"This May Seem Hard": Temporal and Personal Perspectives on Fiduciary Law

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Hon Justice Stephen Kos
President of the Court of Appeal of New Zealand

Tēnā koutou, tēnā koutou, tēnā koutou katoa

Introduction[1]

[1] I am going to talk today about temporal, and some personal, perspectives on the law of fiduciaries. First, I am going to talk about some historical aspects of the subject, focusing on three seminal cases. Secondly, I will look at the present state of the law in New Zealand, and the indicia for a fiduciary relationship drawn by current case law. Thirdly, I will engage in some speculation about the future path of fiduciary law.

[2] This is a subject that has interested me for a long time. Allow me to explain why.

[3] Christmas Eve 1989, almost 32 years ago. I was 30 years of age, a year into partnership at Russell McVeagh, a lateral-hire brought in to help kick-start the firm's new Wellington office. As the local talent, I was the last out of the office that Christmas, and just before I left, my phone rang. It was a very nice man called John Sissons, a litigation partner in Herbert Smith at Hong Kong.

[4] I'd like to say he was ringing to retain me, my reputation as an Equity lawyer having preceded me. It hadn't, for good reason, and he wasn't. But the partner he wanted was on holiday, I was there, and John Sissons had a big problem.

[5] The Acting Director of Public Prosecutions in Hong Kong, a New Zealander called Warwick Reid, had disappeared. Along with a prominent Hong Kong solicitor, and a prominent barrister, he was under investigation into prosecutorial irregularities by the Independent Commission Against Corruption. Not overzealous prosecution. Under-zealous.

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[1] I express my appreciation to my clerk, Nic Wilson, for his assistance in the preparation of this paper.

[6] Now the solicitor and the barrister had been arrested and Mr Reid, who had had to surrender his passport, could not be found. But investigations established that he was in possession of assets worth over $5 million that he could not explain. These included two orchards and a house near Tauranga.

[7] The ICAC believed — rightly as it transpired — that these assets were the proceeds of bribes. They wanted to seize them pending further legal action. But they were worried Mr Reid might already have taken steps to liquidate the assets and there was no time to delay getting together a Mareva injunction. In any case, these were still exotic and unruly beasts in the late 1980s.

[8] Which explains why the Hong Kong Attorney-General found himself pursuing proceedings for proprietary remedies against Mr Reid in the New Zealand High Court (unsuccessfully), Court of Appeal (also unsuccessfully) and then the Privy Council (at last, successfully) across the early 1990s. It explains it because on Christmas Eve 1989, the solution that recommended itself to me (and my property partner Chris Moore) was to impress caveats on the titles of the three properties. Which meant, in due course, we had to show that the employer of a bribed official had a proprietary interest in property bought by its fiduciary with those bribes.

[9] And also, why I found myself in 1994 in a blue worsted pin-striped suit beside a swimming pool in Port Vila. But that, as they say, is another story.

Past[2]

[10] So let us go back to a beginning, or a beginning of sorts at least, work out where we came from, and then survey three great waypoints on the journey.

[11] Fiduciary duty first developed in the context of English real property. The fiduciary arose from the concept of the "feoffment to use", a sort of forerunner to today's express trust. The "use", derived from the Latin "ad opus" meaning "on his behalf", appears first to have been used in medieval England to allow land to be held on behalf of religious orders that had pledged vows of poverty and were therefore unable to own land.[3] It was subsequently used by landowners, beginning in the 14th century, to effectively pass on land after death but avoid feudal inheritance rules.[4]

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2 This section draws on an earlier speech: Stephen Kós, "Aristotle and All That: Finding the Foundations of Fiduciary Law" (Hellenic Australian Lawyers Association Conference, July 2018).

3 F W Maitland *Equity: A Course of Lectures on Equity* (2nd ed, Cambridge University Press, 1969) at 34–35.

4 D J Seipp "Trust and Fiduciary Duty in the Early Common Law" (2011) 91 Boston L Rev 1011. This use was ended by Henry VIII in *Lord Dacre's Case* (1535) 1 Spelman's Reports, Uses, pl 4.

[12] At the same time the Court of Chancery began to develop a body of decisions relying on concepts such as "trust" and "confidence".[5] Breach of trust or confidence might sound in a remedy in the Court of Chancery where the common law courts would turn the applicant away. Relationships devoid of contract might depend on trust or confidence — such as trustees and guardians. In others contract and equitable interests co-existed — such as employees, agents and professional advisors.[6]

[13] Eventually these concepts of "trust and confidence" evolved into the well-worn (and much abused) word "fiduciary" that we now so frequently use for a relationship based on powers conferred, short of express trusteeship, but usually in conjunction with some perceived double-dealing.

[14] The term "fiduciary" was a relatively late addition to the law of equity. One of the first uses of the word was in 1717 where Cowper LC described a tenant as "a sort of fiduciary to the lord, and it is a breach of the trust which the law purposes in the tenant, for him to take away the property of the lord".[7] It only achieved real currency in the 1850s.[8]

[15] Why the change? Reference to terms such as "trust" and "confidence" sufficed when decisions followed general principles, but as the law of equity developed, so too did the specificity of those principles. "Trust" came to be formalised, focusing on express trust in particular. But that left other relationships previously referred to as a trust, without a name.[9] The word "fiduciary" came to be used to describe situations that fell short of the by-now more strictly-defined trust.[10]

[16] Professor Paul Finn describes the 19th century as the "truly formative" period in the development of the courts' jurisdiction over fiduciaries, with fiduciary obligations developing by analogy to the standards imposed on trustees.[11]

[17] The developments were two-fold. First, the demands of increasingly complex society drove the development of new fiduciary obligations — such as the duty to keep

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5 L S Sealy "Fiduciary Relationships" (1962) 20 CLJ 69 at 69–70.

6 At 69.

7 *Bishop of Winchester v Knight* (1717) 1 P Wms 406 at 407

8 Paul Finn "Fiduciary Obligations: 40th Anniversary Republication with Additional Essays" (The Federation Press, Sydney, 2016) at [2]; and Sealy, above n 5, at 72, n 11. There are some examples prior to then: see: *Woodhouse v Meredith* (1820) 1 Jac & W 204 at 213; *Oliver v Court* (1820) 8 Price 127 at 143; *Cholmondeley v Clinton* (1820) 2 Jac & W 1 at 183; and *Docker v Somes* (1834) 2 My & K 655 at 665.

9 Sealy, above n 5, at 70–71.

10 At 71–72. See also Finn, above n 8, at [2].

11 Finn, above n 8, at [7].

information in confidence.[12] That said, the general principle established by Lord Thurlow in the 1788 decision of *Gartside v Isherwood* — "if a confidence is reposed, and that confidence is abused, a court of equity shall give relief"[13] — has stood the test of time over the past 250 years. The language we use to describe fiduciary relationships has become a more specific, and certain classes of relationship are now presumptively fiduciary, but in substance the principle is little better defined.

[18] Secondly, vague rules of analogy developed into the specific, distinct fiduciary obligations we recognise today.[14] This is self-evident from the development of one of the most foundational obligations on a fiduciary — the obligation to act in the beneficiary's best interest and not profit from his or her position as fiduciary.

[19] Let us look, then, at three seminal cases. The first, from the 18th century, reached into, and shaped, the other two — 20th century — cases.

Keech v Sandford

[20] *Keech v Sandford* was decided in 1726 — well before the "fiduciary" had developed into a distinct legal concept.[15] As you will recall, it concerned a lease of the Rumford Market. A trustee under a will held the lease, as lessee, for a beneficiary who was a minor. Seeking to the renew the lease, the trustee was confronted by a lessor who refused to renew it in the name of the beneficiary. So to preserve the lease, the trustee renewed it in his own name.

[21] The report of this seminal case is just half a page long. But in 1972 an academic, Dennis Paling went and dug out the pleading — "in manuscript on parchment approximately 1 metre by 0.5 metre" — at the Public Record Office.[16] It seems the beneficiary, Susanna White, married Charles Keech soon after her majority, and suspecting fraud on the trustee, William Sandford's part, sought conveyance of the lease.[17] Lord King LC — said by Professor Cretney to be "one of the less distinguished holders of the Great Seal" — ordered that be done.[18]

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12 At [7].

13 *Gartside v Isherwood* (1788) 1 Bro C C 558 at 560, citing *Filmer v Gott* (1770) 4 Bro Parl Cas 230.

14 Finn, above n 8, at [7].

15 *Keech v Sandford* (1726) SelCasCh 61, 25 ER 223 (Ch).

16 Dennis Paling "The Pleadings in Keech v Sandford*"* (1972) 36 Conv 159 at 159.

17 The trustee's defence was not assisted by his claim that the accounts had had to be revised because ink had been spilled on the originals: at 161.

18 Stephen Cretney "The Rationale of Keech v Sandford" (1969) 33 Conv 161 at 162. Lord King LC (Lord Chancellor from 1725–1733) was perhaps more distinguished than his predecessor: the Earl of Macclesfield, Lord Parker LC, was impeached for corruption.

[22] The trustee was found to hold the lease on a trust for the beneficiary — a constructive trust, though that expression was not used. As he put it: "This may seem hard, that the trustee is the only person of all mankind who might not have the lease: but it is very proper that rule should be strictly pursued".[19] So the lease had to be assigned to the beneficiary, the profits accounted for, and an indemnity given the trustee against further liability under the lease.

[23] The origins of the rule were likely the same as the medieval use of land, and the resulting development of the trust. That is, the need to regulate co-ownership, to protect minors under wardship and guardianship laws, to recognise duties to account, and to control office holders.[20]

[24] It has been said that, when delivered, the rule in *Keech v Sandford* would likely have been regarded as "marginal".[21] But it was subsequently adopted and reaffirmed throughout the latter part of the century (and beyond),[22] though questions as to the scope of the no-profit rule still arose.[23]

Boardman v Phipps

[25] The scope of the no-profit rule, and the recognition of novel fiduciary relationships, were issues that both arose in the landmark *Boardman v Phipps* case.[24] The facts will be familiar. The Phipps trust had a minority shareholding in a struggling textile firm, Lester & Harris. Mr Thomas Boardman was the Phipps family solicitor, and from time to time advised on matters relating to the trust. His co-defendant was Mr Tom Phipps, a beneficiary of the trust. The plaintiff was another beneficiary, Tom's brother, John Phipps. Each brother was a beneficiary; neither brother was a trustee.

[26] Mr Boardman and Tom were of the view Lester & Harris was badly run. The dividend-based value of the shares was a mere shadow of the asset-backing. The majority shareholders were set in their ways, hostile to the Phipps and resisted Tom

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19 *Keech v Sandford*, above n 15, at 62.

20 Joshua Getzler "Rumford Market and the Genesis of Fiduciary Obligations" in Andrew Burrows and Alan Rodger (eds) *Mapping the Law: Essays in Memory of Peter Birks* (Oxford University Press, Oxford, 2006) 577 at 590.

21 At 587.

22 See, for example, *York Buildings Company v Mackenzie* (1795) 8 Brown Parl Cas 42, 3 ER 432 (HL).

23 Getzler, above n 20, at 588.

24 *Boardman v Phipps* [1967] 2 AC 46 (HL).

Phipps joining the board. Something had to be done, and there were discussions with some of the trustees about it.

[27] The answer that commended itself was a takeover bid of the company. This enterprise the trust could not undertake: the price range was beyond what then was seen as a prudent investment and a Court was unlikely to sanction it.[25] So Mr Boardman and Tom set about the takeover in their own names — a course which naturally would also benefit the trust. In doing so they obtained information about the company's finances and management by holding themselves out as representing the trust, when in fact they had no such authority. The takeover allowed them to turn the company around and make a handsome profit — and so too did the trust.

[28] But John Phipps — who comes across in this as rather a dog in the manger, and a greedy dog too — brought proceedings for breach of fiduciary duty. All three courts, including the House of Lords (by 3 to 2), found that claim was made out.

[29] Neither Mr Boardman nor Tom acted in breach of trust, neither being trustee. Liability rested on a different basis, namely the fiduciary relationship between them and the trustees and beneficiaries. The fiduciary relationship is often understood as having arisen from an agency relationship between Mr Boardman and Tom, and the trustee and beneficiaries of the trust.[26]

[30] In his re-examination of the case, Professor Michael Bryan argues, reasonably convincingly, that there was no true agency relationship. Wilberforce J had labelled them "self-appointed agents".[27] Rather, there was only agency *de son tort*. By intermeddling as if purported agents, they assumed responsibilities as such.[28] But that does not affect the ultimate recognition of a relationship akin to trusteeship, with similar duties, in the absence of a trust.

[31] *Boardman v Phipps* also provides a stark example of the need to carefully identify the exact manner in which a relationship is said to be fiduciary (or trust-like). The majority in the House of Lords placed much emphasis on the perceived conflict of interest between Mr Boardman's obligations of advice to the trustees generally and

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25 Andrew Hicks "Proprietary Relief in *Boardman v Phipps*" (2014) NILQ 1 at 3.

26 See, for example, *Boardman v Phipps*, above n 24, at 104 per Lord Cohen.

27 *Phipps v Boardman* [1964] 1 WLR 993 (Ch) at 1007.

28 Michael Bryan "*Boardman v Phipps* (1967)" in Charles Mitchell and Paul Mitchell (eds) *Landmark Cases in Equity* (Hart Publishing, Oxford, 2012) 581 at 587–589; and Hicks, above n 25, at 12–14.

his personal interest in acquiring the shares.[29] But that does not explain Tom's fiduciary obligations to the trustees and other beneficiaries, nor Mr Boardman's to John as a beneficiary of the trust.[30] Moreover as Paul Finn argues, Mr Boardman owed no duty to advise unless consulted.[31]

[32] The case is best understood then as a strict application of the rule against self-profit. As in *Keech*, there was no suggestion that the Phipps trust could have acquired the relevant property interests so as to generate the profit.[32] But that provided no defence to liability. That turned more on the fact that the *information* used by Mr Boardman and Tom came to them, at least in part, in the course of representing the trust, and thereby constituted trust property.

[33] It may be noted that none of this did Mr Boardman much harm. Already a prominent solicitor and businessman, much respected for his commercial acumen, he took to politics. The year after he lost in the House of Lords he won at the hustings, becoming MP for Leicester South. In due course he became a cabinet minister in Edward Heath's government, a member of the House of Lords and Chairman of the NatWest Bank. It is harder to trace the subsequent career of John Phipps.

Attorney-General for Hong Kong v Reid

[34] The strictness with which the House of Lords held Messrs Boardman and Phipps to account later influenced the Privy Council in the case I began this talk with, *Attorney-General for Hong Kong v Reid*.[33] Having founded our do-it-yourself Mareva injunctions — humble caveats — on the existence of a constructive trust, we had warmed to our theme and decided to stick with proprietary claims.

[35] First, I thought that doctrinally correct – despite a long-standing English Court of Appeal decision in a case called *Lister & Co v Stubbs*.[34] Secondly, the Tauranga assets had risen in value; should the erring fiduciary gain that too? And thirdly, it meant that any competing interest — the Reid family, in particular — would need to show they were bona fide purchasers for value without notice.

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29 *Boardman v Phipps*, above n 24, at 103 per Lord Cohen, 111–1112 per Lord Hodson and 115 per Lord Guest.
30 Bryan, above n 28, at 590–591.
31 Finn, above n 8, at [567].
32 See *FHR European Ventures LLP v Mankarious* [2014] UKSC 45, [2015] AC 250 at [40].
33 *Attorney-General for Hong Kong v Reid* [1994] 1 NZLR 1, [1994] 1 AC 324 (PC).
34 *Lister & Co v Stubbs* (1890) 45 Ch D 1 (CA).

[36] The Attorney-General was not acquisitive; he wanted no kiwifruit orchards across the sea. But what he did want was to enlarge the remedy as far as possible to discourage others from copying Mr Reid's disgraceful dereliction of duty.

[37] Having lost this argument twice in the High Court and the Court of Appeal, which both followed *Lister*, the Attorney-General not unreasonably gave me a leader in the Privy Council — the clever, cadaverous chain-smoking David Oliver QC.[35] Think Julian Miles QC, with a persistent cloud of smoke. Think, in fact, of a combination of Julian Miles and Lindsay McKay.

[38] Just one conference ahead of the hearing. "Sit down, Stephen, sit down" he said, ignoring the fact that the only seat in his chambers without a great stack of papers on it was his own. While he hunted for the appeal papers — "I know they're here somewhere" — he explained that he was taking the tube these days because his car was out of commission. He'd dropped in to chambers the previous Sunday to pick up a file — on the way to walk his dog on Hampstead Heath — became distracted and, remembering the dog two hours later, raced out to find the dog content enough but his driving seat in ribbons.

[39] Distractable, David was, but he delivered my (unaltered) submissions with aplomb, apart from the moment when unaccountably he couldn't remember the facts of *Boardman v Phipps*. Lord Templeman called an early lunch, and we headed outside — ostensibly for me to reacquaint him with *Boardman v Phipps*. "Thank goodness", David said, "I was gasping for a fag".

[40] The panel included two Chancery giants: Lords Templeman and Goff. We didn't have to wait long for the decision. Departing from *Lister*, the Privy Council held a fiduciary was a constructive trustee of bribes as soon as they were received. The principal's right was proprietary; it did not depend on a judgment determining an *in personam* remedy. Further, where that bribe is applied or invested, the fiduciary is accountable for the increase in value of the property or investment representing the value of the bribe. Equity considers as done what ought to be done.[36]

[41] Relying on *Keech v Sandford*, Lord Templeman explained that if property which a trustee obtained by use of knowledge acquired as trustee, becomes trust property, then the same must be true of a bribe accepted by a trustee (or fiduciary) for

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35 *Attorney-General for Hong Kong v Reid* (1991) 1 NZ ConvC 191,020 (HC); and *Attorney-General for Hong Kong v Reid* [1992] 2 NZLR 385 (CA).

36 *Attorney-General for Hong Kong v Reid*, above n 33, at 331.

a criminal purpose injuring the trust (or beneficiary).[37] *Boardman v Phipps* was significant here also. Lord Templeman emphasised that if a fiduciary acting honestly, making a profit the principal could not make himself, could be held to account, then that must also be true of a fiduciary acting criminally and dishonestly.[38]

[42] *Reid* was controversial. The issue was the priority given by a proprietary remedy. That remedy ousted other, unsecured creditor claims, giving the bribed official's employer priority. Initially the English Courts stuck with *Lister* and refused to follow *Reid*. In *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd (in admin rec)*, in the Court of Appeal, Lord Neuberger MR expressly declined to adopt *Reid*.[39]

[43] But in 2014, twenty years after *Reid* was delivered, the United Kingdom Supreme Court adopted it, in *FHR European Ventures LLP v Mankarious*.[40] Considerations of policy and principle led Lord Neuberger P this time to conclude the position stated in *Lister* was in error, and should be abandoned for the position stated in *Reid*. Interestingly, he acknowledged that the *Lister* approach is inconsistent with both *Keech* and *Boardman*.[41]

Conclusion

[44] Fiduciary law developed from the courts of equity's practice of enforcing trust and confidence relationships *in personam*, that is as between the parties, despite the absence of formal *legal* obligation. Indeed, frequently this arose in circumstances where one party *sought* to rely upon their legal rights. The relationships that are recognised as fiduciary in character have been refined, as have the exact obligations placed upon a fiduciary, and the remedies that then flow. But the function of fiduciary law has been remarkably consistent. It was a correction of legal justice.

[45] The trio of *Keech*, *Boardman* and *Reid* is a good example of how the founding principles of fiduciary law have evolved, giving a clearer understanding of the duties a fiduciary owes. In conventional fiduciary relationships, the arguments have focused

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37 At 332.

38 At 338.

39 *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd (in admin rec)* [2011] EWCA Civ 347, [2012] Ch 453 at [76]–[87] per Lord Neuberger MR. Compare *Daraydan Holdings Ltd v Solland International Ltd* [2004] EWHC 622 (Ch), [2005] Ch 119 at [75]–[86] and *Fyffes Group Ltd v Templeman* [2000] 2 Lloyd's Rep 643 at 668–672 where the Courts indicated preference for *Attorney-General for Hong Kong v Reid*, above n 33, over *Lister & Co v Stubbs*, above n 34.

40 *FHR European Ventures LLP v Mankarious*, above n 32. The Full Court of the Federal Court of Australia has also adopted *Attorney-General for Hong Kong v Reid*, above n 33: *Grimaldi v Chameleon Mining NL (No 2)* [2012] FCAFC 6, (2012) 200 FCR 296 at [569]–[584].

41 *FHR European Ventures LLP v Mankarious*, above n 32, at [40].

on abuse of power or opportunity, the form of remedy and recompense for an honest (but erring) fiduciary. Each of our trio may seem hard in at least one of those respects.

Present

[46] I turn now to the current state of fiduciary law.

[47] Fiduciary responsibility may be inferred where the relationship is one of assumed trust, confidence and loyalty. These qualities were identified in a trio of New Zealand Supreme Court decisions in the latter-half of the first decade of this century: *Chirnside v Fay*,[42] *Paper Reclaim Ltd v Aotearoa International Ltd*[43] and *Amaltal Corp Ltd v Maruha Corp*.[44]

[48] As Tipping J noted in in the New Zealand Supreme Court decision in *Chirnside v Fay*, no single formula or test has received universal acceptance in deciding whether a relationship outside of the recognised categories is such that the parties owe each other obligations of fiduciary kind.[45]

[49] Some think that imprecision unsatisfactory. I do not, however. It has never been equity's remit to be entirely explicit.

[50] Nevertheless, some guiding principles are discernible. I have previously suggested that fiduciary law's modern form focuses on three indicia, these being the essence of a fiduciary relationship:[46]

(a) the possession of *powers*, either agreed, assumed or imposed;

(b) *reliance*, via a relationship of trust and confidence (or vulnerability) and;

(c) *assumption of responsibility*, actual, inferred or imposed:—

resulting, then, in these three general requirements:

(d) the active promotion of the principal's interests by the fiduciary;

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42 *Chirnside v Fay* [2006] NZSC 68, [2007] 1 NZLR 433.
43 *Paper Reclaim Ltd v Aotearoa International Ltd* [2007] NZSC 26, [2007] 3 NZLR 169.
44 *Amaltal Corp Ltd v Maruha Corp* [2007] NZSC 40, [2007] 3 NZLR 192.
45 *Chirnside v Fay*, above n 42, at [75].
46 This formulation is one I eventually reached after lengthy discussion with my friend, Professor Matthew Harding, of Melbourne Law School, at a seminar we co-presented to judges and the academy in Victoria in May 2018.

(e) priority to be given to the beneficiary over the interests of third parties; and

(f) subordination (although not entire elimination) of the fiduciary's self-interests.

[51] More recently, the issue of fiduciary duties arose in an appeal before the Court of Appeal in *Dold v Murphy*.[47] In a judgment I wrote, we distilled these fiduciary markers a little further:[48]

> … a fiduciary relationship is only likely to be inferred when the legal relationship between parties involves: (1) the conferral of powers in favour of the alleged fiduciary, which may be used to affect the proprietary rights of the beneficiary; (2) the apparent assumption of a representative or protective responsibility by the alleged fiduciary for the beneficiary (for example, to promote the beneficiary's interests, or to prefer the interests of the beneficiary over those of third parties); and (3) the implied subordination (although, not necessarily, elimination) of the alleged fiduciary's own self-interest.

[52] *Dold* concerned the sale of shares in a Queensland-based tourism company. Messrs Dold and Jacobs were the majority shareholders, Mr Murphy — who had once acted as their lawyer — a minority shareholder. Looking to sell, the three shareholders received an exceptionally lucrative offer for their shareholding from a private equity firm. But Mr Murphy insisted he would not sell his shares unless his fellow shareholders paid him AUD 4 million. In effect he sought to leverage his small six per cent shareholding into the equivalent of a ten per cent one. Having acceded to that demand so as to not jeopardise the sale, Mr Dold sought to recover his AUD 2 million. One argument he advanced was that Mr Murphy and he were in a fiduciary relationship.

[53] Putting to one side the shareholder's agreement which contained aspirational objectives in relation to maximisation of shareholders' returns on funds invested, but also a clause excluding partnership, what was missing were the basic indicia just described.[49] Mr Murphy had no particular power — he was simply one of three shareholders. Nor did he have a particular representative responsibility or obligation to actively promote other shareholders' interests over his own or those of third parties.[50] Nor was there some other assumption of fiduciary responsibilities — that

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47 *Dold v Murphy* [2020] NZCA 313.
48 At [55].
49 At [57].
50 At [58].

is, an agreement separate from the shareholders' agreement — precluding the exercise of Mr Murphy's rights as a minority shareholder to seek a premium.[51]

[54] We also noted that it would be quite exceptional to impose fiduciary duties on a minority shareholder.[52] The proposition that shareholders owe fiduciary duties generally to one another would represent a surprising development,[53] and one we thought contrary to principle. With certain statutory exceptions — most notably relief against oppression under s 174 of the Companies Act 1993 — shareholders are entitled to act selfishly in their dealings with one another.[54] That is the antithesis of fiduciary obligation.

[55] The fact that one shareholder's actions may diminish the value of another's shareholding does not mean there is a fiduciary obligation: impact on another's worth is not enough. Something more is required, being what Professor Farrar calls the "special facts fiduciary relationship".[55] *Coleman v Myers* was the locus classicus — director-shareholders controlling the majority of shares then setting about a full takeover of a tightly-held company.[56]

[56] A similar issue arose very recently in our Court in *Keller v Daisley*.[57] That case, also in a company context, concerned in part a finding by the High Court that the Kellers owed a Mr Daisley a fiduciary duty to issue him shares in a company.[58] That company had been set up to purchase properties from Mr Daisley, its shares to be held by the Kellers and Mr Daisley. Due to a dispute, the Kellers never transferred shares to Mr Daisley.

[57] On appeal, the Court rejected the notion of a fiduciary obligation of the sort claimed. Though the parties used the language of "joint venture" on occasion, again, the Kellers had no representative responsibility or obligation to prefer Mr Daisley's interests over their own.[59] Nor, as in *Dold*, was any discretion or power to affect

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51 At [60].
52 At [59].
53 The shareholder-shareholder relationship is not inherently fiduciary: *Brant Investments Ltd v KeepRite Inc* (1991) 3 OR (3d) 289, [1991] OJ No 683 (ONCA) at [16]; *Bell v Source Data Control Ltd* (1988) 66 OR (2d) 78, [1988] OJ No 1424 (ONCA) at [40]; and *Stacey v Watson* [2016] NZHC 1891, [2017] NZCCLR 5 at [116].
54 *Pender v Lushington* (1877) 6 Ch D 70 (CA) at 75–76.
55 John Farrar "The duties of controlling shareholders – complex relationships, legal confusion and new approaches" (2015) 30 Aust J Corp Law 140 at 145.
56 *Coleman v Myers* [1977] 2 NZLR 225 (CA). It may be observed that caselaw in the United States has long recognised a fiduciary duty owed by a dominant or controlling shareholder to the minority: *Pepper v Litton* 308 US 259 (1939).
57 *Keller v Daisley* [2021] NZCA 351
58 *Daisley v Ark Contractors Ltd* [2020] NZHC 793.
59 *Keller v Daisley*, above n 57, at [137].

Mr Daisley's interests conferred on the Kellers: the obligation to transfer shares only extended as far as prescribed in the shareholders agreement.[60]

[58] So far, my focus has been commercial. But the same principles characterise the essence of a fiduciary in non-commercial contexts.

[59] The most obvious example of recent years is the fiduciary relationship that may exist in certain circumstances between the Crown and Māori. I speak of course of the behemoth that is *Proprietors of Wakatū v Attorney-General*.[61] The majority in the Supreme Court held that the Crown owed fiduciary duties to reserve 15,100 acres for the benefit of the customary owners and, in addition, to exclude their pa, urupa and cultivations from the land obtained by the Crown following the 1845 Spain award. Adopting the approach taken in *Guerin v The Queen* in Canada,[62] Elias CJ described the circumstances where fiduciary duties between Crown and Māori may arise thus:[63]

> … a fiduciary duty may arise in a particular case where the Crown is exercising discretionary powers, whether conferred by statute or not, on behalf of or for the benefit of others.

[60] There is the familiar conferral of a power in favour of the beneficiary: traditionally Canadian jurisprudence has focussed on the Crown's right of pre-emption. In *Wakatū*, the "equitable terms" of the Spain award included reservation of land for the benefit of the former Māori proprietors or exclusion of land intended to be retained in their possession and control according to native custom. That power fell to the Crown in whom the land vested when cleared of native title.[64] Also present was an assumption of representative or protective responsibility to prefer the customary owners' interests over those of third parties.

[61] Fiduciary obligations may not arise where the Crown "wears many hats and represents many interests" — it only owes governmental obligations to all.[65] But here there were no competing interests, the Crown acting as it did in relation to independent legal interests.[66] And from this narrative comes the implied subordination of the Crown's self-interest. The policy of the Land Claims Ordinance was to protect Māori

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60 At [140].
61 *Proprietors of Wakatū v Attorney-General* [2017] NZSC 17, [2017] 1 NZLR 423.
62 *Geurin v The Queen* [1984] 2 SCR 335.
63 *Proprietors of Wakatū v Attorney-General*, above n 61, at [365]. Arnold and O'Regan JJ also adopted the approach in *Geurin v The Queen*, above n 62: at [779]. Glazebrook J agreed with the finding of fiduciary duties but on the basis the narrative created obligations so close to those of a trustee that the Crown inevitably owed fiduciary obligations: at [588].
64 See at [388].
65 At [379], quoting *Wewaykum Indian Band v Canada* 2002 SCC 79, [2002] 4 SCR 245 at [96].
66 At [385] and [389].

by ensuring purchases were on equitable terms.[67] Once the land vested in the Crown, it was obliged to uphold the obligations it assumed for the benefit of the customary owners.[68]

[62] A clear majority accepted the application of fiduciary law principles to the Crown's dealing with the relevant land. Arnold and O'Regan JJ held the Crown "owed fiduciary duties to Māori who had customary rights to the land purchased by the [New Zealand] Company in the Nelson area. The Crown did so because it assumed the Company's obligation to allocate the Tenths reserves and to manage them in the best interests of the original customary owners. *This was in addition to its own governmental responsibilities towards Maori*".[69] Glazebrook J, provisionally, reached a similar conclusion.[70] Only William Young J expressed doubt, holding such a claim time-barred in any case.[71]

[63] *Dold* and *Wakatū* are undoubtedly very different cases arising in very different circumstances. But also they are not so different. The Courts analysed the fiduciary relationships, both recognised and rejected, by reference to the same essential ideas of what it means to be fiduciary: power, reliance and assumption of responsibility.

Future

[64] I turn now to the future. If the history of fiduciary law explains its present, to what extent can the present point to which direction fiduciary law may travel in the future?

[65] The types and forms of private relationships recognised as fiduciary are likely to grow as equity faces up to a changing New Zealand. The types of relationships recognised as fiduciary may also grow.

[66] In recent years the High Court has twice refused to strike out claims pleading a fiduciary relationship between a parent and adult child whom they abused during his or her childhood.[72] Interfamilial fiduciary relationships owed by parents or other family members to children have been recognised, typically in the context of (sexual)

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67 At [387].
68 At [388].
69 At [779] (emphasis added).
70 At [588].
71 At [942].
72 *A v D* [2019] NZHC 992, [2019] NZFLR 105; and *Rule v Simpson* [2017] NZHC 2154. The Court of Appeal declined leave to appeal the refusal of the interlocutory application for summary judgment in the former: *D and E Ltd v A* [2019] NZCA 585.

abuse.[73] But what about where that child is now an adult and the parent alienates property without providing for that child? In *A v D*, Associate Judge Johnston reasoned the alienation was the exercise of a discretionary power affecting the plaintiffs' interests. There was an evidential basis suggesting the parent's abuse of the plaintiff's left them vulnerable as adults. And it was possible that, given the long-term consequences of the mistreatment, the plaintiffs may be entitled to expect the parent have regard for their interests.[74] The suggestion that fiduciary obligations are arguable in this context has received criticism.[75] Whether such a fiduciary relationship actually exists will require close scrutiny against the indicia identified earlier. The march here is incremental; the question to be examined will often be whether a purely legal analysis produces an evidently unjust outcome, so that equity has little choice but to enter the fray.

[67] We are likely to witness fiduciary relationships recognised against increasingly diverse relationships and cultural backgrounds — but those relationships will have the same essential indicia of a fiduciary. A good example is the recent decision of Walker J in *Fa'agatu v Derhamy* in the High Court.[76] There, a Muslim man, in frail health entered a Mudharaba arrangement, derived from Sharia law, with a fellow Muslim, an accountant.[77] The arrangement was set aside for undue influence. But the relationship was also fiduciary.

[68] Some refer to the fiduciary duty recognised in *Wakatū* as a "legal fiction".[78] I question that observation. The facts of the relationship might have been novel, and set in a time in history in which the fiduciary duty was itself only emerging, but the essential and accepted indicia of a fiduciary relationship are still there. "Applying fiduciary law to new relationships is a manifestation of the jurisdiction's purpose".[79] It allows equity to fulfil its historical role of preventing the injustice of the hard operation of the law where (for example) contract leaves an evident injustice in its wake. In *Dold* and *Daisley* that was not so, because the contract was the whole bargain and it was not unjust to analyse the relationship in those terms only. In other cases, especially where there are operating dependencies based on vulnerability, it may not.

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73 *B v R* (1996) 10 PRNZ 73; and *Jay v Jay* [2014] NZCA 445, [2015] NZAR 861 at [67]–[69].

74 *A v D*, above n 72, at [35]–[36].

75 Andrew Steele "Do parent owe fiduciary duties to their adult children?" [2019] NZLJ 315.

76 *Fa'agatu v Derhamy* [2020] NZHC 404, [2020] 2 NZLR 774.

77 I note here that the notion of a trust is no stranger to Islamic law, namely the Waqf: see Avisheh Avini "The Origins of the Modern English Trust Revisited" (1996) 70 Tul L Rev 1139.

78 David V Williams "Fiduciary Duty Remedies Stripped of Historical Encumbrances" [2019] NZLR 39 at 60; and Miriam Bookman "A Legal Backstop for Historical Māori Grievances: *Proprietors of Wakatū v Attorney General*" (2017) 23 Auckland U L Rev 348 at 362.

79 Bookman, above n 78, at 362. See also Andrew S Butler "Fiduciary Law" in Andrew S Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) 471 at 485.

[69] Of particular interest will be how tikanga may influence the obligations private parties are subject to, and what fiduciary duties they owe one another. Nicole Roughan argues the fiduciary history so far, including *Wakatū*, has been one-sided. She asks "how would the relationship [in *Wakatū*] be characterised, and what duties would be imposed, under Indigenous law".[80] That is to say, how might the principles of tikanga play out in future contexts so as to give rise to the requisite relationship of trust and confidence?

[70] In another speech, given two years ago at the Law Society Trusts Conference, I suggested that tikanga Māori concepts would increasingly influence equity in New Zealand — even in relation to trusts involving non-Māori.[81] As I suggested: "Equity is both principle and ethos, the latter inherently receptive and influential upon the former".[82] In *Takamore v Clarke* Elias CJ observed that "Māori custom according to tikanga is therefore part of the values of the New Zealand common law".[83] It is an observation I agree with: equity in New Zealand will draw more now on mātauranga Māori — such as whanaungatanga and kaitiakitanga — than from 18th century English cases.

[71] The genius of the common law, including for these purposes, equity, is that it draws on experience and context. The New Zealand English language evolves; so too – albeit more slowly – the broad communal values that underpin our common law.

[72] A number of scholars have revisited the idea of a fiduciary relationship between the state and citizens.[84] In many respects this conception relates more to fiduciary political theory, which draws analogies between the private fiduciary-beneficiary and public state-citizen relationship.[85] But at the same time, there are suggestions that more concrete public fiduciaries may be recognised by the law. *Wakatū*, it must be remembered, recognised a fiduciary duty on the Crown or the state,

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80 Nicole Roughan "Public/Private Distortions and State–Indigenous Fiduciary Relationships" [2019] NZLRev 9 at 29.

81 Stephen Kós "A Short History of the Trust" (Keynote Address, Law Society Trusts Conference, June 2019) at 15–16.

82 At 15.

83 *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [94]. See the discussion by Valmaine Toki "Lessons from the Navajo Tribal Courts – Tikanga Māori as Common Law?" (2018) 28 NZULR 197 at 204.

84 Roughan, above n 80, at 18. See, for example, Evan Fox-Decent *Sovereignty's Promise: The State as Fiduciary* (Oxford University Press, Oxford, 2012); Ethan J Leib and Stephen R Galoob "Fiduciary Political Theory: A Critique" (2016) 125 Yale LJ 1820; Evan J Criddle and Evan Fox-Decent "Keeping the Promise of Public Fiduciary Theory: A Reply to Leib and Galoob" (2016) 126 Yale Law Journal F 192; and Paul Finn "Public Trust and Public Accountability" (1994) 3 GLR 224.

85 Roughan, above n 80, at 19.

but it did so on the basis of the Crown's assumption of the New Zealand Company's obligation to customary owners. The analysis remains an essentially private law one.

[73] Suggestions of a general fiduciary relationship between indigenous peoples and the states they inhabit are in many respects a call for a form of public fiduciary. But there are also suggestions of other quasi-public institutions being in fiduciary relationships vis-à-vis the public, notably sovereign wealth funds and pension or savings funds — might, for instance, the New Zealand Super Fund or Kiwisaver funds owe fiduciary obligations to the public in making investment decisions in the public interest.[86]

[74] I think calls for recognition of broader public fiduciary relationships should be met with some caution. Of course, it may be that in a particular instance a public official or body may be in a fiduciary relationship with particular persons.[87] But that relationship simply arises by the existence of the fiduciary indicia I set out earlier. It is not related to or founded on the body's public character, and again equity's role here should be supplementary, rather than the primary basis for analysis. What, here, is the fatal failing of public law such that an essentially private law response is needed?

[75] As Elias CJ cautioned in *Wakatū*, public bodies wear many hats in relation to many different and competing interests.[88] The content and application of fiduciary relationships between public actors in public capacities would necessitate a pluralistic and complicated fiduciary relationship to the public.[89] The intersection with public law seems to offer more a yawning, formless void than a valuable pathway, and it is not clear to me that this mooted public fiduciary relationship is useful or desirable. As Hammond J once said, in declining to hold a particular relationship to be fiduciary: "An otherwise admirable end cannot be met by utilising an important concept, and one which has a distinct moral and functional presence in our law, by watering down the basic concept of a fiduciary".[90]

[76] Equity serves as the correction of legal justice. But the perceived need for correction of legal justice alone a fiduciary does not make. There are many more hurdles to cross — as this paper demonstrates.

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86 Benjamin Richardson "Sovereign Wealth Funds and Socially Responsible Investing: An Emerging Public Fiduciary" (2012) 1 Global Journal of Comparative Law 125; and Edward J Waitzer and Douglas Sarro "The Public Fiduciary: Emerging Themes in Canadian Fiduciary Law for Pension Trustees" (2012) 91 Can B Rev 163 at 188.

87 Paul Finn "Public Trusts, Public Fiduciaries" (2010) 38 Fed L Rev 335 at 336.

88 *Proprietors of Wakatū v Attorney-General*, above n 61, at [379]

89 Roughan, above n 80, at 23.

90 *H v R* [1996] 1 NZLR 299 (HC) at 307.

Postscript

[77] And the blue pin-striped suit by the Port Vila swimming pool?[91]

[78] After the excitement of the *Reid* case in the Privy Council, I returned to New Zealand. The caveats were doing their job here; the ICAC was still tracing the proceeds of bribes. Then another telephone call: "Can you get to Vanuatu tonight? We think we've traced the Reid money there".

[79] Vanuatau was the last link in a chain of secret Mareva injunction application orders made across the globe. I flew straight up there that afternoon — in my blue wool suit — though my bags, for reasons known only to Air Vanuatu, travelled at a more leisurely pace. The next morning Garry Blake and I appeared in front of the Chief Justice and got ancillary Mareva disclosure orders against a local trust company.

[80] As I waited for delivery of the files, I steamed quietly in my suit beside the hotel swimming pool. Initially, no trace of Warwick Reid appeared in the files; I seemed to have been on a wild goose chase. Then, at about 10 pm, Garry and I found, literally in the very last file, the document we were looking for. A direction that the funds were to be released on presentation of a passport by a Charles Warwick Reid.

[81] More orders followed. And as I headed back out through the airport, my missing bags arrived.

[82] I now wish you the very best for this conference. My thanks to the organisers, and to you all for your kind attention today. Good morning, and good luck.

Kia ora rawa atu. Tēnā koutou, tēnā tatou katoa

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91 See [9] above.