THE IMPORTANCE OF THE FIDUCIARY UNDERTAKING

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It is a pleasure to be invited to speak today at this conference and seminar on fiduciaries. I have had the great benefit of discussing, usually debating, many issues in this area with Lionel over the last decade and with Matthew, generally in print, over the last few years. And I am enthused by the prospect of reading Scott's recent doctorate on this subject. In the short time I have for the presentation of this paper I will only make a small number of points, leaving the detail of many of the matters in the written version of this paper for discussion this afternoon. The full paper will be available on the website of the Supreme Court of Western Australia.

My presentation at this conference today is, in some ways, very different from the enterprise in which Matthew and Lionel are involved. I am not endeavouring, as Lionel is, to identify when a fiduciary relationship arises. Nor am I attempting to delineate fiduciary duties from other duties. Nor am I attempting, as Matthew does, to describe the purpose of fiduciary duties. My aim is far more modest. It is simply to describe what appears to be a necessary, but not sufficient, condition for fiduciary duties to arise in equity. And, in stating this basic proposition, my argument, contentious for some, is that the vast majority of the decided cases in relation to fiduciaries are both correctly decided and correctly reasoned on this point. I do not make this remark facetiously. The academy performs an extremely important role in questioning orthodoxy no matter how well entrenched it appears. Yesterday's orthodoxy sometimes becomes tomorrow's heresy. There is no place for dogma in the law. But in this instance the vast weight of authority can be, and should be, defended. And it has the benefit of being clear and intelligible. I will focus on Australia, although the approach is also evident in cases in Canada, England and New Zealand which I will touch upon.

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[1] Justice of the Supreme Court of Western Australia. My thanks to Daniella Spencer-Laitt for research assistance on this paper.

The approach which I will suggest is evident in the law is that a necessary, but not sufficient, condition for the recognition of a fiduciary duty in equity is the presence of an undertaking. This necessary condition is essential to understand the contours of the fiduciary duties unless one were to abandon the foundations of this area of law in many authorities and start afresh.

This paper is divided into three parts. The first part explains that the necessity for an undertaking appears from numerous cases. A selection of cases is provided. The first part purports to be entirely descriptive. The state of the law appears to be that although not all undertakings involve fiduciary duties, a fiduciary duty will not be imposed upon a person *without* an undertaking. The construction of the undertaking determines the scope and extent of the fiduciary duty. The first part of this paper therefore aims to illustrate the vast bulk of authority which relies upon an undertaking as an essential component of a fiduciary duty and as the component which shapes the content of the duty. The observation is not only a repetition of what has been iterated and reiterated in many cases. It was also at the core of the pathbreaking monograph by Dr Finn (as he was then) in 1977, *Fiduciary Obligations.* However, it is acknowledged in the conclusion to the first part that it may be that the requirement for an undertaking, as a pre-condition to the existence of a fiduciary duty, might not be firmly established.

The second part of this paper concerns a matter of history. It does not explore the historical origins of *fiduciary* duties which historically were probably not understood as duties at all, at least in Hohfeldian terms. Rather, the second part of this paper focuses upon the historical basis of the core component of a modern fiduciary duty, namely the undertaking. It shows that the undertaking is not a novel concept. The second part briefly explains how the concept of an undertaking has strong historical roots.

The final part of this paper is analytical. It examines two arguments that fiduciary duties can be imposed upon parties independently of an undertaking, or that the scope of a fiduciary duty can extend beyond the scope of an undertaking. If fiduciary duties can be recognised independently of an undertaking on either of these two theses then,

apart from considerations of precedent, it will be suggested that there are serious analytical obstacles for each approach to overcome.

There is a conundrum which flows from any centrality of an undertaking to fiduciary duties. The conundrum can only be addressed briefly. It is a subject to which I will return in more detail with a number of you in Chicago in July. The conundrum is the relevance of fiduciary *relationships*. If an undertaking determines and shapes the content of the fiduciary duty then why do we speak of a fiduciary *relationship*? What does it matter that a person is in a particular relationship or not if the duty is shaped by that person's undertaking.

The answer which might be given to this question is not novel. It has been given a number of times. It depends upon an understanding of the role of *status* in law. The essential point is that status is often an objective indicium of the content of an undertaking. The status of a person as a trustee, or as a company director carries with it reasonable expectations of the content of an undertaking. That status operates in relation to fiduciaries generally in no different a manner from the way it operates in contract law. The point was made by Spigelman CJ, and Sheller and Stein JJA in *Beach Petroleum v Kennedy*:[2]

> Even in the case of a solicitor-client relationship, long accepted as a status based fiduciary relationship, the duty is not derived from status. As in all such cases, the duty is derived from what the solicitor undertakes, or is deemed to have undertaken, to do in the particular circumstances.

The only matter with which one might quibble is the reference to 'deemed to have undertaken'. Undertakings are construed objectively. This is not a fiction. Nor is it a 'deeming' of subjective intention.

There are some significant questions which I will not address in this paper. One question is *which* undertakings are binding. We know that contractual undertakings are binding. Unilateral deeds can become binding. Other voluntary, unilateral undertakings are binding without formality: declarations of trust and letters of credit

[2] *Beach Petroleum v Kennedy* (1999) 48 NSWLR 1, 188.

are two examples. It is not necessary for the purposes of this paper to consider this issue.

Another question is: what makes fiduciary duties distinct? In this country, as in Canada, it is accepted that, as the joint judgment of McHugh, Gummow, Hayne and Callinan JJ explained in *Pilmer v Duke Group*,[3] it is the 'pledge' (undertaking) by one party to act in the best interests of the other which makes fiduciary relationships distinct from other relationships. But, it should be remembered, as their Honours also explain in that case, that there is not imposed upon fiduciaries a quasi-tortious duty to act solely in the best interests of their principals'.

Part I: Fiduciary duties arising from construction of an express or implied undertaking

What follows in the first part of this paper is purely descriptive. I set out numerous statements in which courts and judges have considered that the scope and extent of a fiduciary duty is critically dependent upon the undertaking which the duty requires in equity. However, before descending to the particular detail of the fiduciary duties it is necessary to reiterate that it is not every undertaking that is a fiduciary undertaking. On one view, at a higher level of generality than particular fiduciary duties, it has been said that the nature of the undertakings which make fiduciary duties different from other undertaken duties is that the undertaking concerns the best interests of the principal. The most famous enunciation of this proposition was by Mason J in *Hospital Products v USSC:*[4]

> The critical feature of these relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense.

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[3] *Pilmer v The Duke Group (in Liq)* (2001) 207 CLR 165, [70]-[71].

[4] (1984) 156 CLR 41, 96-97

Again in *Pilmer v Duke Group (In liq)*,[5] McHugh, Gummow, Hayne and Callinan JJ said:

> The critical feature of [fiduciary] relationships was the undertaking or agreement by the fiduciary to act for or on behalf of or in the interests of another person in the exercise of power or discretion which will affect in a legal or practical sense the interests of that other person.

And again in *John Alexander Tennis Club v White City Tennis Club*,[6] French CJ, Gummow, Hayne, Heydon and Kiefel JJ repeated the point:

> Mason J began his treatment of the issue of whether HPI was a fiduciary by identifying the critical feature of what may be called the accepted traditional categories of fiduciary relationship ... That critical feature was "that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense.

Authorities explaining the need to construe an undertaking

It is convenient to begin with undertakings which are made as part of a contract. In relation to contractual undertakings, in a statement which has been quoted on occasions almost without number, Mason J said in *Hospital Products Ltd v United States Surgical Corporation:*[7]

> it is the contractual foundation which is all important because it is the contract that regulates the basic rights and liabilities of the parties. The fiduciary relationship, if it is to exist at all, must accommodate itself to the terms of the contract so that it is consistent with, and conforms to, them. The fiduciary relationship cannot be superimposed upon the contract in such a way as to alter the operation which the contract was intended to have according to its true construction.

The point was made powerfully by Jacobson J in *ASIC v Citigroup Global Markets Australia Pty Ltd (No 4)*,[8]

> '[W]here a fiduciary relationship is said to be founded upon a contract, the ordinary rules of construction of contracts apply. Thus, whether a party is subject to fiduciary obligations, and

[5] (2001) 207 CLR 165, [70] –[71].
[6] (2010) 241 CLR 1, [87].
[7] [1984] HCA 64; (1984) 156 CLR 41, 97.
[8] (2007) 160 FCR 35, 77 [281].

> the scope of any fiduciary duties, is to be determined by construing the contract as a whole in the light of the surrounding circumstances known to the parties and the purpose and object of the transaction.'

Similarly, in *Henderson v Merrett Syndicates Ltd*[9] Lord Browne-Wilkinson said, in a passage approved in Australia,[10] that if a contract exists between the parties, the extent and nature of the fiduciary duties are determined by reference to that contract.

Again, in *Noranda Australia Ltd v Lachland Resources NL*[11] Bryson J said:

> It would not be right to impose on the parties fiduciary obligations wider or different to those which in careful terms they imposed on themselves.

In *John Alexander Tennis Club v White City Tennis Club* at [87], French CJ, Gummow, Hayne, Heydon and Kiefel JJ repeated the observations which I have quoted above from Mason J in *Hospital Products* and then added that in ensuring that the fiduciary relationship is consistent with the operation that the contract was intended to have on its proper construction:

> The terms of the contract include not only those expressed, but those implied, particularly those implied pursuant to the principles in *Codelfa Construction Pty Ltd v State Rail Authority of NSW*... Where a term to like effect [as the fiduciary obligation] cannot be implied, it will be very difficult to superimpose the suggested fiduciary obligation upon that limited contract.

The fact that the construction of a contract determines the content of the fiduciary obligation means that it is unsurprising that obligations which are often described as classic fiduciary obligations by attaching the broad epithet 'loyalty' are sometimes treated solely as express or implied contractual terms. For instance, in *Del Casale v Artedomus (Aust) Pty Ltd*[12] Hodgson JA said that 'it is clear that a contract of employment generally includes an implied duty of good faith on the employee'. Campbell JA (with whom McColl JA also agreed) made similar observations.[13] In

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[9] [1994] UKHL 5; [1995] 2 AC 145, 206.
[10] *Canberra Residential Developments Pty Ltd v Brendas* [2010] FCAFC 125; (2010) 188 FCR 140 [36].
[11] *Noranda Australia Ltd v Lachland Resources NL* (1988) 14 NSWLR 1 [17].
[12] [2007] NSWCA 172, [32] (Hodgson JA, McColl JA agreeing).
[13] [2007] NSWCA 172, [76].

Manildra Laboratories v Campbell[14] McDougall J subsequently said that he considered that 'the duties to which their Honours referred can be identified as ones of fidelity or loyalty'.

The need to construe fiduciary undertakings in order to determine the content of the fiduciary duty is not confined to undertakings which arise in a contractual context. For instance, in *Grimaldi v Chameleon Mining NL (No 2)*,[15] the Full Court of the Federal Court said generally:

> A person will be in a fiduciary relationship with another when and insofar as that person has undertaken to perform such a function for, or has assumed such a responsibility to, another as would thereby reasonably entitle that other to expect that he or she will act in that other's interest to the exclusion of his or her own or a third party's interest.

Again, the language is that of the undertaking, or assumption of responsibility, and the question is one of the construction of that undertaking by a reasonable person in the position of the other party.

In *United Dominions Corporation Ltd v Brian Pty Ltd*,[16] Mason, Brennan and Deane JJ said of an argument that joint venturers were in a fiduciary relationship:

> The most that can be said is that whether or not the relationship between joint venturers is fiduciary will depend on the form which the particular joint venture takes and *the content of the obligations which the parties have undertaken.*

In *Chan v Zacharia*,[17] Deane J, after referring to the *implication* of obligations upon a partner said that:

> It is conceivable that the effect of provisions of a particular partnership agreement, in the context of the nature of the particular partnership, could be that any fiduciary relationship between the partners was excluded.

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[14] [2009] NSWSC 987, [63].
[15] [2012] FCAFC 6; (2012) 200 FCR 296 [177].
[16] (1985) 157 CLR 1, 10-11.
[17] (1984) 154 CLR 178 , 196.

Again in *Elovalis v Elovalis*[18] Buss JA said:

> Where a fiduciary relationship arises out of a trust instrument, the terms of the instrument must be examined to determine the nature and extent of the fiduciary's undertaking.

And in a recent, and, with respect, extremely discerning observation, Beech J compared matters such as 'ascendency', 'influence', 'vulnerability', 'trust', 'confidence' or 'dependence' on the one hand with the undertaking on the other hand. His Honour explained that they are 'two sides of the same coin'. Issues of vulnerability or dependence arise from the perspective of the principal. They 'invite attention to whether the alleged fiduciary has, in an objective sense, agreed or undertaken to act in the interests of another in the exercise of a power'. And, on the other side of the coin, focusing upon the actions of the fiduciary, the question is whether the conduct of the fiduciary has manifested an undertaking such that the principal is entitled, 'in an objective sense, to expect that the other will act in his or their interest in and for the purposes of the relationship.'[19]

In conclusion to this part of the paper a concession must be made. The authorities I have described are not uniformly one way, although they are predominantly so. In Canada, for example, there are statements expressly recognising a fiduciary obligation in the absence of an undertaking. In *M(K) v M(H)*,[20] La Forest J suggested obiter dicta that 'fiduciary obligations are imposed in some situations even in the absence of any unilateral undertaking by the fiduciary'. It may be that this statement is no longer the law in Canada. Putting aside the reference to statute, in *Galambos v Perez,*[21] the Supreme Court of Canada, in a joint judgment said of fiduciary duties in equity:

> It is fundamental to all ad hoc fiduciary duties that there be an undertaking by the fiduciary, which may be either express or implied, that the fiduciary will act in the best interests of the other party.
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> The fiduciary's undertaking may be the result of ... the express or implied terms of an agreement or, perhaps, simply an undertaking to act in this way. In cases of per se fiduciary relationships this undertaking will be found in the nature of the category of relationship in issue.

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[18] [2008] WASCA 141 [66].
[19] *Red Hill Iron Ltd v API Management Pty Ltd* [2012] WASC 323 [362].
[20] [1992] 3 SCR 6.
[21] [2009] 3 SCR 247, 249.

Previously, in *Strother v 3464920,* [22] the Supreme Court of Canada had said in a joint judgment that 'the duty of loyalty is not a duty in the air, but is attached to the obligations the lawyer has undertaken pursuant to the retainer'.

The decision in *Galambos v Perez,*[23] was relied upon by the Barratt JA (Meagher JA and Ward JA agreeing) in the New South Wales Court of Appeal in *Streetscape Projects (Australia) Pty Ltd v City of Sydney*.[24] In that case, the Court held that 'a fact-based fiduciary duty cannot arise unless one party undertakes, expressly or impliedly, to act in the particular factual context solely in the interests of the other.' Although the *Streetscape* decision discussed, and endorsed, many of the cases which require or describe the need for an undertaking, there was also language in the decision which suggested that there may be cases where an undertaking is not required. For instance, Barrett J said[25]

> The two types of obligation - contractual and fiduciary - will, in general, co-exist only if and to the extent that the sanctions available for breach of contract (including any implied terms) are insufficient to deal with some possibility of unconscionable conduct to which one party is exposed.

This approach to identification of a fiduciary duty leaves open the possibility of a contract where the parties' undertakings, express and implied, do not include any undertaking which can be characterised as 'fiduciary' but where the necessity to respond to unconscionable conduct with appropriate remedies will lead to the imposition of a fiduciary duty.

Part II: Historical foundations

The importance of an undertaking in the law of obligations is not a new concept. It has deep historical foundations at common law as well as in equity. The modern expression of this idea is usually regarded to be the expression of it in the decision of

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[22] *Strother v 3464920* [2007] 2 SCR 177
[23] [2009] 3 SCR 247, 249.
[24] [2013] NSWCA 2 [121].
[25] [2013] NSWCA 2 [100].

Lord Devlin in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*.[26] His Lordship spoke of an assumption of responsibility as an express or implied undertaking; a relationship 'equivalent to contract' where but for the lack of consideration there would be a contract. Speaking of *Hedley Byrne*, Professor Stevens has argued that the concept of assumption of responsibility is 'the only doctrinally satisfying way of explaining the result in the case'[27] and 'indispensable if the law is to be understood'.[28]

In *Hedley Byrne*, Lord Devlin was not formulating a new idea. Lord Devlin was repeating the views of Lord Shaw in *Nocton v Lord Ashburton*[29] who, in turn, had quoted from the argument of Sir Roundell Palmer (as Lord Selborne LC was then) in *Peek v Gurney*[30] who spoke of a 'representation in equity ... equivalent to contract'. The notion of an assumption of responsibility, or probably much more accurately, an objective undertaking, was probably borrowed by Sir Roundell Palmer from the form of action for assumpsit. This involved a pleading that the defendant 'undertook and faithfully promised'. The proper general issue for the defendant to plead was 'non assumpsit' (I did not undertake and promise).[31] Until the late 17th century, consideration from the plaintiff was unnecessary for a successful action which pleaded assumpsit in relation to mis-performance of an undertaken responsibility.[32]

The language of an assumption of responsibility has not generally been adopted in modern Australian law.[33] But, as I have explained above, the notion of an expressed or manifested undertaking, which was essentially the concern of Lord Devlin and which has deep historical roots, is essential to understand the scope and content of fiduciary duties.

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[26] *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] UKHL 4; [1964] AC 465, 529.
[27] R Stevens *Torts and Rights* (OUP, 2007) 34.
[28] R Stevens *Torts and Rights* (OUP 2007) 36.
[29] *Nocton v Lord Ashburton* [1914] AC 932, 971.
[30] (1873) LR 6 HL 377.
[31] D Ibbetson *A Historical Introduction to the Law of Obligations* (1999) 131.
[32] D Ibbetson *A Historical Introduction to the Law of Obligations* (1999) 133 and *Powtuary v Walton* (1598) Ro Abr 1.10, *Action sur Case,* P5.
[33] *Hill v Van Erp* [1997] HCA 9; (1997) 188 CLR 159, 229-231; *Perre v Apand Pty Ltd* [1999] HCA 36; (1999) 198 CLR 180, 228 [124]; *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* [2004] HCA 16; (2004) 216 CLR 515, 530 [23]. Cf *Smith v McCusker QC (No 7)* [2011] WASC 88 [432] - [434].

Part III: Two theses which suggest that fiduciary duties might arise where the duty is not manifest in an undertaking

The final part of this paper is analytical. Although there appears to be no case which has yet recognised a fiduciary duty in the absence of an undertaking, and although there are many authorities which insist upon undertakings (including, as explained at the start of this paper, undertakings which are implied by the nature of the relationship), the question might be asked whether there is a model of fiduciary duties that would dictate that these duties can arise in the absence of an undertaking.

At this seminar we have heard two suggestions for a model which could dispense with the undertaking. This part of the paper asks whether it *should* it be the law on either of these approaches, that in the absence of any manifested undertaking, or perhaps if there is an express undertaking to the *contrary*, a particular fiduciary duty should be imposed.

There are, of course, many obligations which are imposed upon people without any manifest undertaking. Duties not to defame another person, not to trespass, not to convert goods, not to imprison falsely, not to commit battery and so on. Should fiduciary duties be added to this list? If so, why?

Two different theses to this effect are espoused by Professors Smith and Conaglen. The two theses are answering different questions from the one set out in this paper. The core, and extremely important, question which the two theses consider is *what is the purpose of fiduciary duties*? In contrast, the question I have been concerned with is *what is an essential component in why fiduciary duties arise*? But the answer given by each of Professors Smith and Conaglen to the former question casts serious doubt upon the undertaking as the essential component of a fiduciary duty. Both of their theses contemplate fiduciary duties as being imposed by law. Therefore they need not involve construction of an undertaking. Both theses are beautifully constructed and involve examination of the finest detail of argument. Both authors have an extremely detailed understanding of the cases and the history of fiduciary law, although Professor Smith's thesis is more closely aligned with the language of the cases. Both thesis might yet be accepted, bringing a powerful coherence and understanding to the operation of fiduciary

law. But, at the moment, it appears that both theses have real obstacles to overcome before they could purport to be an overarching thesis of fiduciary law.

The first thesis about fiduciary duties is that the fiduciary duties exist to protect underlying non-fiduciary duties. This thesis is proposed by Professor Conaglen.[34] A similar version of this thesis was first proposed by Professor Birks.[35] This approach suggests that the content of fiduciary duties is not determined by an undertaking but, instead, exists in order to protect a non-fiduciary duty. There are, at least, three potential problems with this approach.

First, if this new thesis were to be recognised then the immediate question is why do non-fiduciary duties need additional protection? The duty of care and skill, on this thesis, is a classic non-fiduciary duty which requires protection. It is said that some duties of care and skill need additional protection to remove temptation from breach.[36] But if these duties need protection then why is it permissible for them to be unilaterally excluded? Why is there a need to remove a fiduciary from temptation from breaching a duty which the fiduciary might have excluded? For instance why can a trustee undertake to hold assets on trust with a specific exclusion from any rules about conflict or any rules about profit? And why are exemplary damages unavailable for breach of these duties? Professor Conaglen's book, an otherwise exhaustive discussion of hundreds of cases, does not mention the reasoning of Lord Nicholls for the majority of the Privy Council in *A v Bottrill*[37] that there 'may be the rare case where the defendant departed so far and so flagrantly from the dictates of ordinary or professional precepts of prudence, or standards of care, that his conduct satisfies this test even though he was not consciously reckless'.

Secondly, on Professor Conaglen's thesis the fiduciary duty is parasitic upon the underlying non-fiduciary duty. It cannot survive without it. But there are examples of fiduciary duties existing without any non-fiduciary duty. A trustee who holds a trust fund without any power to invest or disburse can be subject to fiduciary duties

[34] M Conaglen *Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary Duties* (Hart Publishing 2010)
[35] P Birks 'The Content of Fiduciary Obligation' (2002) 16 *Trust Law International* 34.
[36] M Conaglen *Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary Duties* (Hart Publishing 2010) , 35-9.
[37] [2002] UKPC 44; [2003] 1 AC 449 [27].

not to be in a position of conflict or to profit from his or her position. These duties can be undertaken without any other 'non-fiduciary' duty.

Thirdly, if the purpose of fiduciary duties were really only to remove temptation for breach of a non-fiduciary duty then this could only be because remedies for the non-fiduciary duty are inadequate. But why create a fiduciary duty simply for the instrumental purpose of deterring through the prospect of fiduciary remedies? The same purpose could be served by imposing fiduciary remedies directly.

The second thesis, by Professor Smith, supposes a conception of fiduciary duties arising from a need to ensure subjective loyalty. The fiduciary must act with a proper motive and be seen so to act.[38] It is said that when a person exercises judgement over the interests of another person then that exercise of judgment must occur in a loyal manner, in the best interests of that other person. Hence, duties such as the no conflict duty or the no profit duty are not themselves the fiduciary duty. Rather, they exist to ensure the performance of the core fiduciary duty which is to act with a proper motive, to ensure loyalty to the best interests of the principal. Apart from the non-justiciability of motive that this approach appears to require, there are at least three major difficulties with this approach.

First, there are examples of people who exercise judgment over the interests of another who do not have to exercise that judgment in a loyal manner, in the best interests of that other person. A parent exercises judgment over the interests of a child. But a parent is entitled to profit from his or her position as a parent. A parent is entitled to put himself or herself in a position of conflict between the interests of the child and the interests of the parent. Indeed, many financial decisions made by parents for their children involve a conflict between the financial interests of the parent and those of the child. A teacher also exercises judgment over the interests of a school student. But the teacher is entitled to make a profit from his or her position as teacher. And a teacher can be in a position of conflict between his or her interests as teacher and the interests of the children.

[38] L Smith 'The Motive not the Deed' in J Getzler (ed) *Rationalising Property, Equity and Trusts: Essays in honour of Teddy Burn* (2003) ch 4.

Secondly, if 'no conflict' or 'no profit' rules are *imposed by law* in order to ensure loyalty rather than as a construction of an undertaking, then no person should be able *unilaterally* to avoid those obligations by undertaking not to comply with them. For instance, it is not possible for a person unilaterally to avoid imposed obligations such as the following: not to commit a battery, not to trespass on another's land, not to convert the goods of another, not to deprive another of his or her liberty. A person who owes these duties cannot undertake unilaterally not to be bound by them. But the same is not true in the case of obligations of fiduciaries. Consider the archetypal fiduciary, the trustee. A trust deed can stipulate that the trustee can make a profit from the trust. The undertaking not to profit from a position as trustee which would usually be reasonably expected might not be undertaken. So, for example, a trust deed can contain a general power entitling the trustee to distribute the trust property to anyone in the world, including the trustee himself or herself. A general power in a trust instrument is not invalid. Hoffmann J held in *Re Beatty*[39] that:

> [t]he rule that a trustee cannot profit from his trust would ordinarily exclude the trustees themselves from the ambit of the powers but cl 12(c) of the will allows the trustees to exercise any power conferred by the will, notwithstanding that they may have a direct personal interest in the mode of its exercise. This arguably allows the trustees, subject to having proper regard to their overall fiduciary duties, to make gifts or payments to themselves. They have in fact paid themselves £10,000 each in accordance with the express wish of [the settlor] that they should do so.

In that case, the will bequeathed property to trustees and gave the trustees powers to distribute it 'among such ... persons ... as they think fit'. Although Hoffmann J construed it as a hybrid power, it would also have been valid as a general power. A trustee can have a power to make a distribution to himself or herself. On no view can this power be in the best interests of the beneficiaries, nor could its exercise be loyal to the beneficiaries. At best, all that can be said is that the trustee has a 'duty' to be loyal to the beneficiaries unless the trustee decides not to be. That is no duty at all.

Thirdly, as numerous others have observed, the duty to act 'loyally' or to act in the 'best interests' of another is too vague to have any real content as a freestanding duty

[39] [1990] 1 WLR 1503, 1506.

in equity.[40] At the very least, it needs to be deconstructed to explain the contours of its content. For instance, a medically qualified trustee is not legally required to render medical assistance to a beneficiary even if that is in the beneficiary's best interests. A company director is not required to abstain from taking holidays even if that were in the company's best interests. As McHugh, Gummow, Hayne and Callinan JJ explained in *Pilmer v Duke Group*,[41] there is not imposed upon fiduciaries a quasi-tortious duty to act solely in the best interests of their principals'. Even in England where the duty to be 'loyal' is sometimes considered be a freestanding duty, that duty had to be deconstructed by the Court of Appeal into four different duties.[42] In other words, the meaning of duties or 'loyalty' or 'best interests' in equity can only take their content by delimiting the boundaries to those duties which is conceptually simple if the exercise involves construction of the terms of an undertaking.

Fourthly, to the extent that the duty to act 'loyally' or 'in the best interests' of the principal is concerned with acting for 'proper purposes' as Professor Smith suggests, then that duty is independent of subjective motive. As Mason, Deane and Dawson JJ said in *Whitehouse v Carlton Hotel Pty Ltd*,[43] 'the exercise of a power for an ulterior or impermissible purpose is bad notwithstanding that the motives of the donee of the power in so exercising it are substantially altruistic'. In that case, the joint judgment explained that the reason why directors of a company cannot *ordinarily* exercise a fiduciary power to allot shares for the purpose of defeating the voting power of existing shareholders is because it is 'no part of the function of the directors as such to favour one shareholder or a group of shareholders'.[44] This brings us back to the point with which this paper began. In the absence of express provision of a fiduciary duty or power, the scope of the power depends upon construction and implication which, itself, may involve considerations of the nature and function of the office.

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[40] S E K Hulme 'The Basic Duty of Trustees of Superannuation Trusts—Fair to One, Fair to All?' (2000) Trust Law International 130; J Lehane 'Delegation of Trustees' Powers and Current Developments in Investment Funds Management' (1995) 7 Bond L Rev 36 at 37; G Thomas 'The Duty of Trustees to Act in the "Best Interests" of Their Beneficiaries' (2008) 2 *Journal of Equity*, 177, 202; D Nicholls 'Trustees and Their Broader Community: Where Duty, Morality and Ethics Converge' (1995) 9 *TLI* 71.

[41] *Pilmer v The Duke Group (in Liq)* (2001) 207 CLR 165, [70]-[71].

[42] *Bristol and West Building Society v Mothew* [1998] Ch 1,18.

[43] (1987) 162 CLR 285, 293; *Piercy v S Mills and Company* [1920] 1 Ch 77, 84-85; *Hogg v. Cramphorn Ltd* (1967) Ch 254, 267-269; *Fraser v Whalley* (1864) 2 H & M 10, 29; 71 ER 361, 369.

[44] (1987) 162 CLR 285, 290.

Conclusion

The essential point of this paper is that it is well established that an (objective) undertaking is a necessary condition of a fiduciary duty. At the heart of the fiduciary duty lies the undertaking. There are competing approaches. Two of these competing approaches, namely those of Professor Smith and Professor Conaglen, were considered at this seminar. Even on the assumption that we could liberate the law from the weight of authority concerning undertakings which those theses appear to require, these two approaches considered in this paper suggest new, and different, conceptions of fiduciary duty. But each of these approaches has analytical difficulties to overcome before it can be accepted as an overarching thesis of fiduciary law.

It is necessary to reiterate that the undertaking is not *sufficient* for a fiduciary duty although it appears on the state of authority to be necessary. The point of this paper is therefore a very limited one. Not every undertaking is a fiduciary undertaking. The existence of an undertaking does not tell us which duties are fiduciary. But it can explain the content of the duty. It can explain why fiduciary duties can be modified or excluded. It can provide a way to determine the content of the fiduciary duty. It can explains why, as Professor Yeo has explained elsewhere, the proper law of the fiduciary duty will follow the proper law of the undertaking. And, apart from having strong support in the cases, the central role of the undertaking in private law is powerfully rooted in history.