

ARE FIDUCIARY DUTIES, UNDER AUSTRALIAN LAW, CONFINED TO THE TWO PROSCRIPTIVE DUTIES OF NO PROFIT AND NO CONFLICT?

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In 1996, in Breen v Williams,¹ the High Court made what appeared to be definitive statements of principle on the ambit of the operation of fiduciary duties under Australian law: in particular, those duties – of no profit and no conflict – were proscriptive in nature. In 2009, in Friend v Brooker,² the High Court described those statements as ‘the settled doctrine of fiduciary law in Australia’.³ However, in 2012, in the Bell Group⁴ case, the Court of Appeal of the Supreme Court of Western Australia: a) concluded that those statements of principle in Breen⁵ ‘must be read in the context of the particular facts of that case’;⁶ presumably, they had no broader application; and b) affirmed findings of breach of fiduciary duty which did not involve either profit or conflict. Was the Court of Appeal being presumptuous, renegade or merely applying orthodoxy?

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¹ (1996) 186 CLR 71, 113 (*Breen*).

² (2009) 239 CLR 129 (*Friend*).

³ *Ibid* 160 [84]–[85].

⁴ *Westpac Banking Corp v Bell Group Ltd (in liq) (No 3)* (2012) 44 WAR 1 (*Bell Group*); (2008) 39 WAR 1 (Owen J at first instance).

⁵ (1996) 186 CLR 71.

⁶ *Bell Group* (2012) 44 WAR 1, 166 [900] (Lee AJA) with whom Drummond AJA agreed: at 372 [2079].

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I INTRODUCTION: A LACK OF CLARITY

1. It has been said that golf is a game which involves hitting a very small ball into an even smaller hole with weapons singularly ill-designed for the purpose.⁷ The level of exasperation inherent in that statement must surely be recognised by lawyers – whether they be practitioners, jurists or judges – examining the topic of fiduciary duties. One explanation for that level of exasperation – or perhaps it is a symptom – is that the ‘principles in this area of the law are easier to state than apply’;⁸ and their elusive quality has been captured in almost identical terms by Sir Anthony Mason: ‘a concept in search of a principle’⁹ (as to the fiduciary relationship); and by the Supreme Court of Canada: ‘a legal obligation in search of a principle’¹⁰ (as to the fiduciary duty). A more recent illustration of a similar sentiment is contained in the 2014 Report of the Law Commission (England and Wales):

Fiduciary duties cannot be understood in isolation. Instead they are better viewed as ‘legal polyfills’, moulding themselves flexibly around other legal structures and sometimes plugging the gaps.¹¹

2. Interesting words; graphic perhaps; but not a resolution to the confusion surrounding fiduciary law. Instead, they tend to reflect the concern that this branch of the law is ‘characterised ... by disagreement, uncertainty and controversy’;¹² is ‘bedevilled by

⁷ Authorship is unsettled; but the usual suspects include Winston Churchill, Woodrow Wilson and George Curzon – a predecessor to Louis Mountbatten as Viceroy of India.

⁸ *Streeter v Western Areas Exploration Pty Ltd (No 2)* (2011) 278 ALR 291, 305 [76] (McLure P) (‘*Streeter*’).

⁹ Sir Anthony Mason, ‘Themes and Prospects’ in P D Finn (ed), *Essays in Equity* (Lawbook, 1985) 242, 246.

¹⁰ *Hodgkinson v Simms* [1994] 3 SCR 377, [29].

¹¹ Law Commission of England and Wales, *Fiduciary Duties of Investment Intermediaries*, House of Commons Paper No 350, Session 2014–15 (2014) 31 [3.1].

¹² Lionel Smith, ‘Fiduciary Relationships: Ensuring the Loyal Exercise of Judgement on Behalf of Another’ (2014) 130 *Law Quarterly Review* 608, 608.

unthinking resort to verbal formulae’;¹³ and has become a ‘strange and nonsensical’¹⁴ jurisprudence.

3. One reason why Leonard Rotman’s¹⁵ ‘Holy Grail’ examination of fiduciary law¹⁶ deserves some attention – apart from its quality – is its currency: it was published in 2011. Rotman’s essential complaint – perhaps disappointment – is one which reflects a sentiment shared by many: that fiduciary law has suffered from ‘its indiscriminate and generally unexplained use, particularly to justify results-oriented decision making.’¹⁷ The consequence is an unattractive creation: ‘a confused and problematic jurisdiction’;¹⁸ and the concern – obviously enough – is that the effectiveness of fiduciary law is thereby reduced.¹⁹ Harsh words? Perhaps not.
4. Paul Miller²⁰ provides a thorough illustration of the scope of the debate – albeit, mostly between academics – as to the proper rationale for the existence of fiduciary law: according to Miller, notwithstanding that fiduciary duties ‘are critical to the integrity of a remarkable variety of relationships’, their justification ‘is an enigma ... It is unclear what makes a relationship fiduciary and why fiduciary relationships attract fiduciary duties’.²¹
5. And in a more recent analysis, Paul Finn²² concludes that despite the High Court, from the 1980’s onwards, providing ‘clear signposts for the future development’²³ of fiduciary law, we ‘remain no closer to agreeing upon a simple, intelligible and coherent account of the fiduciary principle and its rationale.’²⁴ Instead, Finn suggests that ‘we

¹³ *Bristol and West Building Society v Mothew* [1998] Ch 1, 16 (‘*Mothew*’); see also P D Finn, ‘Fiduciary Obligations of Operators and Co-Venturers in Natural Resources Joint Ventures’ *AMPLA Yearbook* (1984) 160, 160.

¹⁴ Leonard Rotman, ‘Fiduciary Law’s “Holy Grail”: Reconciling Theory and Practice in Fiduciary Jurisprudence’ (2011) 91(3) *Boston Law Review* 921, 934 (‘Fiduciary Law’s “Holy Grail”’).

¹⁵ Then Visiting Scholar, Hennick Centre for Business and Law, Osgoode Hall Law School, York University (2010–11).

¹⁶ Rotman, *Fiduciary Law’s “Holy Grail”*, above n 14.

¹⁷ *Ibid.*

¹⁸ *Ibid.*, 921–2.

¹⁹ *Ibid.* 922.

²⁰ Assistant Professor, Faculty of Law, McGill University,

²¹ Paul B Miller, ‘Justifying Fiduciary Duties’ (2013) 58(4) *McGill Law Journal* 969, 969.

²² Professorial Fellow, University of Melbourne Law School.

²³ Paul Finn, ‘Fiduciary Reflections’ (2014) 88 *Australian Law Journal* 127.

²⁴ *Ibid.*

are heading, unnecessarily, in the opposite direction’;²⁵ and he attributes blame, in part, to decisions such as *Streetscape*²⁶ and *Bell Group*.²⁷

A Defining a Fiduciary

6. Adapting, but only slightly, what Finn said at least as long ago as 1977: a person is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to those obligations that he *is* a fiduciary.²⁸ Finn was speaking, there, in the context of a caution against the use of convenient terms – which he regarded as unimportant in understanding fiduciary law.²⁹ Instead, for him, the particular rules and principles governing fiduciary law ‘are everything. The description “fiduciary”, nothing’.³⁰ And that approach has found support across the jurisdictions, including in the English Court of Appeal. *Mothew* is an illustration.³¹
7. Fletcher Moulton LJ cautioned against ‘the danger of trusting ... verbal formulae’³² as long ago as 1911 in his ‘errand boy’ judgment:

Fiduciary relations are of many different types; they extend from the relation of myself to an errand boy who is bound to bring me back my change up to the most intimate and confidential relations which can possibly exist between one party and another where the one is wholly in the hands of the other because of his infinite trust in him. All these are cases of fiduciary relations ... There is no class of case in which one ought more carefully to bear in mind the facts of the case, ... than cases which relate to fiduciary and confidential relations and the action of the Court with regard to them.³³

8. And in *Boardman v Phipps*, Lord Upjohn repeated the effect of this refrain when he explained that:

Rules of equity have to be applied to such a great diversity of circumstances that they can be stated only in the most general terms and applied with particular attention to the exact circumstances of each case.³⁴

²⁵ *Ibid.*

²⁶ *Streetscape Projects (Australia) Pty Ltd v City of Sydney* (2013) 295 ALR 760 (‘*Streetscape*’).

²⁷ (2012) 44 WAR 1.

²⁸ P D Finn, *Fiduciary Obligations* (Law Book, 1977) 2; see also *Mothew* [1998] Ch 1, 18.

²⁹ Finn, *Fiduciary Obligations*, above n 28, 2.

³⁰ *Ibid* 1.

³¹ [1998] Ch 1, 18.

³² *Re Coomber* [1911] 1 Ch 723, 728.

³³ *Ibid* 728–30.

³⁴ [1967] 2 AC 46, 123.

9. For Australian jurisprudence – since 1984 – it would be difficult to find a case involving fiduciary law that did not identify the critical features of a fiduciary relationship by reference to the reasons of Mason J in *Hospital Products*.³⁵ It may be accepted that fiduciary relations are of different types, carrying different obligations;³⁶ or, as it was put by Mason J:

The categories of fiduciary relationships are infinitely varied and the duties of the fiduciary vary with the circumstances which generate the relationship. ... In accordance with these comments it is now acknowledged generally that the scope of the fiduciary duty must be moulded according to the nature of the relationship and the facts of the case.³⁷

These statements, by their very terms, reflect the potential for confusion in fiduciary law; and, in *Maguire*, it was recognised that: ‘minds reasonably may differ as to the outcome of the application of [fiduciary] principles.’³⁸

10. And that is so even in a case within one of the accepted – status based – fiduciary relationships.³⁹ In *Maguire*, Brennan CJ, Gaudron, McHugh and Gummow JJ said:

The present case stands apart ... because it involves both a fiduciary relationship within a well-recognised category [solicitor and client] as well as the claim to a well-established remedy. Nevertheless, even here, to say that the appellants stood as fiduciaries to the respondents calls for the ascertainment of the particular obligations owed to the respondents and consideration of what acts and omissions amounted to failure to discharge those obligations.⁴⁰

11. But irrespective of whether a relationship is within one of the accepted fiduciary relationships, such as trustee and beneficiary, solicitor and client, director and company, agent and principal, and partners;⁴¹ or is a fact based fiduciary relationship,⁴² the critical feature remains the same:

³⁵ *Hospital Products Ltd v United States Corporation and Ors* (1984) 156 CLR 41, 96–7 (*‘Hospital Products’*).

³⁶ *Ibid* 69 (Gibbs CJ) cited in *Bell Group* (2012) 44 WAR 1, 348 [1970].

³⁷ *Ibid* 102 cited in *Bell Group* (2012) 44 WAR 1, 348 [1970].

³⁸ *Maguire v Makaronis* (1997) 188 CLR 449, 468 (*‘Maguire’*); *Streeter* (2011) 278 ALR 291, 305 [76].

³⁹ Which are fiduciary not because of their ‘status’, but because of their undertaking of undivided loyalty: see, for example, James Edelman, ‘The Role of Status in the Law of Obligations: Common Callings, Implied Terms and Lessons for Fiduciary Duties’ (Speech delivered at the University of Alberta, Canada, 18 July 2013) <http://www.supremecourt.wa.gov.au/_files/The%20Role%20of%20Status%20in%20the%20Law%20of%20Obligations%20Edelman%20J%20July%202013.pdf>.

⁴⁰ *Maguire v Makaronis* (1997) 188 CLR 449, 464 (citations omitted).

⁴¹ *Hospital Products* (1984) 156 CLR 41, 68 (Gibbs CJ), 96 (Mason J).

⁴² Miller, above n 21, 1010–11 n 143; *Streetscape* (2013) 295 ALR 760, 782 [121], 783 [131]; Law Commission of England and Wales, *Fiduciary Duties of Investment Intermediaries*, House of Commons Paper No 350, Session 2014–15 (2014) [3.14].

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. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position. The expressions ‘for’, ‘on behalf of’, and ‘in the interests of’ signify that the fiduciary acts in a ‘representative’ character in the exercise of his responsibility ...⁴³

12. So, the foundation of the fiduciary relationship is ‘the obligation [duty] to act in the interests of another’;⁴⁴ or, as it has been put: ‘The essence of a fiduciary relationship ... is that one party ... pledges himself or herself to act in the best interests of the other.’⁴⁵

II SYNOPSIS

13. There has been no statement of principle from the High Court that the scope of fiduciary duties is defined merely by reference to the possibility of profit or conflict – although they are the usual suspects. On the other hand, it has long been accepted that the critical feature of a fiduciary relationship is the pledge to act in the interests of another.
14. In Australia, at least since 1996, there has been controversy as to the precise scope of fiduciary duties. And in order to determine whether those duties are rightly confined to the two proscriptive duties of no profit and no conflict, it is necessary to examine the subtleties to that question. *Breen*⁴⁶ and *Bell Group*⁴⁷ – the ‘bookends’ of the controversy – give colour to the question at the core of this paper. It will be seen that the fiduciary relationship cases preceding *Breen*⁴⁸ reveal a broader scope for the imposition of fiduciary duties, including by recognising their sometimes positive nature. *Breen*,⁴⁹ together with some authorities which follow it, suggest a narrower basis. *Bell Group*,⁵⁰ on the other hand, favours the older, broader, approach. Judicial murmurings since *Breen*,⁵¹ and more particularly since *Bell Group*,⁵² suggest that

⁴³ *Hospital Products* (1984) 156 CLR 41, 96–7.

⁴⁴ *Ibid* 100; see also *Pilmer and Ors v Duke Group Ltd (in liq) & Ors* (2001) 207 CLR 165, 196 [70] (‘*Pilmer*’).

⁴⁵ *Norberg v Wynrib* [1992] 2 SCR 226, 272, quoted with approval in *Pilmer* (2001) 207 CLR 165, 196–97 [71].

⁴⁶ (1996) 186 CLR 71.

⁴⁷ (2012) 44 WAR 1.

⁴⁸ (1996) 186 CLR 71.

⁴⁹ *Ibid*.

⁵⁰ (2012) 44 WAR 1.

⁵¹ (1996) 186 CLR 71.

⁵² (2012) 44 WAR 1.

fiduciary law in Australia is in a state of confusion. *Breen*,⁵³ by its unnecessary enunciation of the proscriptive–prescriptive dichotomy, has led the charge to that state of confusion – which, hopefully, is not intractable: a definitive statement of principle from the High Court is the only solution.

A The Question at the Core

15. The question at the core of this topic – are fiduciary duties, under Australian law, confined to the ‘no profit, no conflict’ duties – has its genesis in a particular paragraph in the reasons of Gaudron and McHugh JJ in *Breen*:

In this country, fiduciary obligations arise because a person has come under an obligation to act in another's interests. As a result, equity imposes on the fiduciary proscriptive obligations – not to obtain any unauthorised benefit from the relationship and not to be in a position of conflict. If these obligations are breached, the fiduciary must account for any profits and make good any losses arising from the breach. But the law of this country does not otherwise impose positive legal duties on the fiduciary to act in the interests of the person to whom the duty is owed.⁵⁴

16. This statement of principle has been repeated by the High Court in a succession of authorities.⁵⁵ In *Howard*,⁵⁶ the most recent, French CJ and Keane J described the relationship between director and company as one of a class of accepted relationships which attracted proscriptive fiduciary duties⁵⁷ – which is undoubtedly true. Hayne and Crennan JJ also described those obligations as ‘proscriptive, not prescriptive.’⁵⁸
17. Nonetheless, the statement of principle enunciated in *Breen*⁵⁹ has not been universally acclaimed as correct. Heydon and Crennan JJ have described it as ‘a very over- simplified proposition in relation to fiduciaries’;⁶⁰ Kirby J has questioned ‘the viability of this supposed dichotomy (because omissions quite frequently shade into commissions)’;⁶¹ the learned authors of *Meagher, Gummow & Lehane* – perhaps with

⁵³ (1996) 186 CLR 71.

⁵⁴ *Ibid*, 113 (citations omitted).

⁵⁵ *Pilmer* (2001) 207 CLR 165, 198 [74] (McHugh, Gummow, Hayne and Callinan JJ); *Friend v Brooker* (2009) 239 CLR 129, 160, [84] (French CJ, Gummow, Hayne and Bell JJ); *Howard v Commissioner of Taxation of the Commonwealth of Australia* (2014) 253 CLR 83, 98–9 [31]–[32] (French CJ and Keane J), 106 [56] (Hayne and Crennan JJ) (*‘Howard’*).

⁵⁶ (2014) 253 CLR 83.

⁵⁷ *Ibid* 98–9 [31].

⁵⁸ *Ibid* 106 [56].

⁵⁹ (1996) 186 CLR 71.

⁶⁰ *Byrnes v Kendle* (2011) 243 CLR 253, 292 [122].

⁶¹ *Pilmer* (2001) 207 CLR 165, 214 [128].

unexpected tact – have observed that, arguably, the distinction between prescriptive and proscriptive duties was ‘drawn too sharply’⁶² by the High Court in *Breen*,⁶³ and Leon Firios has contended that the proscriptive approach has no historical support.⁶⁴

18. The approach taken in *Breen*⁶⁵ may immediately be contrasted with the approach taken by Rotman – in his ‘Holy Grail’ paper – when speaking of the aspirational nature of fiduciary law. He accentuated the positive:⁶⁶

Fiduciary law imposes strict duties consistent with the prescriptivism of equity, which stresses modes of behaviour that are to be aspired to because of equity’s focus on conscience and its emphasis on substance rather than form.

The prescriptivism of equity conflicts sharply with the common law’s proscriptivism, which generally dictates what individuals are not to do.⁶⁷

19. But the question at the core of this topic – are fiduciary duties, under Australian law, confined to the ‘no profit, no conflict’ duties – needs to be put more exactly, as a question at that ‘level of generality [is] apt to obscure some difficult questions that lie beneath’.⁶⁸
20. Does a duty arising in a relationship involving an undertaking of undivided loyalty – the critical feature of a fiduciary relationship⁶⁹ – nonetheless fail to qualify as a fiduciary duty unless it involves an obligation not to profit or not to be in a position of conflict? If it is suggested that the answer is yes, then that would involve an important statement of principle which, so far, has not been enunciated by the High Court; at least not in terms, including in *Breen*.⁷⁰ The need for a resolution to this question of principle was recognised by Carr AJA in *Bell Group* in relation to the acknowledged status based fiduciary relationship with which that case was concerned:

⁶² J D Heydon, M J Leeming and P G Turner (eds), *Meagher, Gummow & Lehane’s Equity: Doctrines & Remedies* (LexisNexis, 5th ed, 2015) 210–11 [5-380].

⁶³ (1996) 186 CLR 71.

⁶⁴ Leon Firios, ‘Precluding Prescriptive Duties in Fiduciary Relationships: The Problems with the Proscriptive Delimitation’ (2012) 40 *Australian Business Law Review* 166, 175.

⁶⁵ (1996) 186 CLR 71.

⁶⁶ With due thanks to Harold Arlen, Bing Crosby and The Andrew Sisters.

⁶⁷ Rotman, Fiduciary Law’s “Holy Grail”, above n 14, 959.

⁶⁸ *Pilmer* (2001) 207 CLR 165, 178 [17].

⁶⁹ *Hospital Products Ltd* (1984) 156 CLR 41; *Mothew* [1998] Ch 1, 18; *Breen* (1996) 186 CLR 71, 93, 108; *Maguire v Makaronis* (1997) 188 CLR 449, 465; *Streeter* (2011) 278 ALR 291, 349–50 [366]–[367]; *Grimaldi v Chameleon Mining (No 2)* (2012) 200 FCR 296, 344–5 [174] (‘*Grimaldi*’); *Meinhard v Salmon* 249 NY 458, 464 (NY, 1928); *EC Dawson Investments Pty Ltd v Crystal Finance Pty Ltd (No 3)* [2013] WASC 183, [406] (‘*EC Dawson*’).

⁷⁰ (1996) 186 CLR 71.

If, as must be the case, some of a company director's powers when exercised do not involve assuming a fiduciary duty but others do, how is the line drawn between the two types of powers? It may be by exercising what might be described as judicial policy either to intervene with proprietary equitable relief (or other equitable relief) or not to do so.⁷¹

21. By way of contrast, Hollingworth J – some six years earlier – thought the question had already been answered. In *P&V Industries*,⁷² by way of obiter, her Honour said ‘that the proscriptive–prescriptive dichotomy ... means that the no conflict and no profit rules encompass the whole content of fiduciary obligations’.⁷³ In *Bell Group*, the Court of Appeal was unpersuaded by her Honour’s reasoning.⁷⁴

B The Broader Approach and the Narrower Approach

22. Nonetheless, it is possible to take a narrower approach and a broader approach to the question. On the one hand, if fiduciary duties are at their core designed to ensure disinterested judgment in the exercise of a power or discretion,⁷⁵ then, unless there is a potential for profit or conflict, there can be no question of that judgment being other than disinterested: there can be no ‘disloyalty’ without self-interest intruding. The consequence would be that, in principle, fiduciary duties – strictly so called – must be confined to the no profit, no conflict duties.
23. On the other hand, the broader approach would involve asking to what does the undertaking of undivided loyalty extend? And the suggested answer would be that it extends to the purpose for which the powers and discretions are to be exercised by the fiduciary: after all, those powers and discretions are vested in the expectation that they will be exercised, not forever lie dormant – indeed, they are often obliged to be exercised.
24. This approach is consistent with the way it was put by those advocating for the existence of fiduciary duties in *Bell Group*: ‘the distinct character of the fiduciary obligation [is determined] by reference to the pledge to act in the interests of another,

⁷¹ *Bell Group* (2012) 44 WAR 1, 521 [2717].

⁷² *P&V Industries Pty & Ors v Anthony Porto & Ors* (2006) 14 VR 1 (‘*P&V Industries*’).

⁷³ *P&V Industries* (2006) 14 VR 1, [23]; Law Commission of England and Wales, *Fiduciary Duties of Investment Intermediaries*, House of Commons Paper No 350, Session 2014–15 (2014) 45 [3.41].

⁷⁴ (2012) 44 WAR 1, 346 [1960]–[1962]

⁷⁵ *Grimaldi* (2012) 200 FCR 296, 344–5 [174].

not by reference to the conflict and profit rules'.⁷⁶ The consequence would be that, if those powers and discretions are exercised for a purpose which the law regards as improper – albeit not involving profit or conflict – there would, nonetheless, be a breach of the undertaking of undivided loyalty and hence of fiduciary duty.

25. There is support for this approach in the view expressed by Lionel Smith:⁷⁷ once it is concluded 'that some power was held *on behalf of* another, the requirement of loyalty is an integral part of the power in question'.⁷⁸ To interpolate: the requirement of loyalty extends to the purpose for which the power or discretion is to be exercised.
26. Take, for example, the long recognised duties on a company director to exercise the powers and discretions of office bona fide in the interests of the company as a whole and for proper purposes.⁷⁹ When speaking in that context in *Whitehouse*, Mason, Deane and Dawson JJ observed that: '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.'⁸⁰ And their Honours 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'.⁸¹
27. The exercise of such a power or discretion for an improper purpose constitutes a 'fraud on a power' in the sense explained by Lord Parker in *Vatcher*:

The term fraud in connection with frauds on a power does not necessarily denote any conduct on the part of the appointor amounting to fraud in the common law meaning of the term or any conduct which could properly be termed dishonest or immoral. It merely means that the power has been

⁷⁶ *Bell Group*, 'Outline of Respondent's Submissions' to the High Court, No P18/2013, 12 July 2013, 8 [34] (citations omitted); *Pilmer* (2007) 207 CLR 165, 196–7 [70]–[71].

⁷⁷ Sir William C Macdonald Professor of Law, McGill University; Professor of Private Law, King's College Dickson Poon School of Law.

⁷⁸ Smith, above n 12, 616 (emphasis in original).

⁷⁹ *Streeter* (2011) 278 ALR 291, 368 [447]–[448]; *Whitehouse v Carlton Hotel Pty Ltd* (1987) 162 CLR 285, 289, 300–1 ('*Whitehouse*'); *Howard* (2014) 253 CLR 83, 98–99 [31], 106–107 [58]; *Pilmer* (2001) 207 CLR 165, 178 [18].

⁸⁰ *Whitehouse* (1987) 162 CLR 285, 293.

⁸¹ *Ibid* 290; *Angas Law Services Pty Ltd v Carabelas* (2005) 226 CLR 507, 532 [67] n 44.

exercised for a purpose, or with an intention, beyond the scope of or not justified by the instrument creating the power.⁸²

28. The doctrine of ‘fraud on a power’ has been the subject of recent exposition by Brereton J in the *Hancock*⁸³ litigation – in the context of the conduct of a trustee.

C An Introduction to the Proscriptive–Prescriptive Dichotomy and its Relevance

29. But, in determining whether a duty fails to qualify as fiduciary in nature unless it involves an obligation not to profit or not to be in a position of conflict, a second question follows: what is the relevance, in terms of the proper characterisation of a duty, of the fact that positive conduct may be required in order to satisfy it? And this involves a consideration of the legitimacy of the proscriptive–prescriptive dichotomy. As to this, there are some layers which need to be revealed, including for the reason that there may be an aspect, here, of form defeating substance – a notion supposedly eschewed by equity.⁸⁴
30. In any event, the proscriptive–prescriptive dichotomy appears not to matter in the context of the ‘no profit, no conflict’ duties, as it has been rationalised that prescriptive conduct, where it is necessary, is merely the means by which a fiduciary complies with its proscriptive duties and does not constitute a positive duty in itself. An easy example is the positive obligation on a fiduciary to disclose a potential for conflict. Once again, Hollingworth J touches on this in *P&V Industries*:

It is true that there are cases which refer to a fiduciary as having an ‘obligation’ to make disclosure. However, in each instance, advance disclosure functions only as the means of obtaining the consent of the beneficiary, thereby avoiding breach of the two fundamental rules governing proscriptive fiduciary relationships.⁸⁵

31. And Finkelstein J made the same point in 2001 in *Fitzwood*, albeit with a little more bite:

⁸² *Vatcher v Paull* [1915] AC 372, 378; *Hancock v Rinehart* [2015] NSWSC 646, [57]; K E Lindgren ‘The Fiduciary Nature of a Company Board’s Power to Issue Shares’ (1972) 10 *Western Australian Law Review* 364, 369.

⁸³ *Hancock v Rinehart* [2015] NSWSC 646 [57], 28 May 2015; Rosemary Teele Langford, ‘The Fiduciary Nature of the Bona Fide and Proper Purposes Duties of Company Directors: *Bell Group Ltd (in liq) v Westpac Banking Corp (No 9)*’ (2009) 31 *Australian Bar Review* 326, 336 n 51.

⁸⁴ *Friend v Brooker* (2009) 239 CLR 129, 150 [47]; Rotman, Fiduciary Law’s “Holy Grail”, above n 14, 959; Leonard I Rotman, *Fiduciary Law* (Thomson Carswell, 2005) 209 citing *Parkin v Thorold* (1852) 51 ER 698, 701 (Romilly MR); *Streeter* (2011) 278 ALR 291, 369 [450].

⁸⁵ *P&V Industries* (2006) 14 VR 1, 6 [24].

The conclusion that equity will impose a positive duty requiring a fiduciary to act in the interests of another person by disclosing information to that other person, appears to be at odds with principle ... So, that which is often regarded as a fiduciary obligation of disclosure should not be seen as a positive duty resting on a fiduciary, but a means by which the fiduciary obtains the release or forgiveness of a negative duty; such as the duty to avoid a conflict of interest, or the duty not to make a secret profit ... I do not propose to recast the nature of the fiduciary obligation here under consideration from a prescriptive obligation to disclose to, say, a proscriptive duty of loyalty or to avoid conflicts of interest. I accept that it might sometimes be necessary to be precise in the description of a fiduciary's obligation. But the equitable obligation that is presently being discussed has been spoken of as a positive duty for well over 100 years ... The law will not be seriously injured if I continue to adopt the same language.⁸⁶

32. The suggested, but not always accepted,⁸⁷ rationalisation may, nonetheless, be an example of form defeating substance if it is used to confine the scope of duties properly described as fiduciary: surely the determinant of the proper characterisation of a duty – here, whether it is fiduciary – cannot be reduced to the means by which the duty is performed. Surely the determinant must be whether the duty has its genesis in an undertaking of undivided loyalty, not whether it is proscriptive or prescriptive – particularly when it is accepted that a proscriptive duty can be performed prescriptively without losing its status as a fiduciary duty. If its genesis is in an undertaking of undivided loyalty, why is it not ‘fiduciary’ in nature? And this question does not ignore the fact that not all duties owed by a fiduciary are necessarily fiduciary in nature.
33. The introduction of the proscriptive–prescriptive dichotomy by the High Court in *Breen*⁸⁸ was without precedent – at that level – in Australian jurisprudence. This was a point made by the learned authors of *Meagher, Gummow & Lehane*:

Neither in *Breen v Williams* nor in any later case nor in any scholarly writing has there been any citation of prior authority explicitly discussing and formulating the proscriptive/prescriptive distinction. Nor was any scholarly writing directly on point cited by the High Court in *Breen v Williams*, except for an article by Finn. And there do not appear to be any relevant cases or any other scholarly writing clearly supporting the distinction before 1996.⁸⁹

⁸⁶ *Fitzwood Pty Ltd v Unique Coals Pty Ltd (in liq)* (2001) 188 ALR 566, 576 [32]–[33].

⁸⁷ *Netglory Pty Ltd v Caratti* [2013] WASC 364, [345]–[349] (‘*Netglory*’) (Edelman J).

⁸⁸ (1996) 186 CLR 71, 113.

⁸⁹ Heydon, Leeming and Turner, above n 62, 214–15 [5-385] (citations omitted).

34. As noted earlier, the point has also been made by Firios, who concluded – for reasons he developed – that ‘there is no historical support for the requirement that fiduciary obligations be proscriptive.’⁹⁰
35. The introduction of that dichotomy in *Breen*⁹¹ was also unnecessary and inflamed the confusion with which the topic of fiduciary law was already burdened. And it will be speculated, later, as to why the High Court did so.⁹² But, the causing of confusion in the law was an outcome against which the High Court cautioned in *Farah* – in the context of the ambit of *Barnes v Addy*⁹³ liability for breach of fiduciary duty:

The result of the statements by the Court of Appeal about restitution-based liability has been confusion among trial judges of a type likely to continue unless ... corrected.⁹⁴

36. Those sentiments can be applied with equal vigour to the debate concerning the ambit of fiduciary duties in Australian jurisprudence as a result of the reasoning in *Breen*;⁹⁵ and that debate can only be resolved, one way or the other, at a level of principle by the High Court. It would be easy to articulate: ‘Under Australian law, fiduciary duties are (or are not) confined to the no profit, no conflict duties.’ And alternative reasons can be attributed: a) without the potential for self-interest intruding, there can be no relevant disloyalty by a fiduciary; or b) the undertaking of undivided loyalty extends to the purpose for which a power or discretion vested in the fiduciary is to be exercised. And the exercise of such a power or discretion for an improper purpose – but not necessarily involving profit or conflict – is nonetheless an act of disloyalty by the fiduciary.
37. But the proscriptive–prescriptive dichotomy should have no role to play in determining the proper characterisation of the duty; and a solution will not be found merely by recasting what may appear to be a prescriptive duty into a proscriptive duty by a strategic use of the word ‘not’.⁹⁶ But, on a lighter note ...

⁹⁰ Firios, above n 64, 175. Firios noted that: ‘The proscriptive delimitation is a relatively recent development in fiduciary law’: at 174.

⁹¹ (1996) 186 CLR 71.

⁹² See below [187].

⁹³ (1874) LR 9 Ch App 244.

⁹⁴ *Farah Constructions v Say-Dee Pty Ltd* (2007) 230 CLR 89, 151 [135]; see also 149 [131], 151 [135] (*‘Farah’*).

⁹⁵ (1996) 186 CLR 71.

⁹⁶ *DFD Rhodes Pty Ltd v Hancock Prospecting Pty Ltd* [2015] WASC 105, 22 [53].

III A LIGHTER NOTE: SOME ELEMENTAL MATTERS

38. The term ‘fiduciary’ – from the Latin *fiducia* meaning trust⁹⁷ – refers to a position which is perhaps the most cherished known to the law; a position to which much acclaim attaches because of its core virtues of loyalty and devotion to the interests of another: the principal. Rotman spoke of this in his ‘Holy Grail’ paper:

fiduciary law as a fundamental precept of equity stresses modes of behaviour to which those holding power over the interests of others should aspire. These foundational fiduciary values differ significantly from those underlying contract, tort, and unjust enrichment.⁹⁸

39. He was contrasting, there, an ordinary case of contract (which might include tortious duties), where it is accepted – and expected – that the parties will seek to advance their several interests.⁹⁹ Judge Posner made the point in 1992:

Contract law does not require parties to behave altruistically toward each other; it does not proceed on the philosophy that I am my brother’s keeper. That philosophy may animate the law of fiduciary obligations but parties to a contract are not each other’s fiduciaries.¹⁰⁰

40. And, more recently, Gleeson CJ spoke of this in the context of unconscionability:

Many, perhaps even most, contracts are made between parties of unequal bargaining power, and good conscience does not require parties to contractual negotiations to forfeit their advantages, or neglect their own interests.¹⁰¹

The same cannot be said of fiduciaries.

41. The acclaim which attaches to that position – and to those who occupy it – has seen the term fiduciary embraced, in one form or another, not only by those aspiring to the high moral ground; but also as an inspiration to achieve it.
42. *Semper fidelis* – ‘always faithful, always loyal’ – is the motto of many ancient families;¹⁰² it is also reflected in the motto on the Seal of the United States Marine Corp

⁹⁷ As well as faith, confidence, reliance and belief: Scott FitzGibbon, ‘Fiduciary Relationships are not Contracts’ (1999) 82(2) *Marquette Law Review* 303, 339.

⁹⁸ Rotman, *Fiduciary Law’s “Holy Grail”*, above n 14, 932.

⁹⁹ P D Finn, ‘The Fiduciary Principle’ in T G Youdan (ed), *Equity, Fiduciaries and Trusts* (Carswell, 1989) 1, 52.

¹⁰⁰ *The Original Great American Chocolate Chip Cookie Company Inc v River Valley Cookies Ltd*, 970 F 2d 273, 280 (7th Cir, 1992).

¹⁰¹ *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51, 64 [11].

– often abbreviated by Hollywood to ‘*Semper fi*’; and a variant is depicted on the coat of arms of the State of Queensland: *audax at fidelis* – ‘bold but faithful’.

43. But the acclaim which attaches to the position of fiduciary comes at a cost: it is accompanied by commensurate expectations – loyalty and devotion – on those who occupy it; and fiduciaries who do not measure up to those expectations will ‘not receive from equity a healing benediction’ – as Cardozo Ch J put it in his typically vivid prose perhaps more reflective of its time, 1928.¹⁰³
44. It has been said that the reasoning of Cardozo Ch J in *Meinhard v Salmon*¹⁰⁴ is replete with religious imagery:

Cardozo remarks that Salmon had ‘put himself in a position in which thought of self was to be renounced, however hard the abnegation.’ The ‘rule of undivided loyalty’ imposed in such a situation is ‘relentless and supreme.’ Conduct short of that standard, Cardozo observes, would not receive from equity a ‘healing benediction.’ The image is one of religion, transcendence and mysticism. The connotation is that when it comes to dealings with co- partners, a person must behave with monastic purity, placing always the other’s interests above his own.¹⁰⁵

45. And, continuing the religious flavour, *Matthew* 6.24¹⁰⁶ was said by Gaudron and McHugh JJ¹⁰⁷ to contain the biblical injunction upon which fiduciary duties rest:

No one can serve two masters: for either he will hate the one, and love the other; or else he will hold to the one, and despise the other. Ye cannot serve God and mammon.

46. Their Honours noted that the solution provided by equity to the problem that duty and self-interest make inconsistent calls on the faithful, is by insisting that fiduciaries give undivided loyalty to the persons whom they serve;¹⁰⁸ and the particular authority upon which they relied for the insistence on undivided loyalty was that of Lord Herschell in

¹⁰² Including the Lynch family of Galway; the Frith family of Ireland more broadly; the Edge and Onslow families of England and the Stewart family of Scotland.

¹⁰³ *Meinhard v Salmon*, 249 NY 458, 468 (NY, 1928).

¹⁰⁴ Ibid cited in *Warman International Limited v Dwyer* (1995) 182 CLR 544, 557 n 26; *Streeter* (2011) 278 ALR 291, 357 [397].

¹⁰⁵ Geoffrey P Miller, ‘A Glimpse of Society via a Case and Cardozo: *Meinhard v Salmon*’ in Jonathan R Macey (ed), *The Iconic Cases in Corporate Law* (Thomson West, 2008) 12, 24 quoted in Stephen M Bainbridge, ‘Must Salmon Love Meinhard? Agape and Partnership Fiduciary Duties’ (2014) 17 *The Green Bag* 257, 261. See also P. A. Keane, ‘The 2009 W A Lee Lecture in Equity: The conscience of equity’ (2010) 84 ALJ 92, 99.

¹⁰⁶ The King James’ version.

¹⁰⁷ *Breen* (1996) 186 CLR 71, 108 (Gaudron and McHugh JJ).

¹⁰⁸ Ibid.

Bray v Ford – who regarded it as ‘an inflexible rule’.¹⁰⁹ That approach remains: it was recently cited with approval by the High Court in *Howard*.¹¹⁰

47. Despite the clarity of the aspiration, the difficulty arises in identifying, in any given circumstances, the persons who will be subject to such an obligation of undivided loyalty and how that obligation is satisfied. Although the questions need context, what is it that distinguishes a fiduciary duty from a duty imposed by equity or at law; and does the distinction have significance?

A To Whom does the Appellation Apply?

48. As to the first question, it is a starting point – although it does not provide a complete answer – to ask whether the person by whom a fiduciary duty is said to be owed is in a fiduciary relationship or subject to fiduciary obligations. And the reason why it is not a complete answer is because it is accepted that not every duty owed by a fiduciary is necessarily regarded as being fiduciary in nature.¹¹¹ This leads to what Finn has described as ‘a large issue’;¹¹² and, in 1989, he identified it in this way:

Even if one accepts the limitation of the fiduciary principle to the modest role of exacting loyalty, a large issue still remains. What is it in a relationship that marks the transition from unconscionability and good faith on the one hand to the fiduciary principle on the other? ... For it to become fiduciary, ‘something more is needed.’¹¹³

49. And, despite the passage of time, the currency of the question remains. Carr AJA put it this way in 2012:

If, as must be the case, some of a company director’s powers when exercised do not involve assuming a fiduciary duty but others do, how is the line drawn between the two types of powers?¹¹⁴

50. Conaglen posits an answer – although, in fairness to him, he was dealing more directly with the function or purpose of duties, rather than their origin:

What sets fiduciary duties apart from other kinds of duties is the function that they serve in protecting other, frequently positive, non-fiduciary duties and the

¹⁰⁹ [1896] AC 41, 51–2.

¹¹⁰ (2014) 253 CLR 83, 114 [91].

¹¹¹ Ibid; Finn, *Fiduciary Reflections*, above n 23, 135; *Hospital Products* (1984) 156 CLR 41, 98; *Permanent Building Society (in liq) v Wheeler* (1994) 11 WAR 187, 237 (‘*Wheeler*’).

¹¹² Finn, *The Fiduciary Principle*, above n 99, 31.

¹¹³ Ibid 31, 41 (citations omitted).

¹¹⁴ *Bell Group* (2012) 44 WAR 1, 521 [2717].

manner in which they serve that function. It is their subsidiary and prophylactic nature that differentiates them from other duties rather than the mere fact that they are proscriptive.¹¹⁵

51. Miller has described Conaglen's prophylactic argument as 'a unique account of the function of the duty of loyalty ... highly sophisticated but still problematic.'¹¹⁶ He continued:

The claim that fiduciary law is an outlier rests on thin authority and is not based on any analysis. Conaglen says that fiduciary relationships are identified by first determining whether fiduciary duties exist. But he does not convincingly explain the incidence of fiduciary duties. Fiduciary duties must either be imposed as a general rule of conduct or arise by virtue of an interaction between individuals. They do not subsist in the air, as it were.¹¹⁷

Why does the distinction matter?

52. As to the second question – why the distinction matters – the answer is conceptually easier: it may be important to the framing of a cause of action, the time at which it accrues and the relief which is open – because 'equitable remedies will commonly be more significant and protective'.¹¹⁸ Mason J alluded to this when he spoke of the need in appropriate cases to do justice by making available relief in specie through the constructive trust: 'the fiduciary relationship being a means to that end.'¹¹⁹ Heydon J and Edelman J have each given this some thought;¹²⁰ as has Gummow J:

Breach of fiduciary duty brings into play a range of remedies. They include: injunction, ... rescission of transactions between principal and fiduciary; declaration and enforcement of constructive trust in respect of assets acquired in breach of duty; account of profits wrongly made, that is, a pecuniary rather than an *in specie* remedy; and compensation for loss inflicted by breach of duty.¹²¹

¹¹⁵ Matthew Conaglen, *Fiduciary Loyalty – Protecting the Due Performance of Non-Fiduciary Duties* (Hart Publishing, 2010) 203.

¹¹⁶ Miller, above n 21, 1002–3.

¹¹⁷ *Ibid* 1003–4.

¹¹⁸ *Pilmer* (2001) 207 CLR 165, 218 (Kirby J); *Howard* (2014) 253 CLR 83, 100 [35]; Law Commission of England and Wales, *Fiduciary Duties of Investment Intermediaries*, House of Commons Paper No 350, Session 2014–15 (2014) 183 [10.4]; Miller, above n 21, 972 n 3.

¹¹⁹ *Hospital Products* (1984) 156 CLR 41, 100.

¹²⁰ J D Heydon, 'Are the Duties of Company Directors to Exercise Care and Skill Fiduciary?' in S Degeling and J Edelman (eds), *Equity in Commercial Law* (Lawbook, 2005) 189–91, 235; James Edelman, 'Directors and Fiduciary Duties: The story of Nocton v Lord Ashburton' (Speech delivered at the Corporate Counsel Day: Conference held by the Australian Corporate Lawyers Association's WA division, Perth, 23 May 2012) <http://www.supremecourt.wa.gov.au/_files/Directors_and_Fiduciary_Duties_20120523.pdf>.

¹²¹ W Gummow, 'Compensation for Breach of Fiduciary Duty' in T G Youdan (ed), *Equity, Fiduciaries and Trusts* (The Carswell Company, 1989) 61 (emphasis in original) (citations omitted).

53. And the distinction is of much significance when seeking to invoke *Barnes v Addy*¹²² liability in order to extend the options for recovery to a third party: *Bell Group*¹²³ is itself an illustration of such a case; so, too, is *Farah*.¹²⁴ The point was made by Bathurst CJ in the following way:

I should add that, in most circumstances, whether a breach by a director of their equitable duties also constitutes a breach of a fiduciary obligation will not be important. It only gained significance in the *Bell* litigation because it was necessary for the duties to be fiduciary in order for accessorial liability to be imposed pursuant to *Barnes v Addy* principles.¹²⁵

B Bell Group: Contradicting Accepted Fiduciary Principles?

54. It was observed at the outset that ‘the principles in this area of the law are easier to state than to apply.’¹²⁶ And that observation remains true even in cases involving relationships within the accepted fiduciary categories.¹²⁷ *Bell Group*¹²⁸ is the obvious example: the relationship, there, was between company and director;¹²⁹ and yet the reasoning of the Court of Appeal has been criticised as running ‘headlong against and [contradicting] the principle that fiduciary duties in this country are confined to the twin but overlapping proscriptive duties of no profit and no conflict.’¹³⁰
55. Perhaps it is implicit in that statement that the Court of Appeal in *Bell Group*¹³¹ failed to heed the caution identified by FitzGibbon: ‘Because judges can easily go wrong, they should be parsimonious; reluctant to adopt aggressive and sweeping doctrines like those found in fiduciary law’;¹³² although he nonetheless acknowledged that: ‘Courts regard themselves as chartered to develop new doctrines and, in some areas, to exercise an ongoing supervisory authority over fiduciaries.’¹³³

¹²² (1874) LR 9 Ch App 244.

¹²³ (2012) 44 WAR 1.

¹²⁴ *Farah* (2007) 230 CLR 89.

¹²⁵ Chief Justice T F Bathurst, ‘It tolls for Thee: Accessorial Liability After *Bell v Westpac*’ (Speech delivered at the Banking and Financial Services Law Association Annual Conference, Gold Coast, 29–31 August 2013) 12 [46].

¹²⁶ *Streeter* (2011) 278 ALR 291, 305 [76] (McLure P).

¹²⁷ *Hospital Products* (1984) 156 CLR 41, 96.

¹²⁸ (2012) 44 WAR 1.

¹²⁹ *Hospital Products* (1984) 156 CLR 41, 96.

¹³⁰ Transcript of Proceedings, *Westpac Banking Corporation & Ors v The Bell Group Ltd & Ors* [2013] HCATrans 49 (15 March 2013).

¹³¹ (2012) 44 WAR 1.

¹³² FitzGibbon, above n 97, 335.

¹³³ *Ibid* 311–12.

56. But the fact of that criticism of *Bell Group* should not be surprising: in many of the cases which have come to be regarded over the years as the more important on fiduciary duties, there was a lack of unanimity within the courts either on matters of principle, the application of the facts or both.¹³⁴ In so far as Australian jurisprudence is concerned, it is unnecessary to go further than *Hospital Products*¹³⁵ to make the point: the statements of principle which tend invariably to be cited and quoted with approval in any case involving fiduciary duties are those of Mason J¹³⁶ – who was in dissent in the final result;¹³⁷ but there are many examples of the point across the jurisdictions.¹³⁸

IV THE CONFUSION IN FIDUCIARY LAW: WHY IS IT SO?

57. The answer to that question involves three issues that are not within the precise scope of this paper. Nonetheless, as they provide some explanation for the level of confusion attributed to fiduciary law, they ought be the subject of some, if not thorough, analysis.

A The Doctrinal Reason

58. The first issue is doctrinal: what is the basis of fiduciary law? And one aspect of that debate is focused on what FitzGibbon¹³⁹ has described as an ‘insurgent theory [which] asserts that fiduciary relationships are really contractual in nature.’¹⁴⁰ FitzGibbon is not the ‘insurgent’: that appellation is reserved for Judge Easterbrook¹⁴¹ and Professor Fischel,¹⁴² who were advocates of the view that:

Fiduciary duties are not special duties; they have no moral footing; they are the same sort of obligations, derived and enforced in the same way, as other

¹³⁴ See, eg, *Chan v Zacharia* (1984) 154 CLR 178 (‘*Chan*’); *Hospital Products* (1984) 156 CLR 41; *Regal (Hastings) Ltd v Gulliver (note)* [1967] 2 AC 134 (‘*Regal (Hastings)*’); *Nocton v Lord Ashburton* [1914] AC 932 (‘*Nocton*’); *Meinhard v Salmon*, 249 NY 458 (NY, 1928); *Breen* (1996) 186 CLR 71; *Farah* (2007) 230 CLR 89; *Streeter* (2011) 278 ALR 291; *Hodgkinson v Simms* [1994] 3 SCR 377; *Boardman v Phipps* [1967] 2 AC 46; *Pilmer* (2001) 207 CLR 165.

¹³⁵ (1984) 156 CLR 41.

¹³⁶ *Hospital Products* (1984) 156 CLR 41, 96–97; *Streeter* (2011) 278 ALR 291, 303 [67]; *Breen* (1996) 186 CLR 71, 92–93; *Pilmer* (2001) 207 CLR 165, 196 [70], 199 [78]; Justice James Edelman, ‘Fiduciaries and Profit Disgorgement for Breach of Contract’ (Speech delivered at the Journal of Equity and Commercial Law Association Conference, Sydney, 30 March 2012) <http://www.supremecourt.wa.gov.au/_files/Fiduciaries_and_Profit_Disgorgement_for_Breach_of_Contract_Edelman_J_20120330.pdf> (‘*Fiduciaries and Profit Disgorgement*’); *John Alexander’s Clubs v White City* (2010) 241 CLR 1, 34 [86]–[87], 36 [91] (‘*John Alexander’s Clubs*’).

¹³⁷ As was Deane J, who had written influentially on fiduciary duties in *Chan* (1984) 154 CLR 178.

¹³⁸ See above n 134.

¹³⁹ Professor, Boston College Law School.

¹⁴⁰ FitzGibbon, above n 97, 303.

¹⁴¹ Judge of the United States Court of Appeals for the Seventh Circuit in Chicago from 2006 to 2013.

¹⁴² Dean of the University of Chicago Law School from 1999 to 2001.

contractual undertakings¹⁴³

59. The contractual foundation of fiduciary duties is said to be based on two variants: a) they are properly understood as contractual terms; or b) they are contractual merely in the sense that they are based on consent.¹⁴⁴ FitzGibbon described the proposition put by Easterbrook and Fischel as reflecting a ‘fundamental change in the jurisprudence and ethics of affiliations’;¹⁴⁵ and Miller has written that their theory ‘has generated significant criticism’; and despite ‘the insights on which it is based, it is still deeply flawed’ and ‘wrong’.¹⁴⁶
60. Edelman has also written extensively on the topic of the basis for fiduciary duties, including in a number of papers delivered between 2010 and 2013. In the first, he highlighted two features: a) the confusion and conflict surrounding the quest to define fiduciary relationships and how it ‘continues without evident sign of success’;¹⁴⁷ and b) that we can only understand when fiduciary duties arise if we conceive of them as obligations based upon a voluntary undertaking to another:

Fiduciary duties thus arise in the same manner as any other express or implied term: by construction of the scope of voluntary undertakings. They are not duties which are imposed by law nor are they necessarily referable to a relationship or status. It is time to move from thinking of fiduciary duties as a matter of status to understanding them as based upon consent.¹⁴⁸

61. Edelman’s identified concern was that:

if we persist in seeing fiduciary obligations as imposed by law, and dependent upon conceptions of status, the quest to understand and explain why different fiduciaries owe different duties will remain an impossible task. In contrast, by understanding fiduciary duties as terms which are expressed or implied into manifested undertakings to another, it is much easier to understand why the nature of fiduciary duties will always depend upon the circumstances. This explanation illuminates the reason why exactly the same analysis is undertaken by courts when determining, on the one hand, whether fiduciary duties have arisen and, on the other hand, in determining whether such duties should be implied into contracts or other voluntary undertakings. The analyses are the

¹⁴³ Frank H Easterbrook and Daniel R Fischel, ‘Contract and Fiduciary Duty’ (1993) 36(1) *Journal of Law & Economics* 425, 427.

¹⁴⁴ Miller, above n 21, 980.

¹⁴⁵ FitzGibbon, above n 97, 303.

¹⁴⁶ Miller, above n 21, 982, 984.

¹⁴⁷ James Edelman, ‘When do Fiduciary Duties Arise?’ (2010) 126 *Law Quarterly Review* 302, 305 n 33 (citations omitted).

¹⁴⁸ *Ibid* 302.

same because fiduciary duties *are* terms expressed or implied in voluntary undertakings.¹⁴⁹

62. Edelman's voluntary undertaking rationale has been the subject of some light praise, but also criticism, from Miller:

Relative to Easterbrook and Fischel's account, Edelman's approach offers the virtues of parsimony and enhanced explanatory power. It is a purer and less intricate voluntarist account of the justification for fiduciary duties. The argument is, in essence, that fiduciaries are rightly subjected to fiduciary duties where they consent to them. However, Edelman's concession that consent may be implied dilutes the voluntarist appeal of his argument and brings it quite close to that of Easterbrook and Fischel.

...

Edelman improves on the argument from contract. However, his account is unsound. Descriptive problems arise from the insistence that consent, divorced from any concept of the fiduciary relationship, is sufficient to ground fiduciary duties.¹⁵⁰

63. In his 2012 paper, Edelman pointed out that one 'common manner in which a fiduciary undertaking, or pledge by a fiduciary, might occur is by contract.'¹⁵¹ That is not a controversial proposition: in *John Alexander's Clubs*,¹⁵² French CJ, Gummow, Hayne, Heydon and Kiefel JJ quoted with approval the following passage from the reasons of Mason J in *Hospital Products*:

In these situations 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.¹⁵³

64. And immediately before that, Mason J had noted:

That contractual and fiduciary relationships may co-exist between the same parties has never been doubted. Indeed, the existence of a basic contractual

¹⁴⁹ Ibid 326 (emphasis in original).

¹⁵⁰ Miller, above n 21, 985–6 (citations omitted).

¹⁵¹ Edelman, *Fiduciaries and Profit Disgorgement*, above n 136, 5.

¹⁵² *John Alexander's Clubs* (2010) 241 CLR 1, 36 [91]; Andrew Eastwood and Luke Hastings, 'A Response to Professor Finn's "Fiduciary Reflections"' (2014) 88 *Australian Law Journal* 314.

¹⁵³ *Hospital Products* (1984) 156 CLR 41, 97.

relationship has in many situations provided a foundation for the erection of a fiduciary relationship.¹⁵⁴

65. But, the undertaking is ‘the critical feature’.¹⁵⁵
66. Edelman’s expressed conclusion was that once ‘the contractual foundation of many fiduciary relationships is acknowledged’, some of the authorities become ‘entirely unexceptional’.¹⁵⁶ He was speaking, there, with particular reference to the decision of the House of Lords in *Attorney General v Blake*¹⁵⁷ – which involved a former British spy, Blake, being ordered to disgorge profits he had made on the sales of a revelatory book about his exploits as a ‘notorious, self-confessed traitor’.¹⁵⁸ The controversy was that the House ordered disgorgement for breach of contract, not for breach of fiduciary duty. The latter, in Edelman’s view, was clearly open:

Once the contractual foundation of many fiduciary relationships is acknowledged, *Blake* becomes an entirely unexceptional case. *Blake* is no more than a case where Blake’s undertaking of loyalty, not to profit from his position, survived the termination of his employment. The survival of this duty was the foundation for his claim for breach of contract and there is no reason that the label ‘fiduciary’ could not also have been attached to Blake’s undertaking not to use his official position.¹⁵⁹

67. Indeed, Lord Nicholls described Blake’s contractual undertaking of loyalty to the Secret Intelligence Service in this way: ‘if not a fiduciary obligation, ... closely akin to a fiduciary obligation’.¹⁶⁰
68. In his 2013 paper, Edelman continues his examination of the voluntary undertaking basis for fiduciary duties; and, in doing so, he identifies what he regards as a conundrum: ‘If an undertaking determines and shapes the content of the fiduciary duty then why do we speak of a fiduciary *relationship*?’¹⁶¹ One answer, suggested by its author as inadequate, is that ‘status is often an objective indicium of the content of an

¹⁵⁴ (1984) 156 CLR 41, 97; *ASIC v Citigroup Global Markets Australia Pty Ltd* (No 4) (2007) 160 FCR 35, 77 [281].

¹⁵⁵ *Streeter* (2011) 278 ALR 291, 349 [364]; *Hospital Products* (1984) 156 CLR 41, 96–7.

¹⁵⁶ Edelman, *Fiduciaries and Profit Disgorgement*, above n 136, 13.

¹⁵⁷ [2001] 1 AC 268.

¹⁵⁸ *Attorney General v Blake* [2001] 1 AC 268, 269, 275.

¹⁵⁹ Edelman, *Fiduciaries and Profit Disgorgement*, above n 136, 13.

¹⁶⁰ *Attorney General v Blake* [2001] 1 AC 268, 269, 287.

¹⁶¹ James Edelman, ‘The Importance of the Fiduciary Undertaking’ (Speech delivered at the Conference on Fiduciary Law, University of New South Wales Sydney, 22 March 2013) 3 (emphasis in original) <http://www.supremecourt.wa.gov.au/_files/UNSW%20Conference%20of%20Fiduciary%20Law%2022%20Mar%202013%20Edelman%20J.pdf>.

undertaking’;¹⁶² but the reason it is inadequate is said to be because even in the case of an accepted, status based, fiduciary relationship, such as solicitor/client: ‘... the duty is not derived from status ... the duty is derived from what the solicitor undertakes ... to do in the particular circumstances.’¹⁶³

69. Nonetheless, the attempt by Easterbrook and Fischel to encourage a better understanding of fiduciary law by analogy to contract law, has received a scoff from Rotman:

To facilitate a definition of fiduciary law, some have attempted to understand fiduciary principles by analogy to contract law. Others have suggested that the principles of fiduciary obligation are ordinary rules of contract law with no special status or operation. These attempts at definition suffer from a common, but fatal flaw: equitable constructs like fiduciary law arose specifically in response to the overly rigid application of the common law, including the law of contract. Consequently, to try to understand fiduciary law by analogy to common law constructs when it was created in response to the common law’s inadequacies is illogical.¹⁶⁴

70. This leads to an alternative view as to the justification for fiduciary duties: that they are based in public policy;¹⁶⁵ and, in Miller’s view, Finn ‘has advanced the most influential argument’¹⁶⁶ from a public policy perspective – in his ‘groundbreaking treatise *Fiduciary Obligations*’.¹⁶⁷ Nonetheless, Finn, too, is the subject of criticism from Miller:

Finn leaves unarticulated the connection between the public importance of some fiduciary relationships and the policy justification for fiduciary duties in general. A policy justification is simply asserted. The assertion is hard to accept without analysis partly because of Finn’s failure to explain the nature of the fiduciary relationship. If it is unclear what makes a relationship fiduciary, it is impossible to determine whether its characteristics engage matters of public interest, and if so, how.¹⁶⁸

¹⁶² Ibid.

¹⁶³ *Beach Petroleum v Kennedy* (1999) 48 NSWLR 1, 188.

¹⁶⁴ Rotman, *Fiduciary Law’s “Holy Grail”*, above n 14, 941 (citations omitted).

¹⁶⁵ Ibid 973.

¹⁶⁶ Ibid 999 n 106; see also 1000–1.

¹⁶⁷ Miller, above n 21, 999–1000.

¹⁶⁸ Ibid 1001.

71. Miller, it appears, tends to be a fervent critic of the views of others; and his assertion of a failure – by Finn – to ‘explain the nature of the fiduciary relationship’,¹⁶⁹ is hard to accept.
72. Miller moves on to proffer his own ‘novel account of the juridical justification for fiduciary duties’¹⁷⁰ – the source of which he regards as ‘an enigma’:¹⁷¹

the fiduciary relationship is a distinctive kind of legal relationship in which one person (the fiduciary) exercises power over practical interests of another (the beneficiary). Fiduciary power is a form of authority derived from the legal capacity of the beneficiary or a benefactor. The duty of loyalty is justified on the basis that it secures the exclusivity of the beneficiary’s claim over fiduciary power so understood.¹⁷²

73. It may be thought, fairly, that this involves no more than a recognition of the accepted notion that a fiduciary relationship involves an undertaking of undivided loyalty; if so, it is hardly ‘novel’.
74. It is unnecessary for present purposes – indeed, presumptuous – to adopt a preferred view of the justification for fiduciary duties. But, the ferocity of the debate does provide an explanation for the assertion by Finn that fiduciary law ‘is bedevilled’.¹⁷³

B The Definitional Reason

75. The second reason for the suggested level of exasperation has its genesis in the assertion of the lack of an adequate definition of ‘fiduciary relationship’. Australian courts have consciously refrained from attempting to provide a general test for determining when persons stand in a fiduciary relationship with one another; and a reason for that ‘refrain’ is because the term fiduciary relationship has been said to defy definition.¹⁷⁴ But that sense of confusion is long standing and not unique to Australian jurisprudence.
76. Informed writers – in this instance Dowsett J and Edelman J – emphasise that whilst labels and language are important, they ‘ought to elucidate not obfuscate’.¹⁷⁵ The

¹⁶⁹ Ibid 1001.

¹⁷⁰ Ibid 973.

¹⁷¹ Ibid 969.

¹⁷² Ibid.

¹⁷³ P D Finn, ‘Fiduciary Obligations of Operators and Co-Venturers in Natural Resources Joint Ventures’ *AMPLA Yearbook* (1984) 160, 160.

¹⁷⁴ *Breen* (1996) 186 CLR 71, 106 (Gaudron and McHugh JJ).

¹⁷⁵ Edelman, *Fiduciaries and Profit Disgorgement*, above n 136, 1.

identified concern is that ‘fiduciary’ is one of ‘the most difficult, and obfuscatory,’ labels;¹⁷⁶ and the genesis of that concern is ‘to describe someone as a fiduciary, without more, is meaningless.’¹⁷⁷ Much earlier, Dowsett J had cautioned that

in truth ... labels conceal more than they disclose. Firstly, the convenience of using labels causes us to overlook the difficulties inherent in deciding which label to use. Secondly, the same convenience dissuades us from considering the possibility that a particular relationship may have some elements derived from one such category and some elements from the other.¹⁷⁸

77. The ‘danger of trusting ... verbal formulae’ was the subject of admonition by Fletcher Moulton LJ as long ago as 1911;¹⁷⁹ and, much more recently, Ipp J¹⁸⁰ expressed agreement with the sentiment of Southin J in *Giradet*: ‘The word ‘fiduciary’ is flung around now as if it applied to all breaches of duty by solicitors, directors of companies and so forth.’¹⁸¹

78. One of the most acclaimed statements on fiduciary law is contained in *Meinhard v Salmon* where Cardozo Ch J identified the principles to which a fiduciary should aspire:

Joint adventurers, like co-partners, owe to one another, while the enterprise continues, the duty of the finest loyalty. Many forms of conduct permissible in a workaday world for those acting at arm’s length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the ‘disintegrating erosion’ of particular exceptions ... Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court.¹⁸²

79. Although Judge Posner¹⁸³ described this language as ‘just words, and florid ones at that’, he nonetheless acknowledged: ‘they are memorable words and they set a tone.’

¹⁷⁶ Ibid.

¹⁷⁷ *Elovalis v Elovalis* [2008] WASCA 141, [65].

¹⁷⁸ Justice Dowsett, then a member of the Supreme Court of Queensland; now a member of the Federal Court of Australia. J A Dowsett, ‘Operator of a Joint Venture – Principal or Agent?’ *AMPLA Yearbook* (1987) 269, 271.

¹⁷⁹ *Re Coomber* [1911] 1 Ch 723, 728.

¹⁸⁰ With whom Malcom CJ and Seaman J agreed in *Wheeler* (1994) 11 WAR 187, 238.

¹⁸¹ *Giradet v Crease & Co* (1987) 11 BCLR (2d) 361 (SC).

¹⁸² 249 NY 458, 464 (NY, 1928).

¹⁸³ Richard A Posner was a judge on the United States Court of Appeals for the Seventh Circuit in Chicago from 1981 to 1993 and chief judge from 1993 to 2000. He is a Senior Lecturer at the University of Chicago Law School.

They make the difference between an arm's length relationship and a fiduciary relationship vivid, unforgettable.'¹⁸⁴

80. Unforgettable they certainly are; but the 'difficulty of ascertaining the legal contours of such remarkable prose'¹⁸⁵ has been the subject of judicial comment at a high level. The point of concern is that those words are said to provide: 'a standard rather than a rule, a clear statement as to tone and direction, but little in the way of specific guidance for resolving hard questions.'¹⁸⁶
81. In 1943, in *Geller v Trans-America Corporation*¹⁸⁷ – a Delaware case – the fiduciary relationship was described as 'one of the most confused and entangled subjects in corporation law',¹⁸⁸ and, in the same year, Frankfurter J gave an explanation for sentiments such as those:

But to say that a man is a fiduciary only begins the analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary? In what respect has he failed to discharge these obligations? And what are the consequences of his deviation from duty?¹⁸⁹

82. Gibbs CJ spoke to similar effect when *Hospital Products* was determined 41 years later:

The authorities contain much guidance as to the duties of one who is in a fiduciary relationship with another, but provide no comprehensive statement of the criteria by reference to which the existence of a fiduciary relationship may be established.¹⁹⁰

83. In 1996 – 53 years after Frankfurter J expressed those sentiments and 68 years after *Meinhard v Salmon*¹⁹¹ – the High Court decided *Breen*;¹⁹² and in doing so, it recognized that the law had still not been able to formulate any precise or comprehensive definition of a fiduciary relationship.¹⁹³

¹⁸⁴ Richard A Posner, *Cardozo: A Study in Reputation* (University of Chicago Press, 1990) 104–105; see also Robert B Thompson, 'The Story of Meinhard v Salmon and Fiduciary Duty's Punctilio' (Vanderbilt University Public Law Research Paper No 08-44, Vanderbilt Law School, 16 October 2008) 16.

¹⁸⁵ *Lawrence v Cohn*, 325 F 3d 141, 152 (2d Cir. 2003).

¹⁸⁶ Thompson, above n 184, 21.

¹⁸⁷ 53 F Supp 625 (D Del, 1943); affirmed 151 F 2d 534 (3d Cir 1945).

¹⁸⁸ *Geller v Trans-America Corporation* 53 F Supp 625, 629 (D Del, 1943).

¹⁸⁹ *SEC v Chenery Corporation*, 318 US 80, 85–6 (1943) ('*Chenery Corporation*').

¹⁹⁰ *Hospital Products* (1984) 156 CLR 41, 68.

¹⁹¹ 249 NY 458 (NY, 1928).

¹⁹² (1996) 186 CLR 71,

¹⁹³ *Ibid* 92.

84. This lack of clarity has become a constant; and, in *Pilmer*¹⁹⁴ – a 2001 decision of the High Court – the continuing force of the unanswered questions posed by Frankfurter J in *Chenery Corporation*¹⁹⁵ was recognised by McHugh, Gummow, Hayne and Callinan JJ. They said those questions ‘[bore] repetition’.¹⁹⁶ And, in 2008, the Court of Appeal of the Supreme Court of Western Australia acted on that invitation in *Elovalis v Elovalis*.¹⁹⁷
85. In *Pilmer*, Kirby J made two points relevant for present purposes: first, he spoke with some relish when reflecting on the outcome in *Breen*.¹⁹⁸

In ascertaining the ratio of *Breen*, it is primarily necessary to examine the differing ways in which members of this court explained their respective conclusions, for within this court there were differences in opinion. One can perform this task, conscious of the wealth of commentary which the decision has evoked. The comments have ranged from the condemnatory, through the disappointed, to the resigned and accepting, rising to praise and ending just short of unalloyed pleasure. Where a judicial decision produces such a wide range of responses, for the most part from knowledgeable writers, it is fair to assume that the law does not speak with total clarity or that its content is uncontested.¹⁹⁹

86. Secondly, his Honour described this lack of clarity as the ‘greatest difficulty facing those who assert the existence of fiduciary obligations, outside the classic per se relationships.’²⁰⁰ Having identified what he regarded as an unfortunate reality, his Honour continued:

The inadequacies and incompleteness of past attempts [at a definition] do not, however, relieve a judge, faced with such a claim, of the necessity to have a notion of what is involved. Without this, there would be no proper, orderly development of fiduciary responsibilities or predictability and clarity in the law. Nor would a foundation be provided upon which those affected might reasonably organise their affairs.²⁰¹

87. The latter point – clearly important – was highlighted by counsel for the banks in their application for special leave to appeal to the High Court in *Bell Group*.²⁰² On the hearing of that application, the resolution of the ambit of fiduciary duties under

¹⁹⁴ (2001) 207 CLR 165.

¹⁹⁵ 318 US 80 (1943).

¹⁹⁶ *Pilmer* (2001) 207 CLR 165, 198 [77].

¹⁹⁷ [2008] WASCA 141, [65] (Buss JA).

¹⁹⁸ His Honour was not on the High Court in *Breen*: his involvement with that case was as President of the Court of Appeal of the Supreme Court of New South Wales – where he was in dissent: (1994) 35 NSWLR 522.

¹⁹⁹ *Pilmer* (2001) 207 CLR 165, 210 [118] (citations omitted).

²⁰⁰ *Ibid* 218 [136].

²⁰¹ *Ibid*.

²⁰² (2012) 44 WAR 1.

Australian law was described as ‘fundamental both to the law and to commercial endeavours and the commercial community in Australia’.²⁰³ That is undoubtedly true: it also reflects a caution identified by Dawson J in *Hospital Products*.²⁰⁴

88. Rotman has, nonetheless, warned that the quest for certainty of definition can create more problems that it solves. He was speaking, there, of the potential for a loss of flexibility in the application of fiduciary law; and he illustrated his point, rather graphically, by drawing on Captain Ahab’s pursuit of the great white whale in Herman Melville’s *Moby Dick*. After recognising ‘how Ahab’s monomaniacal fixation on killing the whale ultimately destroys both him and his ship’,²⁰⁵ he concluded that ‘the single-minded desire to achieve certainty can easily degenerate into an enterprise that emphasizes procedure over purpose.’²⁰⁶ That caution is rightly made: it reflects the sentiment expressed by Lord Chelmsford as long ago as 1866: ‘the Courts have always been careful not to fetter this useful jurisdiction [over fiduciary relationships] by defining the exact limits of its exercise.’²⁰⁷
89. The prose of Cardozo Ch J in *Meinhard v Salmon*²⁰⁸ has been described as ‘highflying rhetoric’,²⁰⁹ and it may suffer from its aspirational, rather than precise, language. But, Bainbridge regards that language as purposive in effect:

when the law is set out as a bright-line rule, people know exactly what they can get away with, which inevitably tempts them to go right up to the line. Cardozo’s rhetoric obscures the actual perimeters of the law, depriving market actors of the guidance that a bright-line rule would offer. By fudging the line, and by imposing severe consequences on those who skate across it, Cardozo likely sought to deter cheating.²¹⁰

90. And, in any event, as Finn has remarked on fiduciary relationships: ‘Here, as in so much of the law, definitional certainty is an illusion.’²¹¹ Finn was not alone. The sentiment was echoed by Stewart J of the United States Supreme Court when dealing not with fiduciary law, but with the constitutional limitations on ‘hard-core pornography’. Faced ‘with the task of trying to define what may be indefinable’,

²⁰³ [2013] HCA Trans 049.

²⁰⁴ (1984) 156 CLR 41, 149.

²⁰⁵ Rotman, *Fiduciary Law’s “Holy Grail”*, above n 14, 950.

²⁰⁶ *Ibid.*

²⁰⁷ *Tate v Williamson* (1866–67) LR 2 Ch App 55, 61.

²⁰⁸ 249 NY 458 (NY, 1928).

²⁰⁹ Stephen M Bainbridge, ‘Must Salmon Love Meinhard? Agape and Partnership Fiduciary Duties’ (2014) 17 *Green Bag 2D* 257, 264.

²¹⁰ *Ibid.*

²¹¹ Finn, *Fiduciary Reflections*, above n 23, 131.

Stewart J observed: ‘I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it’.²¹² That cannot always be said for fiduciary relationships.

C Result-oriented Outcomes

91. The third reason for the level of exasperation would seem logically to follow as a consequence of the first and second reasons: *post hoc ergo propter hoc*. There is a body of thought that judicial decisions have become ‘result-oriented misapplications’²¹³ of fiduciary law. And there is some incidental judicial explanation, by Mason J, for the genesis of the concern:

it is important in the first instance to ascertain the characteristics which, according to tradition, identify a fiduciary relationship. As the courts have declined to define the concept, preferring instead to develop the law in a case by case approach, we have to distil the essence or the characteristics of the relationship from the illustrations which the judicial decisions provide.²¹⁴

92. But, by way of introduction to the point, it is safe to proceed from the premise acknowledged by Gaudron and McHugh JJ in *Breen*:

Judges have no authority to invent legal doctrine that distorts or does not extend or modify accepted legal rules and principles. Any changes in legal doctrine, bought about by judicial creativity, must ‘fit’ within the body of accepted rules and principles. The judges of Australia cannot, so to speak, ‘make it up’ as they go along.²¹⁵

93. And Kirby J took that premise a little further in *Pilmer*:

where a suggestion is made that fiduciary obligations arise in a new relationship, or out of particular facts, it is essential that judges perform their functions by analogy from settled principles. They are not entitled to distort those principles. Nor may they superimpose an equitable classification on facts, simply because to do so would afford better or larger remedies to a plaintiff who appears to have suffered some wrong.²¹⁶

94. Rotman illustrates his concern about result-oriented misapplications of fiduciary law by an amusing, yet brutal, reference to the ‘Bring Out Your Dead’ scene from the film

²¹² *Jacobellis v State of Ohio*, 378 US 184, 197 (1964).

²¹³ Rotman, *Fiduciary Law’s “Holy Grail”*, above n 14, 924.

²¹⁴ *Hospital Products* (1984) 156 CLR 41, 96.

²¹⁵ (1996) 186 CLR 71, 115.

²¹⁶ (2001) 207 CLR 165, 217 [136] (citations omitted).

Monty Python and the Holy Grail. A mortician leads his cart of corpses through a village, calling attention to his presence by shouting ‘Bring out your dead!’. A large man appears with an old man’s body slung over his shoulder. The large man wishes to place the old man on the cart, but the old man protests that he is not yet dead. The mortician informs the large man that he cannot take the old man’s body as it is against the regulations. So, as a solution, the mortician clubs the old man to death to grant the large man his wish while still conforming with the law.²¹⁷

95. Having created that visual, Rotman concludes:

Just as the mortician’s results-oriented action resolves the dilemma of what to do with the old man, judges have applied fiduciary law in a similarly results-oriented fashion purely to achieve results that they otherwise would be unable to reach. A common goal of this results-oriented approach is to enable the transfer of property via a constructive trust. ... Since a constructive trust is properly used only where there is a breach of an equitable obligation, judges have imposed fictitious fiduciary relationships merely to facilitate a constructive trust order.²¹⁸

96. And Finn spoke of the potential for just such a phenomenon long ago:

It can be anticipated that in common law jurisdictions which are diffident in committing themselves to a good faith principle adventitious fiduciary findings will be made on occasion to remedy perceived unfairness arising from the actions of a contracting party.

...

It must be acknowledged that ... courts can be anticipated on occasion to make dubious fiduciary findings to no greater end than to visit on the wrongdoer a remedy felt more appropriate to the wrong done. This temper does seem to be reflected in the various fiduciary findings (erroneous in the writer’s view) made by judges at all levels, but in the event unavailingly, in the important Canadian litigation, *Lac Minerals Ltd v International Corona Resources Ltd*.²¹⁹

97. One case which is the subject of particular ire from Rotman is *Chase Manhattan Bank*.²²⁰ In that case, Chase Manhattan had mistakenly transferred a very large sum of money to the defendant’s account. Understandably, it sought to recover those monies – to which the defendant clearly had no entitlement. The difficulty was presented by the intervening receivership of the defendant – as a result of which Chase Manhattan was

²¹⁷ Rotman, *Fiduciary Law’s “Holy Grail”*, above n 14, 926–7.

²¹⁸ *Ibid* 927.

²¹⁹ Paul Finn, ‘Joint Ventures – Good Faith, Unconscionability and Fiduciary Duties’ 147, 163, 173.

²²⁰ *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd* [1981] 1 Ch 105 (‘*Chase Manhattan*’).

merely an unsecured creditor and unlikely to recover the full amount of the mistaken transfer. That difficulty was overcome by a declaration by the Court – Goulding J – that the mistakenly transferred funds were the subject of a constructive trust in favour of Chase Manhattan.²²¹ As such, the defendant’s creditors had no legitimate claim to the monies impressed with that trust.

98. However, in order to make that declaration, Goulding J determined that he first had to find the parties to be in a fiduciary relationship – which he did: ‘a person who pays money to another under a factual mistake retains an equitable property in it and the conscience of that other is subjected to a fiduciary duty to respect his proprietary right.’²²²
99. The complaint made by Rotman does not extend to the actual result of the case – which he acknowledged ‘appears just’,²²³ instead, his complaint is reflected in the following paragraph:

the only bond between the banks in *Chase Manhattan* was the transfer of funds, which hardly qualifies as the sufficiently substantive interaction needed to create fiduciary obligations. Instead, like the results-oriented actions of the mortician in clubbing the old man, [the judge] found a fiduciary relationship to exist merely to substantiate his imposition of a constructive trust. The problem with this practice is that it uses fiduciary principles where the *indicia* of a fiduciary relationship are absent. ... Achieving just results cannot validate flawed actions or analyses.²²⁴

100. In fairness to Rotman, the reasoning of Goulding J in relation to the imposition of a fiduciary duty has been disapproved, including by Lord Browne-Wilkinson in *Westdeutsche Bank*:

It will be apparent from what I have already said that I cannot agree with this reasoning. First, it is based on a concept of retaining an equitable property in money where, prior to the payment to the recipient bank, there was no existing equitable interest. Further, I cannot understand how the recipient’s ‘conscience’ can be affected at a time when he is not aware of any mistake.²²⁵

101. There are two further illustrations of the point sought to be made by Rotman. The first involves an observation by Deane J in *Hospital Products*²²⁶ about the potential for the

²²¹ Ibid 128.

²²² Ibid 119D–E.

²²³ Rotman, *Fiduciary Law’s “Holy Grail”*, above n 14, 929.

²²⁴ Ibid (emphasis in original).

²²⁵ *Westdeutsche Bank v Islington London Borough Council* [1996] AC 669, 714.

²²⁶ (1984) 156 CLR 41.

imposition of a constructive trust notwithstanding the absence of a fiduciary duty. Having found he was not persuaded that a fiduciary relationship existed between the parties, Deane J nonetheless concluded:

In my view, the constructive trust pursuant to which H.P.I. is liable to account for the profits ... should properly be seen as imposed as equitable relief appropriate to the particular circumstances of the case rather than as arising from a breach of some fiduciary duty ...²²⁷

102. Although Finn has commented favourably on this inclination by Deane J,²²⁸ his Honour recognised the somewhat elusive nature of his statement when he concluded later in his reasons:

Since this particular aspect of the matter was not explored in argument and a majority of the Court is of the view that there is no basis for any finding of constructive trust however, it is preferable that I defer until some subsequent occasion a more precise identification of the principles governing the imposition of a constructive trust in such circumstances.²²⁹

103. The second illustration worthy of comment involves some particular reasoning in *Streetscape*²³⁰ which appears to have failed to heed the warning of Kirby J and gives expression to the concerns of Rotman. The Court of Appeal overturned a finding made below of the existence of a fact-based fiduciary relationship. And it did so based on the following reasoning:

fiduciary duties, of their nature, do not ordinarily attend bargains struck at arm's length between sophisticated parties with equal bargaining power who, in pursuing their own financial ends, take care to document their respective rights and obligations in a comprehensive way.²³¹

104. It may be assumed that is not a controversial proposition. But the decision of the Court of Appeal was heavily influenced by its reasoning in two – rather contentious – paragraphs that suggested the availability of relief defines the scope of the duty:

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 ... are insufficient to deal with some possibility of unconscionable conduct to which one party is exposed.²³²

²²⁷ Ibid 124.

²²⁸ Finn, *The Fiduciary Principle*, above n 99, 56.

²²⁹ *Hospital Products* (1984) 156 CLR 41, 125.

²³⁰ *Streetscape* (2013) 295 ALR 760.

²³¹ Ibid 782 [121].

²³² Ibid 778 [100].

105. The predisposition of the Court of Appeal was made clearer a little later:

The adequacy of remedies for breach of contract is therefore, in general, the determinant of whether there is scope for equity to play a supplementing role by way of the imposition of a fiduciary duty upon a contracting party.²³³

106. The effect of that statement is worth repeating: the adequacy of remedies for breach of contract is, in general, the determinant of whether there is scope for the imposition of a fiduciary duty? Whilst the ultimate decision of the Court of Appeal may have been correct,²³⁴ the reasoning reflected in those paragraphs cannot be correct. After a thorough factual investigation, a fiduciary duty will be found to exist, or not; but if it is found to exist, it cannot be because of the lack of alternative relief.

107. Reasons for judgment, even from an appellate court, are not obliged to exhibit a lightness of touch or a flair for writing. The reasoning may be pedestrian; even stodgy, and yet conclude correctly – perhaps inadvertently or coincidentally. But even absent flair, there should be a thorough analysis of principle, particularly if the ultimate conclusion involves a controversial proposition.

108. Finn has commented adversely on the reasoning in *Streetscape*:

What the court in this appeal did not do, I respectfully suggest, is address the question: ‘Was Streetscape a fiduciary in consequence of the limited, the circumscribed, use it could properly make of the intellectual property etc it obtained from Sydney which were subjects of the License Agreement?’²³⁵

109. Finn’s conclusion was that:

the court did not address the issue confronting it. Nor, with respect, did the cases it referred to assist in answering it ... The court’s error was that its starting point led it astray.²³⁶

110. The ‘starting point’ to which Finn was referring was the statement by the Court of Appeal (cited above) that:

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

²³³ Ibid 778 [107].

²³⁴ Because the question was a factually intensive one as to the existence, or not, of a fiduciary relationship outside the accepted categories.

²³⁵ Finn, *Fiduciary Reflections*, above n 23, 144.

²³⁶ Ibid 143–4.

... are insufficient to deal with some possibility of unconscionable conduct to which one party is exposed.²³⁷

111. This is the very sort of result-oriented approach to which Rotman referred and against which Kirby J cautioned. And that complaint can be made about the reasoning in *Streetscape*²³⁸ notwithstanding – it may be assumed – the correctness of the finding of fact as to the absence of a fiduciary duty. The concern goes to a matter of legal principle.
112. On the other hand, Andrew Eastwood and Luke Hastings have described the approach of the Court of Appeal in *Streetscape*²³⁹ as ‘hardly novel’.²⁴⁰ However, that description was used in relation to the natural reluctance of a court to impose fiduciary obligations on parties who have entered into ordinary and arm’s length commercial relationships, which fully prescribe their respective powers and duties.²⁴¹

V THE BOOKENDS: BREEN TO BELL GROUP

113. What is of particular significance for present purposes are the arguably contradictory statements of principle on the ambit of fiduciary duties under Australian law identified by the High Court in its 1996 decision in *Breen*²⁴² and by the Court of Appeal in its 2012 decision in *Bell Group*.²⁴³

A Breen – A Brief Introduction

114. In *Breen*²⁴⁴ – which concerned the relationship between a medical specialist and patient – the High Court held that equity imposes on a fiduciary proscriptive obligations not to obtain any unauthorised benefit from the relationship and not to be in a position of conflict: the no profit and no conflict duties. The court also held that the law of Australia does not otherwise impose positive legal duties on the fiduciary to act in the interests of the person to whom the duty is owed.²⁴⁵

²³⁷ Ibid 144 quoting *Streetscape* (2013) 295 ALR 760, 778 [100].

²³⁸ (2013) 295 ALR 260.

²³⁹ Ibid.

²⁴⁰ Andrew Eastwood and Luke Hastings, ‘A Response to Professor Finn’s “Fiduciary Reflections”’ (2014) 88 *Australian Law Journal* 314, 318.

²⁴¹ Ibid.

²⁴² (1996) 186 CLR 71, 113.

²⁴³ *Bell Group* (2012) 44 WAR 1.

²⁴⁴ *Breen* (1996) 186 CLR 71, 113.

²⁴⁵ *Breen* (1996) 186 CLR 71, 113 (Gaudron and McHugh JJ).

115. *Breen*²⁴⁶ needs close scrutiny in order to determine not only the genesis of those statements; but also the precise principle for which it stands as a binding or at least a persuasive authority. And in considering what is binding, it is necessary to have regard to the broader approach to that question taken by the High Court in *Farah*: it appears that it is not merely the ratio of a case determined by the High Court which has that binding quality; it extends to its ‘seriously considered dicta’.²⁴⁷

B *Bell Group* – A Brief Introduction

116. In the *Bell Group*²⁴⁸ case, it was necessary for the Court of Appeal to determine whether, under Australian law, fiduciary duties were confined to the ‘no profit, no conflict’ proscriptive duties to which the High Court referred in *Breen*.²⁴⁹ The case involved enormous sums of money; was spawned over 20 years or so of hard fought litigation; and arose out of the notorious collapse of the Bell Group of companies with which Mr Alan Bond was associated.
117. If, in *Breen*,²⁵⁰ the High Court – whether as part of the ratio of the case or as persuasive obiter – found that, under Australian law, fiduciary duties were so confined, then the Court of Appeal in *Bell Group*²⁵¹ clearly disagreed. Lee AJA disavowed those statements of principle by employing a well-recognised judicial euphemism - reflected in the following paragraph:

Comments made in *Breen v Williams* on the distinction between prescriptive and proscriptive duties must be read in the context of the particular facts of that case which concerned a very limited fiduciary relationship of patient and specialist medical practitioner.²⁵²

118. But his Honour was also more direct on occasion:

in the circumstances found by [the trial judge] it would have been a strange result to have treated the duty to act in the best interests of the companies as anything other than a fiduciary duty...²⁵³

119. Drummond AJA was generally less circumspect:

²⁴⁶ (1996) 186 CLR 71,

²⁴⁷ *Farah* (2007) 230 CLR 89, 91, 150–51 [134], 159 [158].

²⁴⁸ (2012) 44 WAR 1.

²⁴⁹ (1996) 186 CLR 71.

²⁵⁰ (1996) 186 CLR 71.

²⁵¹ (2012) 44 WAR 1.

²⁵² *Bell Group* (2012) 44 WAR 1, 166 [900].

²⁵³ *Ibid* 169 [922].

If the fiduciary obligations of directors to their company are limited to the two proscriptive ones, not to benefit and not to be in a conflict situation, an extensive revision of the law governing directors' duties must have taken place without any examination of that particular issue at the intermediate or final appellate level.²⁵⁴

120. Even Carr AJA, who dissented in the outcome, was not persuaded to hold that the duties on which *Bell Group*²⁵⁵ was determined – which did *not* include the ‘no profit, no conflict’ duties – ‘were other than fiduciary’.²⁵⁶ Interestingly, the banks had initially admitted in their pleadings that the duties of the directors to act bona fide in the interests of the company and to exercise their powers for a proper purpose were fiduciary in nature; but, at trial, they argued to the contrary.²⁵⁷
121. Ultimately, the directors were found to have been in breach of their fiduciary duties to act bona fide in the best interests of the companies and for a proper purpose.²⁵⁸ Pausing for a moment, a number of points may immediately be noted: first, it is unarguably true that directors owe their companies such duties. There is long standing authority on the point.²⁵⁹ Secondly, by their very nature, those duties appear to be prescriptive, not proscriptive; thirdly, a breach of those duties does not necessarily involve either profit or conflict. *Ampol Petroleum*²⁶⁰ is an example of such a case.
122. In the end result, the banks in *Bell Group*²⁶¹ were held liable as accessories: they were beneficiaries of the breaches (by the directors) in that they received security (for loans) which they would not otherwise have had.

²⁵⁴ Ibid 346 [1962] (Drummond AJA).

²⁵⁵ (2012) 44 WAR 1.

²⁵⁶ Ibid 524 [2733].

²⁵⁷ *Bell Group* (2012) 44 WAR 1, 168 [913].

²⁵⁸ Ibid 181 [1007], 372 [2079].

²⁵⁹ See Drummond AJA at [1996]–[2026] of *Bell Group* (2012) 44 WAR 1, 355–62; Justice K M Hayne, ‘Directors’ Duties and a Company’s Creditors’ (2014) 38 *Melbourne University Law Review* 795, 805–8.

²⁶⁰ *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821.

²⁶¹ (2012) 44 WAR 1.

C The Dilemma: Special Leave

123. On the hearing of the application for special leave to appeal to the High Court from the decision of the Court of Appeal, senior counsel for the banks opened his argument on a critical point by putting his clients' position in this way:

the first group of issues in this matter concerns directors' duties. In that respect, as the Court understands, the majority [of the Court of Appeal] held that the duties in question, the duty to act in the best interest of the corporations and the duty to act for proper purposes were fiduciary. We say that that conclusion runs headlong against and contradicts the principle that fiduciary duties in this country are confined to the twin but overlapping proscriptive duties of no profit and no conflict. That this is the principle in this country is exemplified by decisions in this Court in *Chan*, particularly Sir William Deane; *Breen*; *Pilmer* and most recently *Friend v Brooker* and the conclusions of the majority therefore may be seen to be in sharp conflict with those notions.

...

In these circumstances, we say that the questions raised are, does the *Breen* principle not apply to company directors and, by way of corollary, do the fiduciary duties of company directors extend to prescriptive duties and, if so, which ones. Those are questions which are fundamental both to the law and to commercial endeavours and the commercial community in Australia and, in our submission, warrant the attention of this Court.²⁶²

124. French CJ and Kiefel J evidently agreed – at least with the 'fundamental' nature of the issue: on 15 March 2013, they granted special leave.²⁶³ Unfortunately, the opportunity for the High Court to determine the issue was never realised: the appeal was settled before it was heard.
125. The issue assumed significance in *Bell Group*²⁶⁴ for at least three reasons: first, it arose in the context of an accepted fiduciary relationship, namely that between the directors and their companies: *Hospital Products*,²⁶⁵ *Breen*²⁶⁶ and *Bell Group*;²⁶⁷ secondly, without a finding of liability against the directors, there could be no accessorial liability

²⁶² Transcript of Proceedings, *Westpac Banking Corporation & Ors v The Bell Group Ltd & Ors* [2013] HCATrans 49 (15 March 2013) 8.

²⁶³ *Ibid* 23.

²⁶⁴ (2012) 44 WAR 1.

²⁶⁵ *Hospital Products* (1984) 156 CLR 41, 96.

²⁶⁶ (1996) 186 CLR 71, 92, 107.

²⁶⁷ (2012) 44 WAR 1, 346 [1959].

against the banks;²⁶⁸ thirdly – and perhaps most importantly – *Bell Group*²⁶⁹ was *not* a profit or conflict case.

126. Subsequent judicial murmurings²⁷⁰ recognise the force of the reasoning of the Court of Appeal; but, due to the binding nature of statements of principle by the High Court, some authorities regard the decision of the Court of Appeal as standing ‘in lonely isolation’²⁷¹ in the Australian judicial firmament. Whether that is an accurate depiction remains to be seen.
127. There may be a debate as to whether the decision of the Court of Appeal in *Bell Group*²⁷² ought to be regarded as freethinking – if not dissident or renegade in the light of *Breen*²⁷³ – or as merely the application of orthodoxy: after all, *Breen*²⁷⁴ was *not* concerned with the relationship between a company and its directors;²⁷⁵ but what is certain is that the decision of the Court of Appeal remains a binding authority – on matters of principle – on first instance decisions in its own jurisdiction and a persuasive authority otherwise. Of course, on matters of principle, *Breen*²⁷⁶ is binding in all respects, including its seriously considered dicta. Therein lies the dilemma.

VI HOW DID WE REACH THIS POINT?

128. It will be necessary to deal with each of four principal authorities upon which the banks relied on the hearing of their application for special leave to appeal in *Bell Group*,²⁷⁷ together with a number of other High Court authorities bearing on the resolution of the question at the core of this topic.

²⁶⁸ Chief Justice T F Bathurst, ‘It tolls for Thee: Accessorial Liability After *Bell v Westpac*’ (Speech delivered at the Banking and Financial Services Law Association Annual Conference, Gold Coast, 29–31 August 2013);

Barnes v Addy (1874) LR 9 Ch App 244.

²⁶⁹ (2012) 44 WAR 1.

²⁷⁰ See below Part VIII.

²⁷¹ *Hoh v Frosthollow Pty Ltd* [2014] VSC 77, 26 [68] (Derham AsJ).

²⁷² (2012) 44 WAR 1.

²⁷³ (1996) 186 CLR 71.

²⁷⁴ (2012) 44 WAR 1, 521.

²⁷⁵ *Bell Group* (2012) 44 WAR 1, 521 [2719] (Carr AJA).

²⁷⁶ (1996) 186 CLR 71.

²⁷⁷ (2012) 44 WAR 1.

A Chan v Zacharia

129. *Chan*²⁷⁸ was cited by the banks because it was said to exemplify ‘the principle that fiduciary duties in this country are confined to the twin but overlapping proscriptive duties of no profit and no conflict’;²⁷⁹ but, on a proper analysis, *Chan*²⁸⁰ does not support that proposition.
130. Doctors Chan and Zacharia were partners in a medical practice carried on from premises the subject of a lease which contained an option for renewal in their favour. Dr Zacharia executed the option; Dr Chan declined to do so, but obtained a new lease of the premises for himself. The High Court held that Dr Chan had acted in breach of his fiduciary duty to his partner; and, as a consequence, the new lease was held by him as constructive trustee.
131. However, there is a backstory to this case which deserves a little telling: months before the option was due to be executed, the parties had quarrelled, dissolved the partnership and were litigating against one another. They were mutually antagonistic; and a receiver had been appointed to wind up the partnership.²⁸¹ In those circumstances, there was no prospect that the partners would have jointly exercised the option to renew – the only way in which it would have been effective on behalf of the partnership.
132. In determining the case against Dr Chan, Gibbs CJ reasoned as follows. First, a partner who, without the consent of his co-partner, obtains a renewal of a lease of the partnership premises in his own name, prima facie holds the lease on a constructive trust for the partnership, and the expression ‘renewal’ extended to the grant of a new lease – as was the case with *Chan*.²⁸² Secondly, it was clear that once a fiduciary relationship or duty was established on the part of the person obtaining the renewal, the onus of proving that there was nothing inequitable in his claiming to obtain the benefit for himself rests with him. Thirdly, although the new lease was obtained after the partnership had been dissolved but before the affairs of the partnership had been wound up, the obligations of the partners continued in so far as was necessary to wind up the affairs of the partnership; and it is in this context that what follows in the reasons of the

²⁷⁸ (1984) 154 CLR 178.

²⁷⁹ Transcript of Proceedings, *Westpac Banking Corporation & Ors v The Bell Group Ltd & Ors* [2013] HCATrans 49 (15 March 2013).

²⁸⁰ (1984) 154 CLR 178.

²⁸¹ (1984) 154 CLR 178, 184.

²⁸² (1984) 154 CLR 178.

Chief Justice becomes important – because his Honour deals, for the first time, with the duty incumbent on Dr Chan:

there is another and important circumstance which affected the capacity of Dr Chan to obtain a new lease for his own benefit. The winding up entailed the application of the surplus assets of the partnership in payment of what might be due to the partners. The option for renewal, being part of the lease, was an asset of the partnership. To enable that asset to be realized, it was, in my opinion, the *duty* of each partner to join in exercising the option, assuming that the renewal was of value (as obviously it was) and assuming that the other party required it. A refusal by one partner to enable the option to be exercised meant that an asset of value was lost to the partnership. Dr Zacharia attempted to persuade Dr Chan to join in exercising the option, and if Dr Chan had genuinely wished to incur no further obligations as lessee, it may be that he could have insisted on obtaining from Dr Zacharia proper protection before he joined in exercising the option. However Dr Chan refused to exercise the option because he wished to obtain a new lease for himself. He made it impossible for the partnership to exercise the option, and in those circumstances it is inequitable that he should be permitted to retain for himself the new lease which could not have been granted if the option had been exercised. He has demonstrably failed to discharge the onus of rebutting the presumption that he was incapable of taking a new lease solely for his own benefit.²⁸³

133. The duty identified by the Chief Justice arose entirely independently of any concern about the potential for profit or conflict: it arose in order to ensure an asset was not lost to the partnership. Further, the duty of which his Honour spoke was clearly positive: a duty ‘to join in exercising the option’.²⁸⁴ That the Chief Justice regarded the partners as obliged to execute the option is clear from this passage:

if Dr Chan had genuinely wished to incur no further obligations as lessee, it may be that he could have insisted on obtaining from Dr Zacharia proper protection before he joined in exercising the option.²⁸⁵

134. Presumably, the Chief Justice was speaking, there, of an indemnity of some sort. But his Honour did not envisage a circumstance in which the partners would not have been obliged jointly to execute the option – in order to ensure an asset of value was not lost to the partnership.²⁸⁶ Such an obligation, if it existed, was clearly positive.
135. Murphy J was in dissent, but appears to have had the concurrence of Brennan J on the question of whether Dr Chan was obliged to join in the exercise of the option: he was

²⁸³ *Chan* (1984) 154 CLR 178, 183 (emphasis added).

²⁸⁴ *Ibid.*

²⁸⁵ *Ibid.*

²⁸⁶ *Ibid.*

not; and Murphy J, by way of explanation, promoted the backstory to the forefront. In those circumstances, his Honour concluded:

It is not equitable to impose on Dr Chan a duty to join in the exercise of the option. Why should Dr Chan be expected to enter a fresh transaction, become a co-tenant for a further term with a person to whom he was antagonistic and who was an adversary in litigation, presumably so that he and Dr Zacharia could then agree to transfer the lease to one of them or to someone else at a profit to the dissolved partnership. The acquisition of a further lease was not for the purpose of the partnership business. Dr Chan was entitled to decline to prolong his relationship with Dr Zacharia in this way. He was entitled to have nothing more to do with him than necessary. Dr Chan did not deal with the partnership property for his own advantage. It was after the expiration of the option period that he obtained a new lease of the premises, not on the option terms, but on the payment of a \$10,000 premium.²⁸⁷

136. Brennan J agreed with Murphy J to the extent that he accepted Dr Chan was not bound to join in the exercise of the option; but they differed on the propriety of Dr Chan executing a new lease for himself. Brennan J concluded:

Though Dr Chan was not bound to join in the exercise of that option, he could not take advantage of his refusal to secure the benefit of a renewal of the lease for the partnership in order to secure the benefit of a new lease for himself.²⁸⁸

137. The reasons of Deane J emphasised a number of points. Doctors Chan and Zacharia were trustees of the legal rights under the lease, including the option to renew. That role was plainly fiduciary; as, in general, is the relationship between partners. Each of the partners, notwithstanding the dissolution of the partnership, remained under fiduciary obligations in respect of the partnership property – which was to be realized in paying the partnership debts and liabilities, together with the expenses of the winding up of the partnership.²⁸⁹

138. Importantly for present purposes, after his Honour concluded that each of Dr Chan's roles of trustee and former partner was a fiduciary one with fiduciary obligations,²⁹⁰ he described the obligations on Dr Chan in positive terms:

Each role complemented and reinforced the fiduciary relationship involved in the other. In particular each role involved the fiduciary obligation to act, in relation to rights under the lease ... in the interests of the dissolved partnership and the beneficial realization of its assets. The question that lies at the heart of

²⁸⁷ Ibid 185.

²⁸⁸ Ibid 186.

²⁸⁹ Ibid 195, 197.

²⁹⁰ Ibid 197–8.

the present appeal is whether, in these circumstances, Dr. Chan was entitled to decline to join in an exercise of the option for a further lease and to obtain and retain the benefit of a new lease of the premises for himself.²⁹¹

139. That question ought to have been dealt with as a disjunctive proposition; but it was not dealt with in that way by Deane J. Gibbs CJ did so, incidentally, in the way described earlier. But it is implicit in the way in which Deane J put the proposition: ‘each role involved the fiduciary obligation to act’;²⁹² that his Honour was speaking of a positive obligation. If Dr Chan was not entitled to decline to join in an exercise of the option, he must have been obliged to join in its exercise. In the end result, Deane J concluded the issue of liability against Dr Chan - including by reference to the rule in *Keech v Sandford*²⁹³ – for reasons reflected in the following paragraph:

it is apparent that, as a matter of fact, Dr. Chan was introduced to the premises through the partnership and that he obtained any rights in respect of a new lease of the premises through the use - or misuse - of his position as a trustee of the former tenancy and as a former partner. It follows that Dr. Chan holds and will hold any rights to or under a new lease of the premises as a constructive trustee unless there be some reason for excluding the ordinary application of the general principle.²⁹⁴

140. The reasons of Dawson J reflected those of Deane J. His Honour concluded that there was a fiduciary duty between the partners arising from the partnership which survived its dissolution and extended to the partnership property. That relationship continued for the purposes of the realization, application and distribution of the partnership assets.²⁹⁵ And, in identifying the continuing obligations in that way, his Honour must have been understood as including obligations which were positive in nature.
141. Properly understood, *Chan* is an illustration of the application of the rule in *Keech v Sandford*²⁹⁶ – that a trustee of a tenancy who obtains a renewal of the lease for himself holds the interest in the renewed lease as part of the trust estate. But the following additional features ought be noted:

- a. the case concerned the duties owed by partners in the context of the renewal of a lease;

²⁹¹ Ibid.

²⁹² Ibid 197.

²⁹³ (1726) Sel Cas T King 61.

²⁹⁴ (1984) 154 CLR 178, 204.

²⁹⁵ Ibid 206.

²⁹⁶ (1726) Sel Cas T King 61.

- b. the court was not unanimous in its reasoning, and that lack of unanimity extended to the judges comprising the majority. For instance, Brennan J agreed with Murphy J (who was in dissent in the outcome) that Dr Chan was under no obligation to execute the option to renew;
- c. the duty of which Gibbs CJ spoke was clearly positive in its obligation;
- d. the duties of which Brennan, Deane and Dawson JJ spoke, included duties which were, at least inferentially, positive in nature;
- e. there was no mention of the proscriptive-prescriptive dichotomy to which *Breen*²⁹⁷ came to refer some 12 years later; and
- f. there was no broader discussion of the ambit of fiduciary law in Australian jurisprudence.

142. What was left unsaid in *Chan*²⁹⁸ – as it was in *Meinhard v Salmon*,²⁹⁹ where the complaint was really about the absence of disclosure of the recalcitrant partner’s intentions – was how the partners, separately, could have gone about attempting to secure a renewal of the lease of the premises without involving a breach of fiduciary duty. That involves a digression which is irrelevant to the topic under consideration; although it was the subject of comment by Robert Thompson in his ‘Punctilio’ paper.³⁰⁰

B Daly v Sydney Stock Exchange

143. It is convenient enough to extract the relevant facts from the reasons of Gibbs CJ.

In April 1975, the appellant’s husband, Dr. Daly, had some money that he wished to invest, and sought advice from a firm of stockbrokers, Patrick Partners, as to the shares in which the money might be invested. At the time Patrick Partners, although apparently a large and prosperous firm, was in a precarious financial situation. An employee of the firm, Mr. Toltz, told Dr. Daly that it was not a good time to buy shares and suggested that the money be placed on deposit with the firm until the time was right to buy; Mr. Toltz added that the firm was as safe as a bank. The learned trial judge found that although the partners in the firm must have been aware of its worsening financial position, there was no evidence that Mr. Toltz was aware that the firm was other than large and successful. Dr. Daly thereupon lent money to the

²⁹⁷ (1996) 186 CLR 71.

²⁹⁸ (1984) 154 CLR 178.

²⁹⁹ 249 NY 458, 464 (NY, 1928).

³⁰⁰ Thompson, above n 184, 22.

firm at what was then quite a high rate of interest. ... In June 1975 Dr. Daly deposited a further sum on the same terms. In the same month he assigned the deposits to the appellant. In July 1975 the firm ceased trading; it was insolvent and unable to repay to the appellant the amounts advanced on deposit. The appellant's claim for compensation from the fidelity fund was rejected by the learned trial judge whose decision was affirmed by the Court of Appeal.³⁰¹

144. The appellant's lack of success continued in the High Court. For present purposes, there are two points of significance. First, it was found that Patrick Partners, as an investment adviser, owed a fiduciary duty to Dr Daly and acted in breach of that duty.³⁰² Secondly, the breach which was the subject of persistent reference by the High Court was the breach of a positive duty to disclose the true financial position of the firm:

It was right to say that Patrick Partners owed a fiduciary duty to Dr. Daly and acted in breach of that duty. The firm, which held itself out as an adviser on matters of investment, undertook to advise Dr. Daly, and Dr. Daly relied on the advice which the firm gave him. In those circumstances the firm had a duty to disclose to Dr. Daly the information in its possession which would have revealed that the transaction was likely to be a most disadvantageous one from his point of view. Normally, the relation between a stockbroker and his client will be one of a fiduciary nature and such as to place on the broker an obligation to make to the client a full and accurate disclosure of the broker's own interest in the transaction³⁰³

145. A similar approach is reflected in the reasons of Brennan J:

His duty is to furnish the client with all the relevant knowledge which the adviser possesses, concealing nothing which might reasonably be regarded as relevant to the making of the investment decision ... Patrick Partners was therefore under a duty, before borrowing from Dr. Daly without security the money on the investment on which their advise had been sought, to tell him fully and truthfully what they knew about their financial position and to warn him³⁰⁴

146. Although the duty was identified in the context of avoiding a conflict of duty and interest,³⁰⁵ it was repeatedly cast in wholly positive language and without reference to the proscriptive-prescriptive dichotomy to which the High Court came to refer in *Breen*³⁰⁶ ten years later. Obviously enough, it did not consider – because the issue did not arise – the ambit of the fiduciary duties owed by directors to their company.

³⁰¹ (1986) 160 CLR 371, 375.

³⁰² Ibid 377.

³⁰³ Ibid 377 (Gibbs CJ).

³⁰⁴ Ibid 385–6 (Brennan J).

³⁰⁵ Ibid 385 (Brennan J).

³⁰⁶ (1996) 186 CLR 71.

C Whitehouse v Carlton Hotel

147. *Whitehouse*³⁰⁷ is important because it involved the question of director's duties in the context of the allotment of shares in circumstances devoid of any suggestion of self-interest.³⁰⁸ Ultimately, it was held that the permanent governing director made the allotment for the impermissible purpose of defeating the voting power of existing shareholders by creating a new majority. But the case is also important because of the terminology used by the court. Throughout their reasons, Mason, Deane and Dawson JJ refer to the power of the directors to allot shares as a fiduciary power which could not be exercised for a purpose foreign to such a power.³⁰⁹ And they concluded that:

In this as in other areas involving the exercise of fiduciary power, 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.³¹⁰

148. Wilson J, who was in dissent on the issue of breach, nonetheless agreed with the majority on the qualification to the right of the permanent governing director to allot the shares: as the power to allot shares was a fiduciary power, it could not be exercised for an improper purpose.³¹¹

The consideration of the issue of improper purpose must begin with the general proposition that the power to allot shares is a fiduciary power which must be exercised bona fide for the benefit of the company as a whole.³¹²

149. Brennan J, who joined Wilson J in dissent on the issue of breach, also agreed with the statements of principle in relation to improper purpose. But, his Honour took the matter one step further: he did not merely confine himself to a discussion of fiduciary power; he discussed the question of obligation and breach in the context of fiduciary duty – by reference to authorities such as *Grant*,³¹³ *Ngurli*,³¹⁴ *Ashburton Oil*³¹⁵ and *Harlowe's Nominees*.³¹⁶

³⁰⁷ *Whitehouse* (1987) 162 CLR 285.

³⁰⁸ *Ibid* 302 (Wilson J): 'There is no question of Charles' decision being infected by self-interest. It is clear that he had nothing personally to gain from the decision for its effect was not to be felt until after his death.'

³⁰⁹ *Ibid* 289–90, 292–3.

³¹⁰ *Ibid* 293.

³¹¹ *Ibid* 300.

³¹² *Ibid* 300.

³¹³ *Grant v John Grant & Sons Pty Ltd* (1950) 82 CLR 1, 32.

³¹⁴ *Ngurli Ltd v McCann* (1953) 90 CLR 425, 439–40.

³¹⁵ *Asburton Oil N.L. v Alpha Minerals N.L.* (1971) 123 CLR 614, 627–8, 640.

³¹⁶ *Harlowe's Nominees Pty Ltd v Woodside (Lakes) Entrance Oil Co N.L.* (1968) 121 CLR 483, 493–4.

An issue of shares which is made for an impermissible purpose is not immune from challenge because one of its effects is to benefit the company: an exercise by directors of their power to issue shares for a purpose foreign to that for which the power is conferred is a breach of their fiduciary duty to the company and a ground for avoiding the exercise of the power.³¹⁷

150. And because of its significance to the current debate, it is worth repeating that the High Court affirmed the finding of the Full Court of the Supreme Court of Queensland ‘that there was a breach of fiduciary duty’³¹⁸ notwithstanding the case was devoid of any suggestion of self-interest on the part of the permanent governing director. This lack of self-interest was a feature in common with the decision of the Privy Council in *Howard Smith Ltd*,³¹⁹ an authority that clearly influenced the High Court in *Whitehouse*.³²⁰
151. It is legitimate to note that the High Court in *Breen*³²¹ made no mention of *Whitehouse*³²² – which had been decided nine years earlier; and it is also legitimate to proffer an explanation as to why that would be so, as that omission cannot have involved happenstance. *Whitehouse*³²³ would not have assisted in the resolution of the issues before the High Court in *Breen*,³²⁴ none of which involved director’s duties. This point was made by Drummond AJA in *Bell Group*:

Neither decision in *Breen* or *Pilmer* considered the position of directors who undoubtedly stand in a fiduciary relationship with their company and who have long been subject to duties to act bona fide in the interests of the company and to exercise their powers for proper purposes, both of which have long been described as fiduciary obligations.³²⁵

And by Carr AJA in *Bell Group*:

Breen ... was not concerned with the duties of a company director.³²⁶

³¹⁷ *Whitehouse* (1987) 162 CLR 285, 310.

³¹⁸ *Ibid* 309.

³¹⁹ *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821, 831:

The judge found, as their Lordships think it right to make clear at once, that the Millers’ directors were not motivated by any purpose of personal gain or advantage, or by any desire to retain their position on the board.

³²⁰ (1987) 162 CLR 285.

³²¹ *Breen* (1996) 186 CLR 71.

³²² (1987) 162 CLR 285.

³²³ *Ibid*.

³²⁴ *Breen* (1996) 186 CLR 71.

³²⁵ (2012) 44 WAR 1, 346 [1962]; see also Hayne, above n 259, 805–8.

³²⁶ *Ibid* 521 [2719].

152. And, in *Maguire*,³²⁷ Brennan CJ, Gaudron, McHugh and Gummow JJ differentiated between cases such as *Breen* – which did not involve director’s duties – and cases such as *Whitehouse*³²⁸ and *Wheeler*,³²⁹ which did.³³⁰ There is a point to that differentiation.

D Bennett v Minister of Community Welfare

153. *Bennett*³³¹ was decided four years prior to *Breen*³³² and it contains a number of observations that are more than suggestive of a positive fiduciary duty. Mason CJ, Deane and Toohey JJ said that:

In the courts below, the duty of care appears to have been equated to, even derived from, a fiduciary duty owed by the Director to the appellant arising out of his statutory office as guardian. That fiduciary duty was a positive duty to obtain independent legal advice with respect to the possible existence of a cause of action on the part of the appellant ...³³³

154. Their Honours continued:

In the circumstances which we have outlined, the Director ... became subject to a duty of care owed to the appellant to avoid his suffering loss and damage arising from the possibility that he might not exercise an entitlement to bring an action for damages in respect of his injury and that the action might become statute-barred. The common law duty of care arose independently of the fiduciary duty which in no way displaced, qualified or derogated from the common law duty.³³⁴

155. McHugh J, too, spoke of the existence of a fiduciary duty:

Nicholson J held that, by reason of the negligence of the officers of the Department, the appellant had had a cause of action for damages against the Minister. His Honour also held that the Director ‘owed a fiduciary duty to [the appellant]; that included in that duty was the obligation to assert rights on his behalf; that ... it was the duty of the guardian to obtain for the [appellant] independent advice.’³³⁵

156. With those findings in mind, McHugh J continued:

Having regard to his Honour’s finding that the Minister was in breach of a fiduciary duty, it might have been thought that the action of the appellant was

³²⁷ *Maguire v Makaronis* (1997) 188 CLR 449.

³²⁸ (1987) 162 CLR 285.

³²⁹ (1994) 11 WAR 187.

³³⁰ *Maguire v Makaronis* (1997) 188 CLR 449, 473 n 103.

³³¹ *Bennett v Minister of Community Welfare* (1992) 176 CLR 408, 411 (*‘Bennett’*).

³³² (1996) 186 CLR 71.

³³³ *Bennett* (1992) 176 CLR 408, 411.

³³⁴ *Ibid* 412.

³³⁵ *Ibid* 426.

one brought in the exclusive equitable jurisdiction to ‘enforce compensation for breach of a fiduciary obligation’. If that jurisdiction had been invoked, there would be much to be said for the view that the Minister could not escape liability to compensate the appellant ...³³⁶

157. His Honour then concluded that it was not open to doubt that, in addition to the fiduciary duty the Director owed to the appellant, the circumstances gave rise to a common law duty of which the Director was in breach – in not obtaining independent legal advice.³³⁷
158. Consequently, it will have been seen that the duty to act was cast in positive terms: ‘That fiduciary duty was a positive duty to obtain independent legal advice’.³³⁸ Further, there was no reference to the proscriptive-prescriptive dichotomy to which *Breen*³³⁹ came to refer, or need to discuss, more broadly, the ambit of fiduciary law in Australia.
159. In *Wheeler*,³⁴⁰ the Court of Appeal of the Supreme Court of Western Australia considered *Bennett*³⁴¹ and noted, in particular, the positive nature of the fiduciary duty with which that case was concerned.³⁴²

E Breen v Williams – For what principle does this case actually stand?

160. *Breen*³⁴³ is invariably cited³⁴⁴ as authority for the proscriptive–prescriptive dichotomy; and that is not surprising: it does not appear that the High Court had previously referred to such a dichotomy in any case concerning fiduciary duties.³⁴⁵
161. It is now notorious that the relationship with which *Breen*³⁴⁶ was concerned was between a patient and her specialist medical practitioner; and the issue for the court to determine was whether that relationship created an entitlement in the patient, by way of a positive obligation on the doctor, to access and copy the doctor’s records of her treatment. The argument for the patient was put on a number of bases,³⁴⁷ including that

³³⁶ Ibid 426.

³³⁷ Ibid 427.

³³⁸ Ibid 411.

³³⁹ (1996) 186 CLR 71.

³⁴⁰ (1994) 11 WAR 187

³⁴¹ (1992) 176 CLR 408.

³⁴² (1994) 11 WAR 187, 236, 239.

³⁴³ (1996) 186 CLR 71.

³⁴⁴ *Friend v Brooker* (2009) 239 CLR 129, 160 [84]; *Pilmer* (2001) 207 CLR 165, 198 [74], 208 [111], 209–16 [116]–[133].

³⁴⁵ Heydon, Leeming and Turner, above n 62, 214–15 [5-385]; Firios, see above n 64.

³⁴⁶ (1996) 186 CLR 71.

³⁴⁷ A proprietary right; contract and fiduciary duty.

there was a fiduciary relationship between them which gave rise to that positive obligation on the part of the doctor. The patient was wholly unsuccessful; but something needs to be said of the separate reasons for judgment in the High Court.

162. It should also be noted at the outset that *Breen*³⁴⁸ was a case entirely devoid of an assertion of profit, conflict or undue influence; so, of precisely what fiduciary duty the doctor could have been in breach is difficult to discern.
163. The reasons of Brennan CJ on the fiduciary duty aspect of the case were concise: a little in excess of one page in length and confined to the following analysis.
164. Before posing and dealing with the question: ‘What is the nature of the doctor-patient relationship?’,³⁴⁹ his Honour dealt generally with matters of principle. First, fiduciary duties arose either from agency or in the course of a relationship of ascendancy, influence or dependency; secondly, whatever may be the source of those duties, it was necessary to identify the subject matter over which they extended;³⁵⁰ thirdly, whilst fiduciary relations were of many different types,³⁵¹ it would be erroneous to regard the duty of a fiduciary as attaching to every aspect of the fiduciary’s conduct, however irrelevant that conduct may be to the relationship that is the source of the duty.
165. His Honour also acknowledged the statements of principle by Gibbs CJ³⁵² and Mason J³⁵³ in *Hospital Products*³⁵⁴ highlighting the elusive nature of the scope of fiduciary duties, and how – to use the language of Mason J – the scope ‘must be moulded according to the nature of the relationship and the facts of the case.’³⁵⁵
166. Having approached the case with those principles in mind, the Chief Justice concluded that, generally, there was no relationship of agency between a doctor and a patient, and it was difficult to conceive how a ‘representative’ character could have been attributed to that relationship. And, as to the notion of ascendancy, influence or dependency, his Honour dealt with it in the context of undue influence – which he found was absent:

³⁴⁸ (1996) 186 CLR 71.

³⁴⁹ *Breen* (1996) 186 CLR 71, 83.

³⁵⁰ *Birtchnell v Equity Trustees, Executors & Agency Co Ltd* (1929) 42 CLR 384, 408–9; *Chan* (1984) 154 CLR 178.

³⁵¹ *Re Coomber* [1911] 1 Ch 723.

³⁵² *Hospital Products* (1984) 156 CLR 41, 69.

³⁵³ *Ibid* 102.

³⁵⁴ *Ibid*.

³⁵⁵ *Ibid* 102.

Such a relationship casts upon the doctor the onus of proving that any gift received from the patient was given free from the influence which the relationship produces. But in this case the doctor has received no gift; he has taken no step to procure an advantage for himself. Nor has he taken any advantage of his ascendancy over his patient or of her trust in him. His refusal to give access to his records does not deny his patient a benefit to which the patient was entitled either by reason of his position as the ... medical adviser and provider of medical treatment or by reason of the trust she reposed in him to provide medical treatment.³⁵⁶

167. His Honour then dealt with and rejected – at the level of principle - the approach taken by the Supreme Court of Canada:

In Canada, the Supreme Court has held that the relationship between doctor and patient casts on the doctor a fiduciary duty to provide the patient with access to his or her medical records: *McInerney v MacDonald*. But in this respect the notion of fiduciary duty in Canada does not accord with the notion in the United Kingdom. Nor, in my opinion, does the Canadian notion accord with the law of fiduciary duty as understood in this country. There is simply no fiduciary relationship which gives rise to a duty to give access to or to permit the copying of the [doctor's] records. There is no relevant subject matter over which the [doctor's] fiduciary duty extended.³⁵⁷

168. And presumably, the absence of a subject matter does not go merely to the question of breach; surely it goes, also, to the existence or not of a fiduciary relationship.

169. So, the features which Brennan CJ regarded as determinative were:

- a. a lack of agency – by which it can be presumed he meant a lack of any representative capacity or undertaking, which is critical to the existence of a fiduciary relationship;
- b. a lack of subject matter;
- c. an absence even of a suggestion of conflict, profit or use of a position of ascendancy;
- d. a disavowal, as a matter of principle, of the broader approach to fiduciary law typified by the decision of the Supreme Court of Canada in *McInerney*;³⁵⁸

³⁵⁶ *Breen* (1996) 186 CLR 71, 83.

³⁵⁷ *Ibid* (citations omitted).

³⁵⁸ [1992] 2 SCR 138.

- e. in the final analysis, the failure to establish a fiduciary relationship and certainly not a fiduciary relationship which gave ‘rise to a duty to give access to, or to permit the copying of the [doctor’s] records.’³⁵⁹

170. One feature is to be noted: the analysis by the Chief Justice was devoid of any reference to the proscriptive-prescriptive dichotomy for which *Breen*³⁶⁰ has become authority.

171. Although Dawson and Toohey JJ acknowledged that the law had not been able to formulate any precise or comprehensive definition of the circumstances in which a person is constituted a fiduciary in his or her relations with another,³⁶¹ they reasoned that the concern of the law in a fiduciary relationship ‘is not negligence or breach of contract.’³⁶² Yet, it was the law of negligence and contract that governed the duty of a doctor towards a patient. This was clear from *Rogers v Whitaker*:

The law imposes on a medical practitioner a duty to exercise reasonable care and skill in the provision of professional advice and treatment. That duty is a ‘single comprehensive duty covering all the ways in which a doctor is called upon to exercise his skill and judgment’; it extends to the examination, diagnosis and treatment of the patient and the provision of information in an appropriate case.³⁶³

172. Their conclusion, as a consequence, was that: ‘this leaves no need, or even room, for the imposition of fiduciary obligations.’³⁶⁴

173. Although they also recognised that ‘duties of a fiduciary nature may be imposed on a doctor’,³⁶⁵ they spoke, in that context, of the need to protect confidential information and of the fact that any substantial benefit received by the doctor from the patient is presumed to be the subject of undue influence: however, they recognised that whether those aspects of the doctor-patient relationship were properly ‘to be described as fiduciary may be a matter of debate.’³⁶⁶

174. That issue did not arise for determination – as the patient was contending for ‘a wider fiduciary relationship ... giving rise to a duty on the part of the [doctor] to afford her

³⁵⁹ *Breen* (1996) 186 CLR 71, 83.

³⁶⁰ (1996) 186 CLR 71.

³⁶¹ *Ibid* 92.

³⁶² *Ibid* 93.

³⁶³ (1992) 175 CLR 479, 483 (citations omitted).

³⁶⁴ *Breen* (1996) 186 CLR 71, 93.

³⁶⁵ *Ibid* 92.

³⁶⁶ *Ibid*.

access to her medical records.³⁶⁷ That was regarded as an obligation which went ‘beyond the exaction of loyalty and as displacing the role hitherto played by the law of contract and tort by becoming an independent source of positive obligations and creating new forms of civil wrong.’³⁶⁸

175. That case was rejected, including for the following additional reasons:

- a. there was no ‘representative’ relationship – in the sense used by Mason J in *Hospital Products* – between a doctor and patient:

A doctor is bound to exercise reasonable skill and care in treating and advising a patient, but in doing so is acting, not as a representative of a patient, but simply in the exercise of his or her professional responsibilities. No doubt the patient places trust and confidence in the doctor, but it is not because the doctor acts on behalf of the patient...³⁶⁹

- b. the ‘no profit, no conflict’ duties of a fiduciary were:

quite inappropriate in the treatment of a patient by a doctor or in the giving of associated advice. There the duty of the doctor is established both in contract and in tort and it is appropriately described in terms of the observance of a standard of care and skill rather than, inappropriately, in terms of the avoidance of a conflict of interest;³⁷⁰

- c. although fiduciary duties may be superimposed on contractual relations, there was no suggestion of conflict or profit;
- d. the tendency in the United States and Canada to impose fiduciary obligations ‘which go beyond the exaction of loyalty’³⁷¹ is without foundation in Australia;
- e. the obligation to act in the best interest of the patient meant no more than the exercise of reasonable care and skill in the treatment and advising of the patient;³⁷²

³⁶⁷ Ibid 92.

³⁶⁸ Ibid 95 (citations omitted).

³⁶⁹ Ibid 93.

³⁷⁰ Ibid.

³⁷¹ Ibid 95.

³⁷² Ibid 97.

- f. there was no basis in the fiduciary law of Australia for discerning a fiduciary relationship between a doctor and patient carrying with it a right of access to medical records.

176. And, consistently with the reasons of Brennan CJ, there was no mention of the proscriptive–prescriptive dichotomy.
177. There is a particular significance to the reasons of Gaudron and McHugh JJ – because they are the authors of the proscriptive–prescriptive dichotomy. But, before turning to it, it should be noted that they rejected the imposition of a fiduciary duty to disclose the records for the following reasons.
178. First, there was no ‘representative’ capacity in the relationship between doctor and patient, ‘because no such undertaking was given’ by the doctor.³⁷³ Secondly, there was an absence of subject matter: the subject matter could only have related to the diagnosis, advice and treatment of the patient³⁷⁴ – matters covered by the law of contract and tort. Thirdly, there was ‘no general fiduciary duty’³⁷⁵ which would have provided a basis for relief.
179. The passage in *Breen*³⁷⁶ which is invariably cited³⁷⁷ for the proposition that, in Australian jurisprudence, fiduciary duties are proscriptive in obligation and confined to the ‘no profit, no conflict’ duties, needs to be set out in full and examined:

In this country, fiduciary obligations arise because a person has come under an obligation to act in another's interests. As a result, equity imposes on the fiduciary proscriptive obligations – not to obtain any unauthorised benefit from the relationship and not to be in a position of conflict. If these obligations are breached, the fiduciary must account for any profits and make good any losses arising from the breach. But the law of this country does not otherwise impose positive legal duties on the fiduciary to act in the interests of the person to whom the duty is owed. If there was a general fiduciary duty to act in the best interests of the patient, it would necessarily follow that a doctor has a duty to inform the patient that he or she has breached their contract or has been guilty of negligence in dealings with the patient. That is not the law of this country.³⁷⁸

³⁷³ Ibid 110.

³⁷⁴ Ibid 108.

³⁷⁵ Ibid 112.

³⁷⁶ (1996) 186 CLR 71.

³⁷⁷ *Pilmer* (2001) 207 CLR 165, 197–8 [74].

³⁷⁸ *Breen* (1996) 186 CLR 71, 113.

180. The first sentence is uncontroversial. The second sentence is literally true: equity does indeed oblige a fiduciary not to profit from the relationship and not to be in a position of conflict. The third sentence – dealing with the consequences of a breach of this obligation – is also uncontroversial. The focus, then, is on what follows:

But the law of this country does not otherwise impose positive legal duties on the fiduciary to act in the interests of the person to whom the duty is owed.³⁷⁹

The only authority cited for that proposition is an article in the Sydney Law Review written about *Breen*³⁸⁰ and pending its outcome in the High Court.³⁸¹

181. But that proposition must surely be read – and surely was said – in a particular context; otherwise, it is not correct: the ‘law of this country’ does impose positive legal duties on a fiduciary – take, for instance, a company and its director – to act bona fide in the interests of the company and for proper purposes. Those duties have long been a feature of the accepted fiduciary relationship between company and director.³⁸² And, it is not to be forgotten that: ‘The essence of a fiduciary relationship ... is that one party ... pledges himself or herself to act in the best interests of the other.’³⁸³ Gummow J said so later in his reasons in *Breen*: ‘In this country, fiduciary obligations arise because a person has come under an obligation to act in another’s interests.’³⁸⁴
182. And the fact that the proposition by Gaudron and McHugh JJ was said in a very particular context is made clear by the next sentence in their reasons:

If there was a general fiduciary duty to act in the best interests of the patient, it would necessarily follow that a doctor has a duty to inform the patient that he or she has breached their contract or has been guilty of negligence in dealings with the patient.

183. They were speaking specifically of ‘a general fiduciary duty’; and it was in that context they concluded: ‘That is not the law of this country.’ They did not say, expressly or by

³⁷⁹ Ibid.

³⁸⁰ (1994) 35 NSWLR 522.

³⁸¹ Patrick Parkinson, ‘Fiduciary Law and Access to Medical Records: *Breen v Williams*’ (1995) 17 *Sydney Law Review*, 433, 441–2.

³⁸² *Streeter* (2011) 278 ALR 291, 368 [447]; *Howard* (2014) 253 CLR 83, 89–99 [31], 106–7 [58], 114 [91], 120–1 [116]; *Mills v Mills* (1938) 60 CLR 150; *Whitehouse* (1987) 162 CLR 285, 289, 300–1; *Bell Group* (2012) 44 WAR 1, 140 [768], 180–2 [999]–[1011], 342–4 [1938]–[1947], 520 [2710], 544 [2810]; *Pilmer* (2001) 207 CLR 165, 178 [18]. And those words are ‘not yet a shibboleth’: *Richard Brady Franks Ltd v Price* (1937) 58 CLR 112, 138 per Rich J; Hayne, above n 259, 805–8.

³⁸³ *Norberg v Wynrib* [1992] 2 SCR 226, 272, quoted with approval in *Pilmer* (2001) 207 CLR 165, 196–97 [71].

³⁸⁴ (1996) 186 CLR 71, 113.

implication, that, in Australian jurisprudence, fiduciary duties were confined to the ‘no profit, no conflict’ duties.

184. Heydon J has written influentially on *Breen*, in particular with respect to the reasons of Gaudron and McHugh JJ. He said that those critical passages:

must be read in the context of the question being decided in that case – whether a doctor owed a duty to the plaintiff, his patient, to grant her access to her medical records. The court excluded various avenues to relief based on contract, property and other bodies of law. Opinions differed on whether, and how far, the doctor-patient relationship was fiduciary; even those justices who thought that it was, or could be, fiduciary for certain purposes, did not conclude that it created an obligation to give access to medical records. Nor did the doctor’s duty to advise and treat the patient with reasonable care and skill encompass that obligation. This was to say no more than that, in the absence of special facts, doctors are in the same position as solicitors, engineers or architects: they owe duties in tort, and if there is a contract, in contract, of care and skill, but these are not equitable duties and not fiduciary duties.

When Gaudron and McHugh JJ said that apart from the proscriptive obligations imposed on fiduciaries, ‘the law of this country does not otherwise impose positive legal duties on the fiduciary to act in the interests of the person to whom the duty is owed’, they cannot have been referring to directors or trustees because that statement is not true for directors or trustees: those persons owe positive legal duties, independently of tort or contract, to act bona fide in the best interest of the company or the beneficiaries, and to do so with care and skill.³⁸⁵

185. Gummow J was the only judge to acknowledge that the relationship between medical practitioner and patient was fiduciary; and his Honour did so based on the decision of the High Court in *Daly*.³⁸⁶ Although it perhaps goes without saying, in order to determine the outcome of the case, Gummow J emphasised a number of features which were absent. And, clearly, the absence of those features must be taken into account when determining the principle for which *Breen*³⁸⁷ stands. In particular, Gummow J noted that the case did not involve an undisclosed financial interest, undisclosed side- benefits or conflicting interests.³⁸⁸ And he concluded against the grant of relief for reasons he identified in the following paragraph:

³⁸⁵ Heydon, above n 120, 233.

³⁸⁶ *Daly v Sydney Stock Exchange Ltd* (1986) 160 CLR 371 (*‘Daly’*). This accords with the observation of Kirby J in *Pilmer* (2001) 207 CLR 165, 210–11 [120].

³⁸⁷ (1996) 186 CLR 71.

³⁸⁸ (1996) 186 CLR 71, 136.

Fiduciary obligations arise (albeit perhaps not exclusively) in various situations where it may be seen that one person is under an obligation to act in the interests of another. Equitable remedies are available where the fiduciary places interest in conflict with duty or derives an unauthorised profit from abuse of duty. It would be to stand established principle on its head to reason that because equity considers the defendant to be a fiduciary, therefore the defendant has a legal obligation to act in the interests of the plaintiff so that failure to fulfil that positive obligation represents a breach of fiduciary duty.³⁸⁹

186. His Honour must have been referring, there, to the positive obligation to disclose the medical records: that was the issue with which the case was concerned.
187. The proscriptive–prescriptive dichotomy enunciated by the High Court was not necessary for the resolution of the issues in *Breen*.³⁹⁰ Of the six judges comprising the court, only one, Gummow J, was prepared to conclude that the relationship between the doctor and the patient was fiduciary.³⁹¹ Why, then, did the High Court speak in what appeared to be broad terms about the scope of fiduciary duties under Australian law? One reason may be speculated. Patrick Parkinson, the author of an article to which the judgments make repeated reference,³⁹² put the need to do so as an imperative:

Given the extent to which the Canadian authorities on fiduciary law have been cited in Australia, and the confusion which increasingly surrounds the law of fiduciary relationships, there is a real need for the High Court, in deciding the case of *Breen v Williams*, to make a definitive statement about the scope and limits of the fiduciary principle.³⁹³

188. And Parkinson’s article is cited by the High Court as authority for the proposition that: ‘the law of this country does not otherwise impose positive legal duties on the fiduciary to act in the interests of the person to whom the duty is owed.’³⁹⁴ The Parkinson article is authority for no such proposition; and no case authority is cited in support of it.
189. As noted earlier, the lack of authority for the proposition has been the subject of criticism by the learned authors of *Meagher, Gummow & Lehane*.³⁹⁵ And it is unusual for a court at the level of the High Court to enunciate such a broad statement of principle without analysis or the consideration and citation of authority in support. But,

³⁸⁹ Ibid 137–8.

³⁹⁰ Ibid.

³⁹¹ *Pilmer* (2001) 207 CLR 165, 210–211 [120] (Kirby J).

³⁹² *Breen* (1996) 186 CLR 71, 95 n 83, 113 n 158–60, 162.

³⁹³ Patrick Parkinson, ‘Fiduciary Law and Access to Medical Records: *Breen v Williams*’ (1995) 17 *Sydney Law Review* 433, 443.

³⁹⁴ *Breen* (1996) 186 CLR 71, 113 (citations omitted).

³⁹⁵ See above [33].

there can be no doubt about the influence of the article: for instance, the paragraph from the reasons of Gummow J quoted above³⁹⁶ is reflected in the article. Parkinson said:

fiduciary obligations arise *because* the person is under an obligation to act in the interests of another, and equitable remedies are available where the person places interest in conflict with duty or gains an unauthorised profit from the position. The Canadian courts are in danger of standing this reasoning on its head: because the law deems someone to be a fiduciary, therefore, they have a legal duty to act in the interests of another, and failure to fulfil that positive obligation represents a breach of fiduciary duty giving rise to a claim for equitable compensation.³⁹⁷

190. *Breen*³⁹⁸ is not authority for the proposition that, under Australian law, fiduciary duties are confined to the proscriptive duties of no profit, no conflict. Its concern was with a very precise issue which arose for determination: was there an obligation on the doctor to disclose medical records to the patient. And the High Court found that there was a lack of any legal basis to justify the making of an order for disclosure of that sort.
191. *Breen*³⁹⁹ was not concerned at all with the broader question of the ambit of fiduciary law in Australia: had it intended, for instance, to determine the scope of the duties owed by directors to their company, including the extent to which they were fiduciary or not, it is most unlikely that it would have done so without reference to its own previous decisions on the point, including *Whitehouse*.⁴⁰⁰
192. And it ought be pointed out that Parkinson, in his article, was not purporting to state the ambit of fiduciary duties in relation to company directors. Indeed, he draws a distinction between a doctor and a company director in relation to that very issue:

The law protects the privacy of information entrusted by us to our doctors through the law of breach of confidence. However, it is another thing to say that doctors should be included in the list of those who owe general fiduciary duties alongside trustees, solicitors, partners, directors, agents and others who are commonly included.⁴⁰¹

³⁹⁶ See above [185].

³⁹⁷ Parkinson, above n 393, 441 (emphasis in original).

³⁹⁸ (1996) 186 CLR 71.

³⁹⁹ (1996) 186 CLR 71.

⁴⁰⁰ (1987) 162 CLR 285.

⁴⁰¹ Parkinson, above n 293, 445; Heydon, Leeming and Turner, above n 62, 216 [5-400].

193. The scope of the point for which *Breen*⁴⁰² actually stands as authority was identified by Kirby J in *Pilmer*:

The primary point for which *Breen* stands in relation to fiduciary duties is that, in Australia, attempts to elevate a relationship between medical practitioner and patient effectively to a special one which, without more, will import fiduciary obligations has, for the moment, failed. Proving that the relationship involves an imbalance of power and even a vulnerability on the part of the patient, was not sufficient.⁴⁰³

F Pilmer v Duke

194. The question before the Court in *Pilmer*⁴⁰⁴ was whether a firm of accountants that had been retained by a company to prepare certain information and advice in relation to a takeover, owed a fiduciary duty or fiduciary obligations to the company. The Full Court of the Supreme Court of South Australia had answered that question affirmatively. It also found the accountants to be in breach. The High Court disagreed with the finding of the existence of a fiduciary duty and found that the Full Court had erred in so finding.
195. *Pilmer* was not concerned with the ambit of fiduciary duties in any broader context; and it was in this case that Kirby J took the opportunity to ‘question the viability of [the] supposed dichotomy’⁴⁰⁵ between proscriptive and prescriptive conduct, because, as his Honour put it: ‘omissions quite frequently shade into commissions’.⁴⁰⁶
196. *Pilmer*⁴⁰⁷ is not determinative of the issues raised in *Bell Group*;⁴⁰⁸ nor does it assist in their determination. For instance, unlike *Bell Group*,⁴⁰⁹ it did not involve one of the accepted categories of fiduciary relationship: indeed, the High Court found against the existence of such a relationship. Further, it did not concern, at all, the proper characterisation of the duties owed by directors to their company, including the extent to which those duties were fiduciary.

⁴⁰² (1996) 186 CLR 71.

⁴⁰³ (2001) 207 CLR 165, 212 [122], 210 [119]. To be fair, his Honour did acknowledge the existence of other points.

⁴⁰⁴ (2001) 207 CLR 165.

⁴⁰⁵ *Ibid* 214 [128].

⁴⁰⁶ *Ibid*.

⁴⁰⁷ (2001) 207 CLR 165.

⁴⁰⁸ (2012) 44 WAR 1.

⁴⁰⁹ *Ibid*.

G Friend v Brooker

197. The question in *Friend*⁴¹⁰ was whether a director owed his co-director a fiduciary duty distinct from his duty to the company. The High Court answered that question in the negative; and the context in which the question arose was as to the nature and scope of the equitable doctrine of contribution – in that case, between company directors.
198. At trial it was asserted, but rejected by the trial judge, that a fiduciary relationship existed, between the directors, after the incorporation of their company.⁴¹¹ On appeal to the Court of Appeal, McColl JA considered that there had been a fiduciary obligation that required each director to meet an equal share of capital contributions to the company; however, that obligation was described, by the High Court, as an obligation ‘with a positive rather than a proscriptive content.’⁴¹²
199. The finding of that fiduciary obligation was the subject of challenge in the High Court – which proceeded to dispatch it in less than one page of reasoning:

The fiduciary duty

McColl JA held that Mr Brooker and Mr Friend were subject to a fiduciary obligation ‘to be equally and personally liable to each other for losses flowing from personal borrowings’. In this Court, the appellant correctly emphasises that such a formulation of fiduciary duty went beyond the imposition of proscriptive obligations, a limitation emphasised in decisions of this Court.

The respondent seeks to meet this apparent failure to observe the settled doctrine of fiduciary law in Australia by recasting the duty. This is not a duty to the Company as a director but a duty to Mr Brooker which is imposed upon Mr Friend and obliges him not to prefer his own interests to those of Mr Brooker in managing the disbursement of the funds of the Company to repay loans to the Company made possible by Mr Brooker’s personal borrowing from third parties, including from SMK. This duty then is said to have been broken by Mr Friend preventing the funds of the Company from being used to reduce the burden of the borrowing by Mr Brooker. The appellant responds with the submission that this attempted reformulation was neither pleaded nor run at trial

The appellant also submits that equity does not impose fiduciary duties between the parties to a deliberate commercial decision to adopt a corporate structure in which they would owe duties, but to the corporation and as directors. Why, it is asked, should equity intervene in such a fashion when the Company, by which Mr Brooker and Mr Friend carried on the business, failed and, in the result, their

⁴¹⁰ (2009) 239 CLR 129.

⁴¹¹ *Ibid* 145 [24].

⁴¹² *Ibid* 147 [36].

personal losses will not be in equal amounts? That submission is to be accepted.⁴¹³

200. Once again, *Friend*⁴¹⁴ was not concerned with the ambit of fiduciary law in Australian jurisprudence. The principal question was as to the nature and scope of the equitable doctrine of contribution; and the fiduciary duty sought to be raised – albeit in the context of conflict – was of a novel kind: a fiduciary duty allegedly owed not by a director to the company, but by one director to his fellow director. Namely, ‘a duty ... upon Mr Friend ... not to prefer his own interests’.⁴¹⁵
201. But the Court found against the imposition of any fiduciary duty; and the reason it did so was because of the deliberate commercial decision by the parties to adopt a corporate structure. The submission which was said ‘to be accepted’ by the Court was a submission that ‘equity does not impose fiduciary duties between the parties to a deliberate commercial decision to adopt a corporate structure in which they would owe duties, but to the corporation and as directors.’⁴¹⁶
202. And the reference by the Court to the ‘failure to observe the settled doctrine of fiduciary law in Australia’⁴¹⁷ was said with reference to the way in which McColl JA had described the fiduciary duty in the Court of Appeal: that the directors were subject to a fiduciary obligation ‘to be equally and personally liable to each other for losses flowing from personal borrowings.’⁴¹⁸ That explains why, in the High Court, there was an attempt, albeit unsuccessfully – to recast the duty in proscriptive language: ‘a duty ... imposed upon Mr Friend ... not to prefer his own interests to those of Mr Brooker’.⁴¹⁹ But, for the reasons already outlined, that attempt failed.

H Howard v The Commissioner of Taxation

203. One risk faced by the author of a paper posing a legal question is that a court may, in the interim, provide what appears to be an authoritative answer; perhaps even inferentially. The decision of the High Court in *Howard*⁴²⁰ obviously deserves mention in this – and a much broader – context; but it does not actually determine the question

⁴¹³ Ibid 160 [84]–[86] (French CJ, Gummow, Hayne and Bell JJ) (citations omitted).

⁴¹⁴ (2009) 239 CLR 129.

⁴¹⁵ Ibid 160 [85].

⁴¹⁶ Ibid 160 [86].

⁴¹⁷ Ibid 160 [85].

⁴¹⁸ Ibid 160 [84].

⁴¹⁹ Ibid 160 [85].

⁴²⁰ *Howard* (2014) 253 CLR 83.

in issue: *Howard*⁴²¹ was concerned solely with the ‘no profit, no conflict’ duties of a fiduciary and not with any broader question of the ambit of fiduciary duties under Australian law. This is made clear in the reasons of Hayne and Crennan JJ:

No question arises in this case ... of the application of the obligation or obligations, often compendiously described as the duty of directors to act in the interests of the company as a whole ... Rather, the appellant asserted that he was bound in equity to hold the compensation he received for [the company] either because his duty and his interest conflicted or because the compensation was an unauthorised benefit obtained from the relationship.⁴²²

204. *Bell Group*,⁴²³ on the other hand, was not determined on either of the ‘no profit, no conflict’ bases:⁴²⁴ it was concerned with directors’ duties to act bona fide in the interest of their company and to exercise their powers for proper purposes – which were found to be fiduciary notwithstanding the absence of profit or conflict.⁴²⁵
205. Howard, who was a joint-venturer, with others, in his personal capacity and also a director of a company, Distronics, sued for equitable compensation for a breach of fiduciary duties owed to him by his co-venturers. He was successful and was awarded a sum of money. Distronics also sued alleging that Howard’s co-venturers owed and breached fiduciary duties to it. The company was wholly unsuccessful in that claim.
206. Howard paid his award of compensation to the company. However, the Commissioner of Taxation assessed Howard to income tax on his award on the basis that, although paid by him to the company, it was received by him beneficially and not as a fiduciary.
207. Howard submitted that he was obliged to pay that award to the company – of which he was a director – as a consequence of a breach by him of the no profit, no conflict duties. The High Court disagreed with Howard and agreed with the Commissioner of Taxation.
208. French CJ and Keane J regarded with suspicion Howard’s motives for submitting that he was in breach of his fiduciary duties to the company:

The appellant attempted to stretch the fiduciary mantle attaching to his position as director to his membership of the joint venture. He did so in order to defeat a claim that he was liable to pay income tax on the amount of

⁴²¹ *Ibid.*

⁴²² *Ibid* 106–7 [58].

⁴²³ (2012) 44 WAR 1.

⁴²⁴ *Bell Group* (2012) 44 WAR 1, 189 [1076] (Lee AJA), 522 [2722] (Carr AJA).

⁴²⁵ *Bell Group* (2012) 44 WAR 1, 168–9 [918], 169 [923]–[924], 181 [1007], 182 [1011], 354 [1989], 355–62 [1996]–[2026], 372 [2079], 520 [2710], 520–1 [2716].

equitable compensation awarded to him in the Supreme Court of Victoria. His purpose had nothing to do with the vindication or protection of Disctronics' interests.⁴²⁶

209. But French CJ and Keane J used language which was suggestive of fiduciary duties being more broadly based than the two proscriptive duties of no profit, no conflict. They described the proscriptive fiduciary duties as 'including' those two duties.⁴²⁷

The relationship of director and company is one of a class of accepted relationships which attract proscriptive fiduciary duties, including a duty 'not to obtain any unauthorised benefit from the relationship and not to be in a position of conflict.' Those proscriptive duties attach to the powers and discretions exercised by company directors. As fiduciary agents, directors must exercise their powers 'honestly in furtherance of the purposes for which they are given ...'⁴²⁸

210. The use of an inclusive definition must have been deliberate; and its significance is that it alludes to the existence of other fiduciary duties. Further, their reasons, on occasion, refer to Howard's duties in positive language, including the duty to pursue any benefit or advantage for the company by procuring its participation in the joint venture project.⁴²⁹ That duty was elemental to his role as a director, and arose independently of any suggestion of avoidance of profit or conflict.

211. Hayne and Crennan JJ spoke to similar effect:

It may be assumed that, before the defaulting venturers diverted the venture to their own use, the appellant's duty as a director of Disctronics was to seek to have the company acquire the golf course at least cost to it.⁴³⁰

212. However, that was a duty which Howard had discharged.⁴³¹

213. They also made reference to the duty in *Furs Ltd v Tomkies*: 'to safe guard and further the interests of the company',⁴³² and to the limited question actually before the Court: it did *not* involve an examination of the 'duty of directors to act in the interests of the company as a whole'.⁴³³

⁴²⁶ (2014) 253 CLR 83, 100–1[35].

⁴²⁷ Ibid 98 [31].

⁴²⁸ Ibid 98 [31] (citations omitted).

⁴²⁹ Ibid 102 [38].

⁴³⁰ Ibid 114–5 [94].

⁴³¹ Ibid 96–7 [25], 102 [38].

⁴³² (1936) 54 CLR 583, 592.

⁴³³ Ibid 106 [58].

214. Gageler J also recognised the fiduciary duty on Howard as a director of Disctronics to act in its interest;⁴³⁴ but he also found a lack of conflict between the personal interest of Howard in obtaining or retaining the sum of equitable compensation awarded to him and his fiduciary duty as a director of the company.⁴³⁵
215. Howard does not support the contention for which it was cited by the banks on their application for special leave in *Bell Group*.⁴³⁶

VII BELL GROUP

216. The question of principle which arose for determination in *Bell Group*⁴³⁷ was whether the duties of a company director to act bona fide in the best interests of the company and to exercise the powers and discretions of office for a proper purpose were fiduciary in nature. It was not in issue that directors owed such duties: they are established by long standing authority. Nor was it in issue that the relationship of director and company was one of the accepted fiduciary relationships: once again, that is elemental to company law.
217. Two issues were, however, very much in contest:
- a. were those duties fiduciary in nature;
 - b. had the directors acted in breach of them?
218. The significance of the outcome of the first question was that it was necessary for the duties to be fiduciary in order to impose accessorial liability against the banks pursuant to *Barnes v Addy*:⁴³⁸ the banks, after all, had the resources to satisfy the money sought to be recovered.
219. At first instance, and on appeal to the Court of Appeal, both questions were answered adversely to the directors and to the banks. The duties were found to be fiduciary in

⁴³⁴ Ibid 120–1 [116].

⁴³⁵ Ibid.

⁴³⁶ Transcript of Proceedings, *Westpac Banking Corporation & Ors v The Bell Group Ltd & Ors* [2013] HCATrans 49 (15 March 2013).

⁴³⁷ (2012) 44 WAR 1.

⁴³⁸ (1874) LR 9 Ch App 244.

nature; they had been breached; the directors were liable, and the banks were liable pursuant to *Barnes v Addy*⁴³⁹ – under both limbs, according to the Court of Appeal.

220. Lee AJA did not regard it as correct in principle to circumscribe the ambit of the obligation of undivided loyalty owed by a fiduciary by limiting it to circumstances involving profit or conflict: clearly, he regarded the obligation of undivided loyalty as a broader concept.⁴⁴⁰
221. He also recognised that fiduciaries were often obliged to act in a positive way in order to comply with their duties; and he cited the continuing obligations on the partners in *Chan* as an illustration.⁴⁴¹ As to a breach of the obligation of undivided loyalty, his Honour dealt with it in this fashion:

The disloyalty of a fiduciary manifested by the repudiation of such an obligation, that results in detriment to the party to whom the obligation is owed is as offensive to good conscience and equity as an act by a fiduciary that is in breach of a proscriptive fiduciary obligation, and entitlement to appropriate relief in equity should follow.⁴⁴²

222. His Honour then dealt with the authority of the proscriptive–prescriptive dichotomy enunciated in *Breen*.⁴⁴³

Comments made in *Breen v Williams* on the distinction between prescriptive and proscriptive duties must be read in the context of the particular facts of that case which concerned a very limited fiduciary relationship of patient and specialist medical practitioner. Neither the broad contractual relationship nor the narrower fiduciary relationship presented any obligation on the practitioner to provide access to personal records maintained by the practitioner in respect of the assessment and treatment of the patient. It followed that there was no duty to grant access to those records, let alone an argument that there was a fiduciary duty to do so. The foregoing comments in *Breen v Williams* were directed at rejecting the suggestion that mere existence of a fiduciary relationship per se could impose an obligation on a fiduciary to act in all circumstances in the interests of the other party to the relationship and that failure so to act would provide a right to relief in equity for breach of a fiduciary duty (at 137-138 per Gummow J).

Rejection of that proposition was a plain statement of the orthodox.⁴⁴⁴

⁴³⁹ Ibid.

⁴⁴⁰ *Bell Group* (2012) 44 WAR 1, 165 [895]–[896].

⁴⁴¹ Ibid 165–166 [897].

⁴⁴² Ibid 166 [898].

⁴⁴³ (1996) 186 CLR 71.

⁴⁴⁴ *Bell Group* (2012) 44 WAR 1, 166 [900]–[901].

223. His Honour then dealt with the question of whether any of the alleged breaches would be a breach of a fiduciary duty:

The degree of reliance of the companies upon the fiduciary relationship with the directors that the directors would faithfully fulfil the duty to act in the best interests of the companies, and the consequences for the company if the directors failed to perform that duty, would cause equity to treat a breach of that duty by a director as a breach of a fiduciary duty.

Indeed, in the circumstances found by his Honour, it would have been a strange result to have treated the duty to act in the best interests of the companies as anything other than a fiduciary duty: see *Walker v Wimborne* (1976) 137 CLR 1 at 7-8 per Mason J; *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2011] 3 WLR 1153 at [35]-[36].⁴⁴⁵

224. This led to his Honour's conclusion:

His Honour, at [4582], found, with respect correctly, that the Transactions that conveyed interests in the property of the companies of the Bell group involved exercise of a fiduciary power and, if done for an improper purpose, a breach of a fiduciary duty.

If the power of a director to allot shares of a company is a fiduciary power, as stated by Mason CJ, Deane and Dawson JJ in *Whitehouse v Carlton Hotel Pty Ltd* (1987) 162 CLR 285 at 290, then it must be concluded, as his Honour found, that the power to dispose of, encumber or charge assets of a company is of a like nature and a fiduciary power.

And it must follow that the duty of a director not to exercise a power of a company for an improper or impermissible purpose is a fiduciary duty at least when the power being exercised is a fiduciary power: see *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* (at [34]).⁴⁴⁶

225. This ultimately resulted in a finding by his Honour that the directors had failed in their duty not to act other than in the interests of the companies; instead, they had acted for an improper purpose by charging, or delivering to the banks, interests in assets in circumstances of known or anticipated insolvency of the Bell group companies, thereby materially prejudicing the interests of other creditors of those companies.⁴⁴⁷

226. The effect of this refrain was repeated later in his Honour's reasons:

Dealings by the directors in assets of the companies facing insolvency, which had the effect of prejudicing the interests of creditors other than the Banks, could not be justified in equity and would constitute misconduct from which a

⁴⁴⁵ Ibid 169 [921]-[922].

⁴⁴⁶ Ibid 170 [930]-[932].

⁴⁴⁷ Ibid 181 [1007].

finding of breach of a fiduciary duty would follow.⁴⁴⁸

227. Drummond AJA recited the long history of authority with respect to the fiduciary powers of directors;⁴⁴⁹ and concluded: ‘The duty of a director to act bona fide in the interests of the company and to exercise powers conferred for proper purposes only are necessarily fiduciary obligations.’⁴⁵⁰
228. His Honour then dealt with the authority of *Breen*, in particular the proscriptive–prescriptive reasoning of Gaudron and McHugh JJ:

Courts of first instance and intermediate courts of appeal have, in various contexts, applied the statement in *Breen v Williams* that a fiduciary is subject to two proscriptive obligations only. Owen J mentioned the first-instance decision in *P & V Industries Pty Ltd v Porto* (2006) 14 VR 1, in which Hollingworth J relied on the proscriptive/not prescriptive principle to hold that a director was not bound by any fiduciary obligation to the company to take positive action (there, to disclose information about his activities outside the company’s business).

But there is no decision of which I am aware binding on this Court to hold that the fiduciary duties of directors to their companies are so limited.

Neither decision in *Breen* or *Pilmer* considered the position of directors who undoubtedly stand in a fiduciary relationship with their company and who have long been subject to duties to act bona fide in the interests of the company and to exercise their powers for proper purposes, both of which have long been described as fiduciary obligations. If the fiduciary obligations of directors to their company are limited to the two proscriptive ones, not to benefit and not to be in a conflict situation, an extensive revision of the law governing directors’ duties must have taken place without any examination of that particular issue at the intermediate or final appellate level.⁴⁵¹

229. His Honour then noted that directors must, in some circumstances, take positive action if they are properly to fulfil their fiduciary duties to act bona fide in the interests of their company and to exercise powers for proper purposes; and that the exercise of those powers ‘cannot always be accommodated within the proscriptive rubric identified in *Breen v Williams*.’⁴⁵²
230. It also appeared to his Honour that the proscriptive–prescriptive dichotomy was not ‘consistent with the well-established rule that the scope of the fiduciary duties in a

⁴⁴⁸ Ibid 191 [1093].

⁴⁴⁹ Ibid 342–6 [1938]–[1956].

⁴⁵⁰ Ibid 346 [1956].

⁴⁵¹ Ibid 346 [1960]–[1962].

⁴⁵² Ibid 348 [1969] (citations omitted).

particular relationship will vary and is to be determined according to the nature of the relationship and the facts of the particular case.⁴⁵³

231. His Honour shared with Lee AJA a reluctance to circumscribe the ambit of the obligation of undivided loyalty by limiting it to circumstances involving profit or conflict:

That directors may be expected to take risks with their company's assets and future emphasises the need for insisting that their fundamental fiduciary obligation of loyalty to the company requires them to act bona fide in the interests of the company and to exercise their powers only for proper purposes, though no question of personal benefit or conflict of interest may arise.⁴⁵⁴

In other words, the concept of undivided loyalty can operate entirely independently of a suggestion of profit or conflict.

232. Carr AJA was in dissent on the question of breach; but some of his observations are worthy of note. First, he recognised the difficulty in drawing the line between those powers of a company director which were fiduciary, and those which were not.⁴⁵⁵ His Honour posed a potential solution: 'It may be by exercising what might be described as judicial policy either to intervene with proprietary equitable relief (or other equitable relief) or not to do so.'⁴⁵⁶

233. He also recognised the force of the debate, and concluded that: 'it would be courageous to suggest that *Breen* is the High Court's last word on the reach and content of fiduciary duties.'⁴⁵⁷

234. Finally, he concluded that he was 'not prepared to hold that the duties [with which *Bell Group* was concerned] were other than fiduciary the breach of which may give rise to liability under the first limb of *Barnes v Addy*.'⁴⁵⁸ And he did so after acknowledging:

There does not seem to be a decision binding on this Court (even prima facie binding such as a decision of another intermediate court of appeal) which holds, as part of its ratio decidendi, that a company director's duties to act in the interests of the company and to exercise powers for proper purposes are fiduciary duties. There are, however, some cases at that level of precedent

⁴⁵³ Ibid 348 [1970].

⁴⁵⁴ Ibid 349 [1972].

⁴⁵⁵ Ibid 521 [2717].

⁴⁵⁶ Ibid 521 [2717].

⁴⁵⁷ Ibid 522 [2720].

⁴⁵⁸ Ibid 524 [2733].

which assume that such is the law.⁴⁵⁹

235. It can be seen that *Bell Group*⁴⁶⁰ involved a thorough analysis of the characterisation and ambit of the duties owed by directors to their companies. That is in marked contrast to the issue that arose for determination in *Breen*:⁴⁶¹ whether a doctor was obliged to make medical records available to his patient. The suggestion that *Breen*, properly understood, ought to have predetermined the outcome in *Bell Group*⁴⁶² on the question of the proper characterisation of the duties owed by directors to their companies – against the grant of relief – is plainly wrong. The cases are clearly distinguishable. Where, for instance, did *Breen*⁴⁶³ consider that question: it did not; and where did *Breen*⁴⁶⁴ consider and distinguish – or perhaps overrule – the earlier decision of the High Court in *Whitehouse*⁴⁶⁵: it did not.
236. The decisions of the High Court subsequent to *Breen*⁴⁶⁶ can be distinguished on the same basis: *Bell Group*, on the other hand, involved an elaborate consideration of the issue. It may have been wrongly decided on a question of principle; but, if that is so, it will not have been because of *Breen*.⁴⁶⁷
237. Although Kirby J has observed that: ‘Until further elucidated by this court, [*Breen*] should ... be followed by Australian courts’,⁴⁶⁸ the elusive element in that directive involves determining precisely *what it is* that ‘should ... be followed’.⁴⁶⁹

VIII SUBSEQUENT JUDICIAL CONSIDERATION OF BELL GROUP

238. The question of the ambit of fiduciary duties in Australian jurisprudence has come before a number of judges since the decision in *Bell Group*.⁴⁷⁰ One judge who has been prepared to advance the debate – not surprisingly – was Edelman J; and he had the opportunity to do so in *Netglory*.⁴⁷¹

⁴⁵⁹ Ibid 50–1 [2716].

⁴⁶⁰ (2012) 44 WAR 1.

⁴⁶¹ (1996) 186 CLR 71.

⁴⁶² (2012) 44 WAR 1.

⁴⁶³ (1996) 186 CLR 71.

⁴⁶⁴ Ibid.

⁴⁶⁵ (1987) 162 CLR 285.

⁴⁶⁶ (1996) 186 CLR 71.

⁴⁶⁷ Ibid

⁴⁶⁸ *Pilmer* (2001) 207 CLR 165, 214 [128].

⁴⁶⁹ Ibid.

⁴⁷⁰ (2012) 44 WAR 1.

⁴⁷¹ [2013] WASC 364.

239. His Honour had before him a case in which a range of alleged breaches of fiduciary duty was pleaded; and he dealt with them in the following paragraphs of his reasons in a way that identified his innovative approach to the question of the characterisation of the duty:

All of these alleged breaches of directors' duties were described ... as breaches of fiduciary duty.

It may arguably be an error, on the current state of Australian law, to characterise the breach of prescriptive duties by a director, such as the duties to act in good faith and in the interests of the ... Company and for proper purposes, as breaches of fiduciary duty.⁴⁷²

240. For that concern, his Honour relied upon *Friend v Brooker*,⁴⁷³ *Breen*⁴⁷⁴ and *Pilmer*.⁴⁷⁵
The reasons continued:

On the other hand there are also reasons why 'fiduciary' might be an appropriate description of the 'proper purposes' duty'. Despite the insistence on the proscriptive nature of fiduciary duties, the High Court appears also to have recognized that there may be a fiduciary prescriptive liability to account, when that liability is associated with a proscriptive fiduciary duty.⁴⁷⁶

241. This approach may be reminiscent of Conaglen's 'prophylactic' rationale.⁴⁷⁷
242. In any event, Edelman J had in mind the decision of the High Court in *Bofinger*, where Gummow, Hayne, Heydon, Kiefel and Bell JJ spoke of a fiduciary obligation to account:

The obligation to account, here by a first mortgagee, is consistent with what was said by Kay J in *Charles v Jones* in the passage set out earlier in these reasons. On 8 February 2006 the first mortgagee was obliged in good conscience both to account to the appellants for surplus moneys and securities it held and not to undertake or perform any competing engagement in that respect without prior release by the appellants. These obligations were fiduciary in character.⁴⁷⁸

⁴⁷² Ibid [345]–[346].

⁴⁷³ (2009) 239 CLR 129.

⁴⁷⁴ (1996) 186 CLR 71.

⁴⁷⁵ (2001) 207 CLR 165.

⁴⁷⁶ *Netglory* [2013] WASC 364 [347].

⁴⁷⁷ See above [50].

⁴⁷⁸ *Bofinger v Kingsway Group Ltd* (2009) 239 CLR 269, 290 [49] (citations omitted).

243. They regarded a breach of that fiduciary obligation as sufficient to engage the principles associated with the ‘second limb’ in *Barnes v Addy*.⁴⁷⁹

244. Edelman J then continued with his reasons:

Another reason why the fiduciary description might be apt is that it may be possible to reconcile the insistence on the proscriptive nature of a fiduciary duty by describing the ‘proper purposes’ duty in negative terms: a duty not to act for collateral purposes.

Another reconciliation may be to characterise the whole of the duty (or duties) to act in good faith in the interests of the company for proper purposes as prescriptive conditions upon the exercise of fiduciary *power*. Powers under a company’s articles are generally ‘fiduciary powers’.⁴⁸⁰

245. For those propositions, his Honour relied upon *Bell Group*,⁴⁸¹ including at first instance,⁴⁸² together with an article by Heydon J.⁴⁸³

246. However, for reasons explained by his Honour, it was unnecessary to take these issues further:

It is not necessary in this case to resolve this issue. The primary reason why it is not necessary to do so is because rescission of a transaction is an available response however the breach of director’s duties are characterised. The epithet ‘fiduciary’ adds nothing to the nature of the ‘duty’ in this case, or the available response.⁴⁸⁴

247. The debate has continued in many of the authorities; and there has been a variety of responses to *Breen*⁴⁸⁵ and to the other High Court authorities following it. Some judges regard those authorities, in the circumstances, as binding on them;⁴⁸⁶ other judges regard the debate as not yet closed beyond argument,⁴⁸⁷ even though they did not need to decide the question;⁴⁸⁸ other judges regard cases such as *Bell Group* as standing in lonely isolation;⁴⁸⁹ and there are still other authorities that are hybrid in effect.⁴⁹⁰

⁴⁷⁹ *Ibid* 291 [51]; (1874) LR 9 Ch App 244.

⁴⁸⁰ [2012] WASC 364, [348]–[349].

⁴⁸¹ (2012) 44 WAR 1.

⁴⁸² (2008) 39 WAR 1.

⁴⁸³ Heydon, above n 120.

⁴⁸⁴ [2012] WASC 364, [350].

⁴⁸⁵ (1996) 186 CLR 71.

⁴⁸⁶ *Hoh and Ors v Frosthollow Pty Ltd and Ors* [2014] VSC 77, 26–7 [68].

⁴⁸⁷ *Lacullo v Lacullo* [2013] NSWSC 1517, [106].

⁴⁸⁸ *EC Dawson* [2013] WASC 183, [407].

⁴⁸⁹ *Hoh and Ors v Frosthollow Pty Ltd and Ors* [2014] VSC 77, 26–7 [68].

⁴⁹⁰ *Commonwealth v Davis Samuel Pty Ltd (No 7)* (2013) 282 FLR 1; *In the Matter of Ledir Enterprises Pty Ltd* (2013) 96 ASCR 1.

248. It might be noted that the debate continues in jurisdictions other than Australia; and a recent example is the decision of the Court of Final Appeal of Hong Kong in *Moulin Global* in which Mr Justice Gummow wrote the judgment of the court. In that case, albeit in the context of a strike-out application, the debate extended to ‘non-proscriptive equitable duties’⁴⁹¹ – a term which is unlikely to quell the ongoing controversy or provide certainty to fiduciary law.

IX CONCLUSION

249. There is no authority, including in *Breen*,⁴⁹² from the High Court which has held, whether as binding ratio or seriously considered dicta, that fiduciary duties, in Australia, are confined to the proscriptive duties of no profit, no conflict. To the contrary, there is longstanding authority against that proposition, including in *Whitehouse*.⁴⁹³

250. The proscriptive–prescriptive dichotomy enunciated by the High Court in *Breen* was unnecessary for the determination of the issue in that case, and has caused much confusion in determining the ambit of fiduciary law in Australia. The true determinant of whether a duty is fiduciary or not must be in its genesis: does it originate in an undertaking of undivided loyalty. And the proscriptive–prescriptive dichotomy has no role to play in the resolution of that question or of the question in principle.

251. *Bell Group*,⁴⁹⁴ as a matter of legal principle, was correctly decided.

252. Interestingly, the reasons in *Bell Group*⁴⁹⁵ do not refer to the 2009 decision of the High Court in *Friend*⁴⁹⁶ in which French CJ, Gummow, Hayne and Bell JJ spoke of *Breen*⁴⁹⁷ as reflecting ‘the settled doctrine of fiduciary law in Australia’;⁴⁹⁸ but what may be

⁴⁹¹ *Moulin Global Eyecare Holdings Ltd (in liq) v Olivia Lee Sin Mei* (2014) 17 HKCFAR 466 [57]; Tom K C Ng, ‘Directors’ Duty Not to Prefer One Creditor to Another’ (2015) 74(1) *The Cambridge Law Journal* 20.

⁴⁹² (1996) 186 CLR 71.

⁴⁹³ (1987) 162 CLR 285.

⁴⁹⁴ (2012) 44 WAR 1. Part of the reasoning in *Bell Group* has been disapproved by the Court of Appeal of the Supreme Court of New South Wales in *Hasler v Singtel Optus Pty Ltd* (2014) 87 NSWLR 609, 613 [9], 614 [11], [14], 623 [57], 630 [91], 632 [102], but not on the ambit of duties owed by company directors. The criticism was confined to the meaning of the ‘dishonest and fraudulent design’ test for the purpose of accessory liability under the second limb of *Barnes v Addy*. See also *FBM Corp v FBM Licence Ltd* [2014] WASC 327 [24]; *Cornerstone Property & Development Pty Ltd v International Mining Industry Underwriters Ltd* [2015] 1 Qd R 75, 94 [91]–[92].

⁴⁹⁵ *Ibid.*

⁴⁹⁶ (2009) 239 CLR 129

⁴⁹⁷ (1996) 186 CLR 71.

⁴⁹⁸ (2009) 239 CLR 129, 160 [85].

particularly telling is the fact that the reasons of the High Court in *Howard*⁴⁹⁹ do not refer to *Bell Group*⁵⁰⁰ – although those reasons were delivered by the High Court⁵⁰¹ almost two years after the reasons of the Court of Appeal in *Bell Group*⁵⁰² and some fifteen months after the High Court granted special leave⁵⁰³ to appeal from the decision of the Court of Appeal. Whether those respective silences by the High Court and the Court of Appeal ‘speak volumes’ – *reticeres loquitur volumina* – is probably only known to the judges.

Glenn Newton

30 June 2015

⁴⁹⁹ *Howard* (2014) 253 CLR 83.

⁵⁰⁰ (2012) 44 WAR 1.

⁵⁰¹ On 11 June 2014.

⁵⁰² On 17 August 2012.

⁵⁰³ On 15 March 2013.