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The nature of fiduciary liability in English law

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Cases: Sinclair Investment Holdings SA v Versailles Trade Finance Ltd (In Administrative Receivership) [2005] EWCA Civ 722; [2006] 1 B.C.L.C. 60 (CA (Civ Div))

Attorney General v Blake [1998] Ch. 439 (CA (Civ Div))

*Cov. L.J. 2 Introduction

Although the abuses of fiduciary relationship have long been one of the major concerns of equitable jurisdiction, the concept of a fiduciary has been far from clear. In *Lac Minerals v International Corona Ltd*¹ La Forest J. in the Supreme Court of Canada explained that '...there are few legal concepts more frequently invoked but less conceptually certain than that of the fiduciary relationship.'² In his seminal work Professor Finn described a fiduciary relationship as 'one of the most ill-defined, if not altogether misleading terms in our law'.³ It is, perhaps this lack of a comprehensive definition that has made the law of fiduciaries not only an interesting area for legal scholars, but also a difficult one for those asked to define the circumstances in which such a relationship will arise. English law categorizes certain relationships as fiduciary *per se*. This is no more than saying that certain relations are, by their very nature, fiduciary *per se*, that is, without further inquiry. Thus the settled categories of fiduciary relationships include solicitor and client⁴; agent and principal⁵; company director and the company⁶, and trustee and beneficiary.⁷ However, despite certain relationships being categorized as fiduciary *per se*, the list of fiduciary relationships is not closed. The courts have, from time to time, admitted into the category of fiduciary relationships relationships that are not traditionally fiduciary. For example, in *O'Sullivan v Management Agency & Music Ltd*⁸ a manager was held to owe fiduciary duties to a singer. On the facts a new and inexperienced pop singer had entered into a contract on grounds of undue influence. The court held that, by virtue of his inexperience and the undue influence asserted by the manager, the facts gave rise to a fiduciary relationship.

This article explores three major aspects of fiduciary law that have been the subject matter of much debate in recent times. The first aspect examines the circumstances in which English law will find a fiduciary relationship. In particular, this article examines whether there is a comprehensive definition of a fiduciary relationship or *Cov. L.J. 3 whether the finding of a fiduciary relationship is left to judicial discretion. The second aspect looks to the question of whether fiduciary relationships are capable of arising in commercial contexts. This has been a somewhat controversial question because the assumption appears to be that in commercial relationships the parties do not usually act in the best interests of the other. Thus, the question arises whether commercial relationships are repugnant to fiduciary law. The final aspect addressed in this article is the extent to which the strict liability of fiduciary law is justified in some of the fiduciary cases that arise in the modern law.

Grounds for the Imposition of Fiduciary Relationship

Although certain relationships are fiduciary *per se*, the real question is: when will the court find a fiduciary relationship in circumstances when it does not fit into the recognised categories of fiduciary relationships? The problem is that the English courts have not provided a universal definition of a fiduciary relationship, instead, the approach has been very much one of judicial flexibility. Academics have attempted to address the matter by identifying certain factors that justify the imposition of a fiduciary relationship. For example, Sealy, after having reviewed the existing authorities, argued in 1962 that there

were essentially four categories of fiduciary relationship.⁹ He argued that the first two classes were reasonably capable of definition whilst the third and fourth classes were concerned with the application of certain presumptions that justified the imposition of fiduciary duties, thereby giving rise to a fiduciary relationship between the parties. The first category deals with the situation where one person has control over property for the benefit of another. Included in this category are persons such as trustees, guardians and bailiffs. Also included in this category is a donee of a power of appointment in circumstances when that power is imposed in the office, for example, of trusteeship.¹⁰ The second category deals with those situations where a claimant entrusts property to the defendant to perform a job in the best interests of the claimant. What is clear with Sealy's second classification is that there is no requirement that the defendant is actually dealing with property belonging to the plaintiff. Thus, whilst the majority of fiduciary relationships will involve some control over property belonging to another, according to Sealy's classification it is not crucial that there be some control over property. A good example of a situation falling into this category is the decision of the **Cov. L.J. 4* House of Lords in *Reading v A-G*.¹¹ In this case, a British army sergeant stationed in Cairo allowed, by virtue of his uniform, civilian lorries carrying contraband goods to pass through check points without any checks. The House of Lords held that the sergeant, by virtue of being employed by the Crown, stood in a fiduciary relationship to the Crown and thus was required to account for the bribes he had received from the smugglers. Whilst Sealy's second category does not require that the fiduciary be in control of property, it is questionable whether this is correct in light of a recent judicial pronouncement that a fiduciary relationship requires some control over property belonging to another.¹²

The third and fourth categories of Sealy's classification are a little more complicated and work on the presumption that certain events have occurred which call for the imposition of fiduciary duties; thereby giving rise to a fiduciary relationship. In the third category are situations where a person, who is already in a fiduciary relationship, and who is controlling property for another, then acquires property for himself as a result of his position as a fiduciary. Any new property acquired will be deemed as an accretion to the original property. Sealy gives as an example the seminal case of *Keech v Sandford*¹³ where, as will be seen in more detail later, a trustee, having failed to renew a lease of a market for an infant beneficiary, renewed the lease personally. The court held that the new lease was to be held on the same terms and conditions as the original lease in favour of the infant. Another example which could be classified as falling into this category, although it could also fall into categories one and two, is the decision of the House of Lords in *Boardman v Phipps*.¹⁴ On the facts of this case, a solicitor acting in connection with a trust advised the trustees, who already held shares in a private company, that they should acquire more shares in the same company with a view to exerting greater control over it. The trustees refused to purchase further shares on the basis that the trust instrument did not authorise them to do so. After consultation with some of the trustees, the solicitor acquired a controlling interest in the company and made a substantial profit for himself, as well as restructuring the company and making profit for the beneficiaries. By a bare majority, the House of Lords held that the solicitor was required to account for those profits made in his capacity as a fiduciary. Despite the absence of dishonesty on his part, those profits had been made in his capacity as **Cov. L.J. 5* a fiduciary and thus belonged to the beneficiaries. The decision of the House of Lords in *Boardman v Phipps*¹⁵ illustrates the strict rule of equity that questions of good faith and honesty are generally not an issue in deciding whether the fiduciary is entitled to retain any property made in his capacity as a fiduciary. This matter is discussed in more detail below. The final classification deals with the imposition of a fiduciary relationship where one party exerts undue influence on another. The existence and possibility of undue influence is sufficient to generate a fiduciary relationship.

Despite Sealy's categorisation, and indeed that of other academics writing in this field¹⁶, the courts have not yet given a comprehensive definition of a fiduciary. Instead, judicial flexibility has resulted in the courts working on the premise that the central defining features of a fiduciary relationship is where one party is acting in the best interests of the

other party and therefore is required to owe a duty of loyalty to the other. Judicial pronouncements of these features can be found in a number of English law cases. In *White v Jones*¹⁷ Lord Browne-Wilkinson commented that '...the paradigm of the circumstances in which equity will find a fiduciary relationship is where one party, A, has assumed to act in relation to the property or affairs of another, B'.¹⁸ In *Bristol and West Building Society v Mothew*¹⁹ Millett L.J. explained that 'a fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single minded loyalty of his fiduciary...' ²⁰ In other jurisdictions such as Australia and Canada the courts have employed concepts such as 'undertaking to act on behalf of another' or 'the exercise of a power or discretion so as to affect the principal's legal position' to find a fiduciary relationship.²¹

Although certain relationships have been described as fiduciary per se, the courts are not precluded from finding a fiduciary relationship in circumstances that justify the **Cov. L.J. 6* imposition of such a relationship and the corresponding duties that follow with it. The reason for this is, as Millet L.J. explained in *Bristol and West Building Society v Mothew*, that a fiduciary 'is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary.'²² In other words, it is the particular circumstances which give rise to the finding of a fiduciary relationship, rather than the nature of the primary relationship of the parties. What the court is required to do is to examine whether any particular set of facts have the features that are identified by Millet L.J. in *Bristol and West Building Society v Mothew*. These features are:

- An element of undertaking by the fiduciary to act for or on behalf of another to procure the best terms for that person
- An element of reliance by the principal that the fiduciary will act in his or her best interest
- An element of vulnerability; that the fiduciary may be in a position to negatively affect the interests of that other person

Using these criteria the courts have found fiduciary relationships beyond the recognised categories identified above. Thus it has been possible for professional advisers, bank managers, mortgagees, doctors and employees to be subject to fiduciary obligations even though they do not fit into the recognised relationships that are fiduciary *per se*.

Fiduciary Relationships in a Commercial Context

The extent to which fiduciary relationships can be imposed in a purely commercial context has been the subject matter of much debate in recent times. There appear to be a number of reasons as to why the debate is more acute in the commercial context than any other. In the first place, there has been the long-standing debate as to the proper application of equitable doctrines in a purely commercial context. In *New Zealand & Australian Land Co. v Watson*²³ Bramwell L J explained that he would be very sorry to see 'the various intricacies and doctrines connected with trusts **Cov. L.J. 7* incorporated into commercial transaction.'²⁴ Similarly, writing extra-judicially, Millett L.J. commented that 'it is of the first importance not to impose fiduciary obligations on parties to a purely commercial relationship.'²⁵ The reasoning behind this relates to the nature of commercial transactions and the relationships created thereby. Unlike the relationship of trust, where the trustee undertakes to act in the best interests of the beneficiary, the assumption in commercial relationships is that each party is bargaining at arms' length and is not acting in the best interests of the other but has its own interests foremost. In the words of Snell, 'it is normally inappropriate to expect a commercial party to subordinate its own interest to those of another commercial party.'²⁶

A second reason for the reluctance to have a liberal application of fiduciary law in a commercial context relates to the remedies that are available in cases of breach of fiduciary duty. Where a fiduciary breaches his duty of loyalty to his beneficiary, the beneficiary will have a right to equitable compensation in circumstances in which he has suffered a loss; or where the fiduciary has made a profit, he will be entitled to restitution. Restitution can be effected in one of two ways: firstly, by requiring the fiduciary to account for the profit; or,

secondly, by imposing a constructive trust on the profit so as to allow the beneficiary a proprietary claim to such profit. It is the imposition of the constructive trust that is more controversial in recent times. The reason for this relates to the fact that the imposition of such a trust gives a particular commercial party, which is the principal of a fiduciary relationship, priority over the property of an insolvent fiduciary. Leading academics have warned against the imposition of a constructive trust in such circumstances so as to adjust property rights on insolvency.²⁷

Despite the reservations about the proper role of fiduciary law in a commercial context, it would be nonsense to say that commercial transactions do not lend themselves to fiduciary obligations. Parties in a commercial relationship may well have intended to bring about a fiduciary relationship so that one party is acting in the interests of the other. Alternatively, the course of conduct between the parties may show that they are under a duty of loyalty to the other. Many agency relationships involve a commercial context where one company is acting in the interests of another. In other situations, the circumstances will themselves import a fiduciary **Cov. L.J. 8* relationship. For example, in the popularly cited Canadian case, *LAC Minerals Ltd v International Corona Resources Ltd*²⁸ the Canadian Supreme Court found a fiduciary relationship in circumstances where two companies were negotiating a joint venture to exploit minerals. The land to be mined belonged to the plaintiff but the defendants, through the course of dealings, established that adjacent land also contained minerals. The defendants then mined the adjacent land without the plaintiff's consent. The Court held that the defendants owed fiduciary duties to the plaintiffs because they had obtained confidential information from the plaintiffs.

More recently in *Sinclair Investment Holding SA v. Versailles Trade Finance Ltd*²⁹ the Court of Appeal had the opportunity to revisit the grounds for the imposition of a fiduciary relationship in a commercial context. The facts of this case involved an appeal by Versailles Trade Finance Limited (VTFL) against an order of Mr Nicholas Strauss QC, allowing an appeal against an earlier order refusing to strike out claims in the case. The background to the appeal involved VTFL, which was an associated company belonging to a group of companies known as the Versailles Group. An important feature of the case was that a major shareholder in the Versailles Group was a company called Marrlist Limited, owned by Mr Cushnie who was also a director of the companies in the Versailles Group. VTFL was a subsidiary of a listed company, Versailles Group PLC. The business of the group involved accelerated discount trading. The court did not go into detail about the nature of the business of the Versailles Group, save to say that it involved raising money from third party investors and investing the money on their behalf in manufactured goods purchased from the manufacturer and sold onto purchasers. Sinclair Investment Holdings SA was one of the third party investors who had entered into a trader's agreement with VTFL. The terms of the agreement involved, *inter alia*, that Sinclair Investments would provide VTFL with £2.35 million for the purposes of buying and selling goods for Sinclair Investments.

Despite the terms of the agreement between Sinclair Investments and VTFL, the monies advanced by Sinclair Investments were not used in accordance with that agreement. In fact, the money belonging to Sinclair Investments was used by the Versailles Group to increase its turnover with the result that Marrlist Limited was able to sell its shares in the Versailles Group at a profit. In other words, the profits enjoyed **Cov. L.J. 9* by Marrlist, and ultimately Mr Cushnie, were made directly as a result of Sinclair Investment's money. The reason why it can be said that the money still belonged to Sinclair Investments, despite being handed over to VTFL, is that one of the terms of the traders' agreement was that any of the money not used for the purpose of buying and selling goods was to be held on trust in a bank account for Sinclair Investments. This meant that VTFL was holding the money on trust for Sinclair Investments. The profits made by Marrlist Limited were used to repay a mortgage on a property in Kensington owned by Mr Cushnie and subsequently sold for £8.6 million. This money had been paid to the receivers of VTFL from whom Sinclair Investments on full trial would attempt to recover.

Sinclair Investments sought to recover their money from the £8.6 million pounds on two grounds. Firstly, that the profit made by Marrlist Limited and ultimately Mr Cushnie had been made as a result of a breach of a fiduciary duty owed to Sinclair Investments by Mr

Cushnie. Secondly, that part of the proceeds of sale were held on constructive trust for Sinclair Investments because the proceeds of the sale of the property in Kensington were made as a result of the fraud of Mr Cushnie who was responsible for increasing the turnover of the Versailles Group by misusing the money of Sinclair Investments. At first instance the Judge held that there was an arguable case on both of these points. VTFL, however, appealed, arguing that there was no fiduciary relationship between Mr Cushnie and Sinclair Investments and nor was there a general principle that a constructive trust should be imposed on a fraudster. These points can be examined in more detail.

Whilst it is trite law that a director owes fiduciary duties to the company in which he is employed,³⁰ does a director owe fiduciary duties beyond that of his company? The general position is that a director does not owe fiduciary duties beyond those owed to the company; thus, a director does not owe such duties to the shareholders generally. Mr Cushnie may well have been a director of the companies belonging to the Versailles Group and thus owed fiduciary duties to VTFL, but did he also owe fiduciary duties to Sinclair Investments? It was argued on behalf of VTFL that Mr Cushnie could not owe parallel duties to VTFL as well as Sinclair Investments for whom VTFL had become a trustee. This would simply put Mr Cushnie in a position of 'hopeless conflict'.³¹ In support of this argument Counsel for VTFL cited a powerful passage from Millett L.J.'s judgment in *Bristol and West Building Society v *Cov. L.J. 10 Mothew*³² where his Lordship, when commenting on the features of a fiduciary relationship, explained that, 'a fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal.'³³ In the opinion of counsel for VTFL, Mr Cushnie simply did not give any undertaking of loyalty, express or implied, to Sinclair Investments.

Although on the facts Mr Cushnie's relationship with Sinclair Investments could not be categorised as fiduciary in the sense of belonging to the recognised categories of fiduciary relationships, Arden L.J. in the Court of Appeal proceeded to answer the question whether Mr Cushnie could have acquired fiduciary obligations towards Sinclair Investments. In her Ladyship's judgment 'if it is alleged that a person who does not fall within the usual categories of a fiduciary relationship, such as trustee and director, made manifest his intention to enter into a fiduciary relationship--that is, to undertake to the other a duty of loyalty - there would be a sufficient pleading of fiduciary relationship.'³⁴ Having identified that a fiduciary relationship could arise where a person had undertaken a duty of loyalty to another, Arden LJ proceeded to examine whether it was a necessary pre-requisite to the finding of a fiduciary relationship that the fiduciary should have a relationship with any item of property belonging to the principal. This question was important on the facts because Mr Cushnie did not have legal title over the money advanced by Sinclair Investments to VTFL. Normally, in most other fiduciary relationships that are fiduciary *per se*, the fiduciary is exercising control over property for the benefit of another, for example the trustee-beneficiary relationship. In her Ladyship's opinion there was nothing in the authorities to suggest that there was a need for a fiduciary to have a particular relationship with any property. However, on the present facts this was a contentious issue because, although Mr Cushnie did not have legal title to the money advanced by Sinclair Investments, he was a director of VTFL and was in a position to control the exercise by VTFL of its powers over the money belonging to Sinclair Investments.

In the opinion of the Court of Appeal, Mr Cushnie, although a director of VTFL and as such not owing fiduciary duties to the traders investing with VTFL, nevertheless had by his own conduct given an undertaking of loyalty to the relevant traders that their **Cov. L.J. 11* sums advanced would be safeguarded and invested in an appropriate manner. This conduct was sufficient for the finding of a fiduciary relationship between Mr Cushnie and the traders.

The Nature and Standard of Fiduciary Liability

The most basic duty of a fiduciary is not to allow himself to be put in a position where there is a conflict between his personal interest and that of his principal. This, often referred to as the 'no conflicts rule', will be applied rigorously by the courts. If the fiduciary allows there

to be a conflict, then inevitably it will result in him making an unauthorised or secret profit at the expense of his principal, or in the case of a trust, his beneficiary. Sometimes it is also said that fiduciary law is concerned with the law against secret profits. The matter is neatly summed-up by Lord Herschell in *Bray v Ford*,³⁵ where his Lordship explained that:

'It is an inflexible rule of a Court of Equity that a person in a fiduciary position...is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his duty and interest conflict. It does not appear to me that this rule is, as has been said, founded upon principles of morality. I regard it rather as based on the consideration that, human nature being what it is, there is a danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect. It has, therefore, been deemed expedient to lay down this general rule. But I am satisfied that it might be departed from in many cases, without any breach of morality, without any wrong being inflicted, and without any consciousness of wrong-doing.'³⁶

The nature of fiduciary liability was extensively considered by Millet L.J. in *Bristol & West Building Society v Mothew*.³⁷ The question before the Court of Appeal was whether a solicitor, who was acting both for a lender and borrower, was in breach of a fiduciary duty in circumstances where the solicitor had given incorrect advice to the **Cov. L.J. 12* lender. In holding that negligent advice given by the solicitor was a breach of duty, albeit not a breach of fiduciary duty, Millet L.J. explained the core elements of the basic fiduciary duty of no conflict of interest. His Lordship explained that:

'A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets: a fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations.'³⁸

It has been suggested that the paramount duty of loyalty comprises two related themes.³⁹ The first comprises a general prohibition on a fiduciary allowing there to be a conflict of interest between his duty and interest. The second is a prohibition on the fiduciary making a secret profit from his position as a fiduciary. However, the two themes are inter-related because the very possibility of a conflict of interest will invariably result in the fiduciary making an unauthorised profit at the expense of his principal.⁴⁰

It is clear that a person standing in a fiduciary relationship owes fiduciary obligations to his principal or beneficiary. However, it should be noted that not all of the duties of a person categorised as a fiduciary are necessarily fiduciary duties. In other words, a fiduciary may owe parallel duties. For example, it is possible for a fiduciary to be subject to contractual duties or duties arising in tort whilst at the same time being subordinated to fiduciary duties.⁴¹ The matter is neatly explained by the decision in *Bristol & West Building Society v Mothew*⁴² where a solicitor was not in breach of a fiduciary duty in circumstances where he had given negligent advice to his client. **Cov. L.J. 13* Although the negligent advice was a breach of duty, it could not be properly categorised as a breach of his fiduciary duty. In the course of his judgment Millet L.J. explained that:

'The expression fiduciary duty is properly confined to those duties which are peculiar to fiduciaries and the breach of which attracts legal consequences differing from those consequent upon the breach of other duties. Unless the expression is so limited it is lacking in practical utility. In this sense it is obvious that not every breach of duty by a fiduciary is a breach of fiduciary duty.'⁴³

There are many examples of the concurrency of fiduciary and non-fiduciary duties imposed on a particular individual. For example, it is trite law that a trustee owes fiduciary duties to his beneficiary. However, a trustee who fails to invest the trust funds will be liable for breach of trust and not for breach of fiduciary duty. His failure to invest the trust funds

arises from trust law and not from the fact that he stands in a fiduciary relationship to the beneficiary. The concurrency of fiduciary and non-fiduciary relationships is illustrated in the decision of the Court of Appeal in *A-G v Blake*.⁴⁴ The facts of this case concerned a certain Blake who was a member of the Crown Secret Intelligence Service from 1933 to 1961. In 1951 he became an agent for the former Soviet Union and was eventually convicted and sentenced to 42 years in prison for communicating information contrary to the Official Secrets Act 1911. In 1966 he managed to escape from prison and went to live in Moscow. In 1990 he published a book 'No Other Choice' which detailed his activities as a member of the Secret Service. This publication was without permission from the Crown who subsequently sought to recover profits he had made as a result of the publication of the book. The Attorney-General acting for the Crown argued that the profits on the book had been made as a result of breach of his fiduciary duty of loyalty owed to the Crown. The basis of the argument was that Blake was a former servant of the Crown and as such owed fiduciary duties to the Crown. Furthermore, the information he had acquired about the Secret Service was imparted to him in his capacity as a servant of the Crown and that this information was now being used to make a profit.

The Court of Appeal accepted that when Blake was employed he owed the Crown a core fiduciary obligation of loyalty. His Lordship explained that 'the core obligation of **Cov. L.J. 14* a fiduciary of this kind is the obligation of loyalty. The employer is entitled to the single-minded loyalty of his employee. The employee must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he must not act for his own benefit or the benefit of a third party without the informed consent of his employer.'⁴⁵ However, the Court of Appeal held that Blake was not acting in breach of fiduciary duty when the book was published. Lord Woolf MR explained that whilst Blake was employed he undoubtedly owed fiduciary duties to the Crown. However, these duties only lasted as long as the relationship giving rise to it lasted; the fact that Blake was no longer employed when the book was published meant that he did not any longer stand in a fiduciary relationship with Crown. The Court of Appeal did, however, hold that although there had been no breach of fiduciary duty, Blake had committed a breach of contract on the grounds that his contract of employment required clearance before writing the book. Furthermore, it held that the Crown had a legitimate interest in ensuring that confidential information was not disclosed in breach of contract. Accordingly, the Court ordered that the profits should be paid over to the Crown.⁴⁶

It is clear now that a fiduciary owes onerous duties to his principal. It should also be made clear that the standard of liability is strict. The courts will not entertain questions of honesty or whether the fiduciary acted in good faith. If there is a possibility of a conflict of interest and the fiduciary allows that conflict to occur then he will be liable and subject to the remedies for breach of fiduciary duty. For example, in *Bray v Ford*⁴⁷ the court explained that a breach of fiduciary duty 'may be attended with perfect good faith'⁴⁸ and furthermore that the conflict rule 'might be departed in many cases, without any breach of morality, without any wrong being inflicted, and without any consciousness of wrong doing.'⁴⁹ The same view was echoed in *Regal (Hastings) Ltd v Gulliver*⁵⁰ where Lord Russell of Killowen, when dealing with the fiduciary duties of a director, explained that:

'The rule of equity, which insist on those, who by use of a fiduciary position make a profit, being liable to account for that profit, in no way depends on fraud, or absence of bona fides; or upon such questions or considerations as **Cov. L.J. 15* whether the profit would or should otherwise have gone to the plaintiff, or whether the profiteer was under a duty to obtain the source of the profit from the plaintiff, or whether he took a risk or acted as he did for the benefit of the plaintiff, or whether the plaintiff has in fact been damaged or benefited by his action. The liability arises from the mere fact of a profit having, in the stated circumstances been made. The profiteer, however, honest and well intentioned, cannot escape the risk of being called upon to account.'⁵¹

Perhaps a good illustration of the lack of dishonesty and the absence of bad faith being irrelevant factors in determining liability is the decision of the House of Lords in *Boardman v Phipps*.⁵² It will be recalled that in this case Boardman was a solicitor providing his services to trustees under a will. The trustees were holding 8000 shares out of an issued

30000 in a private company. Boardman advised the trustees that there was substantial scope for making a profit on the shares in the private company and therefore they should purchase more of the shares in the company. The trustees refused to purchase the shares because the trust instrument did not allow the acquisition of further shares in the same company. Boardman used the knowledge he had gained from the trust to purchase the remaining shares in the private company. After reorganisation of the private company, the shares he acquired were sold at a profit. He made a profit in the region of £75,000 as well as a benefit to the trust shares in the region of £47,000. The House of Lords held by a majority of 3:2 that Boardman was a constructive trustee of the profits made and as such was required to account for them. In coming to this decision, the House of Lords paid significance to the fact Boardman had made the profit because he had acquired knowledge of the shares by virtue of the fact that he was acting as solicitor to trustees of the trust fund. Furthermore, it mattered not that the trustees could not have used the information for their own benefit. The fact remained that Boardman made the profit by virtue of his position as solicitor to the trust fund with specific knowledge of the company and the shares within it. Boardman, however, was authorised to retain some of the profit by way of remuneration on the basis of *quantum meruit*. Both the Court of Appeal and the House of Lords were aware that Boardman was a man of great ability and had expended labour in re-organising the company and increasing the share therein.

***Cov. L.J. 16** The absence of bad faith being an irrelevant factor in determining the liability of the fiduciary was also illustrated in another decision of the House of Lords in *Guinness v Saunders*.⁵³ On the facts of this case, a director of a company received a sum of £5.2m under a contract he had entered into to provide his services in relation to a take-over bid. Thomas Ward, a former non-executive director of Guinness, was employed to provide his services to Guinness in relation to the takeover bid for Distillers. Ward had been a former non-executive director of Guinness and, despite the absence of any bad faith on his part, the House of Lords held that he had failed to disclose his former interest to the company Board. On this basis the House of Lords held that he was liable to account for the money he had received.

The Rationale for the Strict Approach

Why does fiduciary law adopt a very strict approach to the no-profit rule? It has been observed that where a profit is made by a fiduciary the court will require that the profit be returned to the principal or beneficiary despite the honesty or good faith of the fiduciary. Furthermore, the strict approach in English Law is further illustrated by the fact that the courts will require the fiduciary to return any profits made in circumstances when the opportunity to make such profits could not be utilised by the beneficiary. For example, it has been seen in *Boardman v Phipps*⁵⁴ that although the beneficiaries were never in a position to acquire further shares in the private company, albeit through their trustees, nevertheless Boardman was required to account for the profit he made on the shares. Similarly, in *Keech v Sandford*⁵⁵ it was observed at the outset of this article that the infant beneficiary was not in a position to renew the lease of Romford Market; nevertheless, the trustee was required to assign the lease to him and account for profits. The rationale for the strict approach hinges on a delicate matter of evidence. From the early nineteenth century the Court of Chancery preferred a deterrence approach because of the evidential difficulties involved in determining the motive of the fiduciary and establishing whether he did act honestly and in good faith. Honesty and good faith are by their very nature subjective criteria in law and involve determining the individual state of mind of the fiduciary. The ultimate question is whether the fiduciary has really put the interests of the beneficiary first, or whether his decision was clouded by the fact that he sees the opportunity to make a profit for himself. The matter is neatly explained by Moffat:

***Cov. L.J. 17** 'The courts of equity in the nineteenth century, particularly, under the early guiding influence of Lord Eldon, favoured the deterrent approach. This was in large measure because of concern over evidentiary difficulties facing a court in determining a trustee's motives where a possible conflict existed.'⁵⁶

In more recent times, it has been doubted whether this strict approach adopted in some of

the eighteenth century cases is justified in modern fiduciary law.

Is the Strict Liability Approach in Fiduciary Law Justified in the Modern Law?

In one relatively recent case Lord Browne-Wilkinson commented that it is '...wrong to lift wholesale the detailed rules developed in the context of traditional trusts and seek to apply them to trusts of quite a different kind.'⁵⁷ This observation has been quite interestingly used by one leading treatise on the law of trusts to question whether the strict liability approach of fiduciary law is justified in the modern law of trusts.⁵⁸ In this article it has been observed that where a fiduciary makes an unauthorised profit, he will be required to return it to his principal irrespective of his good faith and honesty. Fiduciary law, however, goes further and holds that a fiduciary will be under a duty to effect restitution even when the profit he has made could never have been made by his principal. For example, cases such as *Keech v Sandford*,⁵⁹ *Boardman v Phipps*⁶⁰ and *Regal (Hastings) v Gulliver*⁶¹ all make it clear that a profit that is made in circumstances where the principal could not have utilised the opportunity to make the profit for himself must nevertheless be returned to the principal. Historically, the justification for the strict rule related to the evidential issues involved in establishing the true motive of the fiduciary. Essentially, the question was whether the fiduciary had put the interests of the principal before his own interest.

In a number of modern cases the evidential issues that concerned the early Court of Chancery do not arise. The cases involve situations where there is no possibility that the principal could have utilised the opportunity. Take, for example, *Regal (Hastings) v Gulliver*⁶², the facts of which concerned the purchase of two cinemas by the plaintiff *Cov. L.J. 18 company which already owned one cinema in Hastings. The intention was that the three cinemas would be acquired by the plaintiff company and then sold off together. In order to facilitate the purchase of the cinemas, a subsidiary with a capital of 5000 shares was formed so as to take leases of the cinemas. However, only 2000 of the shares were fully paid, which proved to be fatal because the owner of the cinema was only willing to grant leases of the cinema on the grounds that all the shares were fully paid up. The plaintiff did not have any further money to pay into the subsidiary. Four directors and an outsider then acquired the remaining shares and the cinemas were eventually taken over with the directors making a substantial profit on the respective sale of their shares. The plaintiff then brought an action to recover the profits made by the directors on the grounds that it was made in breach of fiduciary duty. The action succeeded in the House of Lords on the grounds that the directors had acquired the shares in their capacity as fiduciaries. The House of Lords were firmly undeterred by the fact that the company could not itself have acquired the shares. The court was firmly of the opinion that the law in *Keech v Sandford* laid a strict rule that a fiduciary was not allowed to make an unauthorised profit.

The decision in *Regal (Hastings) v Gulliver* exemplifies the strictness of the common law. However, it is questionable whether this strict approach is justified in circumstances where there are no real evidential issues as regards the fiduciary's motives. For example, in *Regal (Hastings)*, the company was never in a position to acquire the shares in the subsidiary. The directors did not abuse their position in order to get the shares and the profit was made in good faith. AJ Oakley makes reference to a number of cases from other jurisdictions where a more flexible approach has been adopted.⁶³ The Supreme Court of Canada ruled in *Peso Silvermines v Cropper*⁶⁴ that a director was entitled to retain profits made from certain mining claims. The company, on whose board he sat, had initially declined to take those claims. Likewise in *Consul Development v D.P.C. Estates*⁶⁵ the High Court of Australia was of the view that the manager of a company could purchase property for himself that the company for whom he was working did not want to purchase themselves. AJ Oakley concludes by commenting that 'if Lord Browne-Wilkinson's remarks cause judges to think twice before they automatically apply conclusions reached in totally different legal and economic contexts to modern conditions, English *Cov. L.J. 19 Law may indeed one day adopt the more flexible attitudes already manifested in other jurisdictions.'⁶⁶

Conclusion

Although the law of fiduciaries has evolved over some 250 years, it remains an area of English law that perhaps, raises more questions than answers. Whilst the law recognises certain categories of relationships as fiduciary, recent judicial pronouncements illustrate that the finding of a fiduciary relationship is not dependant on such categorisation. Rather, it is the very circumstances of individual cases that may subject a particular person to fiduciary duties thereby making that person a fiduciary. This judicial flexibility has allowed the courts to find fiduciary relationships in contexts that were once assumed to be immune to fiduciary law. For example, in commercial contexts it is quite possible that one party may subordinate to the interests of another.

What does, however, remain the subject matter of much debate is the strict liability approach of fiduciary law. It has been observed in this article that the English courts continue to adopt the strict liability to the no-profit rule. Thus, where a fiduciary makes a secret profit, the courts will require full restitution even in circumstances where that profit could not have been made by the beneficiary. It is submitted that, whilst the strict liability rule was justified in the context of some of the nineteenth century cases where evidential issues prevented the court from ascertaining the intention of the fiduciary, in modern cases it is questionable whether such an approach is justified. There is much to be said for recent judicial calls for recognition that it is not appropriate to apply laws decided in a wholly different context to a different kind of situation. This recognition has already been made in a number of commonwealth jurisdictions and it remains to be seen how far English lawyers follow suit.

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[1.](#)

(1989) 61 D.L.R. (4th) 14.

[2.](#)

(1989) 61 D.L.R. (4th) 14 at 26.

[3.](#)

P. D. Finn, *Fiduciary Obligations* (1977), at page 1.

[4.](#)

Bristol & West Building Society v Mothew [1998] Ch.1

[5.](#)

Kelly v Cooper [1993] A.C. 205.

[6.](#)

Guinness v. Saunders [1990] 2 A.C. 663.

[7.](#)

Keech v Sandford (1726) Sel Cas Ch. 61

[8.](#)

[1985] 1 Q.B. 428.

[9.](#)

S. Sealy, 'Fiduciary Relationships' [1962] C.L.J. 69.

[10.](#)

Re Hay's S.T. [1981] 3 All. E.R. 788.

[11.](#)

[1951] A.C. 501.

[12.](#)

Sinclair Investment Holding SA v. Versailles Trade Finance Ltd [2005] EWCA Civ. 722. This decision is explored in more detail below.

[13.](#)

(1726) Sel Cas Ch. 61

[14.](#)

[1967] A.C. 46.

[15.](#)

[1967] A.C. 46.

[16.](#)

See, for example, Finn, *Fiduciary Obligation* (1977); Sheperd, *The Law of Fiduciaries* (1981) and Sheperd, 'Towards a Unified Concept of Fiduciary Relationships' (1981) 97 L.Q.R. 51.

[17.](#)

[1995] 2 AC 706.

[18.](#)

Ibid, at 728. This statement is echoing the opinion of Asquith L.J. in the Court of Appeal in *Reading v A-G* [1949] 2 KB 232 where his Lordship explained that '...a fiduciary relationship exists (a) whenever the plaintiff entrusts to the defendant property... and relies on the defendant to deal with such property for the benefit of the plaintiff or purposes authorised by him, and not to do otherwise, and (b) whenever the plaintiff entrusts to the defendant a job to be performed... and relies on the defendant to procure for the plaintiff the best terms available...' at 236.

[19.](#)

[1998] Ch 1.

[20.](#)

Ibid, at 18.

[21.](#)

See G. Moffat, *Trust Law: Text and Materials* 3rd Edition, (1999), at page 617.

[22.](#)

Ibid, at 16.

[23.](#)

[1881] 7 QBD 374.

[24.](#)

Ibid, at 382.

[25.](#)

P. Millett, 'Equity's Place in the Law of Commerce' (1998) 14 LQR 214, at page 217.

[26.](#)

Snell's Equity 31st Edition (2004), at page 149.

[27.](#)

See, for example, P. Birks, *The Frontiers of Liability* Vol 2 (1994), at 218.

[28.](#)

(1989) 61 DLR (4th) 14.

[29.](#)

[2005] EWCA Civ. 722.

[30.](#)

Guinness plc v Saunders [1990] 2 AC 663.

[31.](#)

[2005] EWCA Civ 722 at para 14.

[32.](#)

[1998] Ch 1.

[33.](#)

Ibid at 18.

[34.](#)

[2005] EWCA Civ 722, at para 22.

[35.](#)

[1896] A.C. 44.

[36.](#)

[1896] A.C. 44 at 51.

[37.](#)

[1998] Ch. 1.

[38.](#)

[1998] Ch.1 at 18.

[39.](#)

See, McGhee, J (ed), *Snell's Equity* (Sweet and Maxwell 2005), 21st ed, at page 150.

[40.](#)

See, for example, *Boardman v Phipps* [1967] 2 A.C. 46, at 123.

[41.](#)

For a critical insight into the relationship between fiduciary and non-fiduciary duties see M. Conaglen, 'The Nature and Function of Fiduciary Loyalty' (2005) 121 L.Q.R. 453 and also R. Lee, 'In Search of the Nature and Function of Fiduciary Loyalty: Some Observations on Conaglen's Analysis' (2007) 27 O.J.L.S. 327.

[42.](#)

[1998] Ch. 1.

[43.](#)

[1998] Ch. 1 at 16.

[44.](#)

[1998] 1 All E.R. 833.

[45.](#)

[1998] 1 All E.R. 833 at 842.

[46.](#)

The decision was affirmed by the House of Lords ([2001] 1 AC 268), although whether he was or was not a fiduciary was not considered.

[47.](#)

[1896] A.C. 44.

[48.](#)

[1896] A.C. 44 at 48.

[49.](#)

[1896] A.C. 44 at 52.

[50.](#)

[1967] 2 A.C. 134.

[51.](#)

[1967] 2 A.C. 134, at 150.

[52.](#)

[1967] 2 A.C. 46.

[53.](#)

[1990] 2 A.C. 663.

[54.](#)

[1967] 2 A.C. 46.

[55.](#)

(1726) Sel. Cas. Ch 61.

[56.](#)

G. Moffat, *Trust Law: Text and Materials* (3rd Ed, Butterworths, London) 1999, at page 338.

[57.](#)

Target Holdings v Redferns [1996] 1 A.C. 421.

[58.](#)

Parker & Mellows: *The Modern law of Trusts* (8th Ed, 2003), pages 362-370

[59.](#)

(1726) Sel.Cas. 61.

[60.](#)

[1967] 2 A.C. 46.

[61.](#)

[1942] 1 All E.R. 378

[62.](#)

[1967] 2 A.C. 134.

[63.](#)

Parker & Mellows: *The Modern law of Trusts* (8th Ed, 2003)

[64.](#)

(1966) 58 D.L.R. (2d) 1.

[65.](#)

(1975) 132 C.L.R. 373.

[66.](#)

Parker & Mellows: *The Modern law of Trusts* (8th Ed, 2003) at page 370.