# Fiduciary Duties and Implied Duties of Good Faith in Contractual Joint Ventures

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## A. Introduction

A joint venturer who finds the trust he has reposed on his co-venturer abused would invariably allege that there has been a breach of fiduciary duties—a successful plea of fiduciary breach affords him more attractive remedies than a contractual breach. Traditionally the question of whether there is a fiduciary breach is determined by asking whether there exists a fiduciary relationship between the parties. This presupposes that the concept of a fiduciary relationship is a clear one. Unfortunately, it is not. In this essay, I suggest that the fiduciary inquiry is more meaningfully pursued by focusing on the obligation sought to be imposed and the interest which the obligation seeks to protect. This avoids the definitional debate of what constitutes a fiduciary relationship and what should properly be termed fiduciary duties.

The organisation of the article is as follows.

**Section B** surveys briefly the attractions of a successful fiduciary plea. It lays out some of the motivations for alleging that there has been a breach of fiduciary duties.

**Section C** identifies the content of "fiduciary" obligations and the interest protected by them. I suggest that the application of the conflict and profit rules depend on identification of a legitimate expectation that one party subordinates the pursuit of his self interest to the interest of another. There is a need to identify when one is entitled to the loyalty of another.

**Section D** discusses the linkages between good faith expectations and fiduciary expectations. Good faith expectations *can* shade into fiduciary obligations. It is important that an obligation found to exist between the parties is consistent with the legitimate expectations of *both* the obligor and the obligee. This Section

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discusses how good faith expectations may be addressed without necessarily invoking fiduciary duties.

**Section E** examines the major theoretical bases offered for the fiduciary relationship and the criticisms made against them. While none of these bases offer a wholly satisfactory basis, each sheds light on how the fiduciary question may be tackled.

**Section F** draws together the observations made in the preceding sections; it suggests how a purposeful inquiry to the fiduciary question may be carried out without necessarily having to construct *a priori* a comprehensive theoretical basis.

### B. Why the fiduciary issue is frequently raised

**Loss versus enrichment.** The compensatory principle underpins damages for breach of contract. The damages due to the aggrieved party are measured by his loss, not the defaulting party's consequential gain from the breach of contract.[1] A successful fiduciary plea, however, affords the possibility of a gain-based remedy rather than a loss-based remedy. This is advantageous to the aggrieved party in a few ways. First, the aggrieved party avoids the difficulties associated with proving his loss.[2] Secondly, the aggrieved party is entitled to claim an enrichment obtained by the wrongdoer which may otherwise never have come to the aggrieved party.[3]

**Equitable compensation.** The obligee to a fiduciary obligation can choose to claim equitable compensation instead of unjust enrichment if he considers the

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[1] *Surrey CC v. Bredero Homes* [1993] 1 W.L.R. 1361, CA. *Quare*: whether the recent case of *AG v. Blake* [1998] 2 W.L.R. 805, CA serves as a platform for further development of restitutionary damages in breach of contract scenarios or whether it will be restricted to its context.

[2] *Lac Minerals v. International Corona* (1989) 61 D.L.R. (4th) 14. The plaintiffs approached the defendants with the proposition to prospect for gold at a certain site. After receiving the information, the defendants embarked on the venture without the plaintiffs. Although the Supreme Court of Canada held against the plaintiffs on the fiduciary issue, all five judges agreed that the plaintiffs were entitled to succeed on the issue of breach of confidence—another category of wrongdoing which permits gain-based remedies. If the compensatory measure rather than the restitutionary measure were required, the plaintiffs would have had to prove the value of the opportunity to them. They may have difficulties proving their ability to realise their expected profits. The uncertainties associated with the proof of loss may induce the court assessing damages to put a discount on the amount claimed.

[3] *Boardman v. Phipps* [1967] 2 A.C. 46 (Beneficiary under a trust which was unable to make further investments entitled to claim the profits from investments made by the fiduciaries because the fiduciaries used information obtained in their fiduciary capacity without consent from the beneficiary.)

former more advantageous. Moreover, as "considerations of causation, foreseeability and remoteness do not readily enter into the matter",[4] equitable compensation at present poses fewer obstacles to the plaintiff's claiming full compensation compared to common law damages.[5]

**Proprietary remedy.** The gain-based remedy earlier mentioned may be *in personam* or *in rem*. The former would take the form of an order for account of profits. The latter may take the form of an order that the fiduciary holds certain property on constructive trust for the beneficiary, *i.e.* the property belongs to the beneficiary. If the property appreciates in value, the benefit of such appreciation goes to the beneficiary. Should the fiduciary be insolvent, the proprietary relief gives the beneficiary priority over the fiduciary's unsecured creditors.[6]

**Consequential relief.** In many common law jurisdictions, the courts do not have the jurisdiction to award compound interest either at law or under statute.[7] In equity, compound interest rather than simple interest is available where the defendant is held accountable as a fiduciary of the plaintiff.[8] Hence, the plaintiff can obtain better consequential relief by pleading the breach of fiduciary duties.

**Adding to the obligations owed between the parties.** Fiduciary duties are seldom expressly covenanted for. More often, the law finds fiduciary duties to be owing because the nature of the relationship suggests that the high standard of conduct embodied in the fiduciary rules is incidental to the relationship. The party calling in aid of fiduciary breach is inviting the court to add to the obligations expressly assumed by the parties. The question, however, is when it is proper to do so.[9]

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[4] *Re Dawson* [1966] 2 N.S.W.R. 211 at 215, Supreme Court of New South Wales.

[5] There are efforts toward harmonising common law damages and equitable compensation: see C. E. F. Rickett, "Where Are We Going with Equitable Compensation?" in A. J. Oakley (ed.), *Trends in Contemporary Trust Law* (Clarendon Press, Oxford 1996), Chapter 8.

[6] This was the motivation for the investors in *Re Goldcorp* [1995] 1 A.C. 74, LPC, New Zealand pleading that the bank with which they had "gold accounts" was in a fiduciary relationship with them.

[7] In many jurisdictions, the statutory power to award interest is inspired by the (U.K.) Civil Procedure Act 1833 ("Lord Tenterden's Act"). Section 28 of the Act (now s.35A Supreme Court Act 1981) bars the award of compound interest and is reflected in the statutory provisions of many Commonwealth jurisdictions. Singapore: see s.9(1) Civil Law Act (c. 43) (but see para. 6, First Schedule Supreme Court of Judicature Act (c. 322) which permits the award of interest without the compound interest bar.) Malaysia: s.11 Civil Law Act 1956. Aust: *e.g.* (NSW) s.94(2)(a) Supreme Court Act 1970, (Vic) s.60(2)(a) Supreme Court Act 1986.

[8] *Westdeutsche Landesbank v. Islington LBC* [1996] A.C. 669 at 701–702, *per* Lord Browne-Wilkinson, 738–739, *per* Lord Lloyd of Berwick. *President of India v. La Pintada Compania Navigacion S.A.* [1985] A.C. 104 at 116, *per* Lord Brandon of Oakbrook.

[9] *Clark Boyce v. Mouat* [1994] 1 A.C. 428, PC, New Zealand. *Kelly v. Cooper* [1993] A.C. 205, PC, Bermuda. While the Privy Council in *Clark Boyce* indicated that it is impermissible to use the fiduciary relationship to expand on the contractual obligations of parties, this



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**Procedural Advantages.** The order that the fiduciary holds the subject property on trust for the beneficiary confers procedural advantages. It circumvents the legal and practical difficulties associated with the enforcement of monetary judgments *simpliciter*. This is particularly so if one seeks the enforcement of a judgment across international borders.[10]

### C. Joint venturers as fiduciaries for the purpose of the profit rule and the conflict rule: locating the interest protected by the profit rule and conflict rule

The term "fiduciary" has been applied as a peripatetic adjective to persons whose conduct the law disapproves of. It is little wonder that the search for a theoretical basis linking the diverse cases has proved an intractable task. Finn has consistently argued that one should only describe as a fiduciary a person who is subject to the two proscriptive fiduciary duties. That is, the fiduciary is a person who:

(a) cannot use his position to his own or to a third party's possible advantage;
or
(b) cannot in any matter within the scope of his service, have a personal interest or an inconsistent engagement with a third party
unless this is freely and informedly consented to by his beneficiary or is authorised by law.[11]

While the quest for doctrinal purity and coherence is a laudable one, consequentialist reasoning with respect to fiduciary relationships is unlikely to subside.[12] I advocate a different approach. Pose the issue directly: what is the interest sought to be protected by the obligation in question, and in what circumstances is a joint venturer bound to regard that interest?

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must be read to mean that the fiduciary duties must be consistent with the contract: see Section F. After all, trust and confidence has given rise to implied terms (see *Mahmud v. BCCI*, (see text to n. 58). There is also clearly a linkage between implied terms and fiduciary duties: see Section F.

[10] *AG for Hong Kong v. Reid* [1994] 1 A.C. 324, PC, New Zealand.

[11] Finn, "The Fiduciary Principle" in Youdan (ed.), Equity, Fiduciaries and Trusts, Carswell, Toronto (1989), p. 27; Finn, "Fiduciary Law and the Modern Commercial World" in Ewan McKendrick (ed.), *Commercial Aspects of Trusts and Fiduciary Obligations* (Oxford University Press, Oxford, 1992) p. 7. Finn's formulation is an adaptation of Deane J.'s formulation in *Chan v. Zacharia* (1984) 154 C.L.R. 178 at 204–205. Interestingly Deane J. acknowledges that " . . . fiduciary relations may take a wide variety of forms and may give rise to a wide variety of obligations": (1984) 154 C.L.R. 178 at 195.

[12] See, for example, *Chase Manhattan Bank NA v. Israel-British Bank (London) Ltd* [1981] Ch. 105 (insolvent bank held a "fiduciary" of moneys wrongly credited into its account); *McInterney v. MacDonald* (1992) 93 D.L.R. (4th) 415, Supreme Court of Canada (Doctor under "fiduciary duty" to provide the medical records of his patient, *contra. Breen v. Williams* (1996) 186 C.L.R. 71, High Court of Australia.

Identification of the protected interest makes for a more meaningful—and focused—inquiry. Thus, the complaint by a minority joint venturer that the majority joint venturer has failed to share the control premium with the minority does not involve so much his right to expect the majority not to profit from his positional advantage[13]; rather it concerns the minority's right to be dealt with fairly in the sale of the company. The majority's "fiduciary duty" is to deal with the minority fairly. It does not involve the two proscriptive duties traditionally associated with the notion of the fiduciary under equity. On the other hand, a joint venturer's complaint that his co-venturer has appropriated to his own benefit an opportunity which should be shared amongst the joint venturers might involve the conflict rule or the profit rule; this is so in so far as the nub of his complaint is that his co-venturer should not derive a personal benefit from his position without the informed consent of the other joint venturers.

As to the interest protected by the two proscriptive fiduciary duties, there is probably common agreement that the interest for which the aggrieved party seeks protection is his expectation that the counter-party will subordinate the pursuit of his self interest to that of the beneficiary.[14] One of Paul Finn's contributions in this area is to point out the fact that the fiduciary standard contained in the two proscriptive duties is the highest protective responsibility which the law imposes on consensual relationships.[15]

This may be contrasted with the unconscionability standard on which contract law is largely premised. The law expects contracting parties to be self-reliant. It mends no man's bargain.[16] Parties are permitted to act in a self-interested manner both in the bargaining process as well as in the course of performing the contract. The only instances where the law intervenes are in circumstances of unconscionable behaviour. The vitiating factors of undue influence, duress, and misrepresentation may be classed under the unconscionability standard.

Viewed in terms of the intensity of protective responsibility, the good faith standard imposes less exacting obligations than the proscriptive fiduciary duties but more onerous responsibilities compared to duties that may broadly be classified under unconscionability.[17] A party is permitted to act in a self-interested manner—subject to an imposition by the law to have regard for certain

[13] *Perlman v. Feldman* (1955) 219 F. 2d. 173 (2nd Cir). In many Commonwealth jurisdictions, the need for recourse to the fiduciary doctrine is avoided because of statutory provisions permitting the minority to sue for minority oppression. U.K.: Companies Act 1985, Part XVII (ss.459–461). Australia: Corporations Law s.260. Singapore: Companies Act s.216.

[14] Finn (1989), (see n. 11 above) ("to act selflessly and with undivided loyalty") at p. 4. *Breen v. Williams*, (see n. 12 above) ("loyalty", *per* Dawson and Toohey JJ. at p. 93; "no man can serve two masters", *per* Gaudron and McHugh JJ. at p. 108, quoting Matthew 6:24). *Hodgkinson v. Simms* (1994) 117 D.L.R. (4th) 161 ("relinquished its own self-interest and agreed to act solely on behalf of the other party", *per* La Forest J. at 176–177).

[15] See Finn (1989), (see n. 11 above) p. 3 *et seq.*

[16] See, for example, Dawson J. in *Hospital Products v. USSC* (1984) 156 C.L.R. 41 at 147.

[17] Finn (1989), (see above at n. 11) at p. 3. "Good faith" is a multifarious concept. Used in the context of "purchaser in good faith for value without notice", it prescribes the

"legitimate" interests of the counter-party.[18] The relationship between majority shareholders and minority shareholders in a corporation is illustrative of this standard. While the minority interests cannot normally complain when they are out voted by the majority interests, many jurisdictions have rules proscribing the majority's taking unfair advantage of the minority.[19] There is as yet no general doctrine of good faith in Commonwealth common law jurisdictions.[20] Such doctrines as there are revealing the upholding of certain standards of honesty and fair dealing arise in discrete categories of cases. They are "mini-doctrines" addressing narrow circumstances.[21] The complainant aggrieved by the behaviour of his counter-party will have to slot the ill complained of into one of these discrete categories if he wishes to obtain redress. There is not yet an overarching general principle which can be called in aid against sharp conduct and the "abuse of rights". Thus one who has incurred pre-contractual expenses at the encouragement of another negotiating party pegs his claim not on a general doctrine of good faith but on a narrower doctrine like estoppel.[22]

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standard which the purchaser of property has to satisfy if he is to take the property free of prior interests. Contracts of utmost good faith require contracting parties to provide full and frank disclosure. "Good faith" is also apt to describe the disclosures or advice to be given by a party occupying a superior bargaining position: see *Barclays Bank v. O'Brien* [1994] 1 A.C. 180, HL, *Commercial Bank of Australia v. Amadio* (1983) 151 C.L.R. 447, High Court of Australia.

[18] Finn (1989), (see above at n. 11) at pp. 10–11, lists the following as examples (footnotes omitted): "(1) the mortgagee exercising a power of sale; (2) majority shareholders in their treatment of the minority; (3) the applicant for insurance cover; (4) an insurer settling claims under a limited liability policy; (5) the directors of a marginally solvent company diminishing its assets in the face of outstanding debts; (6) a bank or creditor accepting third party guarantees of a customer's or debtors' liabilities; (7) a broker "closing out" a margin account; (8) one contracting party in his decision or action in relation to the other; (9) the doctor in counselling a patient on proposed treatment; and (10) the possessor of superior information dealing with one to whom that information is not reasonably accessible."

[19] See text to n. 13 above.

[20] Though there are indications that it may be developed: *Hughes Aircraft v. Airservices* (1997) 146 A.L.R. 1 (Fed. Ct. of Aust., Finn J.).

[21] I do not propose to engage in the debate of whether there should be a general doctrine of good faith at common law. (The literature on this issue is fairly extensive. See, for example, S. M. Waddams, "Good Faith, Unconscionability and Reasonable Expectations" (1995) 9 J.C.L. 55; P. Finn "Equity and Contractual Performance", and H. K. Lucke, "Good Faith and Contractual Performance" in P. D. Finn (ed.), Essays on Contract (Law Book Co. Sydney 1987) p. 104 and p. 155 respectively; M. Bridge, "Does Anglo-Canadian Law need a Doctrine of Good Faith?" (1984) C.B.L.J. 385; B. J. Reiter "Good Faith in Contracts" (1983) 17 Valparaiso U.L.R. 704; R. Brownsword, "Two Concepts of Good Faith" (1994) 7 J.C.L. 197.) In so far as the doctrine is meant to address the reasonable expectations of parties and to encourage fair dealing, the common law has within its armoury doctrines which are capable of fulfilling the function to be performed by a general doctrine of good faith. These include: implied terms (see Section D) and the rule that the incorporation of an onerous clause requires reasonable notice (*Interfoto Picture Library v. Stiletto Visual Programmes Ltd* [1989] Q.B. 433).

[22] *Walton Stores v. Maher* (1988) 164 C.L.R. 387, High Court of Australia. An excellent article on this area is: E. A. Farnsworth, "Pre-Contractual Liability and Preliminary Negotiations: Fair Agreements and Failed Negotiations" (1987) 87 Colum. L.R. 217.

The three standards stated by Finn are not meant to be water-tight compartments. They are merely "dominant shades on a spectrum" of protective responsibility which the law imposes on the dominant party in the relationship. Indeed they do not embody wide general doctrines. They are merely the themes which underlie the discrete doctrinal pockets lying along the spectrum sketched out by Finn. This perspective serves as a useful reminder—when one is calling in aid the proscriptive fiduciary duties, one is seeking the highest degree of protective responsibility. There must be sufficient basis for such a finding.

### D. The collaborative joint venture and good faith expectations

As joint ventures are invariably supported by numerous contractual documents, it is inevitable that their premises are found in contract law. Some of these premises may, however, be incompatible with the expectations of joint venturers. As the long term nature of a joint venture may not permit exhaustive contract planning, parties may enter into the venture relying on the good faith of co-venturers to work out some unforeseen contingencies. The collaborative nature of a joint venture may suggest that parties rely not only on their co-venturers abiding by the contractual stipulations, but also on their good faith in respecting the spirit and intent of the collaborative venture. These expectations may be unwritten and unspoken—but yet deserving of relief in the context of the relationship.

How may these expectations be addressed in Commonwealth jurisdictions? Outside the United States,[23] the common law countries have yet to embrace a general notion of good faith in the performance of contracts. The basis for the court's intervention must be found in the breach of an obligation. There is no equivalent to the doctrine of good faith in civilian legal systems to restrain opportunistic behaviour.[24] Yet a failure to address these expectations would reflect poorly on the legal system.

This was the problem faced by the Australian courts in *Hospital Products v. United States Surgical Corporation ("USSC")*.[25] The defendants were the New York dealers of the plaintiffs' surgical stapling products which were marketed under the tradename "Auto Suture". They persuaded the plaintiffs that there was

[23] Restatement Second, s.205, "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement"; Uniform Commercial Code, s.1–103, "Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement." For a summary of the "gap-filling" function of the good faith doctrine under U.S. law, see *Farnsworth on Contracts* (Little Brown & Co. Boston, 1990) ss.7.17 and 7.17a.

[24] See, for example, Articles 6, 1375 and 1434 Civil Code of Quebec 1990; Articles 1134 and 1135 French Civil Code and jurisprudence on the articles; Werner F. Ebke & Bettina Steinhauer, "The Doctrine of Good Faith in German Contract Law" in J. Beatson & D. Friedman (eds) *Good Faith and Fault in Contract Law*, Chapter 7.

[25] (1984) 156 C.L.R. 41.



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great potential in the Australian market which the existing Australian distributor was not tapping but which the defendants were capable of realising. They also said that after developing the market for Auto Suture products, the defendants might then take on other non-competing products in order to develop a broad based business. The plaintiffs were assured that the development of the surgical distributorship would not interfere with the marketing of the "Auto Suture" products. In consequence the defendants were appointed the exclusive distributors of the plaintiffs' products. In truth, the defendants intended to manufacture and sell competing products from the onset. They had accumulated a large number of unsterilised "Auto Suture" products. They had also sought the advice of Australian experts and lawyers with a view to reverse engineering the plaintiffs' product. The plan was conceived and actively pursued even before the defendants' solicitation of the exclusive distributorship from the plaintiffs. After obtaining the appointment as exclusive distributors, they put the plan into action; they began deferring orders for "Auto Suture" products and filling these orders with products of their own manufacture. The defendants subsequently terminated the distributorship. When the plaintiffs discovered the defendants' conduct, they promptly sued. They sought a constructive trust extending over all of the defendants' assets, damages for breach of contract and an injunction against the defendants' continuing their business. The plaintiffs sought to invoke the fiduciary doctrine to restrain the opportunistic behaviour and to deprive the defendants of the gains they had obtained. Interestingly the appointment was oral in nature; no formal written agreement was ever executed.

The plaintiffs had relied on more than the competence of the defendants. The plaintiffs had trusted the defendants to exercise good faith in marketing their products. A failure to provide redress against such contumelious behaviour would throw a very poor light on the legal system. At first instance, McLelland J. found that the defendants owed fiduciary duties to the plaintiffs which were breached first, by the defendants' deferring orders for "Auto Suture" products and filling the orders with their own products, and second, by the secret development of the competing products. The majority of the High Court of Australia was not convinced that the distributor was a fiduciary of the U.S. manufacturer. They were not satisfied that the nature of the relationship required the distributor to subordinate the pursuit of his self-interest to that of the manufacturer. Relief was, however, granted on the basis that: (a) there was a breach of an express undertaking to use best efforts in marketing the defendants' products; and (b) section 2–306 of the Uniform Commercial Code was applicable to imply a duty to exert best efforts in carrying out the contract. In the result, the High Court of Australia was able to provide redress for the plaintiff's grievances.

Apart from UCC section 2–306, relief could also be granted through use of the duty of good faith under UCC section 1–203 and Restatement Second section 205. As a matter of general law, therefore, the UCC and Restatement adopt principles sounding from the good faith standard; they provide the doctrinal bases by which the court may check against unscrupulous behaviour. These doctrinal bases are absent in other common law jurisdictions.



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*Terms implied in fact*

To some extent, the doctrine of implied terms may be called in aid of the "good faith" expectations of a joint venturer.[26] However, common law courts are very chary of permitting the doctrine to be used as a Trojan horse by which to mend improvident or imperfect bargains. Terms implied in fact require the satisfaction of the rather exacting business efficacy test, *viz.* the implied term must be "necessary to give the transaction such business efficacy as the parties must have intended".[27] In the practical outworking of the test, the term has to be one which is "so obvious it goes without saying".[28] Thus the doctrine would not assist where the court cannot be confident that both parties would in fact have agreed to the term. It is a doctrine which rests very much on the actual—if attributed—intentions of parties.

The narrowness of the doctrine is illustrated by the resolution of the implied terms issue raised in *Hospital Products v. USSC.* The trial judge had found that there was an implied term to the effect that the distributor would not during the currency of the distributorship do anything inimical to the market in "Auto Suture" products. This finding was reversed by the High Court of Australia. Dawson J., who echoed the sentiments of Gibbs C.J. and Wilson J., opined that:

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[26] Indeed, it appears that the good faith requirement in the United States performs a primarily gap-filling function to fulfil the reasonable expectations of parties. See *Tymshare Inc v. Covell* (1984) 727 F 2d 1145 at 1152 (DC Cir.) (The duty of good faith is "simply a rechristening of fundamental principles of contract law", *per* Scalia J.). Also *Farnsworth on Contracts*, (see above at n. 23) s.7.17a. Nonetheless there continues to exist considerable debate over the exact meaning of "good faith". For the "excluder" analysis, see R. S. Summers, "'Good Faith' in General Contract Law and the Sales Provisions of the Uniform Commercial Code" (1968) 54 Va. L. Rev. 195. For the "foregone opportunity" analysis, see S. J. Burton "Breach of Contract and the Common Law Duty to Perform in Good Faith" (1980) 94 Harvard L. Rev. 369.

[27] *The Moorcock* (1889) 14 P.D. 64 at 68.

[28] *Shirlaw v. Southern Foundries* [1939] 2 K.B. 206 at 227. Andrew Phang sees the "business efficacy" test formulated in *The Moorcock* providing the basic theoretical guideline, and the "officious bystander" test formulated by Mackinnon L.J. in *Shirlaw v. Southern Foundries* providing the "practical mode for effecting the general principle" in *The Moorcock*: "Implied Terms Revisited" [1990] J.B.L. 394 at 397. See further Phang, "Implied Terms, Business Efficacy and the Officious Bystander—A Modern History" [1998] J.B.L. 1. *B P Refinery (Westernport) Pty Ltd v. Shire of Hastings* (1978) A.J.L.R. 20 at 26 provides a most complete summary of the conditions to be satisfied before a term implied in fact may be found:

> " . . . for a term to be implied the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that it goes without saying; (4) it must be capable of close expression; (5) it must not contradict any express term of the contract."

*Quare*: whether the High Court of Australia in *Byrne v. Australian Airlines Ltd* (1995) 131 A.L.R. 422 lays down a more liberal test. See Tolhurst & Carter, "The New Law on Implied Terms" (1996) 11 J.C.L. 76.

> " . . . to imply [such] a term . . . would . . . be to impute to U.S.S.C. a concern which had in no way been manifested by it and which, if it existed, could have been met by appropriate contractual terms. . . . not only was the term implied by the trial judge unnecessary to give the distributorship agreement business efficacy but its implication would effectively recast that agreement in a form which the parties had chosen not to adopt."[29]

The close identification between terms implied in fact and the parties' unstated intentions permits only limited room for manoeuvre. The premise of terms implied in fact is undertakings voluntarily if impliedly assumed. The plaintiffs in USSC failed on the implied terms issue not because the High Court was hesitant in using the doctrine of implied terms to uphold the good faith understanding of the parties. They failed because the implied term in question was framed too widely. Apart from the UCC, an argument that the defendants are impliedly obliged to exert best efforts in the marketing of the product is probably sustainable.

To some extent, the doctrine of terms implied in fact is capable of giving effect to a joint venturer's "good faith" expectations. For example a joint venturer may stipulate that one party is responsible for procuring the supplies of the venture without further stating the manner in which the procurement is to be carried out. The discretion conferred carries with it the expectation that the party will exercise reasonable efforts in securing a good price for the enterprise. If the responsible party were to make purchases without obtaining any further quotes, or if he were to purchase the supplies from his relations at a higher than market price, his co-venturers can probably sustain an action for breach of implied obligation against such conduct.

It is noteworthy that there is some common ground between the implied terms doctrine and the undertaking theory of fiduciary relationship discussed below.[30] Indeed in *USSC*, the fiduciary argument proceeded through the implied terms doctrine; the High Court's reversal on the question of implied terms removed much of the grounds capable of sustaining the fiduciary argument. The difference between implied terms and undertaking theory of fiduciary relationships is one of degree; the latter is more onerous and requires a greater sacrifice of one's self-interest. As such the factual matrix must be capable of supporting the finding of such an implied obligation.

### *Terms implied in law*

The doctrine of terms implied in law may also assist a joint venturer in the protection of his "good faith" expectations. The advantage of this doctrine over terms implied in fact is that the test to be applied is a little more liberal, *viz.* what is reasonably necessary for the contracts of a defined type. The court is no longer tied to the inferred intention of parties. Terms implied in law are based on "wider considerations". They are terms which the law implies "as a necessary incident of

[29] At 141 (see n. 25 above).
[30] See Section F.

a definable category of contractual relationship".[31] It permits more room for the courts to do the necessary justice in a case. The doctrine performs at least two functions: first, it gives effect to legitimate expectations arising from *both* the agreement itself and the context of the agreement, and second, it sets norms for certain kinds of contracts.

In *Elawadi v. BCCI*,[32] the plaintiff lost £50,000 worth of travellers cheques which he had purchased from the defendant. The issue arose whether the purchaser was entitled to sue for a refund as the contract terms were vague on the bank's obligation to make a refund. Hutchison J. found that there was an express right to seek refund of lost or stolen cheques. As an alternative ground, he found that there was an implied right to the same effect. In arriving at this conclusion, Hutchison J. recognised that the implied term was inserted by the courts "irrespective of the intention of the parties".[33] He indicated that he was applying the test of necessity as understood by Lord Wilberforce in *Liverpool City Council v. Irwin*, *viz.* "such obligation should be read into the contract as the *nature of the contract* itself implicitly requires, no more, no less . . . ".[34]

The expectations of parties arise not merely from the formally executed contracts. They arise also from the nature and the context of the contracts. The subject matter of the contract, as well as the contractual environment, impact on the legitimate expectations of the parties. Whereas terms implied in fact are more closely tied to the real—if inferred—intentions of the parties, terms implied in law give effect to the expectations which reasonably accompany such contracts.

Courts play a norm-setting function in terms implied in law. This is evident from *Scally v. Southern Health and Social Services Board.*[35] The plaintiffs were health service employees who joined the public health service too late to complete the 40-year contribution requirement necessary to participate in the statutory superannuation scheme. Regulations permitted such employees to purchase, within a specified time-frame, "added years" on advantageous terms for the purpose of making up the full 40 years' contribution. This was not brought to the attention of the plaintiffs when they joined the service. Consequently they lost the right to the advantageous add-on scheme. The House of Lords held for the plaintiffs on the ground that it was necessary in the circumstances to imply a term that the employer was obligated to publicise the entitlements conferred by the

[31] *Scally v. Southern and Social Services Health Board* [1991] 3 W.L.R. 778 at 787, *per* Lord Bridge. The orthodox understanding of this doctrine depends first on classifying the contract as one of a defined type. Some legitimate criticism has been made of when a contract fails to be considered a contract of a defined type: see Phang (1990) (above at n. 28) at p. 404–405, Phang, "Implied Terms in English Law—Some Recent Developments" [1993] J.B.L. 242 at 243–250. Each contract can be classified and categorised. A unique contract is merely one that belongs to a "type" which is less commonly encountered. Indeed this is how it has been borne out in the application of the doctrine. See *Scally v. Southern Health and Social Services Board*, text to n. 35.

[32] [1989] 1 All E.R. 242, QBD.

[33] *ibid.* at 253.

[34] *ibid.* at 253, citing Lord Wilberforce at [1976] A.C. 239 at 254 (emphasis mine).

[35] [1991] 3 W.L.R. 778, HL.

regulations. In doing do, it recognised the norm-setting function that the Court was performing.[36]

The *Scally* case shows that the norm-setting function may be invoked even when the defined type is of relatively infrequent occurrence. Viewed at a higher level of abstraction, the relationship in *Scally* is an employer-employee relationship. The norm sought to be implied is, however, inappropriate for such a defined type; it is of too sweeping a character for this defined type. Nonetheless the *Scally* case shows that where the defined type is of too general a character for the imposition of a norm, it is possible by a narrower characterisation of the defined type to tailor the appropriate circumstances for application of the norm. In other words, the narrower characterisation of the contract type brings into focus the necessary incidents of that more narrowly defined type of contractual relationship.[37]

While the incidents of a contractual joint venture may vary considerably, it is nonetheless possible, by narrower characterisation of the contract type, to introduce suitable terms implied in law into joint ventures. Nonetheless the fact that the parties are of arguably equal bargaining strength is likely to give a court cause to pause before exercising what is in essence a norm-setting power.[38]

### *The difficulty with implied term*

The doctrine of implied terms holds the promise of securing a joint venturer's good faith expectations. The joint venturer's expectations that the co-venturers will conduct themselves in a bona fide manner and in accordance with the spirit of the contract may be given effect to by finding appropriate implied terms.[39] There are a few drawbacks however. First, terms implied in fact. This doctrine operates within narrow confines. The desire on the part of the courts to do justice is circumscribed by what may be inferred to be the common intention of parties. As for terms implied by law, it may not find much resonance in the more conservative judges involving as it does a norm-setting function; they may choose to use it sparingly to avoid the accusation of judicial activism. In the same vein, judges who are more persuaded by the notion of individual responsibility would be less likely to intervene than judges who are more persuaded by the desire to promote communitarian values and standards of good conduct. The outcome depends as much on the proper application of the doctrine as on the liberality by which the doctrine is wielded. The efficacy of implied terms in law in addressing the good faith expectations of a joint venturer depends vitally on the robust use of the doctrine.

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[36] See also *Mahmud v. BCCI*, at 110–112 (n. 58). At 787H (see n. 35 above).

[37] [1991] 3 W.L.R. 778 at 787H.

[38] Courts are not inclined to such norm-setting where the contract represents a carefully negotiated bargain between parties who are of equal bargaining strengths: see *Ali v. Christian Salvesan Food Services Ltd* [1997] 1 All E.R. 721, CA.

[39] An interesting recent case showing the implication of an obligation of good faith and fair dealing is *Hughes Aircraft v. Airservices* (1997) 146 A.L.R. 1, Fed. Ct of Aust., Finn J.

These considerations accentuate the attractiveness of a fiduciary plea. As traditionally conceived, a fiduciary relationship immediately calls into service the two proscriptive fiduciary rules. The troublesome issues which attend the formulation of the obligations are avoided. Moreover, as earlier discussed, breach of fiduciary duties offers the prospect of generous equitable remedies; remedies for breach of implied terms are at present constrained by the remedies available for contractual breach. Until a more flexible remedial regime develops for breach of contract, fiduciary duties will continue to be an attractive plea for the joint venturer who finds his trust and confidence in his co-venturer abused.

## E. A test for fiduciary relationship between joint venturers?

When should joint venturers be considered fiduciaries of one another for the purposes of the two proscriptive fiduciary duties? The law prescribes that these fiduciary duties are incidents of certain kinds of relationships. Flannigan terms these "status based" fiduciary relationships.[40] The partnership is one such relationship. Thus where the contract between two joint venturers amounts to a partnership,[41] they are presumed to be fiduciaries of each another within the scope of the partnership.[42]

If the relationship between joint venturers does not fall within an established "status based" relationship, it may yet be a "fact-based" fiduciary relationship. Various tests have been suggested for identifying "fact-based" fiduciary relationships.[43] Although it is often said that there is no one single satisfactory test for identifying fiduciary relationships,[44] it is apposite to examine the more prominent theories or tests to see how they weigh out. The weakness of a theory may not so much show its invalidity as where its sphere of application ends.

### *(a) The undertaking theory*

The undertaking theory takes various forms.[45] In essence this theory postulates that the fiduciary is someone who has undertaken to act in the beneficiary's interest:

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[40] Flannigan, "The Fiduciary Obligation" (1989) 9 O.J.L.S. 285.

[41] The substantive test for a partnership is found in s.1(1) of the Partnership Act 1893 (U.K.) (parties "carrying on a business with a view of profit"). This definition has been adopted in other Commonwealth jurisdictions. Singapore: Partnership Act (c. 91) s.1(1). Aust: *e.g.* (ACT) Partnership Act 1963, s.6(1) (NSW) Partnership Act 1892, s.1(1) (Vic.) Partnership Act 1958, s.5(1).

[42] *Aas v. Benham* [1891] 2 Ch. 44.

[43] For a summary of the various theoretical bases proffered for fiduciary relationships, see J. C. Shepherd, "Toward a Unified Concept of Fiduciary Relations" (1981) 87 L.Q.R. 51 and *The Law of Fiduciaries* (Carswell, Toronto, 1981).

[44] *e.g.* Dawson J. in *USSC* (see n. 25 above) at 141 ("No satisfactory, single test has emerged which will serve to identify a relationship which is fiduciary.")

[45] See, for example, Mason J.'s formulation n. 59 below.

> "[A] fiduciary relationship exists where the facts of the case in hand establish that in a particular matter a person has undertaken to act in the interest of another and not in his own. This "representative" element is essential and it is from the fiduciary's undertaking to subordinate his interest that the beneficiary's expectation, or his trust and confidence, that the fiduciary will act accordingly arises."[46]

The undertaking theory finds many adherents amongst the academic writers.[47] It has also found fairly widespread judicial acceptance.[48]

The theory is attractive because it rests on the free assumption of responsibility. It is premised on the fiduciary assuming upon himself an obligation to act in a fiduciary capacity. It is especially apt for describing fiduciaries in status-based fiduciary relationships. The incidents of these relationships are notorious. The solicitor, the company director and the trustee cannot be heard to complain about the onerous proscriptive rules; they should know the obligations necessarily incident to the relationships they enter into. For fact-based fiduciary relationships, too, it is an attractive theory. In locating the link to fiduciary obligations in the "undertaking" of the person, it avoids the accusation that law is being interventionist. It is merely enforcing the obligations which a person has taken upon himself. In the context of commercial relationships where much emphasis is placed on individual responsibility and certainty, it has the merit of providing the assurance that parties are not subject to obligations other than those assumed. It thus serves as a sound basis for justifying the application of fiduciary law.

One difficulty with the undertaking theory is that while it explains why fiduciary duties should be imposed on those assuming status-based fiduciary positions, it does not explain why those relationships are considered fiduciary in nature. If one asks whether the fiduciary has consciously undertaken to act in the interest of the beneficiary, the answer is likely to be in the negative. The fact of the matter is that the law has by force of precedent and the process of analogical reasoning attached fiduciary incidents to that relationship.[49] The theory does not provide a wholly satisfactory basis for the imposition of fiduciary duties.

As "undertakings" include implied undertakings, there is also a certain linkage with implied terms under contract law.[50] Issues arise as to whether the methodology adopted for implied terms should not also be used for finding such implied undertakings. Further, in so far as there is an admitted prescriptive element in

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[46] *Hospital Products v. USSC* [1983] 2 N.S.W.L.R. 157 CA at 208–209.

[47] Scott, "The Fiduciary Principle" (1949) 37 Cal. L.R. 539; Sealy, "Some Principles of Fiduciary Obligations" [1963] C.L.J. 119 at 122 (accepted the test for fiduciaries not holding property); Gautreau, "Demystifying the Fiduciary Mystique" (1989) 68 Can. Bar. Rev. 1 at 7 (the undertaking taken as indicative of a fiduciary relationship).

[48] See, for example, *Moorgate Tobacco Co. Ltd v. Philip Morris Ltd [No 2]* (1984) 156 C.L.R. 414 at 436–437; *Walden Properties Ltd v. Beaver Properties Pty Ltd* [1973] 2 N.S.W.L.R. 815 at 833, CA; *Elders Trustee & Executor Co. Ltd v. E G Reeves Pty Ltd* (1987) 78 A.L.R. 193 at 238 (Fed. Ct); *Pacific Coal Pty Ltd v. Idemitsu Queensland Pty Ltd* (Supreme Court of Queensland, unreported, noted at [1992] 9 I.C.C.L.R. 321).

[49] See historical survey by Sealy (see n. 47 above).

[50] See Section F.

implying terms, it is difficult to press too far the notion that fiduciary obligations arise from the free assumption of responsibility.

The undertaking theory cannot be the sole basis for fiduciary law. In the final analysis, fiduciary duties are imposed by law. In status-based fiduciary relationships, the undertaking by the fiduciary consists of the assumption of a certain status from which flows fiduciary incidents. The fiduciary is taken to know that fiduciary incidents flow from that position. He does not necessarily assume the fiduciary responsibility consciously. The fiduciaries in *Boardman v. Phipps*[51] were no doubt surprised by how strictly the House of Lords worked out the contours of fiduciary obligations. They could not be heard to complain that they did not contemplate or foresee the applicability of onerous fiduciary duties.

Even for fact-based fiduciary relationships, the undertaking is often inferred from *the nature of the relationship*. If the undertaking is to be found in this manner, it is less meaningful to speak of the fiduciary obligation as an undertaking than as an incident which the law supplies to the relationship. *United Dominion Corp. Ltd v. Brian*[52] illustrates this point. Three parties embarked on a joint venture to develop land. One party charged the land to another to secure not only the loans advanced for the venture but also loans made to him personally. The question arose whether the third (minority) joint venturer was subject to this collateralisation clause. It was held that he was not subject to it as the lending joint venturer was a fiduciary of the third joint venturer; as a consequence he could not obtain any advantage without the informed consent of the third joint venturer. The mortgage was granted before the parties were in partnership. At that point, they were contemplating a partnership; but the partnership was not yet formed. In permitting the extension of fiduciary notions into the pre-contractual stage, the court was making a determination that the nature of the relationship justified the infusion of fiduciary notions. Indeed Finn who originally embraced the undertaking theory has since recognised that the "fiduciary responsibility ultimately is an imposed not an accepted one".[53]

The undertaking theory provides good justification for imposing upon a person who has so undertaken the onerous proscriptive fiduciary duties. Nonetheless it does not provide a wholly satisfactory test for all fiduciary relationships.

### *(b) The trust and confidence theory*

The trust and confidence theory postulates that the fiduciary relationship exists when one has been reposed trust and confidence that one will act in the interest of another rather than in one's own interest. Historically it is the abuse of this which sears the conscience of equity and invites its intervention.[54] It is also

[51] See n. 3.

[52] (1985) 157 C.L.R. 1. See also *Fraser Edmiston Pty Ltd v. AGT (Qld) Pty Ltd* [19 Qd R. 1 (appropriation of an opportunity to lease premises by a prospective venturer).

[53] Finn (1989), (see n. 11 above) at p. 54.

[54] See Sealy, (above at n. 47).



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that trust and confidence is the common element found amongst the many categories of fiduciary relationships. Nonetheless the classic trustee-beneficiary relationship shows that the trust and confidence reposed in a fiduciary relationship may not necessarily come from the beneficiary. Further one cannot confidently assert that in all fiduciary relationships, the beneficiary subjectively trusts the fiduciary. For example, it can hardly be proposed that a company subjectively trusts its company directors to act in its interest even if the company is taken to be represented by its members. Indeed the proposition that this element is characteristic of fiduciary relationships was rejected by Gibbs C.J. in *USSC*:

> "[A]n actual relation of confidence—the fact that one person subjectively trusted another—is neither necessary for nor conclusive of the existence of a fiduciary relationship."[55]

Moreover the trust and confidence theory is an inadequate one in so far as it focuses on the position of the disadvantaged party without addressing the expectations of the "fiduciary". The "fiduciary" too may have a legitimate expectation that he is free to pursue his self-interest and that the disadvantaged party is responsible for protecting his own interest. This is especially true in a commercial context. That the vulnerable or weak party places subjective trust in the other is an inadequate criteria. In the words of Dawson J.:

> "A fiduciary relationship does not arise where, because one of the parties to a relationship has wrongly assessed the trustworthiness of another, he has reposed confidence in him which he would not have done had he known the true intentions of that other. In ordinary business affairs persons who have dealings with one another frequently have confidence in each other and sometimes that confidence is misplaced. That does not make the relationship a fiduciary one... A fiduciary relationship exists where one party is in a position of reliance upon the other because of the nature of the relationship and not because of a wrong assessment of the character or reliability."[56]

The distinction drawn is between trust subjectively placed and a relationship which when viewed objectively invites the conclusion that trust and confidence are integral to the relationship. There is therefore a close parallel between this latter conception of a fiduciary relationship and the one based on legitimate expectation that the "fiduciary" will subordinate the pursuit of his self-interest to that of the beneficiary. Both are objective in nature. Both involve ascertaining the necessary fiduciary element from the nature of the relationship. Indeed they may be viewed as "two faces of the same coin." The objective approach prevents giving undue weight to the fact that the "beneficiary" has been taken advantage of. It recognises that the "fiduciary" may also legitimately expect to act in a self-interested manner and that the counter-party will take steps to safeguard his own interests.

Dawson J.'s criticism also points to a more amorphous form of the trust and confidence theory which can lead to confusion. Mutual trust and confidence

[55] At 69 (see n. 25 above).
[56] At 71 (see n. 25 above).

between parties dealing with one another can be of various kinds. It may involve trusting in the competence of the counter-party to carry out the task and bring to fruition the expected results. It may involve trusting the other party to perform his obligations in good faith in accordance with the spirit of the agreement. Or it may involve trust and confidence in the manner stated at the beginning of this section, *i.e.* that the counter-party will suppress the pursuit of his self-interest in the pertinent area of activity and subordinate it to the interest of the counter-party. The danger with speaking of trust and confidence without greater specificity is a muddling up of the protected interest. Trust and confidence in the good faith performance of obligations assumed is different in quality from trust and confidence in the counter-party's subordination of self-interest to one's own. Accordingly, the fact that one party has placed trust and confidence in the other party without more is insufficient basis for the two onerous proscriptive rules.

Canadian courts have adapted the notion of trust and confidence and used it to found positive equitable duties. In *M(K) v. M(H)*,[57] the Supreme Court of Canada held that a father who sexually abused his daughter had abused the trust inherent in a parent-child relationship; this, it was held, constituted a breach of fiduciary duties. The "fiduciary" duty not to sexually abuse the child acted as a surrogate tort—albeit one founded in equity. While characterisation of the relationship as "fiduciary" may be criticised, it cannot be impermissible to found new positive duties upon trust reposed and confidence abused. In *Mahmud v. BCCI*,[58] the trust and confidence in an employer-employee relationship gave rise to an implied term; this opened the possibility to the employee's claiming "stigma" damages arising from the employer's fraudulent conduct of the business.

Stated without sufficient particularity, the trust and confidence theory is at best an insufficient indicia of when a relationship attracts the proscriptive fiduciary rules; at worst it confuses and muddles the protected interests. Trust and confidence can form only the starting point of inquiry. It is an unsatisfactory theoretical basis.

### *(c) Power and discretion—vulnerability*

The theory that the fiduciary is a person who possesses the power to affect the interests of the beneficiary has close linkage with the theory that the identifying mark of a fiduciary relationship is the vulnerability of the beneficiary. For some, "power and discretion" and "vulnerability" are integral elements of the undertaking test.[59] The power and discretion theory, on the other hand, takes these two elements as the defining characteristics of the fiduciary.

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[57] (1992) 96 D.L.R. (4th) 289. (Use of the fiduciary obligation to circumvent the Limitation Act RSO 1980, c. 240).

[58] [1997] 3 W.L.R. 95, HL.

[59] See Mason J.'s oft cited test in *Hospital Products v. USSC* at 96–97 (see n. 25 above): "The critical feature of these [fiduciary] relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interest of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. The relationship between the parties is therefore one which gives the

The starting point for discussion of this theory is the dictum of Wilson J. in *Frame v. Smith*:

> "(1) The fiduciary has scope for the exercise of some discretion or power;
> (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interest; and
> (3) The beneficiary is particularly vulnerable to, or at the mercy of the fiduciary holding the discretion or power."[60]

This dictum has found general acceptance in the Supreme Court of Canada. "Wilson J.'s mode of analysis has been followed as a 'rough and ready guide' in identifying new categories of fiduciary relationships."[61]

The difficulty with the power and discretion test is that it is formulated at such a high level of abstraction that it catches many situations which have no linkage with the subordination of self-interest to a paramount interest. In the context of the joint venture, the application of this theory would mean that joint venturers will be fiduciaries of one another as long as there is power or discretion conferred to affect the interest of a co-venturer. The joint venturer who is depended upon to contribute proprietary information has the power to affect the joint venture and thereby the interests of the co-venturers. Will the withdrawal of his participation attract the profit or conflict rule such that the co-venturers have a right to claim the profits which he makes from the subsequent use of his proprietary information? The theory does not define the interest to be protected with sufficient particularity to be meaningful.

Some judges have focused the fiduciary inquiry around the element of vulnerability.[62] The problem is: a person can be vulnerable in many ways. The feeble-minded, the illiterate and the infirm are vulnerable as are the loyal disciples of a religious counsellor. Vulnerability explains the law's motivation for intervening. But vulnerability is common to many forms of legal intervention, *e.g.* undue influence. If vulnerability is to be used as a "test" for fiduciary relationships, it is at least of a different quality from the kind of vulnerability that exists in other relationships, *e.g.* that of undue influence. In *Hodgkinson v. Simms*,[63] a financial adviser was held to be a fiduciary towards a fairly sophisticated investor.

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fiduciary a special opportunity to exercise the *power or discretion* to the detriment of that other person who is accordingly *vulnerable to abuse* by the fiduciary of his position," (emphasis mine).

[60] (1987) 42 D.L.R. (4th) 81 at 99, Supreme Court of Canada.

[61] *Hodgkinson v. Simms, per* La Forest J. at 176b (see above at n. 14).

[62] See Dawson J. in *Hospital Products v. USSC* (see above at n. 25) at 143, Sopinka and MacLachlan JJ. in *Hodgkinson v. Simms* (see above at n. 14) at 218–219. But see *New Limited v. ARL* (1996) 21 A.C.S.R. 635 at 756.

[63] The defendant Simms was an accountant and investment adviser from whom the plaintiff Hodgkinson sought advice on tax-sheltering of his investments. Simms recommended investments in four multi-unit residential buildings ("MURBs") without disclosing that he stood to gain from the developer bonuses which were pegged to the amount of investments channelled to the MURBs in question. Hodgkinson followed Simm's advice. The real estate market subsequently collapsed; as a result, Hodgkinson lost virtually the entire value of his investments. It was found as a matter of fact that the plaintiff relied completely on the defendant's advice. La Forest J., delivering the opinion of the majority,

The vulnerability found in *Hodgkinson v. Simms* arises not from the beneficiary's inherent vulnerability and inability to protect his interests. It is premised on the beneficiary's legitimate expectations that the fiduciary will use the power conferred for the beneficiary's benefit and that the fiduciary's self-interest will not intrude into the advice he provides. The vulnerability arises from and is the end result of the reposing of such trust. To the extent that emphasis is put on complete or total reliance, there is the danger of focusing on the consequence of a fiduciary relationship rather than the reason for it in the first place.

The notion of vulnerability as the basis for fiduciary relationships is nonetheless valuable for explicitly recognising the policy dimension of finding a fiduciary relationship. It brings to open debate the normative rules that should govern a relationship.

## F. Toward a Focused Inquiry

A joint venture—or aspects of a joint venture—may fall within an established category of status-based fiduciary relationships. If the relationship amounts to a partnership, fiduciary duties are presumed to extend over the scope of the business. Even if a joint venture does not amount to a partnership, fiduciary duties may extend over those aspects of the joint venture which fall within other status-based fiduciary relationships. Thus a joint venturer who is also agent for his co-venturer to procure supplies would be a fiduciary within the scope of the agency; if he receives a secret commission from the supplier, he would be obligated to disgorge the benefit conferred.

Status-based fiduciary relationships provide inclusive tests for determining whether a joint venture or aspects of it attract the proscriptive fiduciary rules. If the status-based inquiry yields no positive indication, a factual inquiry is inevitable. In this regard, I have suggested that the protected interest contained in the proscriptive fiduciary rules should direct the inquiry. As the complainant is in substance claiming the loyalty of the obligor, the touchstone of inquiry should be: does the complainant have a legitimate expectation that the "obligor" subordinate the pursuit of his self-interest to that of the complainant? The loyalty interest forms, as it were, the "centre of crystallisation" for the factual inquiry. It indicates what facts are relevant and how they are relevant to the fiduciary inquiry.

Loyalty expectations are different in quality from good faith expectations. They are similar in so far as they seek to *limit* the pursuit of one's self-interest. Good faith expectations, however, do not necessarily require the *subordination* of the obligor's interest to that of the obligee. A person who confers power or discretion on another expects the latter to conduct himself in good faith. While appropriate obligations may be implied to give effect to the good faith expectations, the lack of an identifiable loyalty interest would negate the applicability of the proscriptive fiduciary obligations. Good faith expectations are more amorphous. The obligations which they call for would depend on the context. At common law, the

held that a fiduciary relationship existed between the parties. For comments, see Oglivie, "Fiduciary Obligations in Canada: from Concept to Principle" [1995] J.B.L. 638.

formulation of good faith obligations will proceed through the doctrine of implied terms.

Supplementing parties' intentions with additional obligations is not something the common law does readily. At common law, contracting parties are permitted fairly wide latitude for self-interested actions. Parties are encouraged to be self-reliant; they should not expect the law to make up for their mistakes. This is borne out by the conservatism of common law courts when asked to infer obligations additional to those expressly agreed between the parties. They are amendable in so far as the supplementary obligations involve no more than concretising the parties' unspoken intentions; the ready acceptance of the undertaking theory and the long-accepted restrictive test for implied terms in fact bear testament to this.

Norm-setting, however, is cause for greater pause. Welfarist concerns are pitted against the need to promote self-reliance and party responsibility. Where parties are sophisticated contracting parties, the latter aims would normally prevail. However, relations between commercial parties are not necessarily premised only on formal contracts; trust and good faith are also important premises. Some element of norm-setting is desirable to promote fairness of conduct. Normally, parties should be encouraged to protect their self-interest through contractual devices. But where the reposing of trust and confidence is encouraged by the counter-party with the consequence that exhaustive contract planning is dispensed with, there is cause for judicial gap-filling. Such judicial gap-filling must be consistent with the contract the parties have concluded; parties' legitimate expectation must not be defeated.[64]

The contractual setting of joint ventures plays both a limiting role and a generative role. The agreed terms limit what may be construed as the inferred or imputed intentions of parties.[65] The philosophical bias circumscribes the room for norm creation. In its generative role, the contractual base comprising the common understanding of parties (though unarticulated) can form the basis for finding good faith and fiduciary obligations.

It is tempting to conceptualise fiduciary obligations as a particular *species* of implied terms.[66] Fiduciary obligations *are* implied obligations and *do* have a certain linkage with implied terms in contract law; in so far as a party may be inferred to have assumed a fiduciary obligation, the techniques used for finding

[64] "The fiduciary relationship, if it exists at all, must accommodate itself to the terms of the contract so that it is consistent with, and conforms to, them. The fiduciary relationship cannot be superimposed upon the contract in such a way as to alter the operation which the contract was intended to have according to its true construction", Mason J. in *Hospital Products v. USSC* at 97 (see above at n. 25).

[65] Mason J. in *Hospital Products v. USSC* at 99 (see above at n. 25) stated that a party's freedom to make decisions by reference to his own interests presents an "overwhelming obstacle" to a comprehensive fiduciary relationship. See also *Moorgate Tobacco v. Philip Morris* (1984) 156 C.L.R. 414 (a distributor who was free to make commercial decisions on the basis of his own profitability not under a fiduciary duty to the manufacturer in relation to the sale and marketing of the latter's product).

[66] See, for example, Easterbrook & Fischel, "Contract and Fiduciary Duty" (1993) 36 J. Law Econ. 425.

implied terms are helpful for justifying its existence. However, implied terms doctrines are inadequate in so far as the touchstone is still "what is necessary for the contract".[67] They do not sufficiently address the dynamics of the relationship that exists between the parties. Judicial dicta has acknowledged that factors like ascendancy, influence, vulnerability, trust, confidence or dependence are relevant for ascertaining legitimate fiduciary expectations.[68] These considerations direct attention to the dynamics of the relationship; they are indicative of the loyalty interest. The strictures of the tests for implied terms should not be applied to judge the legitimacy of loyalty expectations. Rather the matrix of the relevant factors should be judged holistically in the context of the relationship to see whether there is a legitimate fiduciary expectation. When evaluating the loyalty interest arising out of a contractual relationship, one must take the "contract" to include the facts which show the realities of the consensual relationship that exists between the parties.[69]

The fiduciary inquiry does not need a complete theoretical basis for fiduciary relationships. It can be purposefully conducted using the protected interest as the compass by which to direct the inquiry. A good sense of direction, a sensitivity to the context and an appreciation of the tensions suffice for the inquiry to be carried out in a focused and yet meaningful manner.



[67] See n. 28 above.

[68] *New Limited v. ARL* (1996) 21 A.C.S.R. 635 at 756, Federal Court of Australia—General Division (Sydney).

[69] *Birchnell v. Equity Trustees, Executors and Agency Co.* (1929) 42 C.L.R. 384 at 408: "The subject matter over which the fiduciary obligations extend . . . is determined by the character of the venture or undertaking for which the partnership exists, and this is to be ascertained not merely from the express agreement of the parties . . . but also from the course of dealings actually pursued by the firm."
See La Forest J.'s treatment of the exclusion clause in *Hodgkinson v. Simms* at 195–196 (see above at n. 14) ("Realities" of the relationship negated the express stipulation of parties).



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