasions undue and avoidable prejudice to the other's interests;[39] or without reasonable notice, endeavours, *etc.*, where such would be expected?[40]

Though judicial responses have been by no means uniform both within and between common law countries, the emerging trend in case law is one of guarded sympathy for claims to fair dealing by the party adversely affected. But consistent with what has been said earlier in this article, when the need to accord relief has been accepted, the paths taken have been quite diverse: negligence, estoppel, unconscionability, unjust enrichment, fiduciary law and the implied term have all been invoked in varying degrees. For the most part, the issue for the courts, whether openly acknowledged or not, has been whether and to what extent they should commit themselves to an implied term of good faith and fair dealing in contractual performance and enforcement either generally or for limited and specific purposes.[41] But the understandable diffidence in making that commitment has in some contexts at least resulted, for remedial purposes, in contractual relationships being termed fiduciary and the requirement of fair dealing being metamorphosed into a fiduciary duty. This tendency is in evidence in the case law of some United States jurisdictions particularly in relation to commercial transactions. But it is by no means only a United States phenomenon.[42] Thus one finds instances of a distributorship or franchise being said to be fiduciary to no greater purpose than to regulate the exercise of powers under the agreement;[43] of a mortgagee being termed fiduciary to protect the interests of the mortgagor in the exercise of the power of sale;[44] and of majority shareholders being the fiduciaries of the minority to prevent demonstrable unfairness;[45] *etc.* Again it is necessary to

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37 *E.g. Caratti Holdings Co. Pty Ltd* v. *Zampatti* (1978) 23 ALR 655.
38 *E.g. Stern* v. *McArthur* (1988) 62 ALJR 588.
39 *Cuckmere Brick Co. Ltd* v. *Mutual Finance Ltd* [1971] Ch 949.
40 *E.g. Meehan* v. *Jones* (1982) 149 CLR 571; see also *K.M.C. Co. Inc.* v. *Irving Trust Co.* 757 F 2d 752 (1985); *Crawford Filling Co.* v. *Sydney Valve & Filling Pty Ltd,* unreported, New South Wales Court of Appeal, 23 November 1988.
41 On 'good faith and fair dealing' see generally H.K. Lücke, "Good Faith and Contractual Performance", in P.D. Finn (ed.), *Essays on Contract* (1987).
42 See *e.g. Offshore Mining Co. Ltd* v. *Attorney-General,* unreported, Court of Appeal of New Zealand, 28 April 1988.
43 *E.g. Arnott* v. *American Oil Co.* 609 F 2d 873 (1979) - this represents a minority view in the U.S.: see *Rickel* v. *Schwinn Bicycle Co.* 192 Cal Rptr 732 (1983); *Dunfee* v. *Baskin-Robbin Inc.* 720 P 2d 1148 (1986).
44 *E.g. Murphy* v. *Financial Development Corp.* 495 A 2d 1245 (1985).
45 *E.g.* 18A Am Jur 2d, S.764 ("Corporations").

note that there is nothing in Australian law to suggest our courts will follow such paths.[46] Nor should they. The fair dealing issue here is simply not a fiduciary one. The right to act self-interestedly is being curtailed, not denied.

A conclusion one can draw from the brief comparative survey above is that Australia, more clearly so than other common law countries, has remained immune from an unprincipled penetration of the fiduciary principle into ordinary contractual dealings. Three factors have contrived this happy state: first, the revitalisation of the unconscionable dealings doctrine and the more general elaboration of an unconscionability principle have parallelled growing judicial preparedness to scrutinise the propriety of conduct in contract formation and performance and these are more obviously suited to that end; secondly, appreciation of the possibilities of section 52 of the Trade Practices Act 1974 (Cth) has obviated in considerable degree the need to resort to contrivances to sustain intervention in relationships and dealings; and thirdly, the decision of the High Court in *Hospital Products Ltd* v. *United States Surgical Corp.*[47] both dampened excessive enthusiasm for the fiduciary principle and signalled that principle and orthodoxy were to govern its application and development.[48] Fiduciary law, for us at least, is destined to have a very modest role in refurbishing and supplementing contract doctrine. But the impression should not be given that it has thus been made a quite unimportant player in regulating contractual activity. The contrary is the case. With society increasingly dependent upon agents, brokers, advisers and service providers ('reliance' relationships) and with commercial activity commonly being conducted through cooperative business arrangements ('partnership' relationships) a significant part of modern contractual activity occurs in contexts, or results in relationships, which can attract fiduciary responsibilities.

III. CONTRACTUAL RELATIONSHIPS - FIDUCIARY RELATIONSHIPS

It is so often the case that what we accept as of course is by no means easy to justify convincingly. We assume, doubtless correctly, that an ordinary contractual relationship (*e.g. of sale or loan*) is not fiduciary: "something more is needed."[49] But the justification for this assumption is by no means

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46 See *e.g. Hospital Products Ltd* v. *United States Surgical Corp.* (1984) 156 CLR 41; *Australian Oil & Gas Corp. Ltd* v. *Bridge Oil Ltd,* unreported, New South Wales Court of Appeal, 12 April 1989.

47 *Ibid.*

48 The Hon. Mr Justice G.A. Kennedy in P.D. Finn (ed.), *Equity and Commercial Relationships* (1987), 13-15.

49 *Cf. Committee on Children's Television Inc.* v. *General Foods Corp.* 673 P 2d 660, 675 (1983).

self-evident and it cannot be arrived at by any process of strict legal reasoning. A contracting party, ordinarily, is bound at least to do some prescribed act or acts for the other's benefit and can be relied upon for this: such is the effect of the consideration doctrine. A fiduciary, ordinarily, is obliged to act in the beneficiary's interests in some particular matter or matters and can be relied upon for that. Yet despite the apparent similarity we hold there is a difference. It is one thing to act for another's benefit. It is another to act in that other's interests. When we describe a relationship as being fiduciary we are saying not only that it possesses certain characteristics but also that we wish to exact a particular standard of conduct (*i.e.* loyalty) from one or both parties to it. An ordinary contractual relationship for its part may possess many if not all of the supposed characteristics of a fiduciary relationship, but despite this the conduct standard we wish to exact from contractors is a different one. This can be illustrated simply. A fiduciary is accountable for profit made from a breach of fiduciary duty. A contractor is not liable, as a rule, for profit made from breach of contract. To account for this, as also for the possible significance of the fiduciary principle to contracting parties, three questions need answering:

(1) What is a fiduciary relationship, and when and why is it so?
(2) Why is a simple contractual relationship not of itself fiduciary?
(3) When will a contract create a fiduciary relationship or be subject to a fiduciary regime?

As the three questions interlock they cannot conveniently be considered separately.

First, a brief note on the apparent burden of fiduciary law. At the core of many legal doctrines which impact on contracting parties (*e.g.* unconscionable dealing, section 52 of the Trade Practices Act 1974 (Cth), *etc.*) is the legal intent to prevent unfair advantage taking or unfair prejudice being occasioned. In achieving this, the path taken by the law is essentially one of mediation between the *several* interests of the parties to the dealing. That is not the path of the fiduciary principle. It does not as a rule mediate between or reconcile conflicting interests. Its object is to secure the paramountcy of *one party's* interests in a relationship or, less commonly as in a partnership, of the parties' *joint* interest. The beneficiary's interests are the ones to be protected. And this is achieved through a regime designed to secure loyal service of those interests - a loyalty that is unselfish and undivided. In consequence a fiduciary's conduct may be condemned though it has no adverse effect at all on the beneficiary's interests: a disloyal tendency is enough as the seminal decision of *Keech* v. *Sandford*[50] makes plain.

50 (1726) Sel Cas T King 61; 25 ER 223.

The true nature of the fiduciary principle is revealed in this. It originates, self-evidently, in public policy. To maintain the integrity and utility of relationships in which the (or a) role of one party is perceived to be the service of the interests of the other, it insists upon a fine loyalty in that service. The fiduciary is not to use his position or the power or opportunity it gives him to serve an interest other than his beneficiary's - be this his own or a third party's. Translated into legal doctrine this has produced two, overlapping proscriptions: A fiduciary,

(a) cannot use his position , or knowledge or opportunity obtained in or by reason of it, to his own or to a third party's possible advantage or to the beneficiary's disadvantage; or
(b) cannot, in any matter within the scope of his service, have a personal interest or an inconsistent engagement with a third party,

unless this is freely and informedly consented to by his beneficiary or is authorised by law.[51]

Loyalty is thus exacted, often in a draconian way. But no more than loyalty is exacted. This warrants emphasis. It is not the case that the pure negligence of a lawyer, an agent's excess of authority, a partner's breach of the partnership contract, or a trustee's improvement investment is a breach of fiduciary duty no matter how harmful in fact to the interests of the client, *etc.* Fiduciaries these may be. But if no issue of disloyalty is involved their conduct will be actionable, if at all, for other reasons and on other bases: negligence, breach of contract, breach of trust or whatever. As a Canadian judge tersely put the matter: "[t]he word 'fiduciary' is flung around now as if it applied to all breaches of duty by solicitors, directors of companies and so forth."[52]

For the purposes of contract law a note of caution needs to be sounded about the language of loyalty. Advocates of a doctrine of good faith in contract performance are apt to express the essence of the good faith idea in terms of 'loyalty'.[53] But for them its signification is not that outlined above. It requires 'fidelity' to the bargain and

> a real commitment to the laws which govern contracts, to the contract itself, and, most importantly, to the other party's aims and objectives, provided these are or should be known and understood.[54]

And when is a person expected to be loyal as a fiduciary - when is a relationship fiduciary?

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51 The most explicit and authoritative recognition of the dual themes in the duty of loyalty is to be found in the judgment of Deane J. in *Chan* v. *Zacharia* (1984) 154 CLR 178.
52 *Giradet* v. *Crease & Co.* (1987) 11 BCLR (2d) 361, 362 *per* Southin J.
53 See *e.g.* the excellent discussion in Lücke, note 41 *supra.*
54 *Ibid,* 164.

IV. A FIDUCIARY RELATIONSHIP?[55]

The received judicial wisdom is that it is unwise, perhaps unhelpful, to attempt to provide a general answer to that most basic question: when and why will a relationship be a fiduciary one?[56] Prudent this may be: a useful jurisdiction should not be fettered; "the categories of fiduciary relationship are not closed."[57] But it is, in the end, an endorsement of uncertainty, not of understanding.

To the extent that judges of recent times have attempted to isolate general characteristics common to fiduciary relationships, they have focussed unevenly on two phenomena: first, the capacity (the power or discretion) one party has to affect the interests of the other and the corresponding vulnerability of that other;[58] secondly, the reliance one party has upon the other because of the trust or confidence reposed in, or because of the influence or ascendancy enjoyed by, that other.[59] The seeds, but only the seeds, of understanding are to be found here. One or other, sometimes both, of these phenomena will be present in all fiduciary relationships - as they will be in some measure in all contractual, business and social relationships. These phenomena are clearly important in explaining why the law may wish to supervise conduct in a relationship: the vulnerable, the reliant, understandably, are amongst the law's chosen. But they do not explain why that supervision should necessarily require one party to act loyally in the other's interests. In many instances where either or both are present in a relationship, no more is - or should be - required of one party than that he should not take unconscientious advantage of the other or that he should deal fairly with the other and this, importantly, while still being permitted positively to pursue self-interest. To be fiduciary "something more is needed."[60]

It is generally accepted, though usually without explanation, that there is nothing fiduciary in an ordinary contractual dealing - a sale, a loan and the like. But to give an unexceptionable justification for this conclusion reveals much about how we perceive fiduciary relationships. Commonly enough a simple contract will contain a combination of those factors which at least the fiduciary rhetoric says are important in the genesis of

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55 The following draws significantly on a chapter entitled "The Fiduciary Principle" contributed by the writer to and published in Canada in T.M. Youdan (ed.), *Equity, Fiduciaries and Trusts* (1989).

56 See *e.g.* the opinions expressed in *Hospital Products* v. *United States Surgical Corp.*, note 46 *supra.*

57 A perennially repeated observation.

58 For the most recent examination of these see *Lac Minerals Ltd* v. *International Corona Resources Ltd,* note 25 *supra.*

59 See *e.g. United Dominions Corp. Ltd* v. *Brian Pty Ltd* note 25 *supra; Royal Bank of Canada* v. *Aleman* (1988) 57 Alta LR (2d) 341; *Lloyds Bank Ltd* v. *Bundy* note 29 *supra, per* Sachs L.J. U.S. authority is legion which emphasises this.

60 *Cf. Committee on Children's Television Inc.* v. *General Foods Corp.*, note 49 *supra,* 675.

fiduciary relationships. First inequality. Rarely, if at all, do contracting parties deal with each other from positions of actual equality: relative need, unequal access to material information and varying skill and judgment make inequality in some degree an endemic feature of contracting. Second, acting for the other's benefit. The consideration doctrine ordinarily requires that each party do an act or acts for the other's benefit. Third, reliance and vulnerability. To secure the anticipated benefits of the relationship each party is compelled to rely upon the other's performance and to that extent is in a position of vulnerability. Fourth, trust and confidence. A party's commitment to a dealing and his expectations in it may well be informed by trust in the integrity, reliability, skill or fairness of the other.[61] Fifth, cooperative endeavour. In many dealings, particularly long term ones, cooperation (often in a high degree) may be necessary if the anticipated benefits of the contract are to be realised. But for all this we still affirm[62] that a simple contractual relationship is not fiduciary.

It was open to us to say that at least to the extent that each party to a contract is obliged to do an act or acts for the other's benefit, to that extent he is obliged to act in that other's interest - to be that other's fiduciary. This, for example, would have settled in a quite different way than is now the case, argument over disgorgement of profits made by an "efficient contract breaker."[63] But as noted earlier, we have not taken this path. We have not equated an obligation to do an act for another's benefit with an obligation to serve that other loyally. It is likewise with the trust, reliance, vulnerability *etc.* which may be present in a contractual relationship. Important these may be. Abused these may be. But we do not see all or any of them as leading to the conclusion that the party who trusts, relies, *etc.* is, as a result, ordinarily entitled to expect that the other will act in his interests. He may, often will, be entitled to expect that advantage will not be taken of him; that obligations will be honoured and fairly so; that cooperation will be forthcoming, *etc.* And we provide a significant array of doctrines (both common law and equitable) which can protect such expectations. But even these we see as doing no more than ensuring that the parties' chosen road of individual self-interest is pursued fairly by each. In short such is the character we attribute to a simple contractual

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61 See *e.g. Asleson* v. *West Branch Land Co.* 311 NW 2d 533, 539-40 (1981); *Citizens & Southern National Bank, Augusta* v. *Arnold* 240 SE 2d 3, 4 (1977); *Burwell & South Carolina National Bank* 340 SE 2d 786, 790 (1986); *Royal* v. *Bland Properties Inc.* 333 SE 2d 145, 147 (1985); *Haroco Inc.* v. *American National Bank & Trust Co. of Chicago* 647 F Supp 1026, 1035 (1986).

62 *E.g. Satellite Financial Planning Corp.* v. *First National Bank of Wilmington* 633 F Supp 386, 401 (1986).

63 See *e.g.* E.A. Farnsworth "Your Loss or My Gain? The Dilemma of the Disgorgement Principle in Breach of Contract" (1985) 94 *Yale LJ* 1339; G.Jones "The Recovery of Benefits Gained from a Breach of Contract" (1983) 99 *LQR* 443; P. Birks "Restitutionary Damages for Breach of Contract" [1987] *Lloyds M & CLQ* 421.

relationship that we do not see its nature and purpose in the usual case as being other than to serve the several interests of each party.

At bottom the fiduciary relationship question is a question of relationship characterisation - and one arrived at in the consciousness that a fiduciary finding carries with it an exacting loyalty obligation. It is one not answered by the application of rigid formulae. A variable mix of legal phenomena, factual phenomena, presumptions, and public policy, guide and structure the judgment made when a character is to be attributed to a relationship. Some relationships we perceive as serving the *several interests* of each party and, as such are not fiduciary. That perception, it may be noted, is often expressed obliquely in our law in the observation that the parties (usually contractors) are dealing at arm's length and on an equal footing.[64] Some relationships on the other hand serve the *interests of one party alone* or, less commonly as with partnerships, *a joint interest* of the parties and are fiduciary in consequence. And yet some again, having discrete parts and purposes, may be fiduciary in part, non-fiduciary in part.[65] Importantly, our perception whether or not a relationship is fiduciary does not turn simply upon whether it allows the alleged fiduciary to derive benefits from it. Fiduciaries are not expected to be charitable institutions.[66] Benefit derivation, though important, is not of itself determinative of the fiduciary question: an agent, a doctor, a company director or a partner may receive remuneration for services rendered but will not be the less a fiduciary for this. The critical matter is our evaluation of the nature and purpose of a relationship (or of a part of it) and of the roles to be ascribed to one or both parties in it: whose interests is the relationship structured or contrived to serve and who in the relationship is responsible for serving them? Here the case law, more often in what it does than in what it says, indicates how and why that determination is arrived at.

The cases suggest that there are two distinct approaches to relationship characterisation, though they overlap in some factual contexts. They entail quite different inquiries. The first requires an analysis of the *actual legal incidents* of a relationship itself in the setting in which it occurs and from this a conclusion is arrived at as to the purpose to be attributed to the relationship and to a party's role in it.[67] Thus the *Restatement, Second, Agency,*[68] for example, asserts unequivocally of the principal and agent relationship that "an agent is a fiduciary with respect to matters within the

64 The observations to this effect in the judgment of the High Court in *Keith Henry & Co. Pty Ltd* v. *Stuart Walker & Co. Pty Ltd* (1958) 100 CLR 342, 351 are regularly repeated in response to fiduciary arguments.

65 See *Hospital Products* v. *United States Surgical Corp.* note 46 *supra*, 98 *per* Mason J.

66 *Cf. Dale* v. *Inland Revenue Commissioners* [1954] AC 11.

67 For a recent illustration of this process see *Australian Oil & Gas Corp. Ltd* v. *Bridge Oil Ltd* note 46 *supra.*

68 S.131

scope of the agency."[69] The second approach focuses upon the presence (actual or presumed) of *factual phenomena* in a relationship - an ascendancy or influence acquired, a dependence or reliance conceded, a trust or confidence given - and from these a conclusion is arrived at as to the character to be attributed to the relationship and as to the role of the 'superior' party in it. To the extent that presumptions are employed here they result (i) from generalisations we make, as a matter of received wisdom, about the likely relative positions of parties in particular types of relationship, for example, solicitor-client or doctor-patient, or (ii) from the "trust and confidence", *etc.* we are prepared to assume certain types of functionary invite or engender - as is the case with at least some advisory or service functions. The end point of both approaches is to ascertain whether the parties are so circumstanced that, for some or all purposes of the relationship, the one has the right to expect that the other will act in the former's interests (or, in some instances, in their joint interest) to the exclusion of his own several interests.

The apparent differences in method employed by the High Court in *Hospital Products Ltd* v. *United States Surgical Corporation*[70] and *United Dominions Corp. Ltd* v. *Brian Pty Ltd*[71] in characterising the respective relationships in issue (manufacturer-distributor, and parties negotiating for a joint venture) stem from the fact that the circumstances of the former case raised, essentially, the first of the above approaches, while the latter involved the second. For convenience in exposition the two approaches will be differentiated by describing the one as identifying 'relationships fiduciary *in law*', the other, 'relationships fiduciary *in fact*'. Of importance to contractors, the former of the approaches is the one of relevance when the question is: Does a contract itself create a fiduciary relationship? It is the latter which is more commonly invoked when the question is: Is the contractual dealing one between parties in a fiduciary relationship?[72]

What should be emphasised in what follows is that the writer has not considered that difficult but somewhat discrete class of case where a person, whether or not under contract, is given ownership, possession or control of property or confidential information but no right or only a limited right to use it for his own benefit. This class of fiduciary relationship is assuming growing importance in commercial and contractual contexts:

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69 The contrary view - see *e.g. Hospital Products* v. *United States Surgical Corp.* note 46 *supra*, 71-2; *R.H. Deacon & Co. Ltd* v. *Varga* (1972) 30 DLR (3d) 653 - confuses the existence of a fiduciary relationship with its *scope* in a given case.

70 Note 46 *supra.*

71 Note 25 *supra.*

72 There is no rigid dichotomy here. A contract between a trustee and beneficiary, for example, does not involve resort to the second approach to determine whether the parties antecedently stand in a fiduciary relationship.

(a) in relation to monetary receipts in agency-type relationships;[73]
(b) in the devices used to guard against the possible insolvency of a party to a commercial contract;[74]
(c) in affording secrecy protection;[75] and
(d) in circumventing the 'efficient breach' notion in vendor-purchaser transactions.[76]

It is here also that the issue foreshadowed in Justice Mason's dissenting judgment in *Hospital Products Ltd* v. *United States Surgical Corp.*[77] looms for future resolution. In holding an exclusive distributor to be a fiduciary in protecting and promoting the manufacturer's "product goodwill", his Honour has opened for consideration an issue as important as it is difficult. Are property and confidential information the only interests ('things') we are prepared through a fiduciary regime to protect from misuse or misappropriation. Or are there other interests ("intangible elements of value")[78] - names,[79] business opportunities or connections,[80] product goodwill, *etc.* - which, in particular contexts, can have such economic or other value to their 'owner' as would warrant a like protection?

V. CONTRACTS AND RELATIONSHIPS FIDUCIARY IN LAW

Whether or not a contract itself creates a fiduciary relationship can be determined in many, though by no means all, instances by an evaluation of its formal incidents in the setting in which it occurs. From an appraisal,

i) of the manner in which, and the apparent purpose for which, rights, powers, duties and discretions are allocated by the contract;
ii) of the character of the parties to the contract, the manner of its negotiation and its commercial or other setting; and[81]
iii) of the actions lawfully open to a party notwithstanding the contract,[82]

one can for the most part determine whether the role and reason of a party

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73 *E.g. Westpac Banking Corp. Ltd* v. *Savin* [1985] 2 NZLR 41; *'The Tiiskeri'* [1983] 2 Lloyds R 658.
74 See the Hon. Mr Justice L.J. Priestley, "The Romalpa Clause and the *Quistclose* Trust", in P.D. Finn (ed.), *Equity and Commercial Relationships* (1987).
75 The case law is now legion.
76 See *Bunny Industries Ltd* v. *F.S.W. Enterprises Pty Ltd* [1982] Qd R 712.
77 Note 46 supra.
78 The description is Mr Justice Dixon's in *Victoria Park Racing & Recreation Grounds Co. Ltd* v. *Taylor* (1937) 58 CLR 479, 509.
79 *Cf. English* v. *Dedham Vale Properties Ltd* [1978] 1 WLR 93.
80 *Cf. Russell* v. *Austwick* (1826) 1 Sim 52; *Fraser Edmiston Pty Ltd* v. *A.G.T. (Qld) Pty Ltd* [1988] 2 Qd R 1.
81 For a recent decision with emphasis on such factors see *Australian Oil & Gas Corp. Ltd* v. *Bridge Oil Ltd* note 46 *supra.*
82 See *e.g. Hospital Products Ltd* v. *United States Surgical Corp.* note 46 *supra.*

in a contract (or in a discrete part of it) can properly be said to be to serve his own interests, the parties' joint interests, or the interests of the other party. In the Californian decision *Rickel* v. *Schwinn Bicycle Co.*,[83] for example, consideration of a distributorship agreement led to the finding that there was nothing fiduciary in it, the court concluding its purpose to be to promote the "non-mutual profit" of the parties and noting in this the right each had to make a range of decisions adverse to the other's interests.[84]

The judgmental process at work here is by no means a mechanical or value neutral one and it is not indifferent to the consequences that the imposition of a duty of loyalty may have upon a contractor both within and beyond the contract. Particularly with negotiated contracts in commercial settings, Australian courts have demonstrated considerable reluctance to supplement contractual obligations with fiduciary ones unless these are "consistent with and conform to" the terms of the contract itself.[85] Even where such a contract expressly manifests a fiduciary intent, the courts have demonstrated a like reluctance to give the duty of loyalty any greater effect than is necessary to effectuate the purpose of the contract according to its terms.[86] In a judicial environment which is increasingly receptive to obligations of good faith and fair dealing in contract performance,[87] this reticence in constraining commercial activity by fiduciary duties may now reflect, not an unpreparedness to set standards of conduct for commercial parties, but a concern to impose ones appropriate to what should be expected in and of business dealings.

Four additional comments should be made of the process of relationship characterisation under discussion.

First, it excludes as of course from any question of fiduciary responsibility those contractual rights and powers which a party has to protect or to further his own interests. For this reason, and despite occasional United States authority to the contrary,[88] there is nothing fiduciary, for example, in a mortgagee's power of sale, a franchisor's discretionary power to terminate the franchise, or a broker's power to close out a margin contract, drastic though the effect of the exercise of each may be on the other party's interests. Such powers, though, can raise fair dealing questions in a critical form. It is noteworthy that those United

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83 Note 43 *supra.*

84 Similar emphases can be found, *e.g.* in *Jirna Ltd* v. *Mister Donut of Canada Ltd* (1971) 22 DLR (3d) 639; affirmed (1973) 40 DLR (3d) 303; *Hospital Products Ltd* v. *United States Surgical Corp.*note 46 *supra, per* Gibbs C.J.

85 *Hospital Products Ltd* v. *United States Surgical Corp.* note 46 *supra,* 97 *per* Mason J.; *Australian Oil & Gas Corp. Ltd* v. *Bridge Oil Ltd* note 46 *supra.*

86 See *e.g. Noranda Australia Ltd* v. *Lachlan Resources N.L.* (1988) 14 NSWLR 1.

87 See P.D. Finn "Commerce, the Common Law and Morality" (1989) 17 *Melb U LR* 87.

88 See *e.g. Murphy* v. *Financial Development Corp.* 495 A2d 1245 (1985) - a mortgage case; *Arnott* v. *American Oil Co.* 609 F 2d 873 (1979) - a franchise case; and *cf. Commercial & General Acceptance Ltd* v. *Nixon* (1981) 56 ALJR 130, 134.

States decisions which have been lured to the 'fiduciary' in the examples given, have used it to no greater purpose than to exact good faith and fair dealing.[89]

Secondly, subject to a significant exception noted below, relatively little difficulty has been experienced where the fiduciary issue has been no more than whether the purpose of a contractual relationship is to serve both parties' several interests or the interests of one alone. Agency contracts, for example, are characterised as fiduciary as of course. Their allocation of rights and responsibilities and the reasons for this warrant, as a rule, one party being entitled to expect that the other will act in his interests within the scope of the agency. Loan, sales and mortgage contracts equally are not seen as fiduciary unless specific and atypical provisions in the contract contrive a contrary conclusion (usually in relation to a discrete part of the relationship): a *Quistclose* trust in a loan; a reservation of title clause in a sales agreement; or a mortgagee's power to control disbursements under a mortgage contract.[90] The atypical case apart, the structure and design of these relationships we do not perceive as warranting either party being entitled to expect that the relationship exists other than to serve each equally and individually.

Thirdly, greater difficulties have surfaced when the characterisation issue is whether the relationship, or powers in it, exists for the parties' joint rather than for their several interests. This has been particularly so in what may be described as 'cooperative contractual enterprises': non-partnership joint ventures;[91] distributorships, franchises, licensing agreements and the like. An initial problem lies, often, in identifying the true nature of the relationship itself. What in name is a joint venture may in fact be a partnership,[92] a distributorship in fact a true agency - and thus both be fiduciary.[93] Both distributorships and franchises exist as a rule to serve the 'non-mutual profit' of each party and should not be found fiduciary save in exceptional circumstances.[94] The great preponderence of

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89 For an excellent example see *Dunfee* v. *Baskin-Robbins Inc.* 720 P 2d 1148 (1986); and see D.A. De Mott "Beyond Metaphor: an analysis of Fiduciary Obligation" (1988) *Duke LJ* 879.

90 See *e.g. Garbish* v. *Malvern Federal Savings & Loan Assoc.* 517 A 2d (1986).

91 See *e.g.* The Hon. Mr Justice B.H. McPherson "Joint Ventures" and the commentary thereon in P.D. Finn (ed.), *Equity and Commercial Relationships* (1987).

92 See *e.g. Canny Gabriel Jackson Advertising Pty Ltd* v. *Volume Sales (Finance) Ltd* (1974) 131 CLR 321; *United Dominions Corp. Ltd* v. *Brian Pty Ltd* note 25 *supra* and *cf. Reynes-Retana* v. *PTX Food Corp.* 709 SW 2d 695 (1986).

93 See *e.g. Arnott* v. *American Oil Co.* note 88 *supra.*

94 That is (i) where a particular provision of the agreement on its proper construction is designed to be exercised by one party in their joint interest or in the interest of the other party; (ii) if a 'trusteeship' is created of an asset in the relationship: and see the dissenting judgment of Mason J. in *Hospital Products Ltd* v. *United States Surgical Corp.* note 46 *supra*; (iii) if the contract is such that one party is required to surrender all independence in the relationship to the other party.

authority accords with this view.[95] The non-partnership joint venture is more problematic. Though ordinarily structured for the several profit of each party, its management provisions may well attract fiduciary incidents and, because of the relationships it may create to property and/or to confidential information, it may be fiduciary for other reasons.[96]

Fourthly, in one large and practically important class of case, the characterisation process under discussion is quite indecisive if not potentially misleading. This is where one party, usually for an agreed remuneration, provides a service to the other: doctor-patient, automobile servicer-customer, information provider-client, tradesman-customer, solicitor-client, travel agent-client and the like. In such relationships where one is the actor, the other the payer, a characterisation based on the incidents of the legal relationship itself loses utility. Some, but not all, of the above examples are characterised as fiduciary. However, in reaching this conclusion a new and variable set of factors takes on importance. The service provider class seems to mark the point of transition from a process which determines whether a relationship is fiduciary in law to one which determines whether it is fiduciary in fact, as here factual phenomena and more overt considerations of public policy enter the law's equation.

VI. CONTRACTS AND RELATIONSHIPS FIDUCIARY IN FACT

The issue here for a contracting party is not whether the contract itself creates a fiduciary relationship but whether the contract will be said to be one between parties to such a relationship, with its propriety in consequence to be tested by fiduciary law.[97] The topic is a large and important one which, for reasons of length, can only be dealt with selectively.

It has long been accepted that a duty of loyalty can arise ad hoc and this because in the actual circumstances of a relationship in which a contractual dealing occurs, the nature of one party's trust or confidence in the other, the corresponding power to influence or opportunity to deceive enjoyed by the other, are such as to warrant the imposition of a duty of

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95 For recent U.S. decisions see *C. Peppas Co. Inc.* v. *E. & J. Gallo Winery* 610 F Supp 662 (1985); *W.K.T.Distributing Co.* v. *Sharp Electronics Corp.* 746 F 2d 1333 (1984); *Rickel* v. *Schwinn Bicycle Co.* note 43 *supra*; *St Joseph Equipment* v. *Massey-Ferguson Inc.* 546 F Supp 1245 (1982); *Dunfee* v. *Baskin-Robbins Inc.*note 89 *supra; Power Motive Corp.* v. *Mannesmann Demag Corp.* 617 F Supp 1048 (1985); *Chmieleski* v. *City Products Corp.* 660 SW 2d 275 (1983). In Canada *Jirna Ltd* v. *Mister Donut of Canada Ltd* note 84 *supra.* In Australia see *Hospital Products Ltd* v. *United States Surgical Corp.* note 46 *supra.*

96 See *e.g.* P.D. Finn "Fiduciary Obligations of Operators and Co-Venturers in Natural Resources Joint Ventures", (1984) *AMPLA Yearbook* 160; see also *Noranda Australia Ltd* v. *Lachlan Resources N.L.* note 86 *supra*; *Australian Oil & Gas Corp. Ltd* note 46 *supra.*

97 See *e.g. Daly* v. *Sydney Stock Exchange Ltd* note 34 *supra.*

loyalty.[98] Here the fiduciary question is essentially factual in character. And here the rhetoric of trust, confidence, dependence, influence, ascendancy and the like comes into its own. It is not a difficult conception that one person should be obliged to show loyalty to another when that other, generally, or in some matter, in fact so relies upon that person as to place the effective protection and promotion of his interests in his hands or is invited by that other so to rely and does so. No less than in a formal trust relationship, if we entrust our interests to another person's care, we should be entitled to expect that that other will act in our interests - at least where that other knows or has reason to know[99] we are so doing and apparently accepts this.[100] The basal idea is simple enough. But its translation into effective fiduciary doctrine has been problematic for what is essentially a practical reason. In a very real sense we do on a day-to-day basis rely upon others, place our trust in others, for the advancement of our own interests. We can do this simply in our contracting, or in obtaining advice, information or the provision of a service. Here we can and do 'entrust' to others a role in the furtherance of our interests. But equally we have not said, and are unlikely to say, that such reliance relationships of themselves are fiduciary ones: again "something more is needed." The difficulty, however, lies in isolating that "something more" especially when, as here, one is supposedly concerned with factual phenomena in relationships - trust, influence and the like. My trust in a motor vehicle mechanic may, in fact, greatly exceed my trust in a lawyer yet only the latter is likely to be found to be a fiduciary. At the margins public policy is a potent element in the matter.

Though the raw materials of a fiduciary finding here are a trust and confidence reposed, a dependence or reliance conceded, or an ascendancy or influence acquired, the important matter is the character to be attributed to the role the alleged fiduciary has, or should be taken as having,[101] in the circumstances of the relationship. It must so implicate that person in the conduct of the other's affairs or so align him with the protection and promotion of that other's interests (or their joint interest) that "foundation"[102] exists for the fiduciary expectation: it must be such as could properly entitle that other to expect that he will act in that other's interests (or their joint interests) - at least to the extent that he is practically enabled to affect those interests by action, recommendation, advice or otherwise.[103]

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98 See *e.g. Union Fidelity Trustee Co. of Australia Ltd* v. *Gibson* [1971] VR 573; *Hayward* v. *Bank of Nova Scotia* (1985) 19 DLR (4th) 758; *O'Sullivan* v. *Management Agency & Music Ltd* [1985] QB 428; *Zeilenga* v. *Stelle Industries Inc.* 367 NE 2d 1347 (1977).

99 *Cf. Royal Bank of Canada* v. *Aleman* (1988) 57 Alta LR (2d) 341.

100 See *e.g. Croce* v. *Kurnit* 565 F Supp 884 (1982).

101 *Ibid.*

102 *Cf. Burwell* v. *South Carolina National Bank* 340 SE 2d 786, 790 (1986).

103 *Consolidated Oil & Gas Inc.* v. *Ryan* 250 F Supp 600, 604 (1966); *City of Harrisburg* v. *Bradford Trust Co.* 621 F Supp 463, 473 (1985).

Where the phenomena of trust and confidence, of dependency and reliance, or of ascendancy and influence are of importance in this is in the light they throw on the role which in the circumstances, one party has assumed, or should be taken as having assumed, in the relationship. First, it is obviously not enough simply to show that some degree of personal trust and confidence are present: these are commonly placed in the skill, integrity, fairness and honesty of the other party to an ordinary contractual dealing.[104] Secondly, it is obviously not enough to show that there is dependence or reliance by one party on the other: these are characteristic of all relationships where performance of some sort is required of another. Thirdly, it is obviously not enough to show merely an ascendant position or a capacity to influence: parties commonly are in unequal positions, and in many instances in contractual dealings representations are made as of course with the object of, and in fact, influencing the other party. Elements of all of the above may be present in a relationship - and consumer transactions can illustrate this - without it being in any way fiduciary. What is necessary to be shown is that the nature of the trust and confidence given or invited, the dependence or reliance conceded, or the ascendancy and influence acquired are of such nature in the circumstances as to warrant or require a fiduciary responsibility in the trusted *etc.* party. What in the end one is seeking to identify is a relationship in which one party has in fact relaxed, or is justified in believing he can relax, his self-interested vigilance or independent judgment because, in the circumstances of the relationship, he reasonably believes or is entitled to assume that the other is acting or will act in his (or in their joint) interests. The trust reposed or invited, the ascendancy acquired, *etc.* must in the circumstances be of such a nature as to be capable of sustaining this conclusion.

In the contracting context the cases must be rare indeed in which a fiduciary relationship will arise so as to regulate the contract of *strangers* who come together for the purpose of a dealing which does not itself create a fiduciary relationship. Whatever may transpire in the negotiating process, truly exceptional circumstances would need to exist before one party could properly say that, despite the other's manifest self-interest in the matter, that other nonetheless was obliged to act in his interests in the process leading to contract. Save in one distinctive case, a fiduciary finding virtually presupposes some antecedent association between the parties which itself attracts the duty of loyalty to their contracting - an advisory[105] or tutelary relationship,[106] a managing or directing role

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104 *E.g. Royal* v. *Bland Properties Inc.* 333 SE 2d 145, 147 (1985).

105 *E.g. Daly* v. *Sydney Stock Exchange Ltd* note 34 *supra; O'Sullivan* v. *Management Agency & Music Ltd* note 98 *supra; Hayward* v. *Bank of Nova Scotia* (1985) 45 OR (2d) 542; (1985) 51 OR (2d) 193.

106 *E.g. Tufton* v. *Sperni* [1952] 2 TLR 516.

assumed in the affairs of the other,[107] *etc.* The distinctive case is where the parties, even though strangers, are negotiating for a contract which itself creates a fiduciary relationship, for example, a partnership of a fiduciary joint venture.[108] Here the relationship negotiated for is itself seen as contriving such trust as one party is entitled to have in the conduct of the other in advance of formal agreement. While allowing for self-interest in the formulation of and commitment to the bargain, the courts have been prepared to intrude fiduciary law into the pre-contract arena to prevent deceptive conduct[109] or the usurption of the business opportunity the subject of the negotiations.[110]

The sphere of contracting in which the ad hoc (or 'factual') fiduciary question has been most controversial in modern times is that of on-going consumer relationships and particularly that of banker and customer, borrower or guarantor. The banking case law warrants brief mention.

Judicial statements are many that the banker-consumer or banker-borrower relationship is not fiduciary *per se*; that banks have interests of their own to serve in such relationships;[111] that banks "are not charitable institutions".[112] But alongside this is a growing acknowledgement that the nature of banking services to borrowers and customers has undergone considerable transformation over time;[113] that financial transactions can have a complexity which can place banks in a position of superior knowledge and understanding;[114] and that banks perform "vital public services" in modern society.[115] In combination these factors can attract significant reliance upon banks in their client dealings[116] - and a reliance often invited by banks themselves. In some United States jurisdictions this perception of the relationship has led to its being seen as having a latent fiduciary potential[117] - a potential which can be actualised, exceptionally, by an acknowledged disparity in knowledge

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107 *E.g. Coleman* v. *Myers* [1977] 2 NZLR 225; *Union Fidelity Trustee Co.* v. *Gibson* [1971] VR 573; *Deist* v. *Wachholz* 678 P 2d 188 (1984).

108 All joint ventures are not such in Australian law: see *United Dominions Corp. Ltd* v. *Brian Pty Ltd* note 25 *supra.*

109 *E.g. ibid.*

110 *E.g. Fraser Edmiston Pty Ltd* v. *A.G.T. (Qld) Pty Ltd* note 80 *supra; Marr* v. *Arabco Traders Ltd,* unreported, High Court of New Zealand, Tompkins J., 22 May 1987; *Cf. Lac Minerals Ltd* v. *International Corona Resources Ltd,* note 25 *supra.*

111 For an emphatic assertion of this see *Sternberg* v. *Northwestern National Bank of Rochester* 238 W 2d 218, 219 (1976).

112 *National Westminster Bank PLC* v. *Morgan* [1983] 3 All ER 85, 91.

113 See *e.g. Woods* v. *Martins Bank Ltd* [1959] 1 QB 55, 70; *Stewart* v. *Phoenix National Bank* 64 P 2d 101, 106 (1937) - a decision widely cited in U.S. jurisdictions: see K.W. Curtis, "The Fiduciary Controversy: Injection of Fiduciary Principles into the Bank-Depositor and Bank-Borrower Relationship" (1987) 20 *Loyola L Rev* 795.

114 See *e.g. Tokarz* v. *Frontier Federal Savings & Loan Assoc.* 656 P 2d 1089, 1092 (1983).

115 *Cf. Commercial Cotton Co. Inc.* v. *United California Bank* 209 Cal Rptr 551, 554 (1985).

116 See *e.g. Barrett* v. *Bank of America, N.T. and S.A.* 229 Cal Rptr 16, 20-1 (1986).

117 See *e.g. Tokarz* v. *Frontier Federal Savings & Loan Assoc.* note 114 *supra,* 1092; *Barrett* v. *Bank of America, N.T. and S.A., ibid.*

and information,[118] or, more regularly, by a known reliance on the bank for counselling, assistance or information.[119] A similar tendency, though less openly expressed, was apparent in England until terminated abruptly by the House of Lords in *National Westminster Bank PLC* v. *Morgan.*[120] Australian case law by way of contrast, while demonstrating its own preparedness to exact a heightened standard of fair dealing from banks, has abjured the fiduciary in favour of an approach based on unconscionable dealing.[121] In this it has shown a more acute appreciation of the issues and interests involved in dealings with banks. With banks having, and being expected to have a manifest self-interest in their dealings with customers in the provision of financial services, it is difficult to see, save in quite exceptional cases,[122] that customers *etc.* could reasonably be entitled to expect anything other than fair dealing and reasonable care and skill from the bank. In the writer's view the English fiduciary decision, *Lloyds Bank Ltd* v. *Bundy*[123] - the source of much subsequent doctrinal confusion in English law[124] - is only supportable on an unconscionability basis.

VII. CONCLUSION

There are three reasons why one may wish to call a contracting party a fiduciary: first, because on grounds that are orthodox, a fiduciary relationship is there (whether created by the contract or otherwise); secondly, because conduct has occurred in contract formation or performance which excites disapproval but for which there is no other obvious doctrine available for its challenge; and thirdly, because a bountiful remedy system has a capacity to provide relief which registers more accurately than ordinary contract remedies the level of disapproval and sanction appropriate to the actual wrongdoing involved. Examples of all three are clearly in evidence in recent case law, though the latter two far less so in Australian law than elsewhere.

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118 See *e.g. First National Bank in Lenox* v. *Brown* 181 NW 2d 178 (1970) - an extreme case; and see the formulations of the law in *Denison State Bank* v. *Madeira* 640 P 2d 1235 (1982). In Commonwealth countries this factor is much more suggestive of a claim based on the unconscionability principle.

119 *Stewart* v. *Phoenix National Bank* note 113 *supra; Klein* v. *First Edina National Bank* 196 NW 2d 619 (1972); *Deist* v. *Wachholz* 678 P 2d 188 (1984); *Atlantic National Bank of Florida* v. *Vest* 480 So 2d 1328, 1333 (1986); *Barrett* v *Bank of America, N.T. and S.A.* note 116 *supra,* 20-1.

120 Note 30 *supra.*

121 *E.g. Commercial Bank of Australia Ltd* v. *Amadio* note 20 *supra*; *National Australia Bank Ltd* v. *Noble* note 20 *supra*; *Westpac Banking Corp. Ltd* v. *Clemesha,* unreported, Supreme Court of New South Wales, Cole J., 29 July 1988.

122 See Finn, "The Fiduciary Principle", note 11 *supra,* 51-2.

123 Note 59 *supra.*

124 See *National Westminster Bank PLC* v. *Morgan* note 30 *supra*; *Bank of Credit & Commerce International S.A.* v. *Aboody* [1989] 2 WLR 759. Canada also was not spared its havoc for some time.

The burden of this article has, in the main, been with the first - with what we should regard as the orthodox province of the fiduciary principle. This gives to it a place of some importance in regulating contractual activity but in distinctive though by no means uncommon circumstances. It denies its importance in the shaping and progressive evolution of the law of contract itself. Both of these outcomes are products first, of the type of relationship presupposed by the fiduciary principle and secondly, of the exacting standard of conduct it insists upon. That type of relationship is not characteristic of that which, in general, is to be found between contracting parties; that standard of conduct is not that which, in general, we would wish to demand of contracting parties. But alter this relationship or this standard, and the way is opened to the other two reasons for 'fiduciary findings' noted above - and for fiduciary law to be used to redress perceived deficiencies in existing contract doctrine.

Such alteration is, in the writer's view, to be resisted. It is at best misguided to distort without good reason one reasonably intelligible and coherent body of law to remedy what is wanting in another.

If it is felt necessary further to sanction unfair conduct in contract formation and performance, other means more specifically focussed on contractual dealings and embodying conduct standards more appropriate to the contractual enterprise exist in or are nascent in our law. For Australian purposes, the unconscionable dealings jurisdiction and the provisions of the Trade Practices Act 1974 (Cth) have gone some distance in this already at least in relation to contract formation. Contract performance and enforcement, is less well served. The emerging unconscionability principle may be found to have some vitality here,[125] and, inevitably, consideration will be given to the appropriateness in one guise or another of a requirement of good faith and fair dealing in contract performance. The fiduciary principle is a poor substitute for this last.

If it is felt necessary to be more flexible in the remedies we are prepared to visit on contractual wrongdoing, that surely is a matter which should be addressed directly not obliquely - and addressed in the light of the interests it is considered contract remedies should protect. Perhaps the judgment of Deane J. in *Hospital Products Ltd* v. *United States Surgical Corp.*[126] foreshadows this.

In the end one can only make the obvious comment. Fiduciary law is concerned with an imposed standard of conduct. Its standard is not one suited to the generality of contractual relationships and dealings.

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125 See *Stern* v. *McArthur* (1988) 62 ALJR 588; F.M.B. Reynolds, "Discharge by Breach as a Remedy", in P.D. Finn (ed.), *Essays on Contract* (1987).

126 Note 46 *supra*