

# *Property rights and Equitable Principles: Understanding Fiduciary Loyalty in an Organisational Context*

Dr David Gibbs, University of Hertfordshire, [d.gibbs2@herts.ac.uk](mailto:d.gibbs2@herts.ac.uk)

Derek Whayman, Newcastle University, [derek.whayman@newcastle.ac.uk](mailto:derek.whayman@newcastle.ac.uk)

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## **1 Introduction**

The thesis in this paper can be stated simply. Fiduciary duties, or equivalently, ‘the duty of loyalty’, cannot be reduced to mere contractual terms, i.e. we do not start with the blank slate of no obligations and *positively* imply fiduciary duties just as one would imply a contractual warranty that, for example, goods will be of satisfactory quality. Instead, one starts with the position that there is a duty of loyalty owed and the question is whether the commercial (or similar) engagement between the parties *negatively* eliminates altogether or reduces the ambit of the duty of loyalty.

We show this primarily from a doctrinal standpoint – by analysing particular rules of law – to make our point that the contractarian thesis – positive implication from nothing – does not comport with the case-law. In this we consider: (i) the general principles of contractual implication; (ii) the cases concerning shaping the scope and extent of the fiduciary duty; and (iii) the content of the remedies for breach.

We consider the debate within the venerable thesis of Sir Henry Maine who argued that our progressive society has moved from status to contract.<sup>1</sup> Lawyers of later times have picked up on this generalisation as a way of explaining trends in the law. Explaining changes in the law since feudal times across topics as diverse as land, marriage and industrial law, Graveson sets out his understanding of Maine’s thesis:

*The meaning of the statement is clear: that the rights and duties, capacities and incapacities of the individual are no longer being fixed by law as a consequence of his belonging to a class, but those former incidents of status are coming more and more to depend for their nature and existence upon the will of the parties affected by them; and the remedy for breach of those incidents is becoming increasingly contractual in nature.*<sup>2</sup>

Influential judges such as Edelman<sup>3</sup> and academics such as Langbein<sup>4</sup> and Easterbrook and Fischel<sup>5</sup> essentially take Maine’s thesis and apply it straightforwardly: once, fiduciary duties arose because the relationship between the parties was one of the traditional fiduciary categories; but now since the law recognises that fiduciary duties can arise outside of these categories, it must be as a result of the contractual obligations between them; and, further,

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<sup>1</sup> Sir Henry Summer Maine, *Ancient Law: Its Connection with the Early History of Society, and its Relation to Modern Ideas* (16<sup>th</sup> edn, Murray 1897) 170: ‘we may say the movement of progressive societies has hitherto been a movement *from Status to Contract*’ (emphasis supplied).

<sup>2</sup> R H Graveson, ‘The Movement From Status To Contract’ (1941) 4 MLR 261, 261 quoting Sir William Markby, *Elements of law* (6<sup>th</sup> edn, Clarendon 1950) para 180.

<sup>3</sup> James Edelman, ‘When do Fiduciary Duties Arise?’ (2010) 126 LQR 302; James Edelman, ‘The Role of Status in the Law of Obligations’ in Andrew S Gold and Paul B Miller (eds), *Philosophical Foundations of Fiduciary Law* (OUP 2014).

<sup>4</sup> John H Langbein, ‘The Contractarian Basis of the Law of Trusts’ (1995) 105 Yale LJ 625.

<sup>5</sup> Frank H Easterbrook and Daniel R Fischel, ‘Contract and Fiduciary Duty’ (1993) 36 J of L and Ec 425.

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since that is the case, we can eliminate the search for a traditional fiduciary relationship as otiose; even in such categories, the fiduciary duties arise on the basis of that contractual relationship.

We argue that the better application of Maine's thesis is to acknowledge that while part of the process of determining fiduciary duties has moved from status to contract, that is only part of it; and indeed once those duties are determined, there remains an element of status in the operation of the remedies. Nonetheless, we suggest that status is indeed not the starting point. Here we adopt, but adapt, Frankel's starting point:

*I submit that we are witnessing the emergence of a society predominantly based on fiduciary relations. This type of society best reflects our contemporary social values. In our society, affluence is largely produced by interdependence, but personal freedom is cherished. Society's members turn to an arbitrator, the government, to obtain protection from personal coercion by those on whom they depend for specialized services. A fiduciary society attempts to maximize both the satisfaction of needs and the protection of freedom ...*

*It permits the government to moderate between altruistic goals and individualistic, selfish desires, as well as between the social goal of increasing the common welfare and the individual desire to appropriate more than a "fair share."*<sup>6</sup>

Hence, fiduciary duties exist as a default in the background and they can be *negated* by elements referable to contract. Our main departure from Frankel is that it is relatively easy to negate fiduciary duties; this is something that happens all the time.

This has implications for what the term 'status' should be taken to mean. Traditionally, status is a legally imposed condition that cannot be altered by decisions of free will even if free will is that what allows the holder to attain or relinquish that status. In a fiduciary sense it is taken to mean one of the conventional 'traditional fiduciary relationships', such as trustee and beneficiary, principal and agent, company and director and so on leading to a fiduciary relationship.<sup>7</sup> Given we expand the starting point to take in all relationships, initial status in this sense is deeply unhelpful. Fiduciary status, for us, is what interests still require loyalty, if *she owes any fiduciary duties at all*, i.e. after the negating process is complete.

In short:

- (i) *The default position between all counterparties is that there is a duty of loyalty;*
- (ii) *The duty of loyalty is reduced in scope or eliminated by the doctrines of 'circumscription', 'contract first' and 'authorisation'; and*
- (iii) *If only reduced, what remains is a fiduciary status, which informs the remedies for breach, particularly the constructive trust or proprietary remedy.*

These observations are in accordance with Graveson's observation that '[m]ost of the few who have given consideration to Maine's doctrine have found it necessary to limit it in some way to fit the facts of modern society.'<sup>8</sup> A specific example Graveson gives is the contract for personal service wherein specific regulation is applied on the basis of this status *after* it is assumed by way of intention;<sup>9</sup> to this one might add the bar on specific performance of such

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<sup>6</sup> Tamar Frankel, 'Fiduciary Law' (1983) 71 Cal L Rev 795, 801–802.

<sup>7</sup> See, e.g., *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 (High Court of Australia) 68.

<sup>8</sup> Graveson (n 2) 262.

<sup>9</sup> *ibid* 269.

contracts on the basis of the same.<sup>10</sup> Similarly we argue there is a place for status also after matters of contract in fiduciary law.

In advancing this thesis we begin with the history of the development of the duty of loyalty and how the law of contract had developed to a point where it might be thought that it could subsume fiduciary law. We rely on the recent case of *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd*<sup>11</sup> as evidence of retrenchment this development of the law of contract, signalling an acknowledgement that it has been stretched too far. We illustrate how, paradoxically, that the contractarian method is too broad-brushed to yield the detailed incidents of fiduciary liability and its remedies and at the same time it is too fine to yield those incidents which are monolithic and irreducible. Status better explains these incidents. We then show how the rules governing the scope of the fiduciary duty, and then the remedies for breach of it, comport better with our thesis than the contractarian one both in terms of the underlying principles at stake and given the retrenchment in *M&S v BNP Paribas*.

## 2 Fiduciary Law: History

It begins, perhaps, with the sobriquet ‘fiduciary’. Dictionary definitions tend to define ‘fiduciary’ in terms of a trusted person in the extra-legal sense or a trustee in the legal sense.<sup>12</sup> The fiduciary must be loyal to his or her principal and subordinate all other interests, including his or hers accordingly. It was once generally thought that certain categories of relationship were inherently fiduciary. Courts would say things like:

*[L]iability to account would ... arise ... only iff[] the relationship was in the eyes of equity a fiduciary one in the sense that it imposed relevant fiduciary duties on the defendant towards the plaintiffs.*<sup>13</sup>

However, more recent case law has moved away from this position. In *Bristol and West Building Society v Mothew*, Millett LJ endorsed Dr Finn’s views that a fiduciary is not subject to fiduciary obligations because they are fiduciary; the label ‘fiduciary’ is attracted because some – but not all – of the obligations they are subject to are fiduciary obligations.<sup>14</sup> Furthermore, the scope of those fiduciary obligations is circumscribed to only those interests the fiduciary has undertaken to protect.

As well as the opportunity for the reduction in scope, the law moved on such that fiduciary duties could arise in situations where the relationship was not traditionally a fiduciary one. The well-known discussion in the Australian case of *Hospital Products Ltd v United States Surgical Corporation* identified various (although non-conclusive) factors that could result in a duty of loyalty, such as a relation of confidence, inequality of bargaining power, absence of arm’s-length contracting.<sup>15</sup> The English cases have further suggested an undertaking of assumption of responsibility and trust of property, affairs, transactions or interests.<sup>16</sup>

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<sup>10</sup> E.g. *Lumley v Wagner* (1852) 1 De GM & G 604, 42 ER 687.

<sup>11</sup> *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2015] 3 WLR 1843.

<sup>12</sup> E.g. *Oxford English Dictionary*, A5; A1b.

<sup>13</sup> *English v Dedham Vale Properties Ltd* [1978] 1 WLR 93 (Ch) 110.

<sup>14</sup> *Bristol and West Building Society v Mothew* [1998] Ch 1 (CA) 18.

<sup>15</sup> *Hospital Products* (n 7) 69ff.

<sup>16</sup> *Peskin v Anderson* [2001] BCC 874 (CA) [34] quoted in *Sinclair Investment Holdings SA v Versailles Trade Finance Ltd* [2007] EWHC 915 (Ch), [2007] 2 All ER (Comm) 993 [79].

### 3 Contract Law: History

It is natural that scholars would advance the contractarian thesis as a result. It is important to examine the changes in the law of contract that facilitated this. One phenomenon of the late twentieth century was the tendency to assimilate various disparate doctrines of the law of contract as mere expressions of the intentions of the parties, objectively ascertained, for which the primary applicable legal principle is merely construction. The judicial champion of this approach has been Lord Hoffmann, and the touchstone case *Investors Compensation Scheme Ltd v West Bromwich Building Society (ICS)*.<sup>17</sup>

The ‘Hoffmann School’<sup>18</sup> further takes into account the context around the agreement, namely: what a reasonable person would know; and the ‘matrix of fact’, i.e. the background to the agreement. Crucially, the process is coloured by the fact that it is an ‘objective’ process, meaning that the agreement is not what the parties subjectively intend it to be; instead it is what a reasonable person standing in the shoes of the parties and bearing their general characteristics (e.g. expertise) would take it to be. *ICS* merely restated the principles of *construction* to this end and did not take in other doctrines. However, such an emphatic restatement of this doctrine of construction was essential in facilitating the assimilation of other doctrines.

The first doctrine to go was causation. In *South Australia Asset Management Corporation v York Montague Ltd (SAAMCO)*, Lord Hoffmann held that before asking the more quotidian ‘but for’ questions of causation, one had to ask what precisely the defendant has assumed responsibility for.<sup>19</sup> This approach was applied to remoteness of loss in *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)*.<sup>20</sup> The high-water mark came with *A-G of Belize v Belize Telecom Ltd*,<sup>21</sup> holding that the implication of the terms of a contract were just a form of construction, and the conventional restrictive officious bystander and business efficacy tests<sup>22</sup> were just expressions of just that.

This picture is thus one of continued expansion of the number of private law doctrines that can be explained by, or at least brought within, the umbrella of merely determining the intentions of the parties with the same underlying methods, notwithstanding that they occupied hitherto separate legal compartments.

### 4 The Contractarian Thesis

This approach has a natural home in the law of contract because contractual liability is consensual liability, so the incidents of it can, at a high level of generality, be reduced to matters derivative of the parties’ intentions. The contractarian thesis simply takes this further. The bare essence of the thesis is that fiduciary duties do not require a separate legal compartment found in equity, but can simply be bundled with the other doctrines under

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<sup>17</sup> *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (HL).

<sup>18</sup> As T T Arvind, ‘Contract, Transactions and Equity’ in LA Di Matteo and others (eds), *Commercial Contract Law: Transatlantic Perspectives* (CUP 2013) 158 puts it.

<sup>19</sup> *South Australia Asset Management Corporation v York Montague Ltd (SAAMCO)* [1997] AC 191 (HL). The answer was, for a land valuer, only for the consequences of the incorrect valuation, not for all of the consequences of taking the decision, i.e. market falls beyond what should have been protected by the security that was not obtained.

<sup>20</sup> *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)* [2008] UKHL 48, [2009] 1 AC 61.

<sup>21</sup> *A-G of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 1 WLR 1988.

<sup>22</sup> See section 6.2 below, from page 7.

‘contractual consent’. You have a relationship and obligations that need to be created in order to meet the commercial necessities of the relevant engagement.

The contractarian thesis has an attractive appeal at first blush: particularly, in the commercial sphere, ‘the contractarian character of the trust is transparent.’<sup>23</sup> Moreover, just like contractual liability, fiduciary liability is voluntarily undertaken; this is something that is accepted in both Australia<sup>24</sup> and in England.<sup>25</sup> A fiduciary has power, trust and confidence reposed in her; there are no constructive fiduciaries.<sup>26</sup> Then, since the principal is vulnerable to the fiduciary, the duty of loyalty is the response, implied and constructed of the need to impose the swingeing remedy of disgorgement. This is necessary, as Edelman puts it, to meet the “reasonable” or “legitimate” expectations of a principal.<sup>27</sup> The fiduciary obligation can easily be expressed in such terms (substituting, if necessary, ‘fiduciary’ for ‘trustee’ and ‘the opportunities within the scope of the fiduciary duty’ for ‘trust assets’):

*[The contract] says to the trustee, “You are left with the entire universe of investment possibilities as outlets for your entrepreneurial impulses; you are required only to stay away from the trust assets when you seek your own fortune.”*<sup>28</sup>

Langbein, however, acknowledges the model’s weak point: its property remedies, particularly the effect of granting priority in insolvency to the principal. For Langbein, one simply acknowledges that the trust is an obligation-property hybrid; to acknowledge its contractarian elements one does not have to disregard its property elements.

The property aspect certainly provides the easiest counterargument, as will be seen in section 6.3.<sup>29</sup> But it proves to be a crack in the armour that allows it to be twisted open further. The proprietary remedy imports a number of complex rules not based on the intentions of the parties, and it necessarily brings obligations to other parties who are not privy to the contract. It says ‘there is more than contract’; then the question simply becomes ‘how much more?’

There is a further issue. In order for the contractarian thesis to be sustained, Lord Hoffmann’s must too. It is the case, however, that there has been some retrenchment in Lord Hoffmann’s expansionary process since he retired, not to mention some continuing difficulties in characterising some contractual obligations as ones referable to the objectively determined obligations of the parties.

## 5 The Philosophical Question

Arvind, considering the slightly broader matter of whether there is a fundamental philosophical difference between the common law in equity reduces the issue to this: not all of the obligations in a commercial transaction can be situated in the compartments of contract.<sup>30</sup> This is easily converted into a question that we will answer: can these equitable fiduciary duties be placed in a contractual compartment? For Arvind the answer is ‘no’, and the reasons is that the fundamental tenets of the law of contract are still not flexible enough to

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<sup>23</sup> Langbein (n 4) 631.

<sup>24</sup> *Hospital Products* (n 7) 97.

<sup>25</sup> It is implicit in *Williams v Central Bank of Nigeria* [2014] UKSC 10, [2014] AC 1189 [9] and assumed in *Novoship (UK) Ltd v Mikhaylyuk* [2014] EWCA Civ 908, [2015] QB 499 [66].

<sup>26</sup> Lionel Smith, ‘Constructive Fiduciaries?’ in Peter Birks (ed), *Privacy and Loyalty* (Clarendon 1997).

<sup>27</sup> Edelman, ‘When do Fiduciary Duties Arise?’ (n 3) 318.

<sup>28</sup> Langbein (n 4) 657.

<sup>29</sup> Below, from page 9.

<sup>30</sup> Arvind (n 18).

accommodate equitable obligations such as fiduciary duties and equitable institutions such as implied trusts.<sup>31</sup> His conclusion is that the equitable obligations take cognisance of broader social concepts than the market rationality of the law of contract. Conaglen makes a related point that classifying fiduciary obligation as incidents of the much more general law of contract risks overlooking the significance of their function.<sup>32</sup> We particularly add that ‘status’ intrudes into these matters as an ingredient known to equity but unknown to the common law in respect of all these points.

There are two threads to the argument that the specifics of fiduciary law cannot be put in the compartments of contract – or, one might suppose, draw entirely from the tools and doctrines of contract even if one does not accept fiduciary law can fully be reduced to contract. The first thread is to show that the tools and doctrines of contract do not work well with fiduciary duties. The second is to show that, conversely, negative implication does. We begin with the first.

## 6 Problems with the Contractarian Approach

The arguments of the first thread, put shortly, are that: (i) positive implication is too narrow in scope and restricted to less intrusive matters; (ii) implication is in part too broad-brush and cannot generate sufficient detail to replicate the features of fiduciary duties and remedies; (iii) paradoxically, implication is in part too fine-grained and should result in the implication of some, but not other equitable duties; and (iv) elements of status intrude. As regards the fine-grained point, it will be seen that fiduciary duties and remedies are indivisible monoliths; in more colourful language one might say that common law implication cannot split these equitable atoms.

### 6.1 Narrowness of Scope

Consider the scope of what may be implied first. Atiyah noted the tendency of the common law judges to characterise obligations they were merely imposing upon the parties in terms of their intentions, most notably as implied terms.<sup>33</sup> This permitted the courts, formally, to hold they were respecting the ideology of freedom of contract while they were in fact effacing it. The kind of characterisation was used to great effect to deal with the effect of exclusion clauses before the enactment of the Unfair Contract Terms Act 1977 gave the courts a legitimate method to strike them down openly.<sup>34</sup> The justification for the subterfuge was of course that a stronger party imposing his will on a weaker party made a mockery of the idea that there was freedom of contract in the first place.<sup>35</sup>

Similarly, in fiduciary law there is a stronger party, the fiduciary, and a weaker party, the principal. Similarly, there is justification for favouring the weaker party. But that is where the similarity ends. The rebalancing caused by the existence of the no-profit, no-conflict and good faith rules goes far beyond the sidelining of exclusion clauses – and certainty beyond the details of the doctrine which took little more in than this: it tended to go far harder on

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<sup>31</sup> *ibid* 176.

<sup>32</sup> Matthew Conaglen, ‘Fiduciary Duties and Voluntary Undertakings’ (2013) 7 J Eq 105.

<sup>33</sup> Patrick Atiyah, *An Introduction to the Law of Contract* (Clarendon 1995) 8–9.

<sup>34</sup> See *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] QB 284 (CA) 297ff for a colourful history.

<sup>35</sup> This justification, of course, ended post-UCTA: *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 (HL) 853.

excluding liability for negligence<sup>36</sup> and also harder where the clause purported to fully exempt the contract-breaker rather than merely reduce liability.<sup>37</sup> It is of far greater ambit than restoring what the parties, supposing they were of equal bargaining power, would have agreed. It is actively going further than this mere tidying-up exercise; it acknowledges an even more serious imbalance and imposed even more dramatic changes to the obligations between the parties in response. Put bluntly, it is easier to destroy than create.

While, as will be seen, fiduciary obligations are shaped by the parties' intentions, it is mainly in terms of reducing their scope, not determining them in the first place.<sup>38</sup> Fiduciary duties hardly seem what the parties would have agreed had they been of equal bargaining power. Their basis is quite different.

## **6.2 About-Turn for Terms Implied in Fact: *Marks & Spencer v BNP Paribas***

The scope of the interpretation process has been further reduced, specifically in the form of the doctrine of the implication of terms, which has been tightly circumscribed. Traditionally there have been two tests before terms can be implied in fact (i.e. where the term is referable to what the parties would have agreed had they thought about it). They are: (i) the 'officious bystander' test; and (ii) the 'business efficacy' test. The first involves the eponymous 'officious bystander' asking if it is necessary to make an express provision for something only to be cut off with a curt 'of course' because it goes without saying.<sup>39</sup> The second restricts the implication of terms in fact where they are necessary for business efficacy and the contract simply would not work without them. The leading case is *The Moorcock* where a ship was contracted to be docked; the implied term was of course that the dock be deep enough for the ship.<sup>40</sup>

Lord Hoffmann's judgment in *A-G of Belize v Belize Telecom Ltd* characterised these tests as mere instances of the more general process of interpretation.<sup>41</sup> On what we call the 'narrow interpretation' of *Belize Telecom* this is clearly true. On this interpretation *Belize Telecom* did not make the terms in fact easier to imply; it merely explained these tests as rules of thumb operating to delineate a more general principle. However, perhaps buoyed by *dicta* holding that it is not necessary for the term implied to be the only possible answer to the question put to the officious bystander, namely:

*In such circumstances, the fact that the actual parties might have said to the officious bystander "Could you please explain that again?" does not matter.*<sup>42</sup>

... many have taken *Belize Telecom* to have indeed expanded the ambit of the process of implication in fact (the 'wide interpretation').<sup>43</sup>

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<sup>36</sup> *Canada Steamship Lines Ltd v The King* [1952] AC 192 (PC) 208; *White v John Warwick & Co Ltd* [1953] 1 WLR 1285 (CA).

<sup>37</sup> *Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd* [1983] 1 WLR 964 (HL); *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 AC 803 (HL).

<sup>38</sup> Section 7, below, from page 13.

<sup>39</sup> *Shirlaw v Southern Foundries (1926), Ltd* [1939] 2 KB 206 (CA) 227.

<sup>40</sup> *The Moorcock* (1889) 14 PD 64 (CA) 68.

<sup>41</sup> *Belize Telecom* (n 21).

<sup>42</sup> *ibid* [25].

<sup>43</sup> Listed in *M&S v BNP* (n 11) [24]: Chris Peters, 'The Implication of Terms in Fact' [2009] CLJ 513; Paul S Davies, 'Recent Developments in the Law of Implied Terms' [2010] LMCLQ 140; John McCaughran, 'Implied

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Signs of retrenchment (if one takes the latter position) are clear in the recent case of *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd*.<sup>44</sup> Lord Neuberger, with whom Lords Sumption, Hodge and Clarke agreed, wished to emphasise that there were differences of approach and principle within the umbrella of doctrine of construction. Particularly, there was a division between two things: the interpretation of words already used in a contract and implying wholly new words. He approved Bingham MR's *dictum* that:

*The implication of contract terms involves a different and altogether more ambitious undertaking: the interpolation of terms to deal with matters for which, ex hypothesi, the parties themselves have made no provision. It is because the implication of terms is so potentially intrusive that the law imposes strict constraints on the exercise of this extraordinary power.*<sup>45</sup>

That Lord Hoffmann's judgment in *Belize Telecom* had been taken to expand the jurisdiction of the courts to imply terms was 'wrong in law'; *Belize Telecom* should not be taken as 'authoritative guidance on the law of implied terms'.<sup>46</sup> Lord Hodge delivered a judgment in which he was not convinced there was any sharp difference in method, only that aims of interpretation and implication were different. Nonetheless, he agreed that more stringent rules applied to the process of implication.<sup>47</sup> In any event, the result was the same: there is a requirement of 'business necessity' embedded in the process of construction; a term will not be implied unless it is necessary for the contract to function.<sup>48</sup> Despite the judges' reluctance to put the matter as high as 'Lord Hoffmann was wrong', the judgment is easily taken to mean just that. Given that business necessity is not necessarily referable to the parties' intentions, we suggest that is the case. The waters have receded and *Belize Telecom* has merely left a higher mark on the dock wall.

Edelman relies heavily on Lord Hoffmann's judgment in *Belize Telecom* that the process of implication is indeed closely tied to interpretation and not limited to the 'officious bystander' or 'business efficacy' tests, i.e. the wide interpretation of *Belize Telecom*.<sup>49</sup> Without that, the interpretation process is constrained to the more restrictive officious bystander and business efficacy tests; Edelman's thesis requires an expansion, not a contraction, of the Hoffmann doctrine. Yet we have a contraction of it.

Whether one accepts that *Belize Telecom* is effectively overruled or not, it is undeniable that the judgments in *BNP Paribas* do much to constrain the role of interpretation. They note that necessity for business efficacy is a value judgement<sup>50</sup> and that the process of interpretation has limits accordingly<sup>51</sup> as well as that there are different modes of application (specifically 'pure' interpretation and implication of terms), which have different constraints accordingly. The acknowledgement of the place of value judgements in the process of implication says what is implied, and how and why, varies depending on what those values are. If the doctrine

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Terms: The Journey of the Man on the Clapham Omnibus' [2011] CLJ 607; and JW Carter and Wayne Courtney, '*Belize Telecom*: a reply to Professor McLauchlan' [2015] LMCLQ 245.

<sup>44</sup> *ibid*.

<sup>45</sup> *ibid* [29] quoting *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd* [1995] EMLR 472 (CA) 481.

<sup>46</sup> *M&S v BNP* (n 11) [31].

<sup>47</sup> *ibid* [69].

<sup>48</sup> *ibid* [21], [23].

<sup>49</sup> Edelman, 'When do Fiduciary Duties Arise?' (n 3).

<sup>50</sup> *M&S v BNP* (n 11) [21].

<sup>51</sup> *ibid* [29], [31].

is applied brings wholly different values – as fiduciary law does – there will be utterly different matters and justifications in that doctrine too.

*BNP Paribas* is therefore judicial recognition that the trend towards the assimilation of various disparate doctrines of the law of contract as expressions of the process of interpretation has gone too far. It is the retrenchment of one legal doctrine back into a separate legal compartment. It is hard to see an English court deciding to go the other way in respect of the far more ambitious matter of assimilating fiduciary law into contract.

### **6.3 Paradoxically Too Broad and Too Narrow; The Intrusion of Status**

The point that implication is, paradoxically, simultaneously too broad-brush and too narrow is now developed. Consider first where it is too broad-brush. As noted, the Supreme Court in *BNP Paribas* also declared that what is necessary for business efficacy is a value judgement. One reasonable party might have different ideas as to what is necessary for a fiduciary relationship to work than another. It seems unlikely that the officious bystander, even on Lord Hoffmann's allegedly expansive approach to implication, would be able to come up with a term that goes without saying even after having had the issues fully explained to her.

It is easy to find concrete examples that fall within these abstract propositions. Take the well-known case of *Boardman v Phipps*. The defaulting fiduciary Boardman made a handsome profit both for himself and the trust but because it was improperly authorised, he was ordered to disgorge his profit subject only to an allowance, albeit a 'liberal' one.<sup>52</sup> To similar effect is *Regal (Hastings) Ltd v Gulliver*, where the company could not have made the profit without the directors' breach of fiduciary duty.<sup>53</sup> And to complete the trio of well-known cases, in *Keech v Sandford* the trustee of the lease of a market renewed the lease for himself after the landlord refused to renew it for the beneficiary of the trust. Lord King notoriously commented that 'This may seem hard, that the trustee is the only person of all mankind who might not have the lease ... for it is very obvious what would be the consequence of letting trustees ... refuse to renew to cestui que use.'<sup>54</sup>

This is clearly a value judgement. But it is not clearly the ones reasonable businesspeople would come to. They might quite easily agree instead a 'best interests' rule<sup>55</sup> excusing these fiduciaries because, notwithstanding they made unauthorised profits, they also acted in the best interests of their principals. The conclusion is clear: the interpretation process simply is not precise and specific enough to generate what are well-settled and clearly understood rules of law.

This matter can be taken further. In *Energy Renewals Ltd v Borg*, the parties intended to restrain trade. While this clause was ineffective, the duty of loyalty stretched further to hold the fiduciary liable for a conflict of interests in respect of diverting opportunities.<sup>56</sup> Two matters not referential to intention came in: first, that the law struck down the clause as contrary to public policy; and second, that the fiduciary duty itself arose contrary to the parties' intentions.

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<sup>52</sup> *Boardman v Phipps* [1967] AC 46 (HL).

<sup>53</sup> *Regal (Hastings) Ltd v Gulliver* [1967] AC 134, [1942] 1 All ER 378 (HL).

<sup>54</sup> *Keech v Sandford* (1726) Sel Cas Ch 61, 62; 25 ER 223, 223.

<sup>55</sup> John H Langbein, 'Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?' (2005) 114 Yale LJ 929.

<sup>56</sup> *Energy Renewals Ltd v Borg* [2014] EWHC 2166 (Ch), [2014] IRLR 713.

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Now it will be shown that contractual implication is too fine and specific. One key aspect of fiduciary duties – and indeed of the proprietary remedy for breach – is that while there are bundles of different rights, but, crucially, these bundles are indivisible. In the case of the fiduciary obligation, there is a monolithic ‘irreducible core’ of fiduciary duties that cannot be excluded from a fiduciary relationship.<sup>57</sup> In the case of the proprietary remedy, the bundle of rights in this ‘property’ remedy include: priority in insolvency; increases in the value of the constructive trust property; the right to trace; and so on. Despite academic arguments that property is ‘disagglomerating’,<sup>58</sup> the proprietary remedy simply has not. It remains indivisible. Yet, if accepted, the positive implication method would contradict this outcome.

There would be in fact two contradictions, concerning duties and remedies. The first is that fiduciary duties can be imposed in opposition to the express terms of a contract. This is simply impossible ordinarily; express terms trump implied ones in a contract.<sup>59</sup> This can be demonstrated by considering the fiduciary requirement of disclosure.<sup>60</sup> Consider an engagement where the fiduciary is entitled to take fees or commissions on management activities. For these not to be caught by the no-profit rule, there must be fully-informed consent to it on the part of the principal. So while at common law it is perfectly possible to stipulate for ‘a reasonable commission’ for subcontracting work out, the precise *details* of that commission must be disclosed in order to avoid liability in equity. The language used in the cases to describe what amounts to full information is strong, for instance: ‘full and frank disclosure of all material facts’.<sup>61</sup> *Lewin on Trusts* summaries the position by stating that the principal ‘must be honestly acquainted with all the material circumstances of the case’.<sup>62</sup> It seems perfectly clear that the ‘implied’ term of non-disclosure could not be ousted by an express term authorising undisclosed fees.

It is possible to tighten up the hypothetical in order to further bring in the point about the irreducible core of fiduciary duties. Consider a contract where there is an express term permitting the taking of such profits without disclosure. There are two possible outcomes. Firstly, the reduction in the duties of the ‘fiduciary’ are such that fiduciary status is not attained at all. Indeed, in *Chan v Zacharia*, Deane J suggested that ‘[i]t is conceivable that the effect of the provisions of a particular partnership agreement ... could be that any fiduciary relationship between the partners is excluded.’<sup>63</sup> Secondly and alternatively, the courts would still find that there is a fiduciary relationship, and accordingly disclosure would be required, contrary to the express term. This must follow from the fact the fiduciary obligation has an irreducible, indivisible core; a Canadian judge, Moore J, has stated that ‘[t]he fiduciary duty transcends these terms and it is abhorrent for contractual terms to abrogate that duty’,<sup>64</sup> i.e. once the duty is owed, one cannot derogate from it even if it is possible to confine it in other

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<sup>57</sup> *Armitage v Nurse* [1998] Ch 241 (CA) 253.

<sup>58</sup> Charles Donahue Jr, ‘The Future of the Concept of Property Predicted from its Past’ in J Roland Pennock and John W Chapman (eds), *Nomos XXII: Property* (New York University Press 1980); Thomas C Grey, ‘The Disintegration of Property’ in J Roland Pennock and John W Chapman (eds), *Nomos XXII: Property* (New York University Press 1980).

<sup>59</sup> E.g. *M&S v BNP* (n 11) [18].

<sup>60</sup> It is not a free-standing duty: *Item Software (UK) Ltd v Fassihi* [2004] EWCA Civ 1244, [2004] BCC 994.

<sup>61</sup> *New Zealand Netherlands Society ‘Oranje’ Inc v Kuys* [1973] 1 WLR 1126 (PC) 1227. See also *Re Pauling’s Settlement Trusts* [1962] 1 WLR 86 (Ch) 107; *Boardman v Phipps* [1964] 1 WLR 993 (Ch) 1011ff aff’d *Boardman v Phipps* (n 52).

<sup>62</sup> Lynton Tucker, Nicholas Le Poidevin and James Brightwell, *Lewin on Trusts* (19<sup>th</sup> edn, Sweet & Maxwell 2015) para 20–140ff.

<sup>63</sup> *Chan v Zacharia* (1984) 154 CLR 178 (High Court of Australia) 196.

<sup>64</sup> *Penner v Yorkton Continental Securities Inc* [1996] AWLD 456 (Alberta Court of Queen’s Bench) [90].

ways.<sup>65</sup> But if this fiduciary obligation were positively implied, it would trump the express term. The only conclusion from the second outcome is that the process of ascertaining fiduciary status is different to positive implication.

The well-known case of *Barclays Bank Ltd v Quistclose Investments Ltd*<sup>66</sup> illustrates the second contradiction, that a proprietary remedy is imposed contrary to the express terms of agreement. A brief reminder of the facts is necessary. Rolls Razor were in serious financial difficulties and had secured a loan from Quistclose in order to pay a promised dividend. The monies were provided on the basis that they would be used to do so, or returned otherwise. A month or so after the loan was made and the dividend not having been paid, Rolls Razor went into liquidation and Quistclose sought return of the funds in priority to Barclays who has a right of set-off. They duly succeeded because a constructive trust has arisen over them which Barclays had notice of.

The underlying commercial issue seems to be that there was insufficient time to arrange the necessary multi-partite agreements whereby Barclays and Rolls' other creditors would have ceded priority to Quistclose in respect of that one specific loan.<sup>67</sup> Clearly it would have been in their interests to agree – they would have lost nothing and would have gained the possibility of Rolls surviving longer and thus paying back more of their debts. But at least contractual agreement would have been required.

Applying the traditional tests for implication it seems unlikely such a trust would be implied. If the officious bystander were to suggest provisions for insolvency and a trust she would not likely be cut off with 'of course' but by 'what precise terms and arrangements do you mean?' That trust law demands there be a separate account segregating the loan would be required does not, as a matter of fact, go without saying. The loan would still have 'business efficacy' in the sense demanded by *The Moorcock*.<sup>68</sup> The loss would have lay where it fell, but as a matter of business process the loan would have worked as designed. Leaving the loss where it falls is a perfectly ordinary business proposition – particularly when the parties act in haste.

Supposing the veracity of the wide interpretation of *Belize Telecom*, there may well have enough background and contextual material to imply such a trust. Just as in *The Achilles* everyone knew the usual arrangements. As a matter of commercial reality and accepted practice, a priority arrangement went without saying. The real difficulty, however, is that the third party – Barclays – was not privy to the arrangements. It is something to bind a third party to property rights, but quite something else to bind a third party who would have had a right of veto over such creditors' priority arrangements, no matter how ill-advised that would be. All that merely amplifies what has gone before The effect of the *Quistclose* trust, and indeed the constructive trust – the vehicle that accommodates the remedy of account of profits – is to create a right close to ownership, which takes the trust property outside of the insolvency regime. This extraordinary remedy attracts what is in effect regulation, both statutory and judge-made. As a consequence, the law is too complex to be implied and includes many elements of status. The latter is probably necessary because of the presence of affected third parties where there is little else to go on and certainly nothing like a contract.

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<sup>65</sup> Section 6.3 below, from page 9.

<sup>66</sup> *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567 (HL).

<sup>67</sup> Arvind (n 18) 151ff.

<sup>68</sup> *The Moorcock* (n 40).

## Problems with the Contractarian Approach

Consider that very issue. The starting point is that when a trust is created, one creates more than mere priority in insolvency. Unlike an inter-creditor agreement, the trust will bind an indeterminate number of people because it is close to a right of property. It will also give access to increases in value of the trust or constructive trust property and the beneficiaries will gain the right to trace into substitutes. Perhaps most importantly of all, the defence to claim for any recipient is if he is a *bona fide* purchaser for value. As noted, the nature of the constructive trust is to indivisibly bundle all these elements together. One cannot have a right of priority without an access to increases in value. One cannot have a right to trace without a right of priority. Accordingly, a number of default rules must spring up to regulate this monolith.

Moreover, it is the breadth of these matters that necessarily attract default rules of law means they cannot be implied positively. Simply put, regulatory law – even if judge-made – is too detailed. It is convenient to start with statutory regulation. While the general case is that even a single party is perfectly entitled to create a trust and no formalities are required at all (save in the case of land).<sup>69</sup> The land exception reflects the fact that land is a unique form of property and the significance of land transactions means that regulatory protection is required.

The next statutory provision is the Law of Property Act 1925, s 53(1)(c) requiring that *transfers* of equitable interests (including personal property) must be made in writing notwithstanding that nothing in s 53 or elsewhere precludes the *creation* of equitable interests in personal property. The reason is of course that equitable interests can be hard to discover and the trustees need to know who are the true beneficiaries of the trust.<sup>70</sup> With an expressly created trust there is the safeguard of requiring constitution of the trust by transfer of the property (or, in the case of self-declaration, the settlor-trustee will be fully apprised of the circumstances). While there are justifications for allowing an express trust to arise relatively informally, transfer is always a more deliberate process. The justifications for creation do not apply to transfer and there is the need for sterner regulation accordingly. What is seen here is the beginning of web of regulations, which primarily take cognisance of the status of the relevant parties.

The judge-made rules are those of overreaching, the *bona fide* purchase defence and tracing. Once property is subject to a trust, that property interest can be transferred into substitute property. Absent a breach of trust, the process of overreaching means a purchaser of trust property in an authorised transaction will take free of the trust interest. If the transaction is unauthorised, the purchaser will only take free if not sufficiently aware of the wrongdoing and has given value. Most remarkably of all, the beneficiary of the trust can elect to trace into the proceeds of the transaction rather than follow the property into the hands of the recipient.

The appeal to status continues even more strongly when one considers the tracing rules. If money is mixed in a bank account with non-trust money and there is insufficient money to meet the proprietary tracing claim, where the mixer is innocent the mixture is shared rateably or according to the rule in *Clayton's Case*.<sup>71</sup> Where the recipient is a wrongdoer,

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<sup>69</sup> Law of Property Act 1925, s 53(1)(b).

<sup>70</sup> *Vandervell v Inland Revenue Commissioners* [1967] 2 AC 291 (HL) 311.

<sup>71</sup> *Clayton's Case* (1816) 1 Mer 572, 35 ER 781; cf *Barlow Clowes International Ltd v Vaughan* [1992] 4 All ER 22 (CA).

presumptions are applied against him such that the beneficiary has a greater claim over what is left.<sup>72</sup>

The complexity of this web of rules is far outwith the powers of implication even on the expansive view of *Belize Telecom*. But that is not all. It betrays an element of status present in the *remedies* for breach of fiduciary duty far in excess of that in the simple rules – no-profit, no-conflict, acting in good faith – within that umbrella. Reductionist theses that all of this can be put down to *positive* implication have these insurmountable twin problems of the complexity and the reversion to status-based rules at the remedy stage.

## 7 Justifying the Negative Implication Thesis

That, in our submission, spells out the trouble with the contractarian thesis. It falls now to justify our thesis that the process for determining the scope of the fiduciary obligation is *raised* through rules of law and merely *reduced* by matters of the parties' intentions. Broadly speaking the justification is that fiduciary law is gap-filling and expands to fill the space left by the absence of express provisions

The starting point is to identify the purpose of fiduciary law. We propose that it is to regulate the relationship between the weaker and stronger parties, where the latter takes responsibility for the former's interests and, in effect, put them on a more equal footing. This is important because the law seeks to fill the gap on how the undertaking should be discharged where the weaker party is unable to understand the risk and/or determine how it should be managed.

On the other hand, Conaglen has advanced that the function of the fiduciary duty is protect proper performance of the non-fiduciary duties i.e. reducing the risk of self-interest.<sup>73</sup> Therefore, he is concerned with the duty's function but not when that function is needed. As such his work sits uneasily between the positive and negative theses where he says in one instance the duties need to be moulded to, or excluded by, the agreement (negative), whilst in others he says the duty is owed where there is a reasonably sensible possibility of a conflict or there needs to be an investigation as to whether the undertaking attracted the need to abide by fiduciary duties in non-traditional relations (positive). As such it is difficult to reconcile sole focus on the function of the duty if one cannot determine clearly when that function is required. This, sometimes, leads to uncertainties in his argument as to why Edelman's thesis should not be accepted. For example, Conaglen acknowledges that an attorney owes no duty to their client outside of their retainer when buying a property since there are no non-fiduciary duties that need protection from improper performance, but fails to explain when the new purchase does not consist of fiduciary duties. Likewise, he submits that Edelman's thesis should be refuted as it might generate the risk of looking for an undertaking to abide by fiduciary duties in traditional fiduciary relations, moments after acknowledging that the duties might be excluded in these traditional relations. Surely, if one acknowledges that in all relations characterised as fiduciary may have loyalty excluded in part or in full then one must look to see if there was an undertaking to abide by fiduciary duties. Asserting that an investigation should not take place because it is practical for the court can ignore the nuances of the duty even in those traditional fiduciary relations.<sup>74</sup> Therefore, our thesis is a stronger refutation of the proposition that fiduciary duties are positively implied since focusing only on the function of the duty does not illuminate when it is required.

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<sup>72</sup> *Re Hallett's Estate* (1880) 13 Ch D 696 (CA); *Re Oatway* [1903] 2 Ch 356 (Ch).

<sup>73</sup> Conaglen (n 32).

<sup>74</sup> *ibid* 126.

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Conversely, we take the view that the purpose of fiduciary law is to regulate the common relationship of trust in an undertaking to another's interests because there is a risk of self-interest. That contrary agreement must be on equal terms to satisfy the prophylactic concern of the fiduciary's stronger position by ensuring the principal is fully informed as to the risk they are taking in respect of their own interests. As Conaglen recognises, 'autonomy can outweigh the protective function'<sup>75</sup> and this is recognised in case law such as *Knightsbridge Estates Trusts v Byrne* where contractual agreement on equal footing postponed an equitable right;<sup>76</sup> or *Boulting v Association of Cinematography Television & Allied Technicians*, which noted a person entitled to the benefit of loyalty may relax the duty where they are 'content with that position and understands his rights'.<sup>77</sup> The requirement that the parties stand on equal footing reflects the nature of the duty. The duty regulates the common relationship between a weak and strong party. Where they are equal, then the duty ceases to be required. This is the basis on which the courts recognised the parties' intentions and applies them to reduce the duty.

From this, the courts have recognised three categories of equality of footing where agreement may negate the imposition of loyalty. These are: (i) circumscription; (ii) contract first; and (iii) authorisation. The first category, circumscription, is where the duty is circumscribed by the agreement that the principal will decide that the fiduciary is only responsible for particular interests. The second, 'contract first', is where the fiduciary agrees to act for the principal on terms that permit disloyalty in respect of all or certain interests they have taken responsibility for. This is where circumscription does not take the disputed subject matter outside of the scope of the fiduciary duty because it is the purpose of the engagement. Here, contracts are negotiated at arm's length and the principal can freely decide, based on their own interests, capacity and information, what terms to agree to before they grant the fiduciary responsibility for their interest. However, where no such terms exist the duty remains as default to fill the gaps left in the parties' contract. The third category is authorisation. A principal who is fully informed will determine themselves whether to permit disloyalty or to require it. As well as a mere doctrinal demonstration that duties are negated, these three categories also show why it is wrongly perceived certain relationships are traditionally fiduciary in that the duty positively arises in such relationships. Rather, the principal is commonly on an unequal footing, demonstrating a difficulty from departing from the imposition at law, whereas in non-traditional fiduciary relations such as commercial, contract, employment *et al*, it is more common for the relation to be of equal footing or one where the principal is better placed to understand the risk. We can now consider these in turn.

To reflect the purpose of the duty of reducing the risk of self-interest, the burden of proof falls on the one subject to the duty.<sup>78</sup> It is for the fiduciary to prove the imposition of the duty is inconsistent with the agreement because the principal agreed that loyalty would not be required. The principal does not need to show the undertaking attracted fiduciary duties. They only need to show there was an undertaking, and it is for the fiduciary to show it did not attract them.

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<sup>75</sup> *ibid* 118.

<sup>76</sup> *Knightsbridge Estates Trust Ltd v Byrne* [1939] Ch 441 (CA) *aff'd* *Knightsbridge Estates Trust Ltd v Byrne* [1940] AC 613 (HL).

<sup>77</sup> *Boulting v Association of Cinematograph, Television and Allied Technicians* [1963] 2 QB 606 (CA) 637.

<sup>78</sup> *Ross River Ltd v Waveley Commercial Ltd* [2013] EWCA Civ 910 [64]; *The Northampton Regional Livestock Centre Company Ltd v Cowling* [2014] EWHC 30 (QB) [188] *Rossetti Marketing Ltd v Diamond Sofa Co Ltd* [2012] EWCA Civ 1021 [21].

## 7.1 Circumscribing the Duty of Loyalty

The duty of loyalty, as a gap-filling tool, only reaches to those interests the individual assumes responsibility for. The interests the fiduciary does not take responsibility for the duty has no operation. Within the scope of that agreement loyalty is owed because the undertaking to another's interests requires the supervision of equity.<sup>79</sup> Therefore, as a general presumption, directors have unlimited fiduciary capacity because they take responsibility for all interests of the company.<sup>80</sup> The duty of loyalty fills the gaps left by the agreement that the obligation undertaken to pursue all interests of the company will be conducted in accordance with the duty. Thus, when a director pursues a new opportunity that the company has not previously been involved with the pursuit would be regulated by the duty of loyalty because the relationship is not limited by an agreement to the contrary that they are not responsible for it and the pursuit is regulated by the duty of loyalty. A good example is Nokia, a paper manufacturer, which moved into mobile phones where it once dominated the market. If a director had a sideline in a rival telephone company, clearly that is a conflict of interests since it possible for a company to pursue alternative opportunities and the director takes responsibility for this.

Likewise, where a solicitor unilaterally takes responsibility for their client's interests then the undertaking is regulated by loyalty to fill the gap left by any, or in the absence of, contract.<sup>81</sup> The parties themselves have not determined that the individual will have no responsibility for those particular interests, so the duty of loyalty operates to regulate the relationship to minimise the risk of the undertaking not been conducted for the interests of the principal. Otherwise a fiduciary would be permitted to determine what interests to be loyal to,<sup>82</sup> undermining the purpose of the duty and negation thesis that autonomy only displaces the prophylactic function where there the principal has freely determined to take and understand the risk. Conversely, where stipulated provisions fail, such as restraint of trade clauses, the fiduciary duty can fill the gap.<sup>83</sup>

That the duty expands this way can only follow from a rejection of the positive implication method. Implication in fact would look to the 'matrix of facts', which would include the current business objects of the company. It would therefore tend to imply a duty of loyalty circumscribed to those present business objects. Yet, if the duty of loyalty were to be implied on the basis of current business activities, it would ignore any changes.

This is what commentators mean when equity takes a more 'relational' approach than the law of contract.<sup>84</sup> The gap-filling the law of contract exercises in the process of positive implication is parsimonious, where in fiduciary law it is expansive.<sup>85</sup> The anti-opportunistic

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<sup>79</sup> *Ross River v Waveley* (n 78) [51] citing P D Finn, *Fiduciary Obligations* (Law Book Co 1977) and Gerard M D Bean, *Fiduciary Obligations and Joint Ventures: The Collaborative Fiduciary Relationship* (Clarendon 1995) 165–7.

<sup>80</sup> *Re Allied Business & Financial Consultants Ltd* [2009] EWCA Civ 751, [2009] BCC 822; David Gibbs, 'The Absolute Limit of Directors' Fiduciary Liability for Conflicts of Interest: the Director's Perspective' (2015) 36 *Co Law* 231.

<sup>81</sup> *Bolkiah v KPMG* [1999] 2 AC 222 (HL); *Marks & Spencer Group plc v Freshfields Bruckhaus Deringer* [2004] EWCA Civ 741, [2005] PNLR 4.

<sup>82</sup> Not permitted: *Cook v Deeks* [1916] 1 AC 554 (PC).

<sup>83</sup> *Energy Renewals Ltd v Borg* (n 56).

<sup>84</sup> Arvind (n 18); Scott FitzGibbon, 'Fiduciary Relationships Are Not Contracts' (1999) 82 *Marq L Rev* 303.

<sup>85</sup> FitzGibbon (n 84) 319–320.

purpose of fiduciary law demands it.<sup>86</sup> But the mechanisms of contract law – particularly following their circumscription in *Marks & Spencer v BNP Paribas*<sup>87</sup> – simply do not lend themselves to responding to long-term changes in the circumstances in which the long-term relationship of fiduciary and principal sits.

This demonstrates that it is unnecessary to start with classifying the initial relationship as fiduciary because the duty operates to fill the gaps. Thus the numerous sources that refer to common fiduciary relations is somewhat pointless since any relationship where there is an undertaking to another's interests can be fiduciary and to determine that it is, is only based on specific interests rather than a characteristic of the whole. However, interests circumscribed outside of the fiduciary's responsibility negates the application of the duty of loyalty. Even in the most expansive fiduciary relations, such as director-company, is this true.<sup>88</sup> Cases such as *Kuys*, *University of Nottingham v Fishel*, and *Ranson v Customer Systems plc* all show that classifying the relationship as fiduciary had no bearing on the outcome since the fiduciary ultimately had no responsibility to the interest in question.<sup>89</sup> Failing to appreciate this can sometimes lead to obscure reasoning or incorrect conclusions. For example, in *Bhullar v Bhullar* the court classified the relationship as fiduciary and based liability on whether the interest of the company was 'worthwhile' rather than an investigation as to whether the director had any responsibility to pursue the interest. The facts evidenced that the company was deadlocked and had agreed not to pursue any new opportunities. This showed that the parties had circumscribed the duty so there was no gap for the duty to fill, as there was no longer an agreement to pursue the interests for the company and no risk of self-interest.<sup>90</sup> This also shows the problem with Conaglen's argument about not investigating traditional fiduciary relationships to abide by fiduciary duties because it is practical for the courts, as it can lead the court to assume the function of the duty was required because of preconceived conception about status of the relationship rather than looking at the particular interest first.

## 7.2 Contract First

Whilst circumscribing the duty means the agreement negates loyalty for those interests outside of the agreement since there is no undertaking to the principal's interests, where there is responsibility, i.e. the matters complained of fall squarely within the undertaking, 'contract first' can nonetheless negate the duty of loyalty. Thus if the terms of the agreement or circumstances of the relationship amount to an equal footing the duty is negated. In this way the duty is dependent on these things.<sup>91</sup> 'Contract first' can be misleading since an individual's responsibility may extend well beyond the initial contractual agreement,<sup>92</sup> or even be significantly reduced.<sup>93</sup> For ease the term 'contract first' will be used as a useful heading.

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<sup>86</sup> Henry E Smith, 'Why Fiduciary Law is Equitable' in Andrew S Gold and Paul B Miller (eds), *Philosophical Foundations of Fiduciary Law* (OUP 2014).

<sup>87</sup> *M&S v BNP* (n 11).

<sup>88</sup> *Framlington Group plc v Anderson* [1995] BCC 611 (Ch); *Plus Group Ltd v Pyke* [2002] EWCA Civ 370, [2003] BCC 332; *Halcyon House Ltd v Baines* [2014] EWHC 2216 (QB).

<sup>89</sup> *Kuys* (n 61); *University of Nottingham v Fishel* [2000] ICR 1462 (QB); *Ranson v Customer Systems plc* [2012] EWCA Civ 841, [2012] IRLR 769.

<sup>90</sup> *Bhullar v Bhullar* [2003] EWCA Civ 424, [2003] BCC 711. Note that the breach was upheld in this case.

<sup>91</sup> *Henderson v Merrett Syndicates Ltd (No 1)* [1995] 2 AC 145 (HL) 214; *Northampton Livestock* (n 78) [180]; *Hilton v Barker Booth & Eastwood* [2005] UKHL 8, [2005] 1 WLR 567 [28]; *Moody v Cox* [1917] 2 Ch 71 (CA) 81.

<sup>92</sup> See, for example, *Ranson* (n 89); *Aas v Benham* [1891] 2 Ch 244 (CA).

<sup>93</sup> *Plus Group v Pyke* (n 88).

The principal may freely decide what terms the undertaking will be performed on and can identify the manner of performance. Where the terms or circumstances demonstrate, expressly or implicitly, freedom to act with self-interest, then the duty is negated as the terms have filled the gap on manner of performance. Thus, traditionally, common fiduciary relations often have no contract first since the principal is vulnerable to the fiduciary, such as instances of widows, orphans, and companies, unable to freely determine how the risk should be placed. In those instances there will rarely be terms the duty can mould to.<sup>94</sup> Conversely, in commercial arrangements, the terms will determine manner of performance themselves because the principal is capable of determining it and understanding the risk. However, in both situations the presumption might be reversed: a commercial party might be vulnerable to another, whilst a company might not be vulnerable to one of its directors, for example.

Whether a contract demonstrates a different intention to a duty of loyalty, it is necessary to ascertain from the terms of the contract and circumstances of the case whether the individual was free to act with self-interest.<sup>95</sup> This can be done by applying normal rules of contractual terms interpretation and implication. Thus we are not implying fiduciary duties *ex contractu*, we are construing and interpreting the express terms, or implying terms, to determine if they permit self-interest, thus negating the duty.

One may attempt to reconcile positive implication of duties in situations not traditionally regarded as fiduciary. For example, in the employer-employee situation, an employer cannot be said to be vulnerable to the employee but in exceptional circumstances the employee will be in a fiduciary position because the employer's interests are entrusted to the employee's care.<sup>96</sup> Yet, if the duty is positively implied based on reasonable expectation of the principal, there is no definitive limits to when the duty may be applied, introducing some considerable uncertainty into undertakings and could override express terms that should otherwise negate the duty, something which the courts are keen to avoid in commercial relations. The negative implication thesis is more certain in its application as it conforms to established contractual rules. Therefore, in the employer-employee scenario, it is not that the situation implies loyalty, it is that the terms themselves, express or implied, are not inconsistent with it. Traditionally an employee will not owe a duty of loyalty because their contract, as a matter of construction, demonstrates the employee can do the job in his or her own time since any term that restricted that would be highly undesirable as it would unreasonably tie the employee's hands.<sup>97</sup> In situations where an employee has owed a duty of loyalty they have been given the freedom to advance a particular interest of the principal and the terms of that freedom are not inconsistent with the imposition of the duty of loyalty. Joint ventures are another example. Simply positively implying the duty based on the reasonable expectations of the principal in joint ventures may mean the duty is rarely owed in these relationships because they are commercially based. Therefore, it might be validly said that a commercial party may not have such a reasonable expectation because they are well placed to protect their own interests. Equally, knowing when the duty will be implied in to the commercial agreement would be particularly uncertain. Yet, joint venturers often owe a fiduciary duty to one another, particularly before the agreement is made, because at that point there are no terms to mould

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<sup>94</sup> *Hilton v BBE* (n 91) [30].

<sup>95</sup> *Fishel* (n 89) 1494.

<sup>96</sup> See, for example, *IG Index plc v Colley* [2013] EWHC 478 (QB); *Ranson* (n 89); *Caterpillar Logistics Services (UK) Ltd v Huesca de Crean* [2012] EWCA Civ 156, [2012] 3 All ER 129; *Fishel* (n 89).

<sup>97</sup> *Hivac Ltd v Park Royal Scientific Instruments Ltd* [1946] 1 Ch 169 (Ch) 174.

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the duty.<sup>98</sup> Once the agreement is made, as in *Ross River Ltd v Waveley Commercial Ltd*, discussed below, the duty is then moulded to the terms based on when they permitted freedom for self-interest ahead of the joint venture or other joint venturer. Thus where there are no terms the duty fills the gap, but applying normal contractual rules where they do it can be determined whether such terms permitted self-interest in the circumstances. Accordingly, in *F&C Alternative Investment (Holdings) Ltd v Barthelemy*, ‘the existence of express or implied contractual terms may be directly inconsistent with the imposition of such duties, and hence exclude them’.<sup>99</sup>

That the negative approach is applied in practice can be evidenced through express and implied terms. First, express terms. *Ross River Ltd v Waveley Commercial Ltd* concerned a joint venture agreement that stipulated in clause 10.5 that payments out of the profit would be made to the principal first before the other joint venturer paid itself except: (i) in respect of proper expenses incurred; or (ii) with the agreement of Ross River. Those two categories made it expressly clear when the company could prefer its own interests over the principal’s and a payment was disloyal where it was made on the basis of a reasonable belief that it would not jeopardise the joint venture. Since liability is strict, this was not a defence and the only permissible self-interest was set out in the contract. The duty filled the gap in respect of how other payments could be made but was negated in two specific instances by the parties’ intentions through express terms, which permitted payments other than to the principal. There are more examples. In *JD Wetherspoon v Van de Berg & Co Ltd*, initially a duty of loyalty was not owed, because the express terms of the contract provided that the fiduciary was to only find ‘suitable’ plots for *JD Wetherspoon* and were given the freedom to determine what was suitable.<sup>100</sup> So the terms of the contract negated the requirement to act in the sole interests of the principal. In *Pfeiffer (E) Weinkellerei Weineinkauf GmbH and Co v Arbuthnot Factors Ltd* the judge found no fiduciary relationship existed between the debtor and creditor because evidence was inconsistent with the proposition from the plaintiff that the defendant was only authorised to sell the product for the account of the plaintiff.<sup>101</sup> Clause 5 made it clear the defendant could sell the property on their own behalf provided payment was not delayed.<sup>102</sup> The defendant then had never agreed that the taking of the property was for the benefit of the plaintiff. The effect was that they held no proprietary claim against the company’s assets and to leave the creditor unsecured as they had merely created a security interest, which was void for non-registration. Likewise in *Borden (UK) Ltd v Scottish Timber Products Ltd* the terms of the agreement evidenced that the resin supplied was to be used in a manufacturing process and for the benefit of the manufacturer.<sup>103</sup> These terms evidenced such freedom to act for one’s own interests, negating the application of loyalty.

Second there are implied terms. This has limited application not only because of the parsimony of the implication process as discussed above, but because of the unlikelihood that, on the facts, it would be necessary to permit the fiduciary to act in his own interest rather than the principal’s. The instance of acting for multiple principals best illustrates the way implied terms can negate the duty’s application. Taking the test for implication of terms,

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<sup>98</sup> *Lac Minerals Ltd v International Corona Resources Ltd* [1989] 2 SCR 574, [1990] FSR 441 (Supreme Court of Canada) 444, 459.

<sup>99</sup> *F&C Alternative Investments (Holdings) Ltd v Barthelemy (No 2)* [2011] EWHC 1731 (Ch), [2012] Ch 613 [225].

<sup>100</sup> *JD Wetherspoon plc v Van de Berg & Co Ltd* [2009] EWHC 639 (Ch) [30].

<sup>101</sup> *Pfeiffer (E) Weinkellerei-Weineinkauf GmbH & Co v Arbuthnot Factors Ltd* [1988] 1 WLR 150 (QB) 160.

<sup>102</sup> *ibid* 160.

<sup>103</sup> *Borden (UK) Ltd v Scottish Timber Products Ltd* [1981] Ch 25 (CA).

in *Kelly v Cooper* it was held ‘residential [estate] agents must be free to act for several competing principals otherwise they will be unable to perform their function’.<sup>104</sup> Here, the fiduciary successfully established an implied term that they were free to act for multiple principals otherwise they would have been unable to perform their function as a residential agent. Thus the implied term is inserted based on an established test for implied terms, namely business efficacy. Such a term is then inconsistent with the imposition of a duty of loyalty since the agent is free to prefer the interests of another, albeit they would still be constrained by their other duties.<sup>105</sup> The availability of such an implied term to act for multiple principals, however, must be extremely limited. In *Hilton v Barker Booth & Eastwood* Lord Walker stated that the proposition one breach of duty in acting for multiple principals could exonerate another ‘seems contrary to common sense and justice’.<sup>106</sup> In *Rossetti Marketing Limited v Diamond Sofa Company Ltd* the judge noted that whilst a residential agent must be free to act for multiple principals, the same could not be said for an agent who sold furniture.<sup>107</sup> Most recently, in *The Northampton Regional Livestock Centre Company Ltd v Cowling*, the judge noted that an implied term permitting the individual to act for conflicting principals was only available in situations where such multiple undertakings were inherent to the business,<sup>108</sup> and ‘any argument promoting the extension of the *inapplicability* of the normal fiduciary obligations would need to be very cogently justified with strong evidence’ (emphasis added).<sup>109</sup>

Finally, those terms, express or implied, must evidence that freedom to act with self-interest otherwise the duty of loyalty will remain. Likewise, normal contractual rules on interpretation and implication may work the other way to show the terms evidenced no such freedom to act with self-interest. In *The Northampton Regional Livestock Company Ltd v Cowling* the Court of Appeal made clear that after an agent has resigned but continued to discharge their specific undertaking to the sale of a land, they were continually bound by the duty of loyalty on the grounds of an implied term that gave business efficacy to the agreement that, whilst they were free to exploit their own opportunities, it was understood it would not involve activity that conflicted with that specific undertaking they continued to have responsibility for.<sup>110</sup>

Thus the parties on equal footing may determine themselves how the undertaking is to be performed by removing loyalty through the grant of freedom to act for other interests, either as a matter of construction and interpretation of express terms, or as a matter of implication through one of the tests for implied terms. The duty is not positively implied because it is not needed out of necessity or business efficacy. The negative thesis is easier to understand and meet because the terms are clearly spelled out in the contract and whether they allow freedom to act for self-interest can easily be determined within the confines of established rules of contractual interpretation and implication, rather than vague notions of reasonableness or real sensible possibility.

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<sup>104</sup> *Kelly v Cooper* [1993] AC 205 (PC) 214.

<sup>105</sup> See, for example, *Plus Group v Pyke* (n 88) [83] citing J Gower, *Principles of Modern Company Law* (6<sup>th</sup> edn, Sweet & Maxwell 1997) 622; see also *Farrington v Rowe McBride* [1985] 1 NZLR 83 (New Zealand Court of Appeal) 90.

<sup>106</sup> *Hilton v BBE* (n 91) [38].

<sup>107</sup> *Rossetti* (n 78) [27].

<sup>108</sup> *Northampton Livestock* (n 78) [186].

<sup>109</sup> *ibid* [187].

<sup>110</sup> *ibid* [222] *aff’d* *The Northampton Regional Livestock Centre Company Ltd v Cowling* [2015] EWCA Civ 651, [2016] PNLR 5.

This shows that *dicta* such as that in *Cobbe v Yeoman's Row Management Ltd*, that equitable duties in commercial relations should not be lightly implied,<sup>111</sup> is wrong. It is the express and implied terms that show when the fiduciary is free to act with self-interest, either in full or in part, such as the case in *Ross River*.

In consequence all undertakings to another's interests – commercial, contractual, voluntary, unilateral – are fiduciary and it is a matter of whether the terms negate the application of the duty. Traditionally vulnerable principals will have the undertaking regulated by the duty through the operation of law; whilst at the opposite end of the scale commercial parties will often evidence an intention to negate the duty. Yet, in both instances, vulnerable principals, such as companies, have had the duty negated, whilst commercial parties have owed the duty, for example in joint ventures. Thus, when looking at the interests the individual is responsible for it is necessary to ask first whether the individual had any freedom to act with self-interest, and only if they did not should the status of fiduciary be attached in respect of the specific interest only, so the relevant rules in relation to the duty of loyalty can be applied. This conforms with the purpose of the duty that it is needed to regulate the manner of performance in an undertaking to another's interests where there is no contrary agreement by the parties to fill the gap. This test also conforms with established contractual rules and clearly defines any freedom of the fiduciary to act with self-interest.

### 7.3 Authorisation

Finally, there is authorisation. Whilst the original agreement might not have permitted freedom to exercise self-interest, a fully informed principal might authorise disloyalty. This is the crux of the matter: that the principal is fully informed. That they can make a decision, on an equal footing, as to how their own interests are to be served, rather than have the law impose a duty to fill the gap on how the undertaking by the fiduciary is to be performed. Like the other two methods then, the duty is negated on the basis of informed consent because the principal understands the risk and is content with that position. As Conaglen notes, consent shows that the 'duties are emphatically imposed by operation of law' since one can consent to conduct that would otherwise be disloyal.<sup>112</sup>

Traditionally, formal acquiescence is needed for valid authorisation, but the fact that even positive acquiescence without the formalities<sup>113</sup> and silence<sup>114</sup> can amount to authorisation evidencing that the underlying matter is whether the parties themselves have permitted self-interest and filled the gap on how the undertaking will be regulated. To make that fully informed decision all material circumstances must be disclosed by the fiduciary.<sup>115</sup> To be able to negate the duty's application it is clear that the concerns that the duty seeks to address must be satisfied. The principal needs to be fully informed to be able to understand the risk and decide whether they are content with the position of allowing the fiduciary the option to serve their own interests in conflict to the principal's. The effect of authorisation is that the duty is negated because the parties' intention has filled the gap on manner of performance. The general rule is still that a fiduciary cannot unilaterally decide what their principal is and is not interested and thus decide what interests to be loyal to<sup>116</sup> and some positive

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<sup>111</sup> *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 WLR 1752 [81].

<sup>112</sup> Conaglen (n 32) 116.

<sup>113</sup> *Re Duomatic Ltd* [1969] 2 Ch 365 (Ch); *Re Home Treat Ltd* [1991] BCC 165 (Ch).

<sup>114</sup> *Sharma v Sharma* [2013] EWCA Civ 1287, [2014] BCC 73; cf *EIC Services Ltd v Phipps* [2003] EWHC 1507 (Ch), [2003] 1 WLR 2360.

<sup>115</sup> See above, section 6.3, from page 9.

<sup>116</sup> *Cook v Deeks* (n 82).

authorisation is required. That is because in those circumstances of silence the principal may not have been able to review the situation, or even where they have their silence is indicative that they do not approve of disloyalty rather than that they do. However, there are those rare instances where silence will indicate consent as a matter of fact.<sup>117</sup>

## **8 Concluding Remarks**

The retrenchment of the Hoffmann School – the attempts to characterise disparate doctrines of the law as merely the intentions of the parties under the aegis of the law of contract – has had profound implications for fiduciary law as well as contract law. It has made the job of pushing back the contractarian thesis of fiduciary duties much easier.

Accordingly, it has been possible to show that proposition that fiduciary duties and remedies to be positively implied runs into difficulties from start to finish. The methods of contractual implication are too unwieldy to produce fiduciary duties and remedies, being simultaneously too fine-grained in some areas and too broad-brush in others. Moreover, many elements are not referable to the intentions of the parties and it is not surprising that attempts to so characterise them fail. Furthermore, the three methods the courts use to shape the scope of the fiduciary duty do not comport with the contractual methods of implication if they are applied as though they would positively imply a fiduciary duty; contractual implication is too parsimonious and, moreover, matters not referable to the intentions of the parties are again present in the law.

The presence of status as an element of the rules for the remedy for breach of fiduciary duty – the proprietary constructive trust – not only directly supports this argument but brings broader support. Like many other matters such as the ones Graveson considered, the thesis that we have gone from status to contract can only be applied so far. Fiduciary law is just one of those matters. Therefore the contractarian thesis, as broadly understood, should be rejected. Instead, fiduciary obligations should be considered ever-present, but reduced in scope – and readily reduced – whenever the terms of the contract require it, in a purely negating process.

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<sup>117</sup> *Sharma v Sharma* (n 114).