# *FIDUCIARY DUTY - PRINCIPLES*

***David H Denton, S.C.***

**David H Denton, S.C.** has a national commercial law practice as a Senior Counsel in all States and in Fiji.

He has a keen interest in commercial arbitration and mediation, and in all aspects of company law, especially insolvency and shareholder disputes; planning and environmental tort matters.

He is a Certified Arbitrator and an experienced nationally accredited Mediator and holds (or has held) the following positions:

- President of the Commercial Bar Association
- Adjunct Professor, Victoria Law School, College of Law & Justice, Victoria University Melbourne
- President of the Australian Institute for Commercial Arbitration
- Chairman of the '*Law Hawks'*, In-House Legal Coterie, Hawthorn Football Club.

He is a member of chambers in Melbourne at *Chancery Chambers*; in Brisbane at *Sir Harry Gibbs Chambers*; in Cairns at *Macrossan Chambers*; and, in Hobart at *Michael Kirby Chambers*.

## *The Principles*

### The Principles

1. The essential feature of a fiduciary relationship is that one party (the fiduciary) undertakes to act solely in the interests of the party to whom the duty is owed and not in his own interests. Relevant also to, though not conclusive of the determination of a fiduciary relationship, is the inherent vulnerability and reliance of one party on another. The High Court considered the principles regarding fiduciary duty in Hospital Products Ltd v United States Surgical Corporation (1984) 156 CLR 41, and has more recently done so in Breen v Williams (1996) 186 CLR 71 and Pilmer v The Duke Group Limited (in liq) [2001) HCA 31 (31 May 2001).

**Hospital Products Ltd v United States Surgical Corporation** (1984) 156 CLR 41

2. Hospital Products Ltd (''HPI") became the distributor of United States Surgical Corporation's (''USSC") products in Australia, intending and ultimately copying USSC's products for the purpose of manufacturing and selling them under its own name. The majority found that there was no fiduciary duty owed by HPI to USSC.

3. Gibbs CJ, noting that HPI committed serious breaches of its obligation to use its best efforts to promote the sale of USSC's products, nonetheless concluded that it owed no fiduciary duty to USSC. After discussing the difficulties of stipulating a definitive test applicable to all circumstances and noting that the categories of fiduciary

relationships are not closed, he states (at pp69-70, [31]-[34]):

> *In the decided cases, various circumstances have been relied on as indicating the presence of a fiduciary relationship. One such circumstance is the existence of a relation of confidence, which may be abused: Tate v. Williamson (1866) LR 2 Ch App 55, at p 61, Coleman v. Myers, at p 325. However, an actual relation of confidence - the fact that one person subjectively trusted another - is neither necessary for nor conclusive of the existence of a fiduciary relationship: on the one hand a trustee will stand in a fiduciary relationship to a beneficiary notwithstanding that the latter at no time reposed confidence in him, and on the other hand an ordinary transaction for sale and purchase does not give rise to a fiduciary relationship simply because the purchaser trusted the vendor and the latter defrauded him.*
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> *Another circumstance which it is sometimes suggested indicates the existence of a fiduciary relationship is inequality of bargaining power, but it is clear that such inequality alone is not enough to create a fiduciary relationship in every case and for all purposes. In any case, Mr Blackman was not in a position of dominance or advantage over U.S.S.C at the time the contract was made. Indeed, if there was any inequality in the situation of the parties, it might well be thought that U.S.S.C was in the stronger position.*
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> *On the other hand, the fact that the arrangement between the parties was of a purely commercial kind and that they had dealt at arm's length and on an equal footing has consistently been regarded by this Court as important if not decisive, in indicating that no fiduciary duty arose: see Jones v. Bouffier (1911) 12 CLR 579, at pp 599-600, 605; Dowsett v. Reid (1912) 15 CLR 695, at p 705; Para Wirra Gold & Bismuth Mining Syndicate No Liability v. Mather (1934) 51 CLR 582, at p 592; Keith Henry & Co. Ply. Ltd v. Stuart Walker & Co. Ply. Ltd (1958)100 CLR 342, at p 351. A similar view was taken in Canada in Jirna Ltd v. Mister Donut of Canada Ltd (1971) 22 DLR (3d) 639; affirmed (1973) 40 DLR (3d) 303.*

4. Concluding then at p72, [37] that:

> *The test suggested by the Court of Appeal in the present case seems to me not inappropriate in the circumstances, although it must be remembered that any test can only be stated in the most general terms and that all the facts and circumstances must be carefully examined to see whether a fiduciary relationship exists (cf. Phipps v. Boardman, at pp123, 127). However, if the Court of Appeal's test is applied it is not satisfied for in mv opinion H,P,L did not undertake, whether by representation or contractual provision, to act solely in the interests of U.S.S.C and not in its own interests.*

5. And further then at [38]:

> ..... *there are two features of the case, in particular, which together constitute an insuperable obstacle to the acceptance of U.S.S.C 's contention that a fiduciary relationship existed between itself and H.P.L In the first place, as I have said, the arrangement was a commercial one entered into by parties at arm's length and on an equal footing.....Secondly, it was of course clear that the whole purpose of the transaction from Mr Blackman's point of view, as U.S.S.C knew, was that he, and later H.P.L, should make a profit .....*

In the event that a party is a fiduciary, Gibbs CJ notes that it can defeat "a claim to account for profits acquired by reason of his fiduciary position and by reason of the opportunity resulting from it only on the ground that the profits were made with the knowledge and assent of the person to whom the fiduciary obligation was owed (see *Phipps v. Boardman*, at p105)" (at p73).

6. Mason J, concluding that HPI was a fiduciary for certain purposes, nonetheless stated the principles in the following terms (at pp96-97, [68]-[69]):

> *The accepted fiduciary relationships are sometimes referred to as relationships of trust and confidence or confidential relations (cf. Phipps v. Boardman (1967) 2 AC 46, at p 127), viz., trustee and beneficiary, agent and principal, solicitor and client, employee and employer, director and company, and partners. The critical feature of these relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. 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, to adopt an expression used by the Court of Appeal.*
>
> *It is partly because the fiduciary's exercise of the power or discretion can adversely affect the interests of the person to whom the duty is owed and because the latter is at the mercy of the former that the fiduciary comes under a duty to exercise his power or discretion in the interests of the person to whom it is owed.....*

7. Noting further (at p98, [72]) that:

> .....*HPI's capacity to make decisions and take action in some matters by reference to its own interests is inconsistent with the existence of a general fiduciary*

*relationship. However, it does not exclude the existence of a more limited fiduciary relationship for it is well settled that a person may be a fiduciary in some activities but not in others (Kuys, at p 1130; Birtchnell v. Equity Trustees, Executors and Agency Co. Ltd (1929) 42 CLR 384, at p 408; Phipps, at p 127).*

8. And at pp99-100, [75]-[77]:

> ..... *The classical illustrations of the fiduciary relationship are those in which the fiduciary is under a duty to act not in his own interests or solely in his own interests but in the interests of another or jointly in the interests of another and himself.....*
> *But entitlement to act in one's own interests is not an answer to the existence of a fiduciary relationship, if there be an obligation to act in the interests of another. It is that obligation which is the foundation of the fiduciary relationship, even if it be subject to qualifications including the qualification that in some respects the fiduciary is entitled to act by reference to his own interests. The fiduciary duty must then accommodate itself to the relationship between the parties created by their contractual arrangements. And entitlement under the contract to act in a relevant matter solely by reference to one's own interests will constitute an answer to an alleged breach of the fiduciary duty.....*
> *There has been an understandable reluctance to subject commercial transactions to the equitable doctrine of constructive trust and constructive notice. But it is altogether too simplistic, if not superficial to suggest that commercial transactions stand outside the fiduciary regime as though in some way commercial transactions do not lend themselves to the creation of a relationship in which one person comes under an obligation to act in the interests of another. The fact that in the great majority of commercial transactions the parties stand at arms' length does not enable us to make a generalization that is universally true in relation to every commercial transaction. In truth, every such transaction must be examined on its merits with a view to ascertaining whether it manifests the characteristics of a fiduciary relationship.*

9. Wilson J, concluding that HPI was not a fiduciary, noted at pp118-119, [6]:

> *In a commercial transaction of the kind here under consideration, where the parties are dealing at arm '.5 length and there is no credible suggestion of undue influence, I am reluctant to import a fiduciary obligation, The Courts have often expressed a cautionary note against the extension of equitable principles into the domain of commercial relationships, so as "not to strain (them) beyond (their) due and proper limits' to use the words of Lord Se/borne LC in Barnes v. Addy (1874) 9 ChApp 244, at p 251:..... ..As the cases referred to by the Chief Justice in his judgment show, this Court has refused, on several occasions, to find a fiduciary*

*relationship in circumstances where the parties contract with each other freely and more or less on an equal footing in a commercial dealing: see Jones v. Bouffier (1911) 12 CLR 579; Dowsett v, Reid (1912) 15 CLR 695; Para Wirra Gold & Bismuth Mining Syndicate N.L. v. Mather (1934) 51 CLR 582. In my view the passage of the judgment of this Court in Keith Henry & Co, Pty Ltd v. Stuart Walker & Co. Pty. Ltd (1958) 100 CLR 342 wherein they said:*

> *'It cannot be suggested that the plaintiff and the defendant at any stage stood in any fiduciary relationship one to the other. The position is simply that business men - or business firms - were engaged in ordinary commercial transactions with each other, dealing with each other, as the saying goes, at arm'.5 length." (per Dixon CJ., McTiernan and Fullagar JJ. at p. 351)*

*aptly describes the relationship which existed between the parties in the present case.*

10. Deane J found that HPI was obliged to account to USSC for profits made, not because of a fiduciary relationship between HPI and USSC, but because this was the equitable relief appropriate to the particular circumstances of the case (p124).

11. Dawson J, concluding that there was no fiduciary relationship stated at pp 141-142, [53]-[55] that:

*To be sure there are relationships which are ordinarily recognized as fiduciary, at least in some of their aspects, and little trouble is experienced with them. They are all relationships which are analogous to that which exists between a trustee and his beneficiary - the clearest of all fiduciary relationships. Without any attempt at classification, obvious examples spring to mind such as the relationship between partners, between employee and employer, between agents and their principals, between solicitors and their clients, between directors and their companies and between wards and their guardians.*

*Notwithstanding the existence of clear examples, no satisfactory single test has emerged which will serve to identify a relationship which is fiduciary. It is usual - perhaps necessary - that in such a relationship one party should repose substantial confidence in another in acting on his behalf or in his interest in some respect. But it is not in every case where that happens that there is a fiduciary relationship. If it were, whenever there is a job to be performed" (Tito v. Waddell (No.2) (1977) 1 Ch 106, at p229) and entrusting the job to someone involves reposing substantial trust and confidence in him, equity would impose fiduciary obligations. Clearly that is not the case. Nor does a fiduciary duty arise because the person to whom a job is entrusted acts in his own interest and thereby fails to perform the job properly, however useful it may appear with hindsight that such protection should have been available. As Megarry VC put it in Tito v. Waddell, at p 230:*

> *''If there is a fiduciary duty, the equitable rules about self-dealing apply: but self-dealing does not impose the duty. Equity bases its rules about self-dealing upon some pre-existing fiduciary duty: it is a disregard of this pre-existing duty that subjects the self-dealer to the consequences of the self-dealing rules. I do not think that one can take a person who is subject to no pre-existing fiduciary duty and then say that because he self-deals he is thereupon subjected to a fiduciary duty."*
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> *The difficulty in identifying and classifying those qualities in individual relationships which give rise to fiduciary obligations is well recognized See, e.g., Phipps v. Boardman (1967) 2 AC 46, at p 125 per Lord Upjohn. There is, however, the notion underlying all the cases of fiduciary obligation that inherent in the nature of the relationship itself is a position of disadvantage or vulnerability on the part of one of the parties which causes him to place reliance upon the other and requires the protection of equity acting upon the conscience of that other. See Tate v. Williamson (1866) 2 ChApp 55, at pp 60-61. From that springs the requirement that a person under a fiduciary obligation shall not put himself in a position where his interest and duty conflict or, if conflict is unavoidable, shall resolve it in favour of duty and shall not except by special arrangement, make a profit out of his position.....*.

Concluding at pp142-143, [56] that there was no term in the contract between the parties giving rise to a fiduciary relationship, from which it followed that "there is absent from the relationship between the parties any fiduciary character which may have been derived from such a term".

Dawson J makes the following further comments with respect to fiduciary relationships and general commercial relationships and dealings:

> *The circumstances in which the contract between USSC and Blackman was made do not suggest any disadvantage or vulnerability on the part of USSC requiring the intervention of equity to protect its interests. Those negotiations were of a commercial nature and were at arm's length. They were conducted by persons on both sides who were experienced in the market place.....(p146, [66])*
>
> *..... A fiduciary relationship does not arise where, because one of the parties to a relationship has wrongly assessed the trustworthiness of another, he has reposed confidence in him which he would not have done had he known the true intentions of that other. In ordinary business affairs persons who have dealings with one another frequently have confidence in each other and sometimes that confidence is misplaced. That does not make the relationship a fiduciary one. See Lloyds Bank v. Bundy at p 341. A fiduciary relationship exists where one party is in a position of reliance upon the other because of the nature of the relationship and not because*

*of a wrong assessment of character or reliability. That is to say, the relationship must be of a kind which of its nature requires one party to place reliance upon the other: it is not sufficient that he in fact does so in the particular circumstances. Of course, where a relationship is fiduciary in character it will be so whether or not the party in whose favour the fiduciary obligations are imposed actually trusts the party upon whom the obligations are imposed (p147, [67])*

*Moreover, a fiduciary relationship does not arise where one of the parties to a contract has failed to protect himself adequately bv accepting terms which are insufficient to safeguard his interests. Where a relationship is such that by appropriate contractual provisions or other legal means the parties could adequately have protected themselves but have failed to do so, there is no basis without more for the imposition of fiduciary obligations in order to overcome the shortcomings in the arrangement between them. (p147, [68])*

*In my view, there was no special feature of the distributorship agreement between USSC and Blackman which distinguished it from an ordinary commercial arrangement of its type. Apart from the actual terms of the contract, I do not think that the nature of the relationship which it created or the circumstances in which it was made, required USSC to put its trust and confidence in Blackman in a way which called for the imposition of fiduciary obligations to protect it from a position of vulnerability or disadvantage. That it did put its trust and confidence in Blackman is clear, but it did so of its own choice. If that placed it in an unequal position in relation to Blackman it was not due to anything inherent in the relationship but to the way in which the parties chose to establish and define it (pp147-148, [69])*

*The undesirability of extending fiduciary duties to commercial relationships and the anomaly of imposing those duties where the parties are at arm's length from one another was referred to in Weinberger v. Kendrick (1892) 34 Fed Rules Serv. 2d 450. And in Barnes v. Addy (1874) 9 Ch App 244, at p 251, Lord Selborne L. C said:*

> *"It is equally important to maintain the doctrine of trusts which is established in this court, and not to strain it by unreasonable construction beyond its due and proper limits. There would be no better mode of undermining the sound doctrines of equity than to make unreasonable and inequitable applications of them. "*

*There can be no question that the behaviour of Blackman was calculated and fraudulent. But the law provides remedies for such behaviour which are capable of a precise application. To invoke the equitable remedies sought in this case would, in my view, be to distort the doctrine and weaken the principle upon which those remedies are based It would be to introduce confusion and uncertainty into the commercial dealings of those who occupy an equal bargaining position in place of the clear obligations which the law now imposes upon them..... (p149, [74]-[75])*

**Breen v Williams** (1996) 186 CLR 71

12. A patient alleged that her doctor owed her a fiduciary duty which he breached by failing to provide to her his records in regard to her. The Court concluded that whilst there might be a fiduciary relationship between doctor and patient, it did not impose upon the doctor the duty to provide such records to his patient.

13. Brennan CJ at pp82-83, [14]:

> *Fiduciary duties arise from either of two sources, which may be distinguished one from the other but which frequently overlap (8). One source is agency (9); the other is a relationship of ascendancy or influence by one party over another, or dependence or trust on the part of that other (10). Whichever be the source of the duty, it is necessary to identify "the subject matter over which the fiduciary obligations extend" (11). It is erroneous to regard the duty owed by a fiduciary to his beneficiary as attaching to every aspect of the fiduciary's conduct, however irrelevant that conduct may be to the agency or relationship that is the source of the fiduciary duty. As Fletcher Moulton LJ pointed out in In re Coomber; Coomber v Coomber (12), fiduciary relations are of many different types (13) and where there is a fiduciary relation the court may interfere and set aside acts which, between persons in a wholly independent position, would have been perfectly valid. His Lordship then added:*
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> > *''Thereupon in some minds there arises the idea that if there is any fiduciary relation whatever any of these types of interference is warranted by it. They conclude that every kind of fiduciary relation justifies every kind of interference. Of course that is absurd. The nature of the fiduciary relation must be such that it justifies the interference. There is no class of case in which one ought more carefully to bear in mind the facts of the case, when one reads the judgment of the Court on those facts, than cases which relate to fiduciary and confidential relations and the action of the Court with regard to them."*
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> *As Mason J said in Hospital Products Ltd v United States Surgical Corporation (14):*
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> > *''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. "*
>
> *In the same case, Gibbs CJ said (15):*
>
> > *''Fiduciary relations are of different types, carrying different obligations ... and a test which might seem appropriate to determine whether a fiduciary relationship existed for one purpose might be quite inappropriate for another purpose. "*

14. Dawson and Toohey JJ consider the nature of fiduciary relationships (at pp92-93,

[20]), and quote from Mason J in *Hospital Products Ltd v United States Surgical Corporation*:

> ..... *There are accepted fiduciary relationships, such as trustee and beneficiary, agent and principal, solicitor and client employee and employer, director and company, and partners/ which may be characterised as relations of trust and confidence. In Hospital Products Ltd v United States Surgical Corporation Mason J said (40):*
>
> > *'The critical feature of these relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. 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 o0 and 'in the interests of' signify that the fiduciary acts in a 'representative' character in the exercise of his responsibility'*
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> *Mason J did not intend to suggest that this description of a fiduciary relationship isolated those features from other relationships of trust and confidence which do not impose fiduciary obligations. It is not the case that whenever there is "a job to be performed" (41), and entrusting the job to someone involves reposing substantial trust and confidence in that person, a fiduciary relationship arises. But it is of significance that a fiduciary acts in a representative character in the exercise of his responsibility.*

15. Gaudron and McHugh JJ at pp106-107, [22]-[24]:

> *Australian courts have consciously refrained from attempting to provide a general test for determining when persons or classes of persons stand in a fiduciary relationship with one another. This is because/ as counsel for Dr Williams pointed out, the term "fiduciary relationship" defies definition. In Hospital Products Ltd v United States Surgical Corporation (100) Gibbs CJ said:*
>
> > *"I doubt if it is fruitful to attempt to make a general statement of the circumstances in which a fiduciary relationship will be found to exist Fiduciary relations are of different types, carrying different obligations ... and a test which might seem appropriate to determine whether a fiduciary relationship existed for one purpose might be quite inappropriate for another purpose. For example, the relation of physician and patient, and priest and penitent, may be described as fiduciary when the question is whether there is a presumption of undue influence, but may be less likely to be relevant when an alleged conflict between duty and interest is in question. "*
>
> *As the law stands, the doctor-patient relationship is not an accepted fiduciary*

*relationship in the sense that the relationships of trustee and beneficiary, agent and principal solicitor and client employee and employer, director and company and partners are recognised as fiduciary relationships (101J. In Hospital Products (102), Mason J pointed out that in all those relationships "the fiduciary acts in a 'representative' character in the exercise of his responsibility'. But a doctor is not generally or even primarily a representative of his patient.*

*However, the categories of fiduciary relationship are not closed (103), and the courts have identified various circumstances that, if present, point towards, but do not determine, the existence of a fiduciary relationship. These circumstances, which are not exhaustive and may overlap, have included: the existence of a relation of confidence (104): inequality of bargaining power (105): an undertaking by one party to perform a task or fulfill a duty in the interests of another party (106): the scope for one party to unilaterally exercise a discretion or power which may affect the rights or interests of another (107): and a dependency or vulnerability on the part of one party that causes that party to rely on another (108).*

16. And at p 113, [41]:

*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 (132).....*

17. Gummow J at p133, [57]:

*This is not the case of any improvident transaction between medical practitioner and patient which is the product of unconscientiously pressure or influence exerted upon the patient. In Johnson v Buttress (204), Dixon J said that a physician must justify the receipt of a substantial benefit from the patient, in the same way as must a solicitor in respect of the client and a guardian from the ward. His Honour said (205) that, where the parties antecedently stood in a relation which gave one an authority or influence over the other from the abuse of which it is proper that there should be protection:*

> *"the party in the position of influence cannot maintain his beneficial title to property of substantial value made over to him bv the other as a gift, unless he satisfies the court that he took no advantage of the donor, but that the gift was the independent and well-understood act of a man in a position to*

> *exercise a free judgment based on information as full as that of the donee' ..... Dixon J went on, in the same passage, to observe that the doctrine which throws upon the recipient the burden of justifying such a transaction rests upon a particular principle. Of that principle, his Honour said (206):*
> *"It applies whenever one party occupies or assumes towards another a position naturally involving an ascendancy or influence over that other, or a dependence or trust on his part. ONE OCCUPYING SUCH A POSITION FALLS UNDER A DUTY IN WHICH FIDUCIARY CHARACTERISTICS MAY BE SEEN. It is his duty to use his position of influence in the interest of no one but the man who is governed by his judgment gives him his dependence and entrusts him with his welfare."(emphasis added)*

18. Gummow J notes at p135, [63] that.....one answer to what otherwise would be breach of duty is the presence of informed consent .....; and at p 136, [68] that the present case was not one where unless the doctor acceded to the right asserted against him by his patient that he will have derived a gain or benefit at the expense of his patient, beyond the agreed fee. He concludes (at pp137-138, [72]) with a similar statement to that made by Gaudron and McHugh JJ at p113, [41] of their judgment:

> *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 fulfill that positive obligation represents a breach of fiduciary duty.*

**Pilmer v The Duke Group Limited (in liq)** [2001] HCA 31 (31 May2001)

19. The respondent wanted to take over a company. The appellants were partners in an accounting firm retained by the respondent to prepare a report which would be placed before a meeting of shareholders of the respondent. The report stated that the price proposed for the takeover was fair and reasonable. A Listing Rule required the report to be supplied by an independent person. The respondent alleged that the appellants were not independent in this regard because of associations between them and the respondent and the company being taken over. The respondent alleged that the appellants owed a fiduciary duty to the respondent which they breached by providing the report. The majority found that there was no fiduciary duty.

20. McHugh, Gummow, Hayne and Callinan JJ at [71]:

> *It is important also to recognise the distinct character of the fiduciary obligation, which sets it apart from contract and tort. In Norberg v Wynrib McLachlin J said [107]:*
>
> > *'The foundation and ambit of the fiduciary obligation are conceptually distinct from the foundation and ambit of contract and tort. Sometimes the doctrines may overlap in their application, but that does not destroy their conceptual and functional uniqueness. In negligence and contract the parties are taken to be independent and equal actors, concerned primarily with their own self-interest Consequently, the law seeks a balance between enforcing obligations by awarding compensation when those obligations are breached, and preserving optimum freedom for those involved in the relationship in question. The essence of a fiduciary relationship, bv contrast, is that one party exercises power on behalf of another and pledges himself or herself to act in the best interests of the other.''.....*

21. At [74] they quote from the judgment of Gaudron and McHugh JJ in *Breen v Williams*.

> .....*In Breen v Williams, Gaudron and McHugh JJ said [111]:*
>
> > *''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."*

And then note at [75] that in the present case "there was no relationship of ascendancy or influence by the appellants over" the respondent, "nor one of dependence or trust on the part of" the respondent "in the relevant sense. It was to be expected that" the respondent "relied upon the appellants to do their work competently and independently but they were not guiding or influencing" the respondent "in the sense discussed in the cases dealing with fiduciary relationships".

Finding that there was no conflict of interest identified sufficient to found a fiduciary duty owed by the appellants to the respondent, at [82]-[83] their honours note in the context of the case:

> ..... *in its submissions (the respondent)..... did not indicate with any specificity*

*the existence of any prior or concurrent engagement or undertaking by the appellants or any one or more of them which, within the meaning of the authorities, presented an actual conflict or a real or substantial possibility of conflict in the acceptance and performance of the retainer for the provision of the report. Rather, in a general way, it was suggested that there was an expectation by the appellants that ''mutual dealings" might not continue if the appellants did not do the bidding of persons ..... in relation to the provision of the report All of this fell short of demonstrating the real or substantial possibility of conflict spoken of in the authorities.*

*The conflicting duty or interests must be identified. Conflict is not shown by simply pointing to the fact that there had been past dealings between the appellants and interests associated with the (respondent's) ..... directors. The fact that dealings are completed will ordinarily demonstrate that any interest or duty associated with those dealings is at an end and no continuing duty or interest was identified here. Nor is it sufficient to say generally that there was a hope or expectation of future dealings. That will often be so. Most professional advisers would hope that the proper performance of the task at hand will lead the client to retain them again. No real or substantial possibility of conflict was demonstrated.*

22. Kirby J, dissenting, discusses the decision in *Breen v Williams*, noting that there were differences in reasoning in the Court's decision (at [120]) and that in some established relationships the relationship itself will be enough to make it clear that a fiduciary obligation is owed by one party to the other in respect of related transactions between them during the relationship (at [121]). Significantly he notes that in relation to the doctor/patient relationship, "proving that the relationship involves an imbalance of power, and even vulnerability on the part of the patient, was not sufficient' (at [122]). He defines the fundamental as an obligation of loyalty (see [125], [131]).

In discussing then the principles governing fiduciary obligations, he notes (at [136]) that:

*.....it is not sufficient to impose fiduciary obligations on an alleged wrong-doer, simply to point to the vulnerability of the person claiming to have been wronged Many people who are in an arm's length relationship with each other Of they have any real relationship at all) experience a serious disproportion of power in their dealings. To turn every such case into one giving rise to fiduciary obligations would be to distort basic doctrine..... For fiduciary obligations, vulnerability to wrong-doing will certainly be a relevant consideration. However, it is not sufficient. Vulnerability can call forth remedies in a case of some proved wrong-doing. But to call forth fiduciary obligations, more than vulnerability is required [229].*

He further notes that:

> ..... *Trust itself is not the essential attribute of fiduciary liability, although it will often exist in fact. Something additional is required [235]. Attempts to suggest that this additional element is the presence of a peculiar vulnerability to the fiduciary holding a discretion or power [236] must be rejected as being too broad, for the reasons already stated [237].* .....

Concluding then that:

> *As a matter of practicality, to reduce the uncertainties that arise from the elusive "essence" of the "fiduciary principle' it is reasonable for courts to have regard to features commonly found in cases where fiduciary obligations have been upheld. Necessarily, such features are not exhaustive. They may overlap. As Gaudron and McHugh JJ pointed out in Breen [246] they have included in the past: "the existence of a relation of confidence [247]: inequality of bargaining powerf2487: an undertaking by one party to perform a task or fulfill a duty in the interests of another party [24]7: the scope for one party to unilaterally exercise a discretion or power which may affect the rights or interests of another [250]; and a dependency or vulnerability on the part of one party that causes that party to rely on another [251]. Superimposed on all of these instances is the common requirement of "loyalty' [252]. Whilst that word itself is also somewhat tautologous, it signals, in the context, the central idea involved. In some relationships, or factual circumstances, an element of selflessness is implicit It is not enough that the party charged with default may have conformed to contractual duties or even to the standards of a tortious duty of care. Whether it has or not, equity will require that party not to profit in any way from the relationship nor advance any interests other than those of the beneficiary, except with the beneficiary's informed consent. Equity will oblige the fiduciary not to have any interest unknown to the beneficiary that could conflict with the foregoing duties [253].*

***David H Denton, S.C.***

***Chancery Chambers***