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COMMONWEALTH DEVELOPMENTS IN FIDUCIARY LAW

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"It seems to have become fashionable in the last few years for people to allege fiduciary duties and their breach in all sorts of circumstances. There will be no doubt many cases where a plea of breach of fiduciary duty is apt. It must, however, be recognised that the concept is not a universal panacea." per Tipping J. in Bowkett v Action Finance Ltd. [1992] 1 N. Z. L. R. 449, 455 (H. C.).

INTRODUCTION

The law of fiduciary obligations is a central part of the law of Equity. We are all, doubtless, familiar with its basic field of operation: the trusting relationship, where, because the trust reposed by one in another provides the latter with an opportunity to advantage himself, the law exacts various duties of loyalty, designed to discourage behaviour inconsistent with the nature of the relationship. Thus, a fiduciary must not profit from the relationship, must not put himself in a position of potential conflict between his own interests and those of the beneficiary, and so on. Traditionally, the application of fiduciary law was limited to a set of time-honoured status-based relationships such as solicitor-client (and other advisory relationships), partners, agent-principal, director-company and so on.

However, as the passage (quoted above) from Tipping J's judgment in *Bowkett v Action Finance Ltd* reveals, the last number of years have witnessed an upsurge of interest among lawyers in fiduciary law. This interest has been driven by the wide and generous range of remedial advantages available against a fiduciary who has breached his fiduciary obligations.[1] Proprietary remedies *(in rem)*; the more flexible tracing rules of equity; the possibility of forcing a defaulting fiduciary into disgorging profits made from a breach of fiduciary obligations (a remedy unavailable for the majority of non-equitable claims)[2]; the strictness of liability; and, the more relaxed equitable rules as to foreseeability

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* Lecturer, Faculty of Law, Victoria University of Wellington, New Zealand. This paper is based on lectures given to the Equity and Trusts class at the National Law School of India University, Bangalore, December 1993, during a research and study break. I would particularly like to thank the class for their enthusiasm and excellent participation, and Professor T. Devidas for our wide-ranging discussion on fiduciary law. Thanks are also due to Petra Kriebel for comments on a draft of this paper.

1 *See*, Sir Anthony Mason, "Themes and Prospects", Essays in Equity 246, (P.D. Finn ed., 1985), [Finn 1985] and M. D. Talbott, "Restitution Remedies in Contract Cases: Finding a Fiduciary or Confidential Relationship to Gain Remedies" 20 *Ohio St. L. J.* 320 (1959). It should also be noted that a tactical advantage can be obtained where one of the traditional status-based relationships is involved, viz., an onus is on the fiduciary to justify any transaction resulting out of the relationship in his favour: *See*, D. A. DeMott, "Beyond Metaphor: An Analysis of Fiduciary Obligation" *Duke L. J.* 879, 900 (1988).

2 For more on this remedy, *See*, P. Birks, Introduction to the Law of Restitution, (Rev'd edn., 1989), Ch. X, and A. Burrows, The Law of Restitution, (1993), Ch.14.

and remoteness are some of the reasons that lawyers would prefer, where possible, to frame a claim in fiduciary law as opposed to traditional common law actions such as tort and contract. With so great a range of prizes on offer (if I may so refer to the remedial advantages of fiduciary law) it is no wonder that lawyers have been keen to persuade the courts to apply the label 'fiduciary' to relationships outside the field of the traditional fiduciary relationships, and have urged the courts to evolve a general principle. Over the last number of years the courts of the Commonwealth have responded to this challenge and a number of interesting attempts have been made to formulate underlying principles and rules intended to govern the imposition of fiduciary obligations.

The relevance of these Commonwealth developments to India is obvious. First, section 88 of the Indian Trusts Act 1882 (hereafter the 1882 Act) states that advantages gained by "a trustee, executor, partner, agent, director of a company, legal adviser or *other person bound in a fiduciary character to protect the interests of another person*" must be held for the benefit of that other person; clearly to the extent that it provides workable tests and principles for determining when a fiduciary relationship arises, Commonwealth jurisprudence (and literature) will be of great assistance to Indian courts and practitioners when dealing with the open-ended wording of section 88. Second, the recent government-sponsored liberalisation of business and capital markets means that litigation surrounding a large range of day-to-day business transactions in India will inevitably focus, as elsewhere in the Commonwealth, on the potential invocation of equitable relief and remedies.[3] In considering how the law should evolve to deal with these developments, Commonwealth experience will be of great assistance. Third, I am well aware of the emphasis in the National Law School curriculum on the relationship between law and societal values, and on the importance of closing the gap between the two, a matter which members of the Supreme Court of India have also commented upon in the past.[4] In light of this concern, it is of significance that the fiduciary concept has proven to be an important intermediating legal concept, converting moral imperatives into legal obligation.[5]

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3 *See*, the recent discussion paper of the English Law Commission, Fiduciary Duties and Regulatory Rules, (London: H. M. S. O., 1992) which considers the interaction between fiduciary law and the various regulatory regimes approved under the Financial Services Act, 1986.

4 The following observations of Bhagwati J. (as he then was) in *Motilal Padampat Sugar Mills v State of Uttar Pradesh* A. I. R. 1979 S. C. 621, 643 (a case of estoppel against the State) seem apposite: "The law cannot acquire legitimacy and gain social acceptance unless it accords with the moral values of the society and the constant endeavour of the Courts and the legislature must, therefore, be to close the gap between law and morality and bring about as near an approximation between the two as possible."

5 In the excellent book, J. C. Shepherd, The Law of Fiduciaries (1981), J. C. Shepherd has stated, at p. v, "The law of fiduciaries is the legal system's attempt to recognise the more blatant abuses of the trust we place in each other. It is undoubtedly the most human area of the legal system, and as such the most undefinable."

The four issues which normally arise for determination where fiduciary law is invoked are as follows:[6]

(i) Is the relationship between the parties fiduciary in nature;

(ii) What is the nature of the duty/duties that arise from the particular relationship;

(iii) Has any duty been breached;

(iv) What liabilities result from the breach of duty.

Clearly, these four issues taken together provide more than enough material to write a book! My project is a little more modest, concentrating, in the main, on the first of these four issues, viz. is the relationship between the parties fiduciary in nature.

To do this, I have divided up my discussion into three parts. The first examines a number of general themes which have a significant impact on development of the fiduciary concept. Among these are: the applicability of fiduciary norms to commercial transactions, the moral and social purposes of the law and the impact these have on the formation of legal principle, the interrelationship between fiduciary law and the law of undue influence, and so on. The next part will move to consider two tests which have found favour with Commonwealth courts in determining the applicability of fiduciary law to novel situations. Third, I will commend for your especial consideration the approach of Professor Robert Flanningan of Saskatchewan Law School. His thesis is that fiduciary law is triggered wherever a person has access to assets (belonging to another person) for a limited purpose, and he also suggests a general range of obligations which may or may not be applicable to such situations depending on the type of access, the extent of the limits which the purpose imposes, and so on. Before concluding, I will attach a rider relevant to the application of aspects of Commonwealth law to the Indian situation.

GENERAL THEMES

Commercial transactions and fiduciary law

A particularly important theme in the evolution of the modern law[7] has been the interaction between commercial transactions and fiduciary law. Fiduciary law is often invoked in commercial situations for remedial reasons - the availability

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6 This formulation is taken from *Canadian Aero Services Ltd. v O' Malley* (1973), 40 D. L. R. (3d) 371; a similar formulation is to be found in the speech of Lord Upjohn in *Boardman v Phipps* [1967] 2 A. C. 46, 127, [1966] 3 All E.R. 721.

7 Though one which was ever present in previous eras too: *See*, the Hon. Mr Justice G. A. Kennedy, "Equity in a Commercial Context" in Equity and Commercial Relationships 2-5 (P.D. Finn ed., 1987), [Finn 1987].

of proprietary remedies or an account of profits in cases of bankruptcy, receivership, failed partnership, failed joint venture, breach of confidentiality and so on, encourage the assertion of fiduciary obligations against the defendant. However, there has been considerable judicial reticence in applying fiduciary doctrine to commercial transactions. It is said that commercial relationships are ones which are inherently 'at arm's length' and that no trusting component is involved. It is argued that the nature of the obligations between the parties ought to be determined through the contract-negotiation process, and not imposed *ex post facto* through fiduciary law.[8] Moreover, it is said that because it will provide a bridgehead for discretionary justice into commercial law, the intrusion of fiduciary notions will spell disaster for certainty in commercial transactions.

The opposing view is that it is not appropriate for the law to isolate such an important part of social interaction as commerce from the norms of society, and, moreover, that ideas of justice and fairness have a role to play in commerce as much as in other areas of society.[9]

Once one looks beyond the rhetoric, a number of important points emerge:

(a) It is trite to observe that a number of the most fundamental fiduciary relationships are commercial in character: e.g. agent-principal, partnerships, director-company. Thus, any claim that fiduciary law and commerce do not intersect is an overstatement.

(b) the claim that the fiduciary obligation would undermine the certainty of commercial law rests on an assumption which overstates the claim to certainty of that part of the common law and statute law which govern commercial relationships.[10]

(c) even a cursory reading of much of the case law and literature in the fiduciary field reveals the rhetorical significance of the phrase "arm's length transaction". It is often said that "arm's length transactions" ought rarely to be subjected to fiduciary obligations; with this no-one can disagree, except to say that it does not go far enough- - once neither party has committed itself to act in the other's interest, and has preserved the ability to act in its self-interest (inherent in the notion of "arm's length"), then fiduciary law can have no role to play. However, the invocation of the arm's length rhetoric has a more subtle function to serve: The manner in which the phrase is normally invoked suggests that it is appropriate to label all commercial transactions as arm's length ones, and so, in reverse, to show

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8 *See*, the judgments of, respectively, Gibbs C. J., Wilson J. and Dawson J. in *Hospital Products Ltd. v United States Surgical Corporation* (1985) 156 C. L. R. 41.

9 *See*, La Forest J. in *LAC Minerals v International Corona Resources* (1989) 61 D. L. R. (4th) 14, at pp. 43 and 44, and R. Flannigan, "Fiduciary Obligation in the Supreme Court", 54 *Sask. L. Rev.* 45, 70 (1990), [Flannigan 1990].

10 *See*, the arguments set out by Kennedy, *Supra* n. 7, at 5-13, which support this view.

that the transaction is commercial in nature is tantamount to showing that fiduciary law has no role to play. Not only does such an approach run counter to the point made in (a) above, but it is also an over-generalisation. As a High Court of Australia judge, Mason J. (as he then was), observed in *Hospital Products Ltd. v United States Surgical Corporation,* [11]

> *The fact that in the great majority of commercial transactions the parties stand at arm's length does not enable us to make a generalisation that is universally true in relation to every commercial transaction. In truth every such transaction must be examined on merits with a view to ascertaining whether it manifests the characteristics of a fiduciary relationship.*

In sum, the use of "Commercial transaction" phraseology must be seen for what it is - a rhetorical device designed to replace the close examination of the facts and the application of clear analytical reasoning, which this area of the law requires. As a descriptive device it is "not particularly helpful in the characterisation of a relationship" and its use should be shunned.[12]

(d) Since the principal fear animating the minds of those who resist fiduciary law's intrusion into the general commercial arena appears to be the wide range of remedial relief available once a breach of fiduciary obligation has been found, perhaps the time has come to hold that proof of the breach of particular obligations do not necessarily trigger a pre-ordained set of remedial responses and those alone. Certainly, the New Zealand Court of Appeal has signalled its intention to break the association between certain sets of remedies and a corresponding set of causes of action, preferring instead a new remedial policy which decides remedial issues on the basis of what is the most appropriate to the breach disclosed on the facts of each particular case.[13] Whether such a development is readily transposable to India is complicated by the statutory obstacles which will be outlined at the end.

(e) A common argument claims that, in the case of commercial transactions, the protection provided by fiduciary law could just as easily have been negotiated for and set out in a contract. The hub of the point is that the parties could have contracted for duties of loyalty but did not, and it is not for the courts to invoke fiduciary law so as to repair the effects of a failure

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11 *Supra* n. 8, at 100. In addition, similar comments are to be found in the judgment of La Forest J. of the Supreme Court of Canada in *LAC Minerals, Supra* n. 9, at p.43, and in the various authorities referred to in R. Flannigan, "The Fiduciary Obligation" 9 *O. J. L. S.* 285, 305, (1989) *n.* 108, [Flannigan 1989]. *See also,* J. R. F. Lehane, "Fiduciaries in a Commercial Context" in Finn 1985, *Supra* n. 1, at 104.

12 Eichelbaum C. J. in *Buckell v Stormont* (CP 736/87, Wellington, 7/11/1988) cited in C. Rickett, Equity in Commerce, 7 (1993).

13 *See, Aquaculture Corporation v NZ Green Mussel Co Ltd* [1990] 3 N. Z. L. R. 299, 301-302, and the cases cited therein. For criticism of this development, *See,* J. Maxton, Equity Update, 6-7 (1993).

to exercise proper business caution. Doubtless, there is merit in this argument, particularly in its assertion of the values of freedom of contract and its emphasis on self-responsibility. As against this approach, two arguments may be made. The first is that fiduciary law is, or ought to be seen as, a default system of law:[14] in other words, where the normal tests would lead to finding that fiduciary law applies, then the fiduciary regime applies unless the parties agree to exclude its application. The onus then is on the defendant to show that the parties agreed to operate outside the reach of fiduciary law, not the other way about. The second argument is one based on economic efficiency. A number of commentators from the law and economics perspective hold the opinion that in those commercial relationships where fiduciary law has achieved some consistency of application, fiduciary law enhances economic efficiency.[15] For example, Professor Austin has observed:

> *The law of fiduciary duties as a whole is efficient in economic terms because the law makes it unnecessary for a principal who delegates power to an agent to protect himself by contractual stipulation against a possible catalogue of possible acts of disloyalty. The law of fiduciary obligations protects him. By saving the cost of individual contracting the law facilitates specialisation in economic enterprise, and hence enhances productivity.*[16]

The correct approach, in my opinion, is the one put forward by La Forest J. of the Supreme Court of Canada in *LAC Minerals v International Corona Resources,*[17] where his Honour said, "The fact that the parties could have concluded a contract to cover the situation but did not in fact do so does not, in my opinion determine the matter... The existence of an alternative procedure (such as contracting for fiduciary-style duties) is only relevant in my mind if the parties would realistically have been expected to contemplate it as an alternative".

The 'Social utility' dimension

An important theme is the emphasis given by courts and commentators alike to the public policy which informs fiduciary law. That policy is the promotion

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14 *See*, Flannigan 1990, *Supra* n. 9, at 66.

15 *See*, R. Cooter & B. J. Freedman, "The Fiduciary Relationship: its Economic Character and Legal Consequences" *66 N. Y. U. L. Rev.* 1045 (1991).

16 R. P. Austin, "Fiduciary Accountability for Business Opportunities" in Finn 1987, *Supra* n. 7, at 163. The economic efficiency reasoning is invoked by La Forest J. in *LAC Minerals, Supra* n. 9, at 42: "Where it is not established that the entering of confidentiality agreements is a common, usual or expected course of action, this court should not presume such a procedure, particularly when the law of fiduciary obligations can operate to protect the reasonable expectations of the parties. There is no reason to clutter normal business practice by requiring a contract."

17 *Supra* n. 9, at 41.

and preservation of trusting relationships, the reason being that "trust in each other remains the pervasive force which allows man to be the social animal his instincts demand. "[18] The invocation of this public policy and the use of moral language which accompanies it (which marks fiduciary law apart from other areas of private law[19]) serve two distinct purposes when it comes to the substantive shape of fiduciary law, one essentially defensive, the other essentially offensive. First, the strict application of fiduciary law's vigorously prophylactic remedial regime is said to be justified by the need to guarantee effective protection for so fundamental an aspect of human interaction - the argument is that the unwavering application of fiduciary remedies is designed to send a deterrence message to all fiduciaries,[20] not just those before the court. The courts rely on this type of argumentation, in particular, a remedy which may appear unjust to the defendant in a particular case, or which may amount to a novel solution given the circumstances of the case.[21] Second, where analogy to previous case law, or application of traditional tests, fails to cover a situation, yet the court is of the opinion that a trusting relationship has been breached, then the 'social utility' argument will be used as a fall-back to justify the application of fiduciary law to the novel situation.[22]

Factual analysis and the use of categories

The interaction between the so-called traditional categories of fiduciary relationships and the repeated self-directed admonition by the courts to engage in a close factual analysis wherever fiduciary claims are made[23] is crucial to a proper understanding of both the way in which fiduciary law operates and its future development.

The traditional status-based categories of fiduciary relationships are those within which it is assumed great potential for abuse of trust exists. Thus, wherever an advantage is alleged to have been obtained by a fiduciary who is a party to one of the traditional categories it is presumed that any advantage gained was

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18 Shepherd, *Supra* n. 5, at v; La Forest J. in *LAC Minerals, Supra* n. 9, states at 47. "The essence of the imposition of fiduciary obligations is its utility in the promotion and preservation of desired social behaviour and institutions." *See also*, Flannigan 1989, *Supra* n. 11, *passim* and Flannigan 1990, *Supra* n. 9, *passim*.

19 *See*, DeMott, *Supra* n. 1, at 891-892.

20 Some commentators doubt that fiduciary law achieves true deterrence requiring a fiduciary to disgorge all that he has gained from the breach means that the fiduciary is in the same position as before the breach occurred: *See*, Shepherd, *Supra* n. 5, at 82, n. 112, and Cooter & Freedman, *Supra* n. 15, at 1053 and *passim*.

21 *See*, La Forest J. in *LAC Minerals, Supra* n. 9, at 47.

22 *See*, the discussion of two judgments of Rand J. of the Supreme Court of Canada in Flannigan 1990, *Supra* n. 9, at 58-60.

23 *See, Re Coomber* [1911] 1 Ch. 723, 728-729, *Cook v Evatt* (No 2) [1992] 1 N. Z. L. R. 676, 685 (H. C.) and *Artifakts Design Group v N P Rigg Ltd.* [1993] 1 N. Z. L. R. 196, 230-231 (H. C.).

obtained in breach of fiduciary obligations, and an onus lies with the fiduciary to justify the transaction.[24] A standard set of obligations which reflect the typical extent of trust reposed within each particular relationship has grown up over the years; but it is open to either party to demonstrate that the obligations in a particular relationship deviate from the norm.[25] Thus, it will be seen that even where a case involves one of the traditional fiduciary relationships and triggers the presumptions pertaining thereto, a close factual analysis is still an important aspect of the case.

Where the case does not fall within one of the traditional categories, it is still possible to argue that it falls within the fiduciary principle on the basis of its own specific facts. Such fact-based fiduciary relationships mean a lot more work for the putative beneficiary's counsel in terms of proof. Counsel must demonstrate the reason why the relationship is fiduciary in nature, set out the obligations which flow from the relationship, and prove the breach.[26] It is for this reason, that counsel will work hard to establish that the case falls within a traditional category.

An interesting recent development feeds on the consistent judicial statements to the effect that the categories of fiduciary relationship are not closed.[27] The corollary that flows from this is that it must still be open to the courts to accept that relationships, not previously recognised as being fiduciary in nature, should be so recognised. For example, counsel can argue that the Court should include the relationship before it, within the category of status-based fiduciary relationships. Thus, it has been held that company promoters have fiduciary obligations, and

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24 As to what amounts to sufficient justification in any particular case is uncertain. For example, it has been held in the famous case of *Keech v Sandford* (1726) Sel. Cas. T. King 61: 25 E. R. 223, that where a trustee obtains a lease renewal (prior to renewal it being held for the beneficiary) for his own benefit, then it is an inflexible rule of Equity that the lease be held on trust for the beneficiary, even if no wrongdoing occurred. Whether this type of irrebuttable presumption applies across the board of all fiduciary obligations is unsettled, and a number of judges and commentators have attacked attempts to broaden the application of *Keech v Sandford*, beyond the scope of its own fact situation. For more on this controversy, *See*, Austin, *Supra* n. 16, at 146; P. D. Finn, Fiduciary Obligations, 261-262 (Finn 1977); R. P. Meagher, W. M. C. Gummow & J. R. F. Lehane Equity Doctrines and Remedies 134-136 (3rd edn., 1992).

25 It has been argued that fiduciary law ought not to allow any lessening of normal fiduciary standards as this will inevitably advantage the strong and well-informed fiduciary: *See*, Shepherd, *Supra* n. 5, at 69.

26 *See*, La Forest J. in *LAC Minerals*, *Supra* n. 9, at 29. *See also*, *Coleman v Myers* [1977] 2 N. Z. L. R. 225, where the facts convinced the New Zealand Court of Appeal to impose fiduciary obligations on a particular company's director in favour of its individual shareholders, a relationship which the courts have traditionally resisted labelling as fiduciary.

27 *See*, *Stepp v Frampton* 179 Pa. 284, 289 (1897), *Re Coomber*, *Supra* n. 23 at 728-729 (per Fletcher Moulton L. J.), and *Laskin v Backe & Co.* (1971) 23 D. L. R. (3d) 385, 392. Despite this oft-repeated declaration, in *Frame v Smith* (1986) 42 D. L. R. (4th) 81, 98, Wilson J. correctly observed, "The failure to identify and apply a general fiduciary principle has resulted in the courts relying almost exclusively on the established list of categories of fiduciary relationships and being reluctant to grant admittance to new relationships despite their oft-repeated declaration that the category of fiduciary relationship is never closed."

likewise governments have been held to owe fiduciary duties to various aboriginal groups. The advantage of this approach to counsel is that having convinced the court that the particular type of relationship is indeed fiduciary, the court will attempt to formulate a standard set of obligations, which the fiduciary will have to demonstrate have not been breached.

Undue Influence and Fiduciary Law: The Possibility of Congruence

It will be recalled that by way of the law of undue influence, equity sets aside *inter vivos* transactions where either (i) one party ("the influenced party") proves that the transaction was entered into under such influence of another ("the influencing party") that the transaction cannot be considered the free act of the first; or (ii) the two parties are in a relationship which belongs to the class of relationships which are presumed by the law to give the influencing party an ability to produce a transaction favourable to himself. Traditionally, Equity texts have tended to separate the treatment of fiduciary law and the law of undue influence, but several commentators now suggest that undue influence is but a particular aspect of the fiduciary regime.[28] If these suggestions are correct then there will be considerable benefits to the law in terms of the elimination of overlapping jurisdiction, the simplification of law, and a concentration on issues of first principle.[29]

A number of arguments support this congruence of categories. First, fiduciary law and the law of undue influence share the same public policy goal, viz., to prevent the trusted party from undermining the trusting relationship.[30] Second, much of the legal and factual analysis undertaken by the law of undue influence is very similar to that of fiduciary law; both employ a class of status-based relationships, yet allow for fact-based claims as well; both require the trusted party to justify the transaction; and so on. Third, the vocabulary of the cases is very similar with references to trust, confidence, confidentiality and so on appearing in both, and with references to "fiduciary characteristics",[31] etc. to be found in undue influence cases.[32]

As against these, it should be noted that as Commonwealth law stands at present there are a number of significant differences between undue influence and fiduciary law. First, the range of remedies available for undue influence is

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28 For references to some of the literature on this point, *See*, Flannigan 1989, *Supra* n. 11, at 286, n. 15.

29 For example it has been notable that in undertaking the most necessary task of rationalising the law of restitution, there has been an acceptance by the judges, the profession and the professors alike, of the importance of returning to first principles to determine outcomes in particular cases. In this way, much of the confusion which abounds in the law of restitution will, hopefully, be expunged.

30 *See*, Flannigan 1989, *Supra* n. 11, at 293.

31 *Johnson v Buttress* (1936) 56 C. L. R. 113, 135 (per Dixon J.).

32 *See also*, the cases referred to in L. S. Sealy, "Fiduciary Relationships" *Camb. L. J.* 69, 78-79 (1962).

narrower than fiduciary remedies, though this seems to be changing.[33] Second, a requirement of the recent cases on undue influence is that the influenced party must show that some "manifest disadvantage" has occured;[34] no such requirement is stipulated by fiduciary law. Third, a number of dicta, most importantly those of Lord Scarman in *National Westminister Bank plc v Morgan*[35] criticise any equivalence between undue influence and fiduciary language.

In conclusion, whether the law of undue influence will merge with the law of fiduciary obligation is unclear. My own view is that such a merger would result in a useful rationalisation of equitable intervention, with no diminution in the effectiveness of the law. Since both pursue the same policy goal, and do so essentially by the same means, there seems little sense in perpetuating any distinction between the two.

Instrumental use of fiduciary law

One final theme must be touched upon, viz., the instrumental use of the label 'fiduciary' to achieve a desired end, even though the case does not at all lend itself to a fiduciary analysis. For example, a judge wishes to grant a proprietary remedy; the cause of action most obviously applicable does not give rise to such a remedy; breach of fiduciary obligation does; therefore, the judge dresses up the situation as fiduciary.

A good example is *Chase Manhattan Bank N. A. v Israeli-British Bank (London) Ltd.*[36] In that case, the plaintiffs had, by error, made a double payment of $2 million in favour of the defendants. By the time the error was discovered, the assets of the defendant were frozen due to liquidation proceedings against it. From his judgement, it is clear that the trial judge, Goulding J., was determined to award a proprietary remedy in favour of the plaintiff, so that the $2 million would no longer be affected by the liquidation. To achieve this his honour was driven to conclude that when the defendant received the second payment a fiduciary obligation sprang up which required it to hold the money on trust for the plaintiff. The reason that this line of reasoning was adopted was that ordinary common law principles do not clearly authorise the declaration of a proprietary remedy, whereas fiduciary law does. While we may have sympathy with a judge

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33 Traditionally the only remedy available for undue influence was recission. However, Profession Flannigan has argued that recent cases show an inclination to be flexible in the remedies awarded for undue influence, and suggests that "remedy congruence" could occur in the future: *See*, Flannigan 1989, *Supra* n. 11, at 296, and also P. D. Finn, "The Fiduciary Principle" , Equity, Fiduciaries and Trusts 43-44 (T. G. Youdan ed.) (Finn 1989).

34 This is a requirement whether the claim is based on a presumption of undue influence (through one of the status-based relationships), or on proof of actual undue influence: *See, B. C. C. I. v Aboody* [1990] 1 Q. B. 923, [1989] 2 W. L. R. 759 (C. A.), apparently accepted as New Zealand law in *Contractors Bonding v Snee* [1992] 2 N. Z. L. R. 157 (C. A.).

35 [1985] A. C. 686.

36 [1981] 1 Ch. 105, [1979] 3 All E. R. 1025 (HC).

forced into such contortions, the problem with this approach is clear: such cases become, over time, authority for the proposition that whenever a person receives a sum of money in error, they hold it as a fiduciary for the benefit of the mistaken party and are accountable for any gain made from it and for any loss suffered through its inappropriate misapplication - an extraordinary proposition under orthodox principles.[37]

Thankfully, one of the heartening developments in the debate over the fiduciary concept is a growing awareness that decisions like *Chase Manhattan* must be knocked on the head if any progress is to be made in rendering fiduciary law more principled.[38] The true solution, as Andrew Burrows and others have observed, lies in the development of common law tracing rules, not in the distortion of fiduciary law.[39]

The Fiduciary Principle in the Courts

At this point, I want to turn from general themes to a consideration of efforts made by Commonwealth courts to formulate a fiduciary test. Through the years, a number of judicial approaches have been suggested, among the main approaches being the property theory;[40] the reliance theory;[41] the unequal relationship theory;[42] the contractual theory;[43] and the power and discretion theory.[44] These have all been described and critiqued at length by Mr. Shepherd, in his useful 1981 text, *The Law of Fiduciaries*,[45] and I do not propose to

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37 *See*, Burrows, *Supra* n. 2, at 36ff for a good critique of the case on these grounds. Similar comments can be found in the judgment of La Forest J. in *LAC Minerals*, *Supra* n. 9, at 29-32. While I am aware that s. 72 of the Indian Contracts Act 1872 requires a person who has received an item of property under mistake to return the item or to pay its value, that statutory remedy is a personal one, not a proprietary one and so the Indian law on this matter conforms with common law principle.

38 *See*, La Forest J. in *LAC Minerals*, *Supra* n. 9, at 29-32. As his honour notes (at p.32) and as Andrew Burrows has also argued (*Supra* n. 2, at 76) the only solution to this problem lies in the judicial recognition of the existence of a range of remedies available on a principled basis even though outside the context of a fiduciary relationship, e.g. the development of common law tracing rules, etc.

39 Burrows, *Supra* n. 2, at 76.

40 "A fiduciary relationship exists where one person has legal title and/or control over property or any other advantage, and another is the beneficial owner thereof." : Shepherd, *Supra* n. 5, at 52.

41 "The reliance theory... suggests that a fiduciary relationship exists where one party reposes trust, confidence or reliance in another.": *Ibid.*, at 56.

42 "A fiduciary relationship exists wherever there is established an inequality of footing between the two parties.": *Ibid.*, at 61.

43 Shepherd, *Ibid.*, at 65, relies on Professor Finn's formulation as representative of this school of thought: "For a person to be a fiduciary, he must first and foremost have bound himself in some way to protect and/or advance the interests of another.": Finn 1977, *Supra* n. 24, at 9.

44 "When one has power to control another, a fiduciary obligation exists.": Shepherd, *Ibid.*, at 85, quoting H. Brown, "Franchising a Fiduciary Relationship" 49 *Tex. L. R.* 650, 664 (1971).

45 Students may be interested to know that the part of his book which critiques the various approaches to fiduciary law is substantially reproduced in Mr Shepherd's paper, "Towards a Unified Concept of Fiduciary Relationships" 97 *L. Q. R.* 51 (1981).

duplicate this work (though further reference to Mr. Shepherd's book is inevitable!). Rather, I want to look at two tests - the *Frame v Smith* test, and the "reasonable expectations" test - which have been developed and applied more recently and which have won favour with Commonwealth courts.

The first approach we will consider is the "reasonable expectations" approach. This approach was relied upon by La Forest J. in *LAC Minerals* and has been used in a number of New Zealand decisions[46] (though it ought to be noted that in New Zealand reasonable expectations appears to be the magical intonation which precedes the imposition of any private law obligation, whether it be tortious, contractual or equitable). In *LAC Minerals*, La Forest J. cited with approval an extended passage from Professor Finn's seminal 1977 work, Fiduciary Obligations, part of which is reproduced below:

> *What must be shown, in the writer's view, is that the actual circumstances of a relationship are such that one party is entitled to expect that the other will act in his interests in and for the purposes of the relationship. The critical matter in the end is the role which the alleged fiduciary has, or should be taken to have, in the relationship. It must so implicate that party in the other's affairs or so align to him with the protection or advancement of that other's interests that foundation exists for the "fiduciary expectation". Such a role may generate an actual expectation that other's interests are being served. This is commonly so with lawyers and investment advisers. But equally the expectation may be a judicially prescribed one because the law itself ordains it to be that other's entitlement. And this may be so either because that party should, given the actual circumstances of the relationship, be accorded that entitlement irrespective of whether he has adverted to the matter, or because the purpose of the relationship itself is perceived to be such that to allow disloyalty in it would be to jeopardise its perceived social utility.*[47]

This passage gives a good flavour of two important features of the reasonable expectation test: First, a broad factual enquiry is necessary with a central role being assigned to intention - what were the plaintiff's subjective expectations?, what were the defendant's subjective expectations?, to what extent does the law attempt to halter these subjective expectations in the name of reasonableness?, to what degree does a plaintiff's failure to advert to fiduciary law (or underestimate the extent of its application in his case) affect the law's view of the case?, and so on. Second, through the concept of 'reasonableness', public policy has an explicit and candid role to play in determining whether the case is an appropriate one

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46 *See, Estate Realties v Wignall* [1991] 3 N. Z. L. R. 482-492 (H. C.) and *Liggett v Kensington* [1993] 1 N. Z. L. R. 257, 281 (per Gault J.).

47 Finn 1977, *Supra* n. 24, at 64, cited by La Forest J. in *LAC Minerals, Supra* n. 9, at 29.

for fiduciary obligations.

The principal positive aspect of this approach is that it facilitates a close examination of the facts and allows variation of remedies and duties from case to case. Thus, overgeneralisation ought to be minimised.

The criticism which is usually levelled at the reasonable expectation test is that by according such an important role to the parties' intentions, the law makes much hinge on an assessment of something ephemeral, particularly if subjective expectations are allowed to loom large. For example, in his critique of the *LAC Minerals* case, Professor Flannigan strongly disapproved of any move towards the adoption of a reasonable expectation test on the ground that it "might result in a finding that, in the circumstance, the transaction was justified or excusable because it must have been within the 'reasonable expectation' of the parties", and thus undermine the deterrence principle encapsulated in fiduciary law's strict liability.[48] Moreover, most formulations of the reasonable expectation test are very open and do not make it clear whose intention (i.e. the defendant's or the plaintiff's) or what type of intention (subjective or objective) is to be preferred in the case of a clash.[49] Accordingly, conflicting applications of the reasonable expectation test have occurred and little consistency has been established from case to case.

In addition, the reasonable expectation test greatly facilitates the invocation of our friend, the "commercial-nature-of-the-transaction" rhetoric; many judges will say that since generally speaking business people do not expect fiduciary relationships to spring up in their dealings with each other, then on an objective test it is next to impossible for a particular business person to say that he reasonably expected fiduciary law to apply.

Finally, mention must be made of a criticism levelled at the "contractual theory" by Mr. Shepherd, but which has equal application to the reasonable expectation test. The danger with a reasonable expectation test is that by allowing the subjective intentions of the parties to enter the equation, the possibility exists for the exercise of superior bargaining power to contract out of fiduciary obligations. As Shepherd observes,[50]

> *The problem of contracting out is that the stronger the fiduciary, the more able he is to reduce or remove the fiduciary obligation. This would appear to be precisely the opposite effect to that the courts should seek.*

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48 Flannigan 1990, *Supra* n. 9, at 67.

49 *See*, Professor Finn's formulation in "Fiduciary Law and the Modern Commercial Law", Commercial Aspects of Trusts and Fiduciary Obligations, 9 (E. McKendrick ed., 1992), [Finn 1992].

50 Shepherd, *Supra* n. 5, at 69-70.

The concept of reasonable expectations encourages the courts to regard contracting out clauses as entirely compatible with the fiduciary principle, whereas this should not always be the case. Rather, any judicial approval of contracting out clauses ought to be made on a case by case basis, with appropriate attention to the extent to which allowing such clauses to operate will undermine the public policy of supporting trusting relationships in each case.

Let us turn now to the *Frame v Smith* test, set out in the dissenting[51] judgement of Wilson J. in the case of that name.[52] In *Frame*, the plaintiff (separated from his defendant wife) had been awarded generous visiting privileges to his children, who remained in the custody of the defendant. The defendant deliberately undermined these privileges by moving from town to town, telling the children that the plaintiff was not their father, diverting gifts and letters, and so on. In this way, the plaintiff's access was effectively destroyed, and he sued for compensation. At the invitation of the Supreme Court of Canada, the plaintiff argued inter alia that the relationship between custodial and non-custodial parents was analogous to traditional fiduciary relationships and should be clothed with the protection of fiduciary law. In a judgement, which is now regarded as a leader in the area, Wilson J. laid out the following three-prong test:[53]

> Relationships in which a fiduciary obligation have [sic] been imposed seem to possess three general characteristics:
>
> (1) The fiduciary has scope for the exercise of some discretion or power.
>
> (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
>
> (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

As to the first characteristic of a fiduciary relationship, it is clear that Wilson J. intended a very broad meaning to be given to "power or discretion": in *Frame* her honour held that this requirement was satisfied because, "[t]he custodial parent has been placed as a result of the court's order in a position of power and authority over the children with the potential to prejudicially affect and indeed utterly destroy their relationship with their non-custodial parent through improper exercise of the power."[54] In adopting a test as broad as this, it is clear that Wilson J. intended that the law of fiduciaries ought to extend

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51 The majority held that it would be inappropriate to impose any judicially created obligations on the custodial parent in addition to the penalties provided by statute; the court therefore did not have to, and did not, comment upon Wilson J.'s fiduciary test.

52 (1986) 42 D. L. R. (4th) 81, 84-111.

53 *Ibid*, at 99.

54 *Ibid*, at 102.

beyond any proprietary moorings, and be capable of application to situations where non-proprietary powers/discretions are involved. This is a development worth supporting - confining fiduciary law to property means that either the law has to ignore certain types of transactions altogether or else it must label as 'property' things (e. g. corporate business opportunities or confidential information) which are traditionally not so labelled, thereby undermining the legitimacy of the decision in the eyes of many practitioners and judges, and moreover leading to inappropriate analogies with trust law.[55]

The second requirement of Wilson J.'s test emphasises (a) the ability to exercise power/discretion unilaterally, (b) in such a way as to affect the beneficiary's interests, whether legal or practical. The former underscores the nature of a fiduciary power/discretion – the power/discretion is such that it provides the opportunity to take decisions and implement them to the beneficiary's disadvantage, without interference. The latter reminds us that the interest which may be affected by the fiduciary's actions does not have to be one which has the full recognition of the law in other instances - for example, Wilson J. suggests that fiduciary law will compensate a company where one of its directors undermines the company's public image or reputation, an interest not recognised by the law in general.[56]

The final requirement, and the most controversial, is that the beneficiary be "peculiarly vulnerable to or at the mercy of the fiduciary". There are, essentially, two aspects to the controversy: first, what does "vulnerable/at the mercy of" mean?, second, what significance attaches to the word "peculiarly"? While one must always be mindful of the constant judicial warning to the effect that the words of a judgement are not to be read like the words of a statute, these two questions are not semantic exercises, but rather ones of first importance.

Let us take the "vulnerability" controversy first. The nub of the issue is this: does "vulnerability" refer to the balance of power *before* the parties enter into a relationship, or does it refer to the balance of power *after* the parties have entered into a particular relationship? Clearly, the correct answer must be that vulnerability refers to the balance of power between the parties after the particular relationship has been entered[57] - for example, in the case of a director of a large corporation such as General Motors or IBM it could hardly be contended that

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55 As to the latter, *See*, Shepherd, *Supra* n. 5, at 55.

56 *Supra* n. 5, at 99. It could be suggested that the interest of the Crown in not having its uniform debased and its reputation with friendly states tarnished was the interest affected by Sergeant Reading's use of his position to have smugglers' vehicles waved through Egyptian customs checks: *Reading v Attorney-General* [1951] A. C. 507, [1951] 1 All E. R. 617 (H. L.).

57 *See*, J. R. M. Gautreau, "Demystifying the Fiduciary Mystique" 68 *Can. Bar Rev.* 1, 5 (1989) to do the opposite, and require a pre-existing vulnerability or imbalance between the parties would be to conflate fiduciary obligation and the common law doctrine of unconscionability: *See*, Flannigan 1990, *Supra* n. 9, at 65.

prior to entering into the directorship the director has more power than the corporation. Yet the latter will be entitled to expect the director to abide by fiduciary standards upon assuming that office, because the director has great powers which he can use to the disadvantage of the corporation. However, there is an obvious problem associated with this viewpoint - while it is undoubtedly the more accurate description of the type of vulnerability present in all fiduciary relationships, it is a very broad test, which on its own leaves a large number of commercial situations open to fiduciary incidents.[58]

It is at this stage I suggest that we turn to the word "peculiarly". The word itself suggests that it is not every vulnerability which is intended to be the subject of fiduciary law, only those deserving of fiduciary law's protection. Interestingly, though her honour did not explicitly link them with "peculiarly", in *Frame*, Wilson J. made two points relating to the third characteristic of her test: (i) it would only be met if there was a grave inadequacy or absence of other legal or practical remedies to redress the wrongful exercise of the defendant's discretion or power and (ii) vulnerability was unlikely to be found to exist between business people because "any 'vulnerability' could have been prevented through the more prudent exercise of their bargaining power".[59] In this way it can be seen that "peculiarly" serves as a "public policy" backstop. In a sense the intrusion of public policy is inevitable - the breadth of the remedies, the generality of Wilson J.'s test (which she admitted was "a rough and ready guide"[60]) and the trepidation at the thought of entangling commerce in the net of fiduciary law (which we have referred to previously) all ensure this.

Despite the uncertainties relating to it, Wilson J.'s three-prong test has proven to be attractive to both the Supreme Court of Canada and to the New Zealand courts.[61] Moreover, there is little reason to suspect that it does not reflect current views of the High Court of Australia - Wison J. herself acknowledged that her formulation was significantly influenced by various judgements of that court.[62] Certainly, as a framework within which courts and practitioners alike can attempt to make sense of fiduciary arguments, her approach is commendable

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58 *See*, J. D. McCamus, 2 *Sup. Ct. L. Rev.* (2d) 505, 527-528, (1991). DeMott, *Supra* n. 1, at 914, observes that, "the law of fiduciaries is inapplicable to some situations in which one party is evidently vulnerable to abuse by another." She uses as an example of the guarantor-principal debtor relationship, which has never been classified as fiduciary even though the principal debtor by entering into certain transactions can increase his risk of default and thus increases the guarantor's risk of being called upon to satisfy the principal debtor's liabilities.

59 *Supra* n. 52, at 100.

60 *Ibid*, at 98-99.

61 Her test was applied by the Supreme Court of Canada in *KM v HM* [1992] 3 S. C. R. 6, and in *Norberg v Wynrib* [1992] 2 S. C. R. 226, and accepted by the New Zealand Court of Appeal in *DHL International (NZ) Ltd v Richmond Ltd* [1993] 3 N. Z. L. R. 10.

62 In particular, her honour made extensive reference to the High Court of Australia's decision in *Hospital Products, Supra* n. 8.

as it touches upon the main elements shown to be of importance in the case law to date, and presents them in a workable form. Moreover, it is superior to the reasonable expectations test in that its elements are less open to conflicting interpretations, and in that it avoids the near contractual rhetoric of the reasonable expectations test.

Professor Flannigan's Thesis

Having considered judicial attempts to formulate a fiduciary principle, it is appropriate now to turn to the academy for assistance. From the large range of commentators on this topic, I would like to single out the work of Professor Robert Flannigan of Saskatchewan Law School, as in my opinion his test is one of the best available.

In his article, "The Fiduciary Obligation",[63] Professor Flannigan argues that a fiduciary is one who acquires access to assets (of another person) for some defined or limited purpose. His analysis proceeds in the following manner: First, it is important to define the purpose of fiduciary law. According to Flannigan the purpose of the law is no less than maintaining the integrity of trusting relationships.[64] Bearing this in mind, the law must therefore identify the mischief which flows from abuse of trusting relationships and formulate the law accordingly.

Second, Flannigan identifies two types of trusting situations which the law must protect, first, 'deferential trusts', and second, 'vigilant trusts'. The former normally involve intimate or close interaction between the trusted and trusting persons (eg. solicitor-client, doctor-patient, parent-child, priest-penitent, etc.) where the danger exists that the influence which naturally flows from the deferential confidence or trust reposed by the trusting party will be abused. The latter normally involve situations where the fiduciary has direct access to, or control over, the beneficiary's assets and can divert (or fail to maintain) the value of those assets (eg. trustee-beneficiary, agent-principal, partner-partner, etc.). In the case of 'deferential trusts' the fiduciary has *indirect* access to the beneficiary's assets; that is, while the fiduciary does not have direct access to, or control over, the assets, their trusted position allows them the opportunity to participate in the original *decision-making process*, relating to the employment of those assets. In the case of 'vigilant trusts', the fiduciary has *direct* access to the assets, and his access allows him to negatively affect the implementation of decisions taken by others, by diverting the assets (and their value) from their intended purpose. As Flannigan himself emphasises both types of trust involve the same mischief, viz., the diversion of asset value from optimum results; it is just the stage at which the diversion occurs (either at the decisional or the implementational

63 Flannigan 1989, *Supra* n. 11.

64 *Ibid*, at 297 and 310.

stage) which differs.

Third, it is important to appreciate that the term 'assets' is to be broadly construed. Thus, the term 'asset' extends to authority over or proximity to assets, such as a purchasing agent has, and to the holding of a discretionary power over assets.

Fourth, Flannigan notes that it is the limited nature or purpose of the fiduciary's access to the beneficiary's assets which makes the fiduciary subject to strict regulation; implicit in the notion of limited access, is the potential for (opportunistic) departure from the original purpose of access. It is the purpose of fiduciary law, in turn, to discourage such departure.[65]

Fifth, according to Flannigan there are four components of the fiduciary obligation, not all of which will be applicable necessarily in every case. Those four are the 'conflict', the 'influence', the 'partiality', and the 'avoidance' components respectively. The title of each component should convey its core content: the 'conflict' component refers to the ways in which fiduciaries can act inconsistently with the trust reposed in them, the 'influence' component to the ability to influence decision making by the trusting party; 'partiality' to the duty to treat beneficiaries fairly (generally applicable only to certain types of trust); 'avoidance' to the duty not to delegate one's fiduciary powers to another, nor to fetter their exercise.[66] Which components of the fiduciary obligation will be applicable in any given situation will depend on the factual structure of the relationship at issue, and all four will not necessarily be applicable in every case of fiduciary law. What is important, according to Flannigan, is that when in doubt as to which components ought to apply, the courts should calculate the content of the obligation so as to ensure that the integrity of the trusting relationship is fully maintained.[67] Moreover, once one recalls that the purpose of the law is to maintain the integrity of trusting relationships, then it is only correct to regard specific rules of fiduciary conduct as illustrative, though not exhaustive of the fiduciary obligation. In other words, "[t]here can be no *final* and *exhaustive* definition of the precise 'content' of any obligation at any time."[68]

The attractions of the Flannigan thesis seem to me to be the following: First, his theory emphasises the close connection between the purpose of the law and the rules which underpin it; in other words, black-letter law cannot be

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65 "Generally, if a person has access to assets, and that access is subject to a defined or limited purpose, a mischief is possible... [because that] person can employ those assets for other than their defined purpose.": Flannigan 1990, *Supra* n. 9, at 50.

66 Flannigan 1989, *Supra* n. 11, at 310-319.

67 *Ibid*, at 319.

68 *Ibid*, at 320. In taking this view, Flannigan rebuts the claim made by Professor Finn in his seminal text, *Fiduciary Obligations*, *Supra* n. 24, at 1-20, to the effect that fiduciary law was merely the sum of its various specific proscriptive rules.

separated from a consideration of the law's theoretical foundation. Without sufficient regard to fiduciary law's purpose, any attempt to formulate a test or tests will flounder. Second, his theory is sufficiently abstract to allow for its application to novel situations without preconceived ideas dimming one's view. (For example, note his use of the word 'asset' so as to escape the preconceived notions which accompany the use of the word 'property'.) At the same time it is clearly adequate to the task of describing the law as it presently stands. In short, his theory looks both forward and backward, an admirable task for any theory to have achieved. Third, his division between 'deferential' and 'vigilant' trusts is sound, and helps one to appreciate more fully the various ways in which a person may trust another, and so, the mischief which must be remedied. Moreover, he uses it to offer an insightful perspective on the relationship between fiduciary law and the law of undue influence. Fourth, his fourfold division of the fiduciary obligation explains in a straightforward and analytically satisfying manner the various aspects of this multi-faceted obligation, without closing the door to the development of new rules in the future.

Compensation for breach of Fiduciary Duty and Non-Proprietary Fiduciary Relationships: Riders in relation to the Indian Trusts Act

Before concluding, I want to attach two riders in relation to the application of Commonwealth developments to the Indian Trusts Act, 1882.

First, section 88 of the 1882 Act (and indeed the 1882 Act in general) appears to be concerned to regulate the conduct of fiduciary obligations connected to property or property-dealing; the implication of this observation is that cases where no property interest lies at the heart of the relationship may not fall within the terms of section 88. Thus, cases such as *Frame v Smith*,[69] *KM v HM*,[70] or *Norberg v Wynrib*[71] may not attract the fiduciary principle under the Indian Act, though they would be protected in other common law jurisdictions.

Second, the remedy stipulated by section 88 is *disgorgement* (i. e. restitution of any advantage gained from breach of the obligation) effected by way of constructive trust,[72] *not the payment of compensation* for damage suffered by the beneficiary through the fiduciary's actions. Again, the use of compensation to effect a remedial solution has been one of the prominent features of the

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69 Interference by custodial parent with non-custodial parent's access to children; majority not considering the merits as to whether fiduciary obligation was breached and finding against non-custodial parent on other grounds; minority judge, Wilson J., finding fiduciary law triggered: *Supra* n. 52.

70 Sexual abuse of a child by parent amounts to a breach of fiduciary obligation: *Supra* n. 61.

71 Doctor-patient relationship; sexual favours demanded by defendant doctor in exchange for giving drugs to the plaintiff; breach of fiduciary obligation found: *Supra* n. 61.

72 *See*, as to the use of constructive trusts to give effect to section 88, D. D. Basu, Equity, Trusts, Specific Relief, (5th edn. 1983) 149 and 142; and, B. M. Gandhi, Equity, Trusts and Specific Relief, (2nd edn. 1993) 350ff.

modern law,[73] linked closely, though not exclusively, to the need to protect, in an effective manner, non-proprietary interests (which, obviously, cannot be vindicated by a constructive trust - what was there for the custodial parent in *Frame v Smith* to restitute to the non-custodial parent?).

As to the first point, the following possibilities exist: (a) it may be that the Commonwealth developments in non-proprietary fiduciary relationships are not transferable to India; (b) it may be that much of the work done through common law development of fiduciary law in the Commonwealth has been achieved in India by statute;[74] or (c) it may be that the judges will be able to evolve Indian common law or statute law in such a way as to harness Commonwealth developments so far as the non-proprietary fiduciary relationships are concerned. I have no answer as to which of the three is most likely to be chosen; but I am certain that it will soon be a matter of judicial determination as awareness of the potential of fiduciary law increases.

As to the second, it might be suggested that section 23 of the 1882 Act[75] could be applied to justify an award of damages for breach fiduciary obligations. Certainly, the section provides for damages as a remedy for *breach of trust*; but that said, the section must be read, and surely would be read, in light of the explanations to the section, and in light of the Part of the Act in which it appears, both of which contain clear overtones of trust property and dealings with that property. Thus, while *trustees* may be liable in damages, other fiduciary officers may not. As against this, however, to draw a distinction between trustees and other fiduciary officers for the purpose of damage awards strikes one as unprincipled in theory, and certainly runs against the received wisdom of Equity - indeed, the most celebrated instance of compensation being awarded as an equitable remedy occurred in the 1914 House of Lords decision, *Nocton v Lord Ashburton*,[76] a case involving a solicitor/client relationship, not a trustee/beneficiary one.

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73 It should be noted that Commonwealth courts and practitioners have only recently awoken to the possibilities open to them under equity's compensatory jurisdiction, and that the English courts in particular have been very slow to utilise this jurisdiction for breaches of fiduciary obligations. Good essays on equitable compensation are I. E. Davidson, "The Equitable Remedy of Compensation" 13 *Melb. U. L. R.* 349 (1982); W. M. C. Gummow, "Compensation for Breach of Fiduciary Duty" in Youdan (ed.), *Supra* n. 33; and, C. E. F. Rickett & T. Gardner, "Compensating for Loss in Equity: the Evolution of a Remedy" 24 *V. U. W. L. R.* (1994).

74 For example, Mr. Ch. Suryanarayana Rao has suggested that much of the work done by fiduciary law in company law overseas, can be achieved in India by reliance upon the relevant statutory provisions in force here: *See*, Ch. S. Rao, Role of Directors in Company Law, (1968).

75 The relevant part of section 23 reads: "S. 23: **Liability for breach of trust**: Where the trustee commits a breach of trust, he is liable to make good the loss which the trust-property or the beneficiary has thereby sustained ..."

76 [1914] A. C. 932, [1914-1915] All E. R. Rep. 45.

Finally, I should reiterate that the doubts surrounding a compensatory jurisdiction and the application of section 88 to non proprietary relationships does not destroy the usefulness of Commonwealth developments to the Indian practitioner or student; at worst, the field of application of Commonwealth developments may be narrowed.

Conclusion

The purpose of this paper has been to introduce to you aspects of the current Commonwealth debate as to who is fiduciary. The general themes which we considered, such as the interaction between fiduciary law and commercial transactions, are important because these themes are returned to time and time again in the cases which involve fiduciary claims. An understanding of these themes is essential to a proper understanding of the purpose, current position, and future direction, of fiduciary law. Examination of the two tests which appear to have won a certain measure of support from Commonwealth courts, indicated the factors which are currently regarded by judges as important in determining whether a fiduciary relationship exists or not. Finally, consideration of Professor Flannigan's theory will, I hope, stimulate you to take a critical look at fiduciary law. In conclusion, I hope that this paper, taken as a whole, will enable you to critically evaluate the application of fiduciary law in India, and the role for Commonwealth jurisprudence in such an exercise.