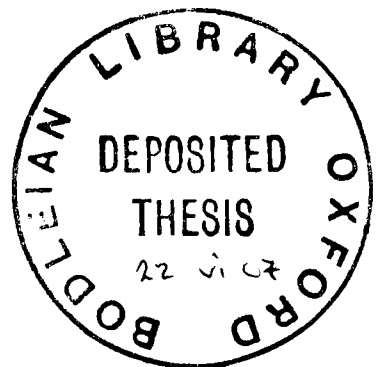


**University of Oxford
Faculty of Law**

**TRUST AND THE FIDUCIARY:
PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW**

**Matthew Harding
Balliol College**



**In partial fulfilment of the Degree of Doctor of Philosophy
Trinity Term, 2006**

ABSTRACT

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In exploring its two themes – trust and the fiduciary – the thesis pursues three aims. The overarching aim of the thesis is to consider to what extent, and in what ways, the fiduciary relationship may be said to be a relationship of trust. The pursuit of that overarching aim requires some understanding of what a relationship of trust is, of what a fiduciary relationship is, and of that which is entailed, in morality and in law, in trusting and fiduciary relationships. Hence the other two aims of the thesis. First the thesis aims to provide some analysis of trust, and responses to trust, from the moral point of view. Secondly, the thesis aims to identify a fiduciary principle, and to explain how fiduciary obligation might be justified.

The thesis concludes that the fiduciary relationship may be said to have trust at its core, but only in some ways, in some cases and from certain points of view. In reaching that conclusion, the thesis develops philosophical accounts of interpersonal trust, obligations that those who are trusted owe to those who trust them, and the cycle of trust and trustworthiness that characterises trusting relationships. The thesis also proposes a fiduciary principle, according to which a relationship is fiduciary to the extent that one person, by exercising discretion to affect the interests of another person, is able to carry out some responsibility the purpose of which is to benefit that other person. It is argued that this principle, along with the Kantian insight that it is wrongful to use people as means to one's own ends, helps to explain and justify the prophylactic rule against fiduciary conflicts of interest in a way that has not to do with trust. However, it is also argued that the fiduciary duty of loyalty may be explained and justified in light of the point of fiduciary regulation, which has to do with supporting trusting relationships and securing the autonomy of individuals.

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INTRODUCTION

I PROLOGUE

To begin with, consider two stories.

In the first story, my friend and I are hiking in a remote part of a foreign country. My friend, who is a better hiker and also fitter than I, wants to continue to the summit of a nearby mountain, but I want to return to the village from which we set out. I do not know the way back, and have until now been relying on my friend's excellent orienteering skills. A local boy whom we meet on the path agrees to accompany and guide me on the return journey. He insists on carrying my bag. Along the path back to the village, he stays well ahead of me, and frequently I lose sight of him. Several times, where there is a fork in the path, I have to wait for him to come back and show me which way to go. He does so every time. After many hours we finally return safely to the village, and I try to pay him for his services but he refuses to take my money. Late the following day, my friend returns to the village in an agitated state. Having reached the summit and begun her journey back to the village, her orienteering skills deserted her and she quickly lost her way. She came across a local girl who offered to guide her back and carry her bag. But the girl disappeared *en route*, leaving my friend stranded at a fork in the path. My friend only made it back to the village by sheer luck, and now her bag, containing her passport, money and brand new camera, is gone.¹

¹ This story is based, in part, on A Lingis, 'Typhoons' (2002) 8 *Cultural Studies Review* 95, 96-7.

In the second story, my friend asks me to sell off her extensive and valuable collection of paintings. She wants me to divide the proceeds of the sale among her children. As I agree to do as she asks, my friend transfers ownership of her collection to me and empowers me to sell it. Without consulting my friend or her children, and without exploring any sale options, I sell part of the collection to a cousin of mine who is an art dealer. I fancy myself as a painter of merit, and my aim in selling to my cousin is to gain favour with him so I can then press him to champion my work. As a result, I am prepared to accept less for the paintings from my cousin than I know he is prepared to pay. The rest of the collection I sell to a company in Liechtenstein for considerably less than its market value. I am the principal shareholder in the company in Liechtenstein, but I do not disclose that fact to my friend or her children. My company on-sells the paintings to a private collector for twice what it paid for them. I personally make many millions of dollars as a result.²

These two stories are about the two themes of this thesis: trust, and the fiduciary. They are intended to set the stage for what follows by introducing those two themes in intuitively plausible ways. It seems undeniable that the first story is about trust and also about at least two possible ways to respond to trust, one of which is morally questionable. Similarly, the lawyer will immediately recognise the second story as one of breach of fiduciary obligation, as it involves a person whose business it is to look after the interests of another, but who instead looks after himself. In the two

² The story is based, again in part, on the facts of *Rothko v Reis* (1977) 372 NE 2d 291. In *Rothko v Reis*, the executors of the estate of the abstract expressionist painter, Mark Rothko, sold off 798 Rothko paintings in self-interested ways. In the New York Court of Appeals, Rothko's children successfully sued the executors for breach of fiduciary obligation.

stories are the broad contours of the notions of trust, responding to trust, the fiduciary relationship and fiduciary obligation as they are developed and analysed in the thesis. Those broad contours provide a sense of what the thesis is about without presupposing anything but what intuition accepts. That is why they are a good starting point.

However, the two stories are more than a good starting point. Because they entail intuitively plausible meanings of trust and the fiduciary, the stories are also capable of functioning as criteria against which theoretical understandings of those concepts may be assessed. For example, a theory of trust and responses to trust that cast doubt on the moral distinction between the actions of my guide and those of my friend's guide in the first story would stand in need of justification or even revision, precisely because it did not accord with intuition. And, shifting attention to the second story, a conception of the fiduciary that did not characterise my self-serving behaviour as a breach of fiduciary obligation would be susceptible to review for the same reason. Insofar as the two stories entail intuitively plausible meanings of trust and the fiduciary, they contribute – in the context of analysis of those concepts – to the underlying methodology that John Rawls famously described as 'reflective equilibrium'.³ In other words, they reflect intuitive judgments, in which we have confidence, against which theoretical principles relating to trust and the fiduciary may be assessed and in light of which such principles may be revised.⁴ The spirit of

³ J Rawls, *A Theory of Justice* (revd paperback edn, Oxford University Press, Oxford, 1999) 17-9, 42-4.

⁴ Rawls notes that the theoretical principles that we develop may also call into question and compel the revision of some of our confidently made intuitive judgments; after all, the equilibrium is to be reached 'reflectively'. That possibility need not be spelled out, however, as it is assumed in any philosophical analysis.

reflective equilibrium underlies this thesis, even if the methodology is not manifested overtly throughout.

The broad contours of the thesis having been introduced, some preliminary observations about trust and the fiduciary are warranted before those concepts – as well as what (if anything) brings them together – are examined in detail.

II TRUST

Discussions of trust are almost entirely missing from moral philosophy.⁵

Russell Hardin's observation is surprising, considering the attention that trust has received in the social sciences over the past two decades.⁶ Yet it remains true today. Hardin should not be taken to mean that the concept of trust has been ignored by moral philosophers; indeed such philosophers have employed it in a variety of theories. His point is rather that moral philosophers rely on an intuitive understanding of the concept of trust when they employ it, and that they do not analyse that concept. Two examples from the work of Charles Fried will suffice to illustrate. First, in his Kantian account of why lying is wrong, Fried concludes that lying is a species of breach of trust, but he does not explain more broadly what he takes trust, or breach of

⁵ R Hardin, *Trust and Trustworthiness* (Russell Sage Foundation, New York, 2002) xix.

⁶ Particularly since the publication of D Gambetta (ed), *Trust: Making and Breaking Cooperative Relations* (Basil Blackwell, New York and Oxford, 1988). That volume, which has been cited frequently in the literature of a variety of disciplines, was the result of an interdisciplinary seminar on the subject of trust held at King's College, Cambridge, in 1985-6.

trust, to mean.⁷ Secondly, in his influential book on promising and contract, Fried argues, in a memorable phrase, that promising gives trust ‘its sharpest, most palpable form’.⁸ Again, in that book, Fried does not analyse the concept of trust that he employs.⁹

Why has trust received so little attention from even those moral philosophers who invoke it in their work? Three points may be made in response to that question. First, it must be acknowledged that trust is widely understood intuitively. That could be because trust is widely experienced intuitively, in the sense that trusters often lack awareness of the fact that they are trusting and rarely reflect on their trust.¹⁰ For example, imagine that I travel by train to the office every morning. During the journey, I keep my umbrella on the floor next to my seat. One morning, the umbrella is missing when I stand up to alight from the train. Only then do I consciously reflect on the fact that I have, for years, trusted my fellow commuters not to steal it. To the extent that trust is experienced in such a non-deliberative – indeed, non-conscious –

⁷ C Fried, *Right and Wrong* (Harvard University Press, Cambridge, Massachusetts and London, 1978) 67. Other accounts of lying that invoke trust in an intuitive sense are S Bok, *Lying: Moral Choice in Public and Private Life* (Vintage Books, New York, 1979) and BAO Williams, *Truth and Truthfulness* (Princeton University Press, Princeton, 2002) Chapter 5. In his *The Logic and Limits of Trust* (Rutgers University Press, New Brunswick and New Jersey, 1983) 3, the sociologist Bernard Barber criticises Bok for her failure to examine the concept of trust that she employs.

⁸ C Fried, *Contract as Promise: A Theory of Contractual Obligations* (Harvard University Press, Cambridge, Massachusetts and London, 1981) 8. Other accounts of promising and contract that invoke trust in an intuitive sense are AJ Bellia Jr, ‘Promises, Trust and Contract Law’ (2002) 47 *American Journal of Jurisprudence* 25 and D Kimel, *From Promise to Contract: Towards a Liberal Theory of Contract* (Hart Publishing, Oxford and Portland, Oregon, 2003) Chapters 1-3.

⁹ Elsewhere, Fried has examined the concept of trust in general terms, but only very briefly and not in ways that assist greatly in understanding the sense in which he invokes trust in his other work: C Fried, *An Anatomy of Values* (Harvard University Press, Cambridge, Massachusetts and London, 1970) Chapter V.

¹⁰ O Lagerspetz, ‘The Notion of Trust in Philosophical Psychology’ in A Alanen, S Heinämaa and T Wallgren (eds), *Commonality and Particularity in Ethics* (MacMillan Press, Basingstoke and London, 1997) 95, 109.

way, it may not matter that it is invoked in moral philosophy in an intuitive sense. Indeed, it may even be preferable not to attempt to analyse trust, because the only way to understand it may be through experience.¹¹

An objection may be raised to this point. Even if it is accepted that trust is widely experienced in a non-conscious way, it is not the case that trust is always so experienced. Some writers have propounded this idea by arguing that a person can decide to trust.¹² Some have argued that a person can decide to act as if she trusted, and can thereby trust trust itself.¹³ Others have said that a truster cannot decide to trust but may decide to act on the basis of her trust.¹⁴ Which of these assertions is correct depends on the conception of trust that one adopts. But none is consistent with the claim that trust is experienced only in a non-conscious way, and each contemplates cases where trusters clearly make decisions in ways that consciously implicate their trust. One such type of case appears to be entailed in promising. By deciding not to wash my car today because you have promised to wash it tomorrow, I

¹¹ Ibid, 114.

¹² N Luhmann, *Trust and Power* (H Davis, J Raffan and K Rooney (trans), John Wiley and Sons, Chichester, 1979) 24-5; R Holton, 'Deciding to Trust, Coming to Believe' (1994) 72(1) *Australasian Journal of Philosophy* 63, 63; AC Baier, 'Response to Olli Lagerspetz' in A Alanen, S Heinämaa and T Wallgren (eds), *Commonality and Particularity in Ethics* (MacMillan Press, Basingstoke and London, 1997) 118, 120.

¹³ Luhmann, *Trust and Power*, above n 12, 69; D Gambetta, 'Can We Trust Trust?' in D Gambetta (ed), *Trust: Making and Breaking Cooperative Relations* (Basil Blackwell, New York and Oxford, 1988) 213, 228-9; AC Baier, 'Trusting Ex-Intimates' in G Graham and H Lafollette (eds), *Person to Person* (Temple University Press, Philadelphia, 1989) 269, 279.

¹⁴ R Hardin, 'The Street-Level Epistemology of Trust' (1993) 21 *Politics and Society* 505, 516; P Pettit, 'The Cunning of Trust' (1995) 29 *Philosophy and Public Affairs* 202, 214; Hardin, *Trust and Trustworthiness*, above n 5, 58-60. As is clear from Chapter 1, I agree – on this point – with Hardin's analysis.

have, in the ordinary case, trusted you.¹⁵ The correct characterisation of that trust is an open question, demanding an analysis of trust generally. But the trust must be conscious and entail reflection, even if only momentary, because I have made a decision not to do something on account of your promise.

The second reason that may explain why trust has received little attention from moral philosophers is that trust, despite being widely experienced and understood intuitively, is a complex phenomenon. Analyses of it from a range of disciplines link it to emotions,¹⁶ attitudes,¹⁷ expectations,¹⁸ and actions.¹⁹ It has been equated by some with confidence²⁰ or with reliance,²¹ but others have distinguished it from those two concepts.²² It has been understood to be directed at people generally²³ but also to

¹⁵ For an account of the role of trust in ordinary cases of promising, and for an explanation of extraordinary cases, see Kimel, *From Promise to Contract*, above n 8, Chapter 1.

¹⁶ Baier, 'Trusting Ex-Intimates', above n 13, 271; LC Becker, 'Trust as Non-Cognitive Security about Motives' (1996) 107 *Ethics* 43, 44.

¹⁷ L Herzberg, 'On the Attitude of Trust' (1988) 31 *Inquiry* 307, 314-5; AC Baier, 'What Do Women Want in a Moral Theory?' in her *Moral Prejudices: Essays on Ethics* (Harvard University Press, Cambridge, Massachusetts and London, 1994) 1, 10; K Jones, 'Trust as an Affective Attitude' (1996) 107 *Ethics* 4, 4; T Govier, *Dilemmas of Trust* (McGill-Queen's University Press, Montreal, Kingston, London and Ithaca, 1998) 6; C McLeod, 'Our Attitude Towards the Motivation of Those We Trust' (2000) 38 *The Southern Journal of Philosophy* 465, 465.

¹⁸ Luhmann, *Trust and Power*, above n 12, 39; Barber, *The Logic and Limits of Trust*, above n 7, 14-5; J Baker, 'Trust and Rationality' (1987) 68(1) *Pacific Philosophical Quarterly* 1, 1; Gambetta, 'Can We Trust Trust?', above n 13, 217; McLeod, 'Our Attitude Towards the Motivation of Those We Trust', above n 17, 465-6.

¹⁹ BAO Williams, 'Formal Structures and Social Reality' in D Gambetta (ed), *Trust: Making and Breaking Cooperative Relations* (Basil Blackwell, New York and Oxford, 1988) 3; Pettit, 'The Cunning of Trust', above n 14, 214.

²⁰ HJN Horsburgh, 'Trust and Social Objectives' (1961) 72 *Ethics* 28, 28; Pettit, 'The Cunning of Trust', above n 14, 204.

²¹ Horsburgh, 'Trust and Social Objectives', above n 20, 28; DO Thomas, 'The Duty to Trust' (1978-9) 79 *Proceedings of the Aristotelian Society* 89, 90; AC Baier, 'Trust and Antitrust' (1986) 96 *Ethics* 231, 234-5.

²² Jones, 'Trust as an Affective Attitude', above n 17, 18-9; N Luhmann, 'Familiarity, Confidence, Trust: Problems and Alternatives' in D Gambetta (ed), *Trust: Making and Breaking Cooperative*

be directed at individuals with respect to particular matters.²⁴ When dealing with such a complex phenomenon, there is a danger of confusion, contradiction and oversimplification, and that danger may make it desirable, and even necessary, to avoid committing to a particular analysis of trust when invoking it in moral philosophy. It might be thought that only such an approach is capable of respecting the complexity of trust.

Despite the undoubted complexity of trust, the dangers associated with analysing it can be overstated. That is because they are likely to arise only when a comprehensive analysis of trust is attempted, and such a comprehensive analysis need not be attempted in order to gain insights about trust that can be applied usefully in moral philosophy. Instead, one or more aspects or senses of trust can be taken up and explored, with a specific objective in view. For example, when considering what it means to assert that lying is a species of breach of trust, it is unlikely to be helpful to analyse those aspects of trust that are connected to the emotions (assuming that such aspects exist). Rather, given that lying is generally considered to entail the intention to deceive,²⁵ it is more likely to be helpful to concentrate on the epistemological aspects of trust. So long as such a particularised analysis does not purport to be comprehensive, it can illuminate trust in important ways without constraining the

Relations (Basil Blackwell, New York and Oxford, 1988) 94; Herzberg, 'On the Attitude of Trust', above n 17, 314-5; Holton, 'Deciding to Trust, Coming to Believe', above n 12, 65-7; AB Seligman, *The Problem of Trust* (Princeton University Press, Princeton, 1997) Chapter 1; McLeod, 'Our Attitude Towards the Motivation of Those We Trust', above n 17, 473-4.

²³ Luhmann, *Trust and Power*, above n 12, 39; EM Uslaner, *The Moral Foundations of Trust* (Cambridge University Press, Cambridge, 2002) 3.

²⁴ Hardin, *Trust and Trustworthiness*, above n 5, 9-10.

²⁵ Williams, *Truth and Truthfulness*, above n 7, 96.

phenomenon in theoretical bonds that cannot hold it. Moreover, a number of such particularised analyses may provide a solid foundation for a sophisticated understanding of trust in all its complexity.²⁶

A third reason why trust does not figure much in moral philosophy might be that trust is generally thought not to be a moral concept. In other words, it is generally thought that there is no right or wrong about trust; one simply trusts or does not trust, and it makes no sense to say that one might, in certain circumstances, owe an obligation to trust. Some writers on trust disagree that trust is a non-moral concept, but – assuming that trust has attitudinal and epistemological aspects – they bear the heavy burden of demonstrating what could justify an obligation to do what many argue is impossible, namely, to decide to acquire or shed an attitude or a belief. As that burden has not been discharged by those who argue for an obligation to trust,²⁷ the more acceptable position appears to be that nothing may be said about trust from the moral point of view.²⁸ If that is the case, what about trust could interest moral philosophers?

The answer to that question becomes clear once it is recognised that trust is usually what Russell Hardin calls a ‘three-part relation’: A trusts B to do X.²⁹ In this three-

²⁶ A similar point is made by F Fukuyama, ‘Differing Disciplinary Perspectives on the Origins of Trust’ (2001) 81 *Boston University Law Review* 479.

²⁷ Writers who have argued that an obligation to trust may arise, but who have not addressed how one can have an obligation to decide to change one’s attitudes or beliefs, are: HJN Horsburgh, ‘The Ethics of Trust’ (1960) 10 *Philosophical Quarterly* 343, 354; Thomas, ‘The Duty to Trust’, above n 21, 99-101; Baker, ‘Trust and Rationality’, above n 18, 8; Herzberg, ‘On the Attitude of Trust’, above n 17, 319-20; Govier, *Dilemmas of Trust*, above n 17, 170-4.

²⁸ The writer who makes this point most cogently is Russell Hardin: ‘The Street-Level Epistemology of Trust’, above n 14, 512; ‘Trustworthiness’ (1996) 107 *Ethics* 26, 28; *Trust and Trustworthiness*, above n 5, 74-8.

²⁹ Hardin, *Trust and Trustworthiness*, above n 5, 9.

part relation, even if it is accepted that nothing may be said, from the moral point of view, about A's trust, there may be much to say about B and also about X, being that which A trusts B to do. For example, does B have an obligation to do X, which will, in the ordinary case, result in the justification of A's trust? Does B have an obligation not to do X, which will, in the ordinary case, result in the disappointment of A's trust? Is either obligation affected in any way by A's trust? These are questions of a type familiar to moral philosophers, and they implicate trust even though they are not directly about it. Indeed, these are questions of precisely the type that moral philosophers have asked and answered in ways that implicate trust in an intuitive sense. The two examples introduced above from the work of Charles Fried are good illustrations.

It is clear that none of the three reasons explaining why trust has been so little analysed by moral philosophers should preclude such analysis in the future. The first aim of this thesis is to provide some analysis of trust from the moral point of view and thereby to contribute to the development of the moral philosophical literature on trust. Chapter 1 recognises and relies on an intuitive sense of trust as an optimistic attitude about the choices that people will make, but it also subjects trusting expectations and actions performed in light of such expectations to analytical scrutiny. Chapter 2 acknowledges that trust is often a three-part relation, and considers, *inter alia*, the role and nature of obligations in responding to trust. The two chapters do not provide anything like a comprehensive analysis of trust. Instead, they illuminate some aspects of it that assist in understanding certain moral obligations and their analogues in law. In so doing, they pay due respect to the phenomenon of trust in all its complexity.

III THE FIDUCIARY

The fiduciary relationship is a concept in search of a principle.³⁰

The second aim of this thesis is to identify that which makes a relationship fiduciary, and to explain how fiduciary obligation might be justified. Put simply, the aim is to describe, with some degree of precision, a fiduciary principle. That is an ambitious project, in light of Sir Anthony Mason's words. Judges and scholars have, for many years, sought such a principle but no consensus about its content or consequences has emerged. For example, there are many different views about what obligations are properly to be regarded as fiduciary. Moreover, although it is generally thought that the obligation to avoid conflicts of interest is undoubtedly fiduciary, there is much dispute over what relationships that obligation should arise in. Given the resilience to definition that the fiduciary relationship has demonstrated, and the lack of agreement about the nature and extent of fiduciary obligation, the second aim of the thesis needs to be qualified if it is plausibly to be achieved.

Chapter 3 of the thesis therefore aims to illuminate one aspect of that which makes a relationship fiduciary, which is that the fiduciary, by exercising discretion to affect the interests of the principal, is able to carry out some responsibility the purpose of which is to benefit the principal. Chapter 5 builds on that analysis and explains why such a combination of discretion and responsibility leads to the obligation to avoid conflicts

³⁰ A Mason, 'Themes and Prospects' in PD Finn (ed), *Essays in Equity* (The Law Book Company, Sydney, 1985) 246, 246.

of interest but does not lead to other obligations which fiduciaries commonly owe. Specifically, that combination does not lead to what is sometimes called a duty of loyalty: an obligation to act in the best interests of the principal. As Chapter 5 makes clear, such an obligation may be justified only on other grounds. By contrast, the thesis contends that the justification of the obligation to avoid conflicts of interest refers to an aspect of that which makes a relationship fiduciary. However, the thesis does not purport to explain every aspect of the fiduciary relationship. It describes *a* fiduciary principle without claiming that it is *the* fiduciary principle. Nonetheless, the thesis does assume that it is possible to define the fiduciary relationship, and that at least one fiduciary obligation is to be justified with reference to a feature of the fiduciary relationship. This assumption has, however, itself been challenged, and the challenge should be addressed and met before the assumption is considered safe to rely upon.

The challenge is in the assertion that the fiduciary relationship cannot be defined in any meaningful way at all. The assertion takes three forms. First, it is said that there is no such thing as a fiduciary relationship, but only certain obligations that equity for convenience labels fiduciary.³¹ In this form, the assertion is problematic. If its proponents believe that the obligations commonly labelled fiduciary are justified in some way, they bear the onus of explaining why the fiduciary label has come to be employed, and what non-fiduciary justification it serves to obscure. In particular, that explanation should illuminate what, apart from the existence of a certain type of

³¹ PD Finn, *Fiduciary Obligations* (The Law Book Company, Sydney, 1977) 1; RP Austin, 'Moulding the Content of Fiduciary Duties' in AJ Oakley (ed), *Trends in Contemporary Trust Law* (Clarendon Press, Oxford, 1996) 153, 174. Paul Finn has since resiled from that view: 'The Fiduciary Principle' in TG Youdan (ed), *Equity, Fiduciaries and Trusts* (The Carswell Co, Toronto, 1989) 1, 46; 'Contract and the Fiduciary Principle' (1989) 12 *University of New South Wales Law Journal* 76, 85.

relationship that equity calls fiduciary, could justify an obligation to avoid conflicts of interest. While such an explanation is lacking, the project of identifying one or more features of the fiduciary relationship that support the justification of at least the core fiduciary obligation should continue undeterred.³²

Secondly, it is said that a relationship is fiduciary only in the sense that fiduciary obligations arise within it.³³ This second form of the assertion suffers from the same problem as the first. If obligations that make a relationship fiduciary have a justification that does not refer to some feature of the relationship, that justification should be explained. No such explanation is offered by those who make the assertion in its second form. If the justification of fiduciary obligations refers to some feature of the relationship within which they arise, the second form of the assertion is circular because it defines the fiduciary relationship with reference to fiduciary obligations which are, in turn, defined with reference to the fiduciary relationship.³⁴ Such a circular assertion is clearly flawed and fails to constitute any objection to conceptual analysis of the fiduciary relationship.

³² It might be argued that the obligations commonly labelled fiduciary are imposed because judges think they should be, and that the fiduciary label is used 'as a rhetorical or argumentative device intended to persuade': J Dietrich, 'Giving Content to General Concepts' (2005) 29 *Melbourne University Law Review* 218, 220. As Dietrich points out, if a concept like the fiduciary is used in such a rhetorical way, there is nothing interesting for a lawyer to say about it, because it has no significant role in determining the rights and obligations of parties before the courts. Moreover, even a cursory review of the case law illustrates amply that judges do not use the fiduciary label in a rhetorical sense, and caution frequently against such rhetorical usage. See, eg, *In re Coomber: Coomber v Coomber* [1911] 1 Ch 723, 728-9, per Fletcher-Moulton LJ, warning against the 'danger of trusting to verbal formulae.'

³³ *Bristol and West Building Society v Mothew* [1998] Ch 1, 18 per Millett LJ; R Flannigan, 'The Boundaries of Fiduciary Accountability' (2004) 83 *Canadian Bar Review* 35, 48.

³⁴ LCH Hoyano, 'The Flight to the Fiduciary Haven' in PBH Birks (ed), *Privacy and Loyalty* (Clarendon Press, Oxford, 1997) 169, 182.

A third form of the assertion that the fiduciary relationship cannot be defined meaningfully mounts an attack, not on the perceived emptiness of the fiduciary label, nor on the idea that a fiduciary relationship may be understood without reference to fiduciary obligations, but instead on the very possibility of definition of concepts like the fiduciary relationship. The attack does not take the form of a thoroughgoing scepticism about whether legal concepts ever have real meaning. It makes the more modest claim that fiduciary relationships do not necessarily have one common feature.

John Glover, who propounds the modestly sceptical argument, states that ‘general terms entail no more than a series of “family resemblances” between their instances.’ Therefore, according to Glover, one should not expect a ‘common element’ to be present in every fiduciary relationship. Glover’s review of the case law leads him to postulate four features of fiduciary relationships, which he calls ‘undertaking’, ‘property’, ‘reliance’ and ‘power’. His conclusion is that no one of these four features will be present in every fiduciary relationship, but that one or more will be present in many fiduciary relationships, and that when a new relationship comes before a court, it will be classified as fiduciary if the judge determines that it resembles a previous fiduciary relationship – which is likely to be characterised with reference to one or more of the four features – sufficiently. Glover contends that analogy by family resemblance serves ‘social purposes external to the system’, but is limited by the demand for ‘coherence and correlativity, which are internal to equity’s regime.’³⁵

³⁵ J Glover, ‘The Identification of Fiduciaries’ in PBH Birks (ed), *Privacy and Loyalty* (Clarendon Press, Oxford, 1997) 269, 276-7. The inspiration for Glover’s argument, and the source of the phrase ‘common element’, is Wittgenstein. See also J Glover, ‘Wittgenstein and the Existence of Fiduciary Relationships: Notes Towards a New Methodology’ (1995) 18 *University of New South Wales Law*

Two objections may be raised to Glover's argument. First, he does not explain why one should be satisfied with an explanation of fiduciary relationships that rests only on family resemblances. Why do family resemblances rule out a common feature rather than constituting evidence that such a common feature exists?³⁶ And, insofar as they constitute such evidence, why should family resemblances not help to support the argument that the members of the fiduciary family share a common feature and to that extent may be analysed with reference to that common feature? Moreover, if family resemblances do not constitute evidence that fiduciary relationships share a common feature, why do they not therefore constitute evidence that the members of the fiduciary family share no common feature? And why should such evidence not support the argument that there is no such thing as a fiduciary relationship and that the fiduciary label is misleading and ought not to be used? In the fiduciary setting, the idea of family resemblances only seems to raise more questions than it answers.

The second objection to Glover's argument relates to his account of the justification and limitation of analogy by family resemblance. It is simply not possible to analogise by family resemblance in order to serve 'social purposes external to the system' while at the same time respecting the limitation set by the demand for

Journal 443, 451; J Glover, *Commercial Equity: Fiduciary Relationships* (Butterworths, Sydney, 1995) 42. Deborah DeMott seems to hold a similar view but stops short of denying the possibility of conceptual definition. She writes, 'the fiduciary obligation is a device that enables the law to respond to a range of situations in which, for a variety of reasons, one person's discretion ought to be controlled because of characteristics of that person's relationship with another. This instrumental description is the only general assertion about fiduciary obligation that can be sustained': 'Beyond Metaphor: An Analysis of Fiduciary Obligation' [1988] *Duke Law Journal* 879, 915.

³⁶ LD Smith, 'The Motive, Not the Deed' in J Getzler (ed), *Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn* (LexisNexis, London, 2003) 53, 54 n 3: 'The members of a group of people among whom we would expect to find family resemblances *do* share a single characteristic, namely descent from a common ancestor (and hence, shared genetic material)' (Smith's emphasis).

coherence and correlativity in private law. Why that is the case is explained by the writer to whom Glover refers³⁷ on coherence and correlativity in private law, Ernest Weinrib. Weinrib writes that coherence ‘signifies a mode of intelligibility that is internal to the relationship between the parts of an integrated whole.’³⁸ To the extent that it operates as a limitation within private law, coherence therefore precludes analogising to serve external considerations – Glover’s ‘social purposes’ – and fails to be met by an understanding of the fiduciary relationship, or any other private law category, that is satisfied with family resemblances rather than conceptual unity. Only conceptual unity is able to deliver the internality and integrity that coherence in private law demands. On correlativity, Weinrib writes that the ‘only pertinent justificatory considerations [for private law liability] are those that articulate the correlational nature of right and duty.’³⁹ In other words, the imposition of liability in private law is justified only to the extent that it recognises that the defendant did not do her duty and therefore the plaintiff’s right has been infringed, and to the extent that it attempts to make good that situation by responding to the requirements of corrective justice. Once again, reference to external ‘social purposes’ is ruled out. And once again, private law demands an internally intelligible justification of duty and corresponding right. In the fiduciary setting, the demand can be met only by analysis that explains the wrong of breach of fiduciary obligation with reference to what draws

³⁷ Glover, ‘The Identification of Fiduciaries’, above n 35, 277 n 41.

³⁸ EJ Weinrib, *The Idea of Private Law* (Harvard University Press, Cambridge, Massachusetts and London, 1995) 14.

³⁹ *Ibid*, 142.

the fiduciary and the principal into a ‘reciprocal normative embrace’:⁴⁰ their relationship.

The second objection to Glover’s argument only works because Glover himself believes that coherence and correlativity operate as boundaries to ‘[a]cceptable resemblance’.⁴¹ The objection could not be raised against an argument that the justification of fiduciary liability is purely functional, having nothing to do with rights and duties.⁴² Whether such a functionalist approach to fiduciary liability should be preferred to one that invokes the internal intelligibility of private law is a large question that admits of no easy answer. This thesis does not aim to supply such an answer. Instead, it pursues two lines of argument. First, Chapter 3 assumes, and Chapter 5 argues, consistently with Weinrib’s assertion that ‘private law is to be understood from within’, that the obligation to avoid conflicts of interest is justified according to the requirements of corrective justice.⁴³ Secondly, Chapters 4 and 5 argue that a fiduciary duty of loyalty may be justified on functional grounds, in light of the point of fiduciary regulation, which has to do with trust. By pursuing both arguments, the thesis hopes to illuminate aspects of the fiduciary relationship for both corrective justice theorists and functionalists.

⁴⁰ Ibid.

⁴¹ Glover, ‘The Identification of Fiduciaries’, above n 35, 277.

⁴² Weinrib regards functionalism as the view that ‘one comprehends law through its goals’: *The Idea of Private Law*, above n 38, 3. If corrective justice – which describes how the law responds to breaches of duty and infringements of right – is a goal of law, then Weinrib is to be understood as referring to goals other than corrective justice. In what follows, ‘goals’ is used in the same sense.

⁴³ Ibid, 8. For a recent account of the fiduciary relationship that draws inspiration from Weinrib, see E Fox-Decent, ‘The Fiduciary Nature of State Legal Authority’ (2005) 31 *Queen’s Law Journal* 259.

IV TRUST AND THE FIDUCIARY

The fiduciary relationship has trust, not self-interest, at its core.⁴⁴

The third, and overarching, aim of this thesis is to explore the extent to which McLachlin J's assertion is true. She is not alone in making it. The case law and literature in which the fiduciary relationship is described as a relationship of trust, or as a relationship in the characterisation of which trust may play a role, is voluminous.⁴⁵ What are usually taken to be cognate concepts like confidence and reliance are also invoked by judges and commentators.⁴⁶ Indeed, Len Sealy has argued that the fiduciary label was first applied, in the nineteenth century, to

⁴⁴ *Norberg v Wynrib* (1992) 92 DLR (4th) 449, 488 per McLachlin J.

⁴⁵ *Helmores v Smith* (1886) 35 Ch D 436, 444 per Bacon V-C; *Birtchnell v Equity Trustees, Executors and Agency Co Ltd* (1929) 42 CLR 384, 407-8 per Dixon J; *Furs Ltd v Tomkies* (1936) 54 CLR 583, 590 per Latham CJ; *Reading v R* [1949] 2 KB 232, 236 per Asquith LJ (affirmed by the House of Lords in *Reading v Attorney-General* [1951] AC 507); *Midcon Oil and Gas Ltd v New British Dominion Oil Co Ltd and Brook* (1958) 12 DLR (2d) 705, 707-11 per Rand J in dissent; *New Zealand Netherlands Society "Oranje" Incorporated v Kuys* [1973] 1 WLR 1126, 1129 per Lord Wilberforce; *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 96 per Mason J; *United Dominions Corporation Ltd v Brian Pty Ltd* (1984-5) 157 CLR 1, 12 per Mason, Brennan and Deane JJ; *Lac Minerals Ltd v International Corona Resources Ltd* (1989) 61 DLR (4th) 14, 35-7 per La Forest J; *Canson Enterprises Ltd v Broughton & Co* (1991) 85 DLR (4th) 129, 154 per McLachlin J; *Norberg v Wynrib* (1992) 92 DLR (4th) 449, 488 per McLachlin J; *Attorney-General for Hong Kong v Reid* [1994] 1 AC 324, 330 per Lord Templeman; *Hodgkinson v Simms* (1994) 117 DLR (4th) 161, 178 per La Forest J; *Bristol and West Building Society v Mothew* [1998] Ch 1, 18 per Millett LJ; *Twinsectra Ltd v Yardley* [2002] 2 AC 164, 186 and 203 per Lord Millett; *Hilton v Barker Booth and Eastwood (a firm)* [2005] 1 All ER 651, 660-1 per Lord Walker of Gestingthorpe; R Flannigan, 'The Fiduciary Obligation' (1989) 9 *Oxford Journal of Legal Studies* 285, 286; R Flannigan, 'Fiduciary Obligation in the Supreme Court' (1990) 54 *Saskatchewan Law Review* 45, 46; RBM Cotterrell, 'Trusting in Law: Legal and Moral Concepts of Trust' (1993) 46(2) *Current Legal Problems* 75, 76; LE Mitchell, 'Fairness and Trust in Corporate Law' (1993) 43 *Duke Law Journal* 425, 430; R Flannigan, 'Fiduciary Regulation of Sexual Exploitation' (2000) 79 *Canadian Bar Review* 301, 302; T Frankel and WJ Gordon, 'Introduction' (2001) 81 *Boston University Law Review* 321, 327; LE Mitchell, 'The Importance of Being Trusted' (2001) 81 *Boston University Law Review* 591, 597-8, 614-7; LI Rotman, 'The Fiduciary Regulation of E-Commerce' (2003-4) 29 *Queen's Law Journal* 739, 741; Flannigan, 'The Boundaries of Fiduciary Accountability', above n 33, 43.

⁴⁶ *Tate v Williamson* (1866) LR 2 Ch App 55, 61 per Lord Chelmsford LC; *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1974-5) 132 CLR 373, 377 per McTiernan J; *Coleman v Myers* (1977) 2 NZLR 225, 325 per Woodhouse J; *Daly v Sydney Stock Exchange Ltd* (1986) 160 CLR 371, 377 per Gibbs CJ; *Hodgkinson v Simms* (1994) 117 DLR (4th) 161, 193-8 per La Forest J.

relationships that had previously been known as relationships of trust but which could no longer be described that way because of the technical meaning that trust had come to have in equity.⁴⁷ On the other hand, it has been pointed out that fiduciary relationships may arise in the absence of trust, and that the presence of trust is not a sufficient condition for the establishment of a fiduciary relationship.⁴⁸ Moreover, the fiduciary relationship is often analysed without any reference to the concept of trust, which suggests that nothing meaningful is to be ascertained about such relationships by considering them in light of trust.

It cannot be doubted that trust is not a sufficient condition for the establishment of a fiduciary relationship, nor can it be doubted that a fiduciary relationship may exist notwithstanding that the parties in it do not trust each other or even distrust each other. To illustrate, consider the profound trust that characterises many family relationships that are not fiduciary in nature. Consider also the Australian case *Chan v Zacharia*, in which the relationship between two partners who had quarrelled and fallen out was still fiduciary even though they no longer trusted each other in any

⁴⁷ LS Sealy, 'Fiduciary Relationships' [1962] *Cambridge Law Journal* 69, 71-2; LS Sealy, 'The Director as Trustee' [1967] *Cambridge Law Journal* 83, 85-6. The word 'fiduciary' comes from the Latin *fiducia*, meaning 'a trust'. Peter Birks prefers 'trustee-like' and argues that 'only the clumsiness of that adjective provokes the Latinate usage': *An Introduction to the Law of Restitution* (revd paperback edn, Clarendon Press, Oxford, 1989) 332. See also PBH Birks, 'The Content of Fiduciary Obligation' (2000) 34 *Israel Law Review* 3, 8.

⁴⁸ *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 69 per Gibbs CJ, 141-2 per Dawson J; *White v Jones* [1995] 2 AC 207, 271-3 per Lord Browne-Wilkinson; *Breen v Williams* (1996) 186 CLR 71, 93 per Dawson and Toohey JJ; FW Maitland, *Equity: A Course of Lectures* (revd edn, Cambridge University Press, Cambridge, 1936) 42-3; T Frankel, 'Fiduciary Law' (1983) 71 *California Law Review* 795, 800 n 17; PD Finn, 'Fiduciary Law in the Modern Commercial World' in E McKendrick (ed), *Commercial Aspects of Trusts and Fiduciary Obligations* (Clarendon Press, Oxford, 1992) 7, 14; P Parkinson, 'Fiduciary Obligations' in P Parkinson (ed), *The Principles of Equity* (The Law Book Company, Sydney, 2003) 339, 385.

meaningful sense and their partnership was being dissolved.⁴⁹ However, that there is no tidy correlation between relationships characterised as trusting and those characterised as fiduciary does not mean that McLachlin J's assertion – that the core of the fiduciary relationship is trust – should be dismissed out of hand. Nor does it mean that a full understanding of the fiduciary relationship may be gained without any consideration of trust. Rather, it means that any connection between trust and the fiduciary is likely to be relatively subtle and complex. Moreover, it means that a cautious posture should be adopted towards accounts of trust and the fiduciary that purport to explain the relationship between the two concepts as straightforward and simple.

In this regard, lessons may be learned from a recent debate in the theory of criminal law. The debate is about the moral justification of punishment. On one side are two scholars who argue that punishment is morally permissible only in response to an act that has violated trust.⁵⁰ On the other side are two scholars who argue that the moral justification of punishment should not be understood solely in terms of trust.⁵¹ The scholars invoking trust make two arguments. David Hoekema argues that punishment is morally justified in response to an act that violates the 'minimum trust that we must, of practical necessity, extend to strangers.'⁵² According to Hoekema, such

⁴⁹ (1984) 154 CLR 178.

⁵⁰ DA Hoekema, 'Trust and Obey: Towards a New Theory of Punishment' (1991) 25 *Israel Law Review* 332; S Dimock, 'Retributivism and Trust' (1997) 16 *Law and Philosophy* 37.

⁵¹ R Gavison, 'Punishment and Theories of Justice: Comments on Sadurski and Hoekema' (1991) 25 *Israel Law Review* 351; D Korman, 'The Failure of Trust-Based Retributivism' (2003) 22 *Law and Philosophy* 561.

⁵² Hoekema, 'Trust and Obey', above n 50, 345.

minimum trust is not voluntarily reposed – we have no choice but to trust strangers not to harm or exploit us if we are to live in a community – and therefore the criminal law must protect it by punishing every violation of it. By contrast, violations of trust that is voluntarily reposed, such as the trust within many family and loving relationships, are not the concern of the criminal law.⁵³ Susan Dimock agrees with Hoekema that the justification of punishment has to do with maintaining the conditions of basic trust in the community.⁵⁴ However, she makes the more sophisticated argument that punishment is justified only in response to acts that make it objectively less reasonable to trust others.⁵⁵ Dimock's argument, unlike Hoekema's, allows for the punishment of acts that do not violate the trust of the victim, so long as they give individuals within the community one less reason to trust each other.

These two scholars argue for a justificatory connection between violations of trust and punishment that holds true for all justified punishment and that establishes a boundary beyond which all punishment is unjustified. Being too ambitious, their arguments are unsuccessful. As Daniel Korman points out, Hoekema's argument fails to account for cases where one person voluntarily reposes trust in another which that other violates by the commission of an act that clearly calls for punishment. The sexual assault of a spouse is one such case. Moreover, Hoekema fails to account for cases where one person involuntarily reposes trust in another which that other violates by the commission of an act that should not be punished. A negligent act causing injury to a

⁵³ Ibid, 347.

⁵⁴ Dimock, 'Retributivism and Trust', above n 50, 37.

⁵⁵ Ibid, 51-3.

stranger is a good example.⁵⁶ And in respect of serious crimes, Hoekema's account seems implausible. As Ruth Gavison observes, the reason for punishing the perpetrator of a brutal rape is surely not only that the perpetrator violated someone's trust.⁵⁷

Unlike Hoekema's, Dimock's argument does not depend on the claim that every violation of someone's involuntary trust deserves punishment. It depends on the more modest claim that every act that makes it objectively less reasonable to trust deserves punishment. However, her argument still claims too much, because many acts that make it objectively less reasonable to trust are not, and should never be, punishable under criminal law. Korman supplies the example of a drug user who provides information to the police about her dealer. In providing that information, the user has made it objectively less reasonable for drug dealers to trust their customers.⁵⁸ On Dimock's account, the drug user should be punished for giving drug dealers in the community one less reason to trust. Moreover, Dimock's account handles the position of the drug dealer inadequately. Presumably, she is committed to the view that the demonstrated trustworthiness of a dealer who faithfully sells high quality drugs at a fair price makes it objectively more reasonable to trust drug dealers and

⁵⁶ Korman, 'The Failure of Trust-Based Retributivism', above n 51, 565. Korman's examples are different from mine.

⁵⁷ Gavison, 'Punishment and Theories of Justice', above n 51, 355.

⁵⁸ Korman, 'The Failure of Trust-Based Retributivism', above n 51, 568.

other merchants, and that the dealer should not be punished as a result. Neither this conclusion nor that with respect to the user is acceptable.⁵⁹

Hoekema's and Dimock's accounts of the moral justification of punishment are unsuccessful not because criminal acts in no way violate trust, nor even because violations of trust do not figure in the justification of punishment. Indeed, it makes perfect sense to speak of much crime in terms of violation of trust. Similarly, one of the most important goals of the law – including the criminal law – is almost certainly helping to bring about, and maintaining, conditions of basic trust in the community. The accounts are unsuccessful because they invoke trust too straightforwardly and too simply. First, in both accounts, it is assumed that the law responds properly to trust only by securing, maintaining and protecting either it or the conditions under which it exists. Secondly, neither account pays sufficient attention to the fact that trust is usually a three part relation – A trusts B to do X – and that questions must be asked about X before A's trust can be assessed from a moral point of view. For example, if I trust you to murder my brother, and you fail to do so, you should not be punished because you have violated trust, because I have trusted you to do wrong. Similarly, if I trust you not to murder my brother, and you murder him, you should be punished because you have intentionally killed someone, not because you have violated my trust. As was discussed above, trust itself is not moral or good. Hoekema and Dimock treat it as such, which is chiefly why their theories fail.

⁵⁹ Those who do not accept that dealing in drugs should be punished may substitute nuclear weapons, child pornography, human organs, slaves, or whatever commodity will help to illustrate the objection to Dimock's account.

The lessons learned from the debate about violations of trust and the moral justification of punishment are applied in Chapters 4 and 5. Chapter 4 argues that trust is at the core of fiduciary relationships in the sense that it helps to explain the point of the regulation of such relationships. However, in making that argument, Chapter 4 is careful not to assert that the justification of fiduciary liability always has to do with trust. As Chapter 5 demonstrates, in many cases it does not. Rather, Chapter 4 treats the phenomenon of trust as a functional consideration bearing on fiduciary regulation generally. As a result, as was alluded to above, Chapters 3, 4 and 5 together provide a corrective justice account of fiduciary liability for breach of the no conflict rule, and a functionalist account of fiduciary regulation. Moreover, Chapters 4 and 5 do not insist on a claim that the only proper response of law to the phenomenon of trust – even trust that is entirely appropriate and reposed in order to achieve valuable ends – is to secure, maintain and protect either it or the conditions of its existence. Chapter 5 avoids treating trust as moral or good in explaining what is wrong about breach of fiduciary obligation. Indeed, Chapter 5 concludes that the wrong of breach of the obligation to avoid conflicts of interest has not to do with trust. And Chapter 5 also argues that a fiduciary duty of loyalty may be justified, on functional grounds, to the extent that it guarantees the trustworthiness of fiduciaries who are *not* trusted by their principals, giving those principals a reason to rely on and cooperate with their fiduciaries in the absence of trust.

V METHODOLOGY

In exploring the nature of trust and the fiduciary and questioning the extent to which the fiduciary relationship has trust at its core, this thesis engages in what Richard Posner has called ‘top down’ legal reasoning.⁶⁰ According to Posner,

[i]n reasoning from the top down, the judge or other legal analyst invents or adopts a theory about an area of law ... and uses it to organize, criticize, accept or reject, explain or explain away, distinguish or amplify the decided cases to make them conform to the theory and generate an outcome in each new case as it arises that will be consistent with the theory and with the cases accepted as authoritative within the theory.⁶¹

The title of the thesis, using the inverse metaphor of foundations, alludes to the top down nature of the thesis’s methodology.

Top down legal reasoning proceeds by deduction from theoretical premises. This distinguishes it from ‘bottom up’ legal reasoning, which uses inductive techniques and proceeds by analogy from decided cases. In private law, top down legal reasoning is associated with the writings of those who seek a home for the principle

⁶⁰ RA Posner, ‘Legal Reasoning from the Top Down and from the Bottom Up’ in his *Overcoming Law* (Harvard University Press, Cambridge, Massachusetts and London, 1995) 171, 172-5. The piece is a revised version of (1992) 59 *University of Chicago Law Review* 433. Here, references are to the book.

⁶¹ *Ibid*, 172.

against unjust enrichment in a rational taxonomy of legal obligations.⁶² It is not associated with equity,⁶³ and certainly not with equity's approach to fiduciary relationships. The frequency with which judges have cautioned against the top down approach, and favoured the bottom up approach, to the fiduciary relationship attests to that.⁶⁴

What justifies taking the top down approach to trust and the fiduciary when judges have expressly disavowed that approach and when equity scholars have displayed scepticism towards it? There are two answers to that question, one general to legal reasoning, and one specific to analysis of the fiduciary relationship. The general answer is that judges and scholars do and should engage in top down legal reasoning. Whenever they are asked to interpret a decided case, they must apply a 'vast linguistic, cultural and conceptual apparatus', whose source is not the case law, in the

⁶² Most notably, Peter Birks. See, for example, his *English Private Law* (Oxford University Press, Oxford, 2000). For a critique of the taxonomical approach from a judge in an unjust enrichment case, see *Roxborough v Rothmans of Pall Mall Australia Limited* (2001) 208 CLR 516, 544-5 per Gummow J. For a critique from a restitution scholar, see S Hedley, 'Rival Taxonomies Within Obligations: Is There a Problem?' in S Degeling and J Edelman (eds), *Equity in Commercial Law* (The Law Book Company, Sydney, 2005) 77.

⁶³ This is partly because of its adoption by the taxonomists, who are accused by some leading equity lawyers of demanding the fusion of equitable and common law principles and remedies in ways not authorised by the Judicature Acts of the 1870s: see RP Meagher, JD Heydon and MJ Leeming (eds), *Meagher, Gummow and Lehane's Equity Doctrines and Remedies* (4th ed, Butterworths, Sydney, 2002) Chapter 2 and paragraph 23-020, and AS Burrows, 'We Do This at Common Law but That in Equity' (2002) 22 *Oxford Journal of Legal Studies* 1; AS Burrows, 'Remedial Coherence and Punitive Damages in Equity' in S Degeling and J Edelman (eds), *Equity in Commercial Law* (The Law Book Company, Sydney, 2005) 381 for the two sides of the debate. For a third way, see LD Smith, 'Fusion and Tradition' in S Degeling and J Edelman (eds), *Equity in Commercial Law* (The Law Book Company, Sydney, 2005) 19.

⁶⁴ One clear example of a bottom up, analogical, approach to the fiduciary relationship is that of Fry J in *Re West of England & South Wales District Bank Ex parte Dale & Co* (1879) 11 Ch D 772, 778: 'What is a fiduciary relationship? It is one in respect of which, if a wrong arise, the same remedy exists against the wrongdoer on behalf of the principal as would exist against a trustee on behalf of the *cestui que trust*.' That passage was cited with approval by Sir George Jessel MR in his celebrated judgment in *In re Hallett's Estate* (1879) 13 Ch 696, 712-3.

interpretive process.⁶⁵ There is no avoiding that. For example, Keith Mason has recently pointed out⁶⁶ that Lord Atkin clearly had the biblical parable of the Good Samaritan, as well as the precedents, in mind when he formulated the neighbour principle in *Donoghue v Stevenson*.⁶⁷ Moreover, it is desirable that judges utilise insights, from sources other than the case law, in disciplines like theology, philosophy, sociology and economics.⁶⁸ No one would dispute that the neighbour principle brought needed clarity and order to the law of tort in accordance with the requirements of morality. Had Lord Atkin instead formulated a ‘stranger principle’ with reference to the Hobbesian state of nature, the proper response would not be to say that he should have confined himself to the precedents. It would be to say that he applied the wrong theory or misinterpreted that theory.

The specific answer is that it is simply impossible to question the extent to which the fiduciary relationship has trust at its core without engaging in top down legal reasoning. That is because trust – putting to one side its technical sense – is not a legal concept. Its meaning cannot be worked out by analogy to decided cases because there are no decided cases establishing the meaning of trust. Whatever the concept of trust means, its meaning must be determined by looking to sources other than the case law. That meaning can then be used to interpret the case law on fiduciary relationships, but only – and necessarily – in a top down way. It might be asked why,

⁶⁵ Posner, ‘Legal Reasoning from the Top Down and from the Bottom Up’, above n 60, 174.

⁶⁶ K Mason, ‘What Is Wrong with Top-Down Legal Reasoning?’ (2004) 78 *Australian Law Journal* 574, 584. Justice Mason is the President of the New South Wales Court of Appeal.

⁶⁷ [1932] AC 562.

⁶⁸ Posner, ‘Legal Reasoning from the Top Down and from the Bottom Up’, above n 60, 175: ‘But there must be a theory. One cannot just go from case to case, not responsibly anyway.’

other than for reasons of theoretical curiosity, the concept of trust should be used to interpret the case law on fiduciary relationships. The answer is that the case law itself demands this by consistently asserting that the fiduciary relationship is one of trust. If we are to make sense of that assertion, we must develop an understanding of what a relationship of trust entails, and whether it is the same as what a fiduciary relationship entails, an imperative that requires reasoning from the top down.

In addition to the two justifications of top down reasoning, there is one further reason why this thesis confidently takes such an approach to trust and the fiduciary. The thesis does not engage in the kind of austere top down reasoning that Posner describes, constructing a theory and then sweeping aside all facts about the world that do not fit it. Instead, the thesis subjects its top down approach to the underlying spirit of reflective equilibrium that was described in the Prologue. Built into the idea of reflective equilibrium is the notion that intuitively plausible judgments potentially may compel the reconsideration, and possibly also the modification, of theoretical understandings, where there is a significant lack of alignment between the two. There is no reason why that notion of intuitively plausible judgments should not include the intuitively plausible judgments of courts as well as those of individuals or communities. Consequently, by subjecting top down reasoning to the constraints of reflective equilibrium, the thesis not only demands that decided cases conform to theory, but also recognises the possibility that decided cases may rightly demand the conformity of theory.⁶⁹

⁶⁹ In this, the thesis adopts a methodology similar to that described by Stephen Smith, in his book on contract theory, as 'interpretive' and 'moderate': see *Contract Theory* (Oxford University Press, Oxford, 2004) Chapter 1.

CHAPTER 1 – TRUST

Consider again the first story set out in the Prologue. It makes sense to say that I trusted the local boy who guided me back from the mountain to the safety of the village. Indeed, the intuitive plausibility of interpreting my interaction with the boy in terms of trust was the primary reason for telling the story. But what does it *mean* to say that I trusted him? At a basic level, it means that I had a certain disposition towards him. In other words, it means that I was inclined, when thinking about the boy, to regard him in a particular way and not in other ways. Yet another way of describing my trust in this sense is to say that I had a certain attitude towards the boy and, entailed in that, a similar attitude towards the interaction between the boy and me.

But it would seem that there was more to my trust than just my attitude towards the boy. The most plausible explanation of my actions would point to the fact that I formed certain beliefs, and that those beliefs were accompanied by my attitude of trust. Among those beliefs would appear to have been that the boy knew his way back to the village and that he had no malevolent intentions, and that therefore he would guide me back safely to the village. Being about the future when I formed them, my beliefs may be described as expectations. Being accompanied by my trusting attitude, those expectations may also be called trusting. Those trusting expectations then led me to act. I followed the boy back to the village; I allowed him to carry my bag; I waited for him when he disappeared on the path ahead of me. By so acting, I appear to have entrusted my safety and my interest in returning to the village to the boy. It is possible that, by entrusting those concerns to the boy, I

showed him that I trusted him. Perhaps by refusing my offer of payment, he reinforced my sense of his trustworthiness and thereby made it more likely that I would trust him again in the future.

This brief interpretation of what happened in the story in terms of trust indicates three aspects of trust that are explored in this chapter. The first section of the chapter considers trust as an attitude, and rests, as does the chapter as a whole, on two claims: that trust is an attitude of optimism; and that the attitude of trust is about the choices that people will make. The second section considers trusting expectations. Without asserting that its analysis is exhaustive, the section examines trusting expectations relating to the trusted's good will, roles, relationship with the truster, integrity, and interests. The third, and final, section considers what trust leads trusters to do, and investigates certain types of action that are well- and ill-suited to manifesting trust. The third section concludes by explaining why, depending on the circumstances, it might be important not only to trust, but also to manifest that trust to the trusted.

I THE ATTITUDE OF TRUST

The first claim on which this chapter rests is that trust is an attitude of optimism.¹ If this claim is accepted, trust may be distinguished from distrust and from the attitude – or, perhaps, the absence of attitude – that is best, if clumsily, described as neither-

¹ The optimistic nature of trust has been pointed out by K Jones, 'Trust as an Affective Attitude' (1996) 107 *Ethics* 4 and T Govier, *Dilemmas of Trust* (McGill-Queen's University Press, Montreal and Kingston, London, Ithaca, 1998). Jones argues that trust is an attitude of optimism directed at the good will or competence, including the moral competence, of another. As is made clear below, I disagree that trust is directed only at good will or (moral) competence, but I agree with Jones that the attitude of trust is characterised by optimism.

trust-nor-distrust.² Distrust is an attitude of pessimism, and neither-trust-nor-distrust is not optimistic, nor pessimistic, but instead has the character of indifference. The optimism of trust means that a truster tends to adopt a stance of positivity, and is therefore disposed to think in a favourable light, about that with respect to which she trusts. By contrast, the distruster tends to adopt a stance of negativity, and is therefore disposed to be suspicious, about that with respect to which she distrusts. Neither-trust-nor-distrust entails no stance at all; it entails no disposition to think in any particular way about the matter with respect to which the attitude – if it is an attitude – is held.

An explanation of the psychology of optimism is beyond the scope of this chapter and may, in any event, be unable to generalise with respect to optimism much beyond pointing out that its causes are to be found in past experience and belief. Eric Uslaner gives a sense of what optimism entails when he writes that

[o]ptimism is a world view, not just a summation of life experiences. Optimists believe that other people will be helpful, are tolerant of people from different backgrounds, and value both diversity and independent thinking; they have confidence in their own capacity to shape the world. Optimists are not worried that others will exploit them. If they take a chance and lose, their

² On distrust and neither-trust-nor-distrust, see E Ullmann-Margalit, 'Trust, Distrust and In Between' in R Hardin (ed), *Distrust* (Russell Sage Foundation, New York, 2004) 60.

upbeat world view leads them to try again. Setbacks are temporary; the next encounter will be more cooperative.³

In this passage, Uslaner suggests that optimism entails beliefs, commitments and background attitudes, for instance towards risk. For the purposes of understanding the attitude of trust, his general description of optimism will suffice.

However, one of Uslaner's arguments about trust and optimism must be clarified if the claim that trust is an attitude of optimism is to be relied on. Uslaner argues that trust and optimism, although they are related, are not the same and that, as a result, one can be an optimistic distruster. According to Uslaner, an optimistic distruster may believe that, because she controls her own fate, tomorrow will be better than today.⁴ Two points may be raised in response to Uslaner's argument about the optimistic distruster. First, in one sense, the optimistic distruster does trust: she trusts herself. To that extent, her attitude of optimism is a trusting attitude. Secondly, although the optimistic distruster may be described *generally speaking* as an optimist, once her distrusting attitude towards the individuals with whom she deals from day to day is considered, it reveals her *specifically speaking*, insofar as she has that attitude towards those individuals, to be a pessimist. The optimistic distruster may be called an optimist overall, and may be said to distrust overall, but to the extent that she is an optimist, she does not distrust, and to the extent that she distrusts, she is not an optimist. These two points are not objections to Uslaner's argument: as his aim is to

³ EM Uslaner, 'Democracy and Social Capital' in ME Warren (ed), *Democracy and Trust* (Cambridge University Press, Cambridge, 1999) 121, 138. See also EM Uslaner, *The Moral Foundations of Trust* (Cambridge University Press, Cambridge, 2002) 95.

⁴ Uslaner, 'Democracy and Social Capital', above n 3, 139.

provide an account of generalised trust, he may be satisfied with overall descriptions. However, they make clear that if, as in this chapter, the aim is to consider the nature of trust in interpersonal relationships, overall descriptions – like that of the optimistic distruster – will be unsatisfying.

The second claim on which this chapter rests is that trust is an attitude about the choices that people will make. If this claim is accepted, trust may be distinguished from another attitude of optimism: confidence. The optimism entailed in confidence is not about choices, but rather about outcomes. The outcomes that confidence is about may result from choices, but they may also result from physical, biological, mechanical or even metaphysical processes. Thus, I can be confident not only that you will play the oboe for me, but also that the acoustics of the room are satisfactory for the oboe, that your fingers are warmed up, that the oboe works, and that Apollo will inspire your performance. By contrast, I can trust you only to do that which you are able to choose to do, which in the example is to play the oboe for me.⁵ In the example, my trust will be about your capacities, dispositions and motivations in making your choice, rather than with what you choose to do itself. Because the attitude of trust is situation-specific, the capacities, dispositions and motivations that it is about vary from case to case. Nonetheless, some themes may be identified and are discussed below in the section on trusting expectations.

The words 'trust' and 'confidence' are often used as synonyms and, to the extent that confidence is an attitude about the outcomes of choices, that usage is defensible. If I

⁵ Virginia Held alludes to the distinction between trust and confidence when she points out that we can trust a person's choices, but not her heartbeat: 'On the Meaning of Trust' (1968) 78 *Ethics* 156, 157.

am confident that you will choose me for the hockey team, it almost certainly follows that I also trust you to choose me, and my attitude towards the situation is adequately described as trust or confidence. However, even though the words 'trust' and 'confidence' may be deployed as synonyms, to equate trust and confidence conceptually is to pay insufficient attention to the many instances in which it makes sense to say that I am confident but no sense to say that I trust, because my attitude is not about the outcomes of choices.⁶ For example, I am confident that the sun will rise tomorrow, but I do not trust it to rise.⁷

Because it is an attitude about the choices that people will make, trust recognises and responds to the freedom of individuals to make choices.⁸ Insofar as it recognises and responds to that freedom, trust is a way of dealing with the risk that such freedom

⁶ Indeed, ordinary uses of the words 'trust' and 'confidence' imply a conceptual distinction. Trust, being about the choices that people will make, is relational. This is reflected in a phrase of the form 'A trusts B to X'. Confidence, being about outcomes, is not relational. This is reflected in a phrase of the form 'A is confident that X'. However, the words 'trust' and 'confidence' are used as synonyms in phrases like, 'A has confidence in B' and 'A trusts that X'. These phrases challenge the conceptual distinction between trust and confidence. The first is relational ('in B') yet invokes confidence. The second is about an outcome ('that X') yet invokes trust. If the second claim set out in the text is accepted, it must be concluded that 'confidence' in the first phrase really means trust, and that 'trust' in the second phrase really means confidence.

⁷ Are there instances in which it makes sense to say that I trust but no sense to say that I am confident? If I ask you to select for me a banana or a pineapple from the fruit shop, I may be said to trust you to choose either a banana or a pineapple, but not be confident about which of the two fruits I will end up with. However, I may still be said to have confidence that I will end up with one of the two fruits. This suggests that wherever there is trust, there is also confidence of some sort. However, as I argue in the text, the reverse is not true.

⁸ Many writers have made this claim. See, eg, N Luhmann, *Trust and Power* (John Wiley and Sons, New York, 1979); N Luhmann, 'Familiarity, Confidence, Trust: Problems and Perspectives' in D Gambetta (ed), *Trust: Making and Breaking Cooperative Relations* (Basil Blackwell, New York and Oxford, 1988) 94; D Gambetta, 'Can We Trust Trust?' in D Gambetta (ed), *Trust: Making and Breaking Cooperative Relations* (Basil Blackwell, New York and Oxford, 1988) 218; P Dasgupta, 'Trust as a Commodity' in D Gambetta (ed), *Trust: Making and Breaking Cooperative Relations* (Basil Blackwell, New York and Oxford, 1988) 49; and especially A Seligman, *The Problem of Trust* (Princeton University Press, Princeton, 1993) Chapter 2. Seligman prefers to write in terms of agency, not freedom to make choices, but his broad claim is the same as the one referred to in the text. Seligman's understanding of agency is set out in his *Modernity's Wager: Authority, The Self and Transcendence* (Princeton University Press, Princeton, 2000) Chapter 1.

represents in interpersonal relationships. It deals with such risk by making sense of it through presenting it in a favourable light. As a result, expectations may be formed and actions may be taken. Whether or not a person deals with risk by trusting depends on many factors, including that person's beliefs and their psychological makeup, including their propensity to tolerate risk. However, trust appears to be a necessary way of dealing with risk at least some of the time, as Niklas Luhmann points out in a striking passage in his book, *Trust and Power*.

[A] complete absence of trust would prevent [a person] even from getting up in the morning. He would be prey to a vague sense of dread, to paralysing fears. He would not even be capable of formulating definite *distrust* and making that a basis for precautionary measures, since this would presuppose trust in other directions. Anything and everything would be possible. Such abrupt confrontation with the complexity of the world at its most extreme is beyond human endurance.⁹

Luhmann's vision of a life devoid of trust suggests that we need to trust in order to flourish, and perhaps even to exist, in the world. However, whether or not it is necessary to have a trusting attitude, at least some of the time, is beyond the scope of this chapter. Instead, the rest of the chapter will assume that trust is an attitude of optimism about the choices that people will make, and concentrate on what we believe and do in light of trust.

⁹ Luhmann, *Trust and Power*, above n 8, 4 (Luhmann's emphasis).

II TRUSTING EXPECTATIONS

Fundamentally, trusting expectations are beliefs about what will happen in the future that are accompanied by an attitude of optimism about the choices that people will make.¹⁰ It has been said that trust itself is constituted by expectations.¹¹ However, those who insist on a necessary connection between trust and expectations must account for cases in which a person may be said to trust even though she has no relevant expectations. The trust of infants who are too young to have developed the cognitive abilities required in order to form beliefs about the future is the best example.¹² It has also been said that expectations must be of a certain type before they can be called trusting. For example, Nancy Nyquist Potter writes,

Where trust is concerned, not just any expectation will do – one must expect that the other has good intentions (at least with regard to the cared-about good) and the ability to carry through with what is expected of him or her.¹³

However, this claim fails to account for cases where a person may be said to trust even though she has no expectations about the goodness of the trusted's intentions or the trusted's ability to do what she is trusted to do. Imagine that my piano needs

¹⁰ Expectations in the sense of beliefs about the future ('I expect that it will rain tomorrow') are to be distinguished from expectations in the sense of demands to which we hold others ('I expected you not to lie to me!'): RJ Wallace, *Responsibility and the Moral Sentiments* (Harvard University Press, Cambridge, Massachusetts and London, 1994) Chapter 2.

¹¹ Gambetta, 'Can We Trust Trust?', above n 8, 217-8.

¹² On the trust of infants, see AC Baier, 'Trust and Antitrust' (1986) 96 *Ethics* 231, 240-4.

¹³ N Nyquist Potter, *How Can I Be Trusted? A Virtue Theory of Trustworthiness* (Rowman and Littlefield Publishers, Inc, Lanham, Maryland, 2002) 4.

tuning, and I open the telephone book and call the first tuner I find. If I engage that tuner simply because I cannot be bothered to call anyone else, I may still be said to trust her to tune the piano, even though I have no expectations of her good intentions or her abilities. I almost certainly have expectations of the abilities of piano tuners generally – if I did not, I would not call someone identifying herself as a piano tuner – but that expectation is of a type different than an expectation about the abilities of the particular piano tuner I engage. Attempts to draw a necessary connection between trust and expectations, or between trust and certain types of expectations, run into trouble because they confine trust in implausible ways. The Introduction warned against imposing such theoretical constraints on a phenomenon, like trust, that is not so easily bound.

With that in mind, this section does not assume that trust is constituted by expectations. It is content to assume that expectations may, when they are accompanied by a trusting attitude, be called trusting.¹⁴ Moreover, the section assumes that, apart from their fundamental nature as beliefs about the future that are accompanied by an attitude of trust, trusting expectations share little in common. They are beliefs, and therefore they depend on reasons. First, their existence may be explained with reference to what the truster perceives to be the reasons for having them. Secondly, their justification depends on what reasons there really are for having them, irrespective of what the truster perceives the reasons for having them to be. Trusting expectations – because they assume the freedom of other people to make

¹⁴ LC Becker calls trusting expectations ‘cognitive trust’, and distinguishes cognitive trust from what he calls ‘affective trust’: ‘Trust as Non-Cognitive Security about Motives’ (1996) 107 *Ethics* 43, 44-5. However, what Becker calls cognitive trust must have affective qualities, for otherwise there is no basis for arguing that a pessimistic expectation is not trusting.

choices, and because they are beliefs about what will happen in the future – respond to uncertainty. The level of uncertainty to which trusting expectations respond differs from case to case. So do the reasons which are perceived to, and which really do, justify them. As a result, trusting expectations, like the attitude of trust, are highly situation-specific. Despite the fact that one of the few characteristics shared by trusting expectations is their situation-specific nature, some themes with respect to such expectations can be identified with sufficient abstractness to enable meaningful analysis.

A Good Will

It is sometimes said that trusting expectations entail that the truster has a belief that the trusted will be ‘directly and favourably moved by the thought that [the truster is] counting on her.’¹⁵ In other words, it is sometimes said that trusting expectations arise for reasons to do with the perceived good will of the trusted. Such a perception might be generated in a variety of ways. For example, it might be explained by past dealings in which the trusted has acted consistently with the fact that the truster is counting on her being a reason for her actions. Or it might be explained simply on the basis of enjoyable social encounters between the truster and the trusted. Perceptions of good will often give rise to a basic, underlying sort of trusting expectation. Many expectations that are accompanied by an attitude of optimism about the choices that another person will make include a belief that the other person will take as a reason for action the fact that one is counting on her. However, that is not true of all

¹⁵ Jones, ‘Trust as an Affective Attitude’, above n 1, 4. See also P Pettit, ‘The Cunning of Trust’ (1995) 29 *Philosophy and Public Affairs* 202, 204; Govier, *Dilemmas of Trust*, above n 1, 6.

expectations accompanied by an attitude of trust. As a result, although trusting expectations that are good will-based are often basic and underlying, expectations that in no way depend on a belief as to good will may still be characterised as trusting.

To illustrate, consider an unusual case. One night, I secretly leave my Picasso drawing on the front step of the Tate Modern. It appears as though I have abandoned a valuable work of art, but I know that a curator will discover it early the next morning on the way to work and I believe that she will look after it. The curator will never know that the drawing belonged to me. If my beliefs correspond with the facts of the situation, I will not have an expectation that the curator will look after the painting because she believes that I am counting on her to do so, even though I am counting on her to do so, because she will not know that the drawing belonged to me and therefore will not know that I am counting on her with respect to it.¹⁶ Therefore, I will not have an expectation that entails a belief as to the good will of the curator.¹⁷ Yet it makes sense to say that I trust the curator to look after my drawing if, for instance, I believe that she is a good curator and that good curators cherish and preserve works of art. Such a belief is what is referred to below as a role-based trusting expectation.¹⁸ The unusual case demonstrates that trusting expectations can be based entirely on reasons other than the perceived good will of the trusted.

¹⁶ If my beliefs do not correspond with the facts of the situation and I expect that the curator will look after the drawing because she believes that I am counting on her to do so, my expectation is good will-based, but unjustified because the curator will not know that the drawing belonged to me and therefore will not know that I am counting on her with respect to it.

¹⁷ I could have a good will-based expectation of the curator if I believed that she would look after the drawing because *someone* – not necessarily me – was counting on her. However, nothing dictates that I must have this expectation or that I cannot have the (to my mind, more plausible) expectation that the curator will look after the drawing because she is a good curator.

¹⁸ I am grateful to Lionel Smith for this example, although he is sceptical that my expectations in such a situation would be based not at all on my perception of the curator's good will.

However, being an unusual case, it demonstrates a point of marginal importance. Less unusual, more complex, cases entail good will-based expectations as well as expectations based on other reasons. Those cases are much more commonplace, and demonstrate not that trusting expectations are not good will-based, but rather that perceived good will is often a partial and defeasible basis for trusting expectations, and may, over time, be replaced by other reasons for trusting expectations. Those other reasons may, *inter alia*, relate to what the truster perceives to be: the role of the trusted; the relationship between her and the trusted; the integrity of the trusted; and the interests of the trusted. Each is considered in turn.

B Roles

Trusting expectations may arise in a particular case because the truster believes that the trusted occupies a role, and the truster has trusting expectations of occupants of that role. The truster's general expectations of occupants of that role may inform – though they may not be coextensive with – her particular expectations of the trusted. Such role-based expectations may have developed for a variety of reasons. The truster may have dealt previously with occupants of the role in question and found them trustworthy. For example, if I have been treated successfully and professionally by orthodontists in the past, I am likely to have developed trusting expectations of orthodontists in general which help to explain my expectation of *this* orthodontist, *now*. In addition, the truster may know of other people who have dealt with occupants of the role in question and who found them trustworthy and who told the truster so. Such a situation might lead me to have trusting expectations, for example, where I visit the orthodontist for the very first time, my friends having reported their

positive orthodontic experiences to me. Furthermore, the truster may belong to a community in which people generally have trusting expectations of occupants of the role in question. In years gone by, my expectations of the parish priest, the school teacher or even the Prime Minister might have been trusting for this reason. Expectations that are trusting for this final reason are likely to be informed, at least in part, by community awareness of the normative – including the legal – constraints within which occupants of the role operate, as well as by a widely held belief that occupants of the role respect and are held accountable with reference to those normative constraints.

Trusting expectations are role-based only when the truster believes that the trusted occupies the role to which the truster attaches trusting expectations generally. Therefore, if I trust you to perform orthodontic work on me, my expectation that you will perform the work professionally and successfully is not role-based unless I believe that you are an orthodontist.¹⁹ If I do not believe that you are an orthodontist, I will trust you for other reasons, even if you really are an orthodontist. Moreover, trusting expectations are role-based even when the trusted does not occupy the role to which the truster attaches trusting expectations generally, so long as the truster believes that the trusted occupies that role. Such is the case if I trust you to perform orthodontic work on me believing you to be an orthodontist, whereas in fact you are a plumber. If you are a plumber, I have no good reasons to form a trusting expectation

¹⁹ Where my expectation entails the belief that all orthodontists – including you – are sadists and will cause patients pain, my expectation is role-based but not trusting, because it is accompanied by an attitude of pessimism about the choices that orthodontists make in performing orthodontic work. If I am a masochist, however, my expectation that you, because you are an orthodontist and because all orthodontists are sadists, will cause me pain may be accompanied by an attitude of optimism, and therefore trusting.

of you *qua* orthodontist, unless unusual circumstances prevail.²⁰ But that does not mean that I do not trust you. Whether I have trusting expectations of you and whether I should have trusting expectations of you are two entirely separate questions. The first is concerned with the facts that are beliefs; the second is concerned with the reasons for those beliefs.

Some scholars deny that role-based expectations can be trusting. Those scholars distinguish trusting expectations from what they call confidence. One such is Adam Seligman.²¹ For Seligman, role-based expectations amount to confidence, and trust arises at 'system limits', where one person has no relevant role-based expectations of another, and cannot make assumptions about the choices that the other will make on the basis of a shared understanding of morality.²² At the system limits, such a person will often still form an expectation of the other, and may be said to trust where the expectation that she forms is 'some sort of belief in the good will of the other.'²³ What Seligman describes is doubtless a commonplace phenomenon. However, if, as Seligman accepts, trust responds to the freedom of individuals to make choices, there is no reason why role-based expectations may not be regarded as trusting where the trusted makes choices in the performance of her role. Those choices might be within an extensive sphere of discretion that her role affords her, or they might be very

²⁰ Perhaps you are highly accomplished at everything you attempt and there is no reason to believe that orthodontics will be an exception, or perhaps the situation is an emergency and you are the only person present.

²¹ See also Luhmann, 'Familiarity, Confidence, Trust', above n 8, 97-9.

²² Seligman, *The Problem of Trust*, above n 8, Chapters 1 and 2.

²³ *Ibid*, 43. Other expectations that, consistent with Seligman's account, might be formed at the system limits may be grouped under two headings: distrust, and neither-trust-nor-distrust. See Ullmann-Margalit, 'Trust, Distrust and In Between', above n 2, 60.

simple choices, like whether or not to stamp a document or sign a cheque. They might include the choice whether or not to perform the role at all. Insofar as expectations are role-based, it makes sense to distinguish them from expectations that are based on reasons that do not refer to roles. However, insofar as expectations are accompanied by an attitude of optimism about the choices that another person will make, they are trusting. If such expectations are not always identified as trusting, there is a risk that we will lose sight of what makes expectations trusting, role-based or not.²⁴

C Relationships

Trusting expectations may arise because of a relationship that the truster believes to subsist between her and the trusted. In such cases, trusting expectations are attributable directly to the relationship itself, and not to any perceived quality or role of the trusted. Trusting expectations often arise for this reason in loving and friendly relationships.²⁵ Loved ones and friends usually have trusting expectations of each other that are strong, wide-ranging and enduring,²⁶ and those expectations often

²⁴ Insisting that what Seligman calls confidence really comprises trusting expectations that are role-based accords with our intuition that trust persists and deepens over time. Seligman's own account is counter-intuitive on that score. If trust exists only at system limits where role-based expectations cannot be formed, then trust must inevitably be replaced by confidence as systems expand and role-based expectations become more extensive.

²⁵ Although not necessarily. See ML Brown, 'Compensating for Distrust Among Kin' in R Hardin (ed), *Distrust* (Russell Sage Foundation, New York, 2004) 167.

²⁶ J Baker, 'Trust and Rationality' (1987) 68(1) *Pacific Philosophical Quarterly* 1, 5-6; AC Baier, 'Trusting Ex-Intimates' in G Graham and H Lafollette (eds), *Person to Person* (Temple University Press, Philadelphia, 1989) 269, 278. See also Becker, 'Trust as Noncognitive Security about Motives', above n 14, 50, discussing trust in a repeatedly unfaithful lover.

respond to the simple fact that the loved one or friend is a loved one or friend.²⁷ By contrast, the trust that is reposed in colleagues, acquaintances and strangers tends to be limited, the limits varying according to knowledge of the individuals in question and the nature of encounters and dealings with them. Trusting expectations of loved ones and friends are not, however, necessarily full or broad in nature. I may trust my good friend to have my best interests at heart – after all, she is my good friend – but not trust her to be on time when we arrange a meeting. Moreover, in some cases, a loved one or friend may not, on the whole, be trusted or may even be distrusted. I may love my son very much, but distrust him with respect to a wide range of matters because he is a drug addict and has stolen money from me to purchase drugs.²⁸ I am likely to regret distrusting my son in this way, however, because it is generally thought that loving or friendly relationships *should* be characterised by full and broad trust and that something stands to be corrected when they are not.²⁹

Trusting expectations that are relationship-based may arise where the trusted does not reciprocate the love or friendship of the truster, so long as the truster believes that the trusted is her loved one or friend. Indeed, some of the most painful betrayals of trust

²⁷ See J Raz, *The Authority of Law: Essays in Law and Morality* (Clarendon Press, Oxford, 1979) 255, who points out that friendship is an 'expressive reason' for what is 'fitting' to friendship. If forming trusting expectations is fitting to friendship, then friendship is an expressive reason for forming trusting expectations.

²⁸ I am grateful to Clare Harding for this example.

²⁹ For example, John Finnis writes that friendship entails a 'sharing, community, mutuality, and reciprocity not only of knowledge but also of activity (and thus, normally, of enjoyment and satisfaction)': *Natural Law and Natural Rights* (Clarendon Press, Oxford, 1980) 142. Read alongside his claim (at 306) that 'mutual trustworthiness ... is in itself a valuable component of any common life', it is clear that Finnis' Aristotelian description of ideal friendship depends on trust. DO Thomas goes further, arguing that there is a duty to trust loved ones and friends because trust enables participation in the value of loving and friendly relationships: 'The Duty to Trust' (1978-9) *Proceedings of the Aristotelian Society* 89, 101.

occur within relationships one party to which believes to be reciprocally loving or friendly, but which in reality are not so. And as is the case with trusting expectations that are based on an erroneous belief as to someone's occupation of a role, trusting expectations of a loved one or friend who turns out not to be a loved one or friend after all are not the less trusting for being based on a falsehood. They are fully trusting, but less than fully justified.

Where trusting expectations that are relationship-based are full and broad, they are usually accompanied by more than just an attitude of optimism about the choices that the other person in the relationship will make. Often, they entail a belief that the trusted will make choices in favour of options that are in the best interests of the truster precisely because those options are in the best interests of the truster. And such a belief is usually attributable to the truster's attitude of love or friendship towards the trusted. As John Finnis points out, loved ones and friends ordinarily value the well-being of each other for each other's sake, and treat each other's well-being as an aspect of their own well-being.³⁰ This helps to explain how an attitude of love or friendship can generate the types of belief entailed in relationship-based trusting expectations. Feeling love or friendship for another person often entails a disposition to think the best of that other person, including a disposition to form a belief that the other person cares about what is best for one.

In the ordinary case, my belief that my friend cares about what is best for me will lead me to believe that my friend cares about what I care about *because I care about it*.

³⁰ Finnis, *Natural Law and Natural Rights*, above n 29, 142-3.

Ordinarily, I will believe that there is a correlation between what I care about and what is best for me. However, that will not always be the case. For example, I may not trust myself to judge accurately on the whole that what I care about is also what is best for me. Perhaps I have a history of making poor decisions about my affairs, or perhaps I appreciate that I am reckless and impetuous, or that I too easily develop passions for worthless goals. In such cases, my belief that my friend cares about what is best for me might lead me to believe that my friend will, when necessary, intervene to discourage or even prevent me from pursuing what I care about. My trusting expectations of my friend will reflect this. Moreover, believing that there is a correlation between what I care about and what is best for me may not be justified, if what I care about is detrimental to my well-being.³¹ For example, I may care about placing enormous bets at the racetrack in the hope of instant riches, but placing those bets has brought me near to bankruptcy. In such a case, if I ask my friend to place the last of my savings on a horse for me, she will not place the bet if she cares about what is best for me. However, in not placing the bet, she will disappoint my trusting expectations of her, because those expectations assumed wrongly that what I cared about was also what was best for me. This example of 'tough love' shows that being a good friend does not always entail justifying a friend's trust, but that is not surprising. Whether or not there is trust in a friendship, and whether or not such trust as there is, should be justified, are separate questions.

³¹ In Charles Dickens' *Bleak House*, Richard Carstone pursues his claim before the Court of Chancery with zeal, only to discover that the entire estate he hoped to share in has been dissipated in the payment of legal costs. His situation is all the more poignant in that he is surrounded by friends and loved ones who know that what he cares about is not what is best for him, but who do not intervene to prevent him prosecuting the claim to his early death: C Dickens, *Bleak House* (N Bradbury (ed), Penguin Books, London, 2003).

D Integrity

Trusting expectations may entail the truster believing that the trusted will 'do the right thing' with respect to some matter.³² Such a belief may arise where the truster believes: that the trusted believes that her (the trusted's) choices are subject to moral or ethical constraints; and that the trusted will in fact apply those constraints when making choices. In other words, it may entail beliefs as to the moral or ethical integrity of the trusted. Integrity-based trusting expectations are likely to arise where a truster believes that there is some similarity between her perception of morality and that of the trusted.³³ That means that such expectations are likely to be relatively widespread within communities that share common conceptions of morality, and relatively rare in situations where people have no or a limited sense of shared background or community with each other. However, integrity-based trusting expectations may arise where a truster believes that her perception of morality is utterly different from the trusted's perception of morality, but also believes that the trusted will take seriously, and make choices in accordance with, the constraints of morality as she (the trusted) views them.

To see better how integrity-based trusting expectations can arise, consider an example. Imagine that, for ethical reasons, I am a strict vegetarian. You are introduced to me at a party. During our conversation I discover, to my delight, that

³² Pettit, 'The Cunning of Trust', above n 15, 204.

³³ C McLeod, 'Our Attitude Towards the Motivation of Those We Trust' (2000) 38 *The Southern Journal of Philosophy* 465, 465-7.

you are also a strict vegetarian for ethical reasons. When you subsequently invite me to your home for dinner, my expectation that you will not serve me meat may depend only on my belief that you live according to the principle that it is wrong to eat meat. I need not form a view as to your good will or our burgeoning friendship in order to form that expectation. It is integrity-based. Indeed, it would be unusual, given that I hardly know you, if I trusted you not to serve me meat for any reason other than my belief that you never eat meat on principle. Now imagine that I am not a vegetarian but, when introduced to you at the party I discover that, for ethical reasons, you are. Again, my expectation that you will not serve me meat may depend only on my belief that you never eat meat on principle. It is still integrity-based, even though we share no common ground on the ethics of consuming meat.³⁴

In what sense are such integrity-based expectations trusting? I need not have an attitude of optimism about the choices that you will make in order to believe that you will refrain from serving meat to dinner guests because you are a vegetarian. I simply need believe that you are a vegetarian. Indeed, I may be pessimistic about the menu choices that you will make, thinking, for example, that you will prepare an array of bland tofu dishes that I will dislike. However, in the example, my belief is not simply that you will refrain from serving meat because you are a vegetarian. My belief is that you will refrain from serving meat because you are a vegetarian *on ethical grounds*. Entailed in my belief is the associated belief that you will be true to your

³⁴ This second variant of the example may seem improbable. Why would I form any sort of expectation as to what I will be served at dinner by a person whom I hardly know, if I have no special dietary requirements? Indeed, I may not form any expectation, but whether I do or not is entirely situation-specific. For instance, if I am considering what to order for lunch on the day of your dinner party, I might choose a meat dish because I believe that you will not serve me meat for dinner. One way of describing this situation is to say that I order meat for lunch because I trust you to be true to your principles and not to serve it for dinner.

ethical principles and apply them in making choices about what to serve for dinner.³⁵ That latter belief – or set of beliefs – will almost certainly be accompanied by an attitude of optimism about the choices that you will make whether or not to apply your ethical principles in the matter of preparing dinner.³⁶ To that extent, the latter belief or beliefs are trusting expectations. They may be trusting and integrity-based even though they do not correspond to the facts. That might be the case where my belief about you is incorrect, such as where I believe that you share my vegetarian ethics and will not serve me meat for dinner as a result, whereas you are not a vegetarian at all and when I go to your home for dinner you are barbequing kangaroo steaks.³⁷ It might also be the case where my beliefs about morality are incorrect, such as where you and I adhere to the code of ‘honour among thieves’ and refuse to give each other up to the police after committing a heinous joint crime. In that case, our expectations of each other may be trusting and integrity-based, even though our code of honour does not reflect what morality really requires.

³⁵ In other words, I believe that you are not weak-willed about moral or ethical matters. Thus, where I trust you not to spread malicious gossip about me, I usually believe that you believe that spreading malicious gossip is wrong and that you do not yield easily to the temptation to do so.

³⁶ If my attitude about those choices is altogether pessimistic, not only do I not trust you, I almost certainly do not believe that you adhere to the principles in question. For example, imagine that you often tell me that a person ought to look after her aged parents but you have done nothing for your aged parents in years. If I am, as I probably should be, thoroughly pessimistic that you will ever put your stated principles into practice, I am unlikely to believe that they really are your principles. I might be more likely to believe that you invoke them to overcome feelings of guilt or to encourage people to think well of you in ways that you do not deserve, to name just two possibilities.

³⁷ Or, indeed, if I believe that you will not serve meat because of your vegetarian ethics, but in fact you will serve meat to those of your guests who eat it because you do not believe that it is right to force others to adhere to your principles.

E *Interests*

Trusting expectations may be formed where the truster believes that the trusted will make certain choices because it is in her (the trusted's) interests to do so.³⁸ Exactly what interests of the trusted the truster believes that the trusted will aim to serve by making choices vary from case to case. In some cases, it will be the trusted's interest in satisfying some need or desire that she has irrespective of the fact that she is trusted. In others it will be the trusted's interest in being well thought of. In still others it will be the trusted's interest in being regarded by the truster as trustworthy, which will often be accompanied by a desire to establish an ongoing (and possibly trusting) relationship with the truster.³⁹ If it is correct to assume that most people have a disposition to make choices most of the time that are in their interests, interests-based trusting expectations should be widespread, especially outside of loving and friendly relationships.

Where trusting expectations are interests-based, the attitude of optimism that accompanies such expectations will be about the disposition of the trusted to make self-interested choices. However, that attitude might coexist with, and help to explain, an attitude of pessimism about those same choices. As a result, a person may be said, from different points of view, to trust and distrust another person at the same time with respect to the same matter. For example, I may trust you to choose the best of three coats that I am giving away to my friends, because of your disposition to be

³⁸ See generally JS Coleman, *Foundations of Social Theory* (Belknap Press, Cambridge, Massachusetts and London, 1990) Chapter 5.

³⁹ Pettit, 'The Cunning of Trust', above n 15, 209, 212.

self-interested, but at the same time distrust you to think of the needs of my other friends when selecting your coat, precisely because I trust you to be self-interested. In that example, my trust seems inconsequential because it constitutes a background attitude against which my distrust is to be understood. As a result, if I am asked to describe the example in terms of trust or distrust, I am likely to describe it in terms of distrust, unless – ‘trust *him* to do that!’ – I invoke trust sarcastically. By contrast, trust in a person’s disposition to be self-interested seems more significant where it coexists with an attitude of optimism about the trusted’s self-interested choices. To illustrate, imagine that you and I are planning a holiday together. I leave to you the decision where to stay, knowing that you love luxury and will reserve a room at a five star hotel. Here, my trust that you will make a self-interested choice constitutes a background attitude against which may be understood my trust that you will choose a hotel with all the comforts and facilities that I desire. If I am asked to describe this latter example in terms of trust or distrust, I will almost certainly – ‘you can always trust him to choose the best!’ – invoke trust.

In his important book, *Trust and Trustworthiness*, Russell Hardin has elevated a theory of interests-based trusting expectations into something approximating a general theory of trust. In Hardin’s view, a person may be said to trust when she believes that the trusted will believe that it is in her (the trusted’s) interests to take seriously the interests of the truster, because the trusted values the continuation of her relationship with the truster. By taking seriously the interests of the truster, the trusted may reveal herself to be trustworthy, which is one excellent way of ensuring the continuation of the relationship that the trusted values. Thus, given what the trusted values, the

interests of the truster are aligned with the trusted's interests.⁴⁰ Hardin calls this the theory of 'trust as encapsulated interest' and, although he does not claim that the concept of encapsulated interest defines trust, he does claim that trust as encapsulated interest is 'important and commonplace' and he regards it as a central case of trust.⁴¹

If I believe that you will take my interests seriously because you believe that it is in your interests to do so, and if I believe that you have that belief because you value a continuing relationship with me, my belief will usually be accompanied by an attitude of optimism about the choices that you will make. To that extent, I trust you. However, such a belief need not be accompanied by an attitude of optimism about the choices that you will make. Indeed, it may be accompanied by an attitude of pessimism about those choices. To illustrate, imagine that you officiously intervene in my affairs in an effort to ingratiate yourself to me, but I dislike you and consider you to be incompetent. I may well believe that you take my interests seriously, in the matters in respect of which you intervene on my behalf, and that you do so in order to show yourself trustworthy and thereby make a continuing relationship with me more likely. However, as I dislike you and think you incompetent, I am unlikely to be optimistic about the choices that you will make with respect to my affairs. To the extent that I am not optimistic, I do not trust you, except, as described above, in the basic sense of having a background attitude of optimism about your disposition to be self-interested. Expectations of encapsulated interests may be, as Hardin points out,

⁴⁰ R Hardin, *Trust and Trustworthiness* (Russell Sage Foundation, New York, 2002) Chapter 1. See also his 'Distrust: Manifestations and Management' in R Hardin (ed), *Distrust* (Russell Sage Foundation, New York, 2004) 3 for a restatement of the account and his 'The Street-Level Epistemology of Trust' (1993) 21 *Politics and Society* 505 for an earlier argument that trusting expectations are interests-based.

⁴¹ Hardin, *Trust and Trustworthiness*, above n 40, 1.

trusting, but only where they are accompanied by a trusting attitude. Otherwise, they are not trusting. As a result, Hardin's account of trust *as* encapsulated interest is too ambitious.

Because it concentrates solely on beliefs, and not also on the attitudes that accompany beliefs, Hardin's theory of trust *as* encapsulated interest does not account for cases in which expectations of encapsulated interests are not trusting. Moreover, his theory does not account for cases in which expectations are clearly trusting but not of encapsulated interests. Among such expectations are those that have been described above as good will-based, role-based, relationship-based, integrity-based and interests-based, to the extent that interests-based expectations are not of encapsulated interests. Indeed, it seems as though trusting expectations that are not of encapsulated interests are so widespread as to call into question Hardin's claim that trust *as* encapsulated interest is 'important and commonplace'. That thought will not be pursued here; it will suffice, to cast doubt on Hardin's claim, to adduce two of the clearest possible examples of trusting expectations and point out that they do not fit the description of trust *as* encapsulated interest. First, there is my belief that my friend will keep a secret that I tell her even if she is pressed to divulge it; and secondly, there is my belief that the babysitter will not molest my children. These are clearly, in the ordinary case, trusting expectations.⁴² However, in neither case are they best described as expectations that the trusted will take my interests seriously because she values the continuation of a relationship with me. In the first case, my

⁴² As with all trusting expectations, they are entirely situation-specific. Referring to the 'ordinary case' thus points to the fact that, in most situations, such expectations are accompanied by an attitude of trust. The fact that there are a few extraordinary cases – for instance, where I want my friend to divulge the secret, or am an unfit parent who wants the babysitter to molest the children – does not affect the point in the text.

expectation is that my friend will keep my secret because that is what friends do. In the second case, my expectation is that the babysitter will not do what any right-thinking person would regard as morally repugnant. Indeed, if I believed that the babysitter would refrain from molesting the children only or even chiefly because, valuing an ongoing relationship with me, she desired to prove trustworthy, I would be very unlikely, and very foolish, to trust her.

F Partial and Defeasible Expectations

Because they are situation-specific, trusting expectations may be based on combinations of reasons to do with the perceived good will, roles, relationships, integrity and interests of the trusted. They may be based on other reasons as well, such as specific reasons provided by the trusted through invitations or inducements to trust. Earlier, the claim was made that the perceived good will of the trusted is often a partial and defeasible basis for trusting expectations and may, over time, be superseded by reasons for trusting expectations to do with what the truster perceives to be the trusted's roles, relationships, integrity and interests. Good will-based trusting expectations are partial in that they may exist alongside expectations that are based on other reasons. For example, if you are my solicitor, my trusting expectations of you may be role-based to the extent that I trust you to perform the work of a solicitor, but good will-based to the extent that I trust you with respect to matters that are not directly related to your role. An example of the former might be my trusting expectation that you will draft a contract in accordance with my instructions. An example of the latter might be my trusting expectation that you will make time to meet me regularly despite your busy schedule.

Good will-based trusting expectations are defeasible in that perceived good will may, over time, be superseded by other reasons for trusting expectations, but often suffices as a basis for trusting expectations in the absence of such other reasons.⁴³ The more a truster knows about a trusted, the more likely it is that reasons will arise alongside perceived good will as the basis of trusting expectations. In order for me to form a good-will based trusting expectation of you, I need believe only, say, that most people – or, at least, most people whom I perceive to be relevantly like you – are favourably disposed most of the time towards those who count on them. I may trust you from the time of our first encounter on the basis of that belief. However, the more I come to know about you, the more likely it is that I will form additional beliefs about you and, where those additional beliefs are about the future and are accompanied by an attitude of optimism about the choices that you will make, they are trusting expectations. For instance, when I learn that you are a tennis coach, I may form a trusting expectation that you will teach me how to play tennis. Such an expectation may be described as role-based. Later, when I learn that you are committed to the teachings of the Roman Catholic Church, I may form a trusting expectation that you will help me with my campaign against the death penalty. Such an expectation may be described as integrity-based. Finally, when we become close friends, I may form trusting expectations that you will keep my secrets and defend me against those who would malign me, and those expectations are relationship-based.

⁴³ Therefore, in order to know whether trusting expectations are good will-based or not, it is necessary to know all the reasons for such expectations and not only that the truster perceives the trusted to have good will. On defeasibility generally, see GP Baker, 'Defeasibility and Meaning' in PMS Hacker and J Raz (eds), *Law, Morality and Society: Essays in Honour of HLA Hart* (Clarendon Press, Oxford, 1977) 26.

As I come to form trusting expectations of you that are based on reasons other than what I perceive to be your good will towards me, I do not necessarily, or even usually, cease to believe that you have good will towards me. I simply form other beliefs about you which may be described as trusting expectations but which do not depend on my perception of your good will. Hence the defeasibility of perceived good will as a basis for trusting expectations. If I cease to have my other beliefs about you – say because you cease to occupy a role that you had previously occupied – I may, in the ordinary case, fall back on my belief about your good will as a basic, underlying type of trusting expectation of you.⁴⁴ However, while I continue to have those other beliefs about you, even though the conditions obtain under which I could have a good will-based trusting expectation of you – because I still believe that you have good will towards me – my trusting expectations of you are not good will-based.⁴⁵ They are based on reasons that arise from what I know about you other than that you appear to be well disposed towards me.

III MANIFESTING TRUST

Like all attitudes, trust is manifested in action. To illustrate the point, consider an attitude other than trust. Imagine that I fear you. My attitude of fear is accompanied by certain expectations: that you will harm me if you have the opportunity, for

⁴⁴ This will not be true where I cease to have my other beliefs about you in circumstances which also cause me to cease to believe that you have good will towards me. In such circumstances, I am likely to cease to trust you altogether.

⁴⁵ ‘The explanation of a defeasible concept ... consists in a list of conditions normally necessary and sufficient for its application together with a series of ‘unless’ clauses stating defeating conditions’: Baker, ‘Defeasibility and Meaning’, above n 43, 34-5. In the case of good will-based trusting expectations, the defeating conditions are the presence of trusting expectations based on reasons other than perceived good will.

instance. However, my fear is not manifested in those expectations. By having those expectations, I do not demonstrate – to you or to anyone else – that I fear you. The situation is different if I act. Perhaps I stay away from you or run away when I see you. Perhaps I tremble involuntarily when you are present. Perhaps I tell you that I fear you. All of those actions are capable of manifesting my fear. That is not to say that, were I to perform them, they would all manifest my fear successfully; it is just to say that they are capable of doing so, and, to the extent that you – or anyone else – interpret them as the actions of a person who fears you, they have successfully manifested that fear. By contrast, my fearful expectations, unaccompanied by action, are incapable of manifesting my fear. They have only the potential to bring about the manifestation of that fear because they may influence my action.

What is true of the attitude of fear is also true of the attitude of trust. Trust, like any attitude, is ‘mere potential’ until it is manifested in action.⁴⁶ What actions are capable of manifesting trust in a particular situation depends on a multitude of factors. Just as the attitude of trust and trusting expectations are situation-specific, so, unsurprisingly, are the ways in which trust is shown. Despite that fact, two general observations may be made about the manifestation of trust. First, and obviously, an action cannot manifest trust unless the agent trusts. That is so even if the action in question is – mistakenly – interpreted by another person as revealing that the agent trusts. If I hand you the keys to my Porsche in order to comply with the direction of an armed bandit,

⁴⁶ D Kimel, *From Promise to Contract: Towards a Liberal Theory of Contract* (Hart Publishing, Oxford and Portland, Oregon, 2003) 29.

my action will not, in the ordinary case, reveal that I trust you.⁴⁷ In the ordinary case, my action will reveal that I fear the consequences of not doing what the bandit directs me to do. That will be true even if you know nothing of the bandit and interpret my action – giving you control of my valuable asset – as manifesting a high level of trust in you.

Secondly, an action cannot manifest trust unless and until someone other than the agent interprets the action as the action of a person who trusts. Imagine that I leave the keys to my Porsche on your desk, because I have a trusting expectation that you will look after the car for me while I am on holiday. My action will only manifest my trust to you if you interpret it as an action that manifests my trust. If you think, for example, that I have simply forgotten to take the keys home with me rather than that I have left them with you because I trust you to look after the car, my action has failed to demonstrate my trust to you. In that situation, further action is required in order for my trust to be manifested. For example, if you phone to tell me that I have left my keys behind, I will most likely manifest my trust when I explain to you why I did not take the keys with me. Importantly, while a number of interpretations of any action that I perform remain plausible to you, only one or some of which entail the belief that I trust you, my trust is not successfully manifested to you. In order for that trust to be successfully manifested to you, you must not only be able to interpret my

⁴⁷ Of course, it is possible to imagine unusual cases in which such an action is accompanied by trust. If you are my friend, I might hand the keys to you to comply with the direction of the bandit but also trusting that, whatever happens, you will do what you think is best. If, in this unusual case, you wonder why I have handed my keys to you but think that, because I am your friend, I trust you with them, I have successfully manifested my trust by handing them to you. Such unusual cases do not affect the point in the text.

actions as the actions of a person who trusts you; you must actually interpret my actions thus.⁴⁸

Although whether trust is manifested in action is highly situation-specific, those two general observations about the manifestation of trust suggest that certain types of action are particularly ill-suited to manifesting trust. Examples of such types of action are acts of delegation and coercive actions. Each is considered below. Moreover, certain types of action are particularly well-suited to manifesting trust. The clearest example of that type of action is what is commonly called entrusting. After dealing with delegation and coercion, this section considers entrusting. Three types of entrusting – entrusting pursuant to the practice of promising, entrusting pursuant to inducements to trust, and what in this section is called giving in trust – are considered. Each of these types of entrusting is partly analogous to the fiduciary relationship, an analogy that is discussed in Chapter 4. The section concludes by explaining why it might be important to manifest trust, whether by entrusting or in some other way.

⁴⁸ This is true of the manifestation of any attitude. The combination of attitudes that is usually described as ‘being in love’ illustrates the point particularly well. Imagine that I am in love with you, but you do not know that fact. I call you every day on the phone. I take you out for dinners and lunches. I give you flowers and other gifts. To begin with, my actions will most likely be interpreted by you as manifesting friendship. Over time, you might come to believe that another interpretation – that I am in love with you – is possible. But while the alternative interpretation – that I am just showing you what a good friend I consider you to be – is still plausible to you, I have not shown you that I am in love with you. It is likely that at least one of us will find the ambiguity of that situation intolerable and will attempt sooner or later to resolve it: I by declaring my love; you by asking what my true feelings are. When you believe that my actions are the actions of a person who is in love with you, my attitude has been successfully manifested to you.

A Delegation

In addition to being an attitude of optimism, trust responds to the freedom of other people to make choices. Therefore, acts that do not respond to the freedom of other people to make choices are ill-suited to manifesting trust. Among the clearest examples are acts of delegation that do not delegate power to exercise discretion. Such acts of delegation are uncommon. Most delegated power entails the exercise of discretion. In public law, the delegation of law-making power by the legislature to a statutory authority is usually of that type, authorising the statutory authority not only to enact a law, but also authorising it to make choices (within limits) as to what the form and content of the law will be. In the non-legal world, if you ask me to water your plant while you are on holiday I must, despite the simplicity of my task, exercise discretion in carrying it out. I must make choices whether to water in the morning or the evening, once a day or once a week, using a hose or a watering can, and so on.

Despite the fact that acts of delegation that do not delegate power to exercise discretion are uncommon, they nonetheless exist. The legislature might authorise a statutory authority to enact a law, and stipulate the exact form and content of that law.⁴⁹ You might ask me to water your plant, every day you are on holiday, at five o'clock in the morning for exactly three minutes, using a specified quantity of water from the garden tap. In these examples, the only real discretion that may be exercised, with respect to what has been delegated, is whether to perform the task that has been delegated or not. That exercise of discretion is anterior, not pursuant, to the

⁴⁹ The fact that the legislature would almost certainly enact the law itself in such a situation does not mean that it could not authorise a delegate to do so.

delegated power. In the public law example, the point is underscored by the fact that an exercise of discretion not to perform a task that has been delegated will not, under the doctrine of *ultra vires*, be recognised as a valid exercise of discretion unless it is itself specifically authorised. Nor will any other exercise of discretion that is not pursuant to a delegated power.

An act of delegation that does not delegate power to exercise discretion is likely to manifest neither-trust-nor-distrust, although, depending on the circumstances in which it is performed, it might manifest distrust. For example, if I ask you to wash my boat but then issue detailed instructions pertaining to every aspect of the task, my act of delegation is most likely to be accompanied by an attitude of pessimism about your ability or inclination to do the job well. Even if it is not accompanied by such an attitude, you are likely to interpret it thus and if you do, it will not manifest to you any trust that I have. By contrast, if I ask you to wash my boat and then leave the job entirely to you, my attitude about the choices that you will make in doing the job is likely to be optimistic, and that attitude is likely to be made evident to you in my act of delegation. Of course, all acts of delegation, whether or not they delegate power to exercise discretion, are capable of manifesting trust in one basic sense. A delegate may choose to perform or not to perform the delegated task, and an act of delegation will usually be accompanied by an attitude of optimism about that choice. However, acts of delegation that respond only to the choice whether or not to perform the delegated task, even if they are accompanied by a trusting attitude, are unlikely to manifest trust, because they are not likely to be interpreted as the actions of a trusting person. Acts of delegation that create a sphere of discretion in the delegate are more likely to be accompanied by a trusting attitude with respect to a range of future

choices and are more likely to be interpreted, by the delegate at least, as demonstrating that she is trusted.

B Coercion

It is not difficult to see why instances of extreme coercion are almost always inconsistent with the manifestation of trust. If I force you physically to perform some action – say by manipulating your hand so that it strikes a third person – I do not acknowledge your freedom to make choices and therefore it appears to be impossible that my attitude towards you with respect to the movement of your hand is an attitude of trust. Even if it could be argued that I might trust you in such a situation, you would not, unless you were deluded, interpret my coercive action as the action of a person who trusts you. Imagine another example of extreme coercion. I hold a gun to your head and order you to advise me about whether I should take up painting or sculpting. Again, even if I trust you to advise me well, you are very unlikely to interpret my action as the action of a truster. Indeed, the most plausible interpretation of my action – putting to one side any interpretation that I am mentally unbalanced – is that I distrust you to provide me with good advice unless I threaten you. Of course, such trust as I do have may be manifested if you believe what appears implausible: that I seek your advice, despite my coercive action, because I trust you to advise me well. The extreme cases do not demonstrate that certain types of coercive action cannot manifest trust. They simply demonstrate that coercive actions – extreme ones at least – are particularly ill-suited to manifesting trust.⁵⁰

⁵⁰ The two examples track the two senses of coercion discussed by MD Bayle, 'A Concept of Coercion' in JR Denno and JW Chapman (eds), *Nomos XIV: Coercion* (Aldine Atherton, Inc,

The suitability of coercive actions to manifesting trust is a more complicated matter when it comes to milder forms of coercion. Interesting examples may be found in relationships of parties to contracts. It has been claimed that trust and contract are inconsistent.⁵¹ That claim is too simplistic unless it is qualified and refined. For example, if you and I have entered into a contract, and I believe – optimistically – that you will adhere to the terms of the contract because it is in your interests to do so, I have an interests-based trusting expectation of you. It is trust in this sense that contract theorist Dori Kimel refers to when he says that the institution of contract allows parties to form relationships on the basis of beliefs about the ‘basic rationality’ of each other.⁵² Such beliefs implicate what Kimel calls trust in a ‘trivial’ sense, but, even if it is correct to call such trust trivial, it is trust nonetheless.⁵³ Moreover, as Kimel points out, trust in a ‘non-trivial’ sense might be desired in contractual relationships for providing ‘an extra source of reassurance’ or a ‘welcome bonus’ to the parties.⁵⁴

Chicago and New York, 1972) 16, 17. According to Bayle, coercion in the first sense is physical force applied directly to cause behaviour, and in the second sense it is a threat with sanctions attached. On what makes a threat coercive, see also J Raz, *The Morality of Freedom* (Clarendon Press, Oxford, 1986) 148-9; Kimel, *From Promise to Contract*, above n 46, 51-4.

⁵¹ Luhmann, *Trust and Power*, above n 8, 34; L Fuller, *The Principles of Social Order* (Duke University Press, Durham, North Carolina, 1981) 185; PS Atiyah, ‘Fuller and the Theory of Contract’ in his *Essays on Contract* (Oxford University Press, Oxford, 1986) 78.

⁵² Kimel, *From Promise to Contract*, above n 46, 57-60. The quotation is on 60.

⁵³ Ibid, 59. AJ Bellia Jr imagines relationships on a ‘continuum of trust’, with contractual relationships falling near, but not at, the end of the continuum that may be styled ‘no trust’. Having recognised that contractual relationships are consistent with trust, Bellia criticises Kimel for drawing a false distinction between trusting promissory relationships and non-trusting contractual relationships: ‘Promises, Trust and Contract Law’ (2002) 47 *American Journal of Jurisprudence* 25, 33-4. The criticism misses its mark – Kimel does not claim that contractual relationships are necessarily non-trusting, only that they ordinarily implicate trust in a trivial, or thin, sense – but Bellia’s insight that contract and trust may be consistent is valid nonetheless.

⁵⁴ Kimel, *From Promise to Contract*, above n 46, 60.

Indeed, a contract may serve as an extra source of reassurance to parties whose relationship is already trusting. Imagine that we have an informal business arrangement, characterised by a high degree of mutual trust. Now imagine that I approach you with a draft contract, not because I no longer trust you and wish to bind you to legal obligations, but because I wish to reassure you of my trustworthiness by binding myself voluntarily to legal obligations. In such a situation, there is no reason to think that we will trust each other any less after the contract is executed, and good reason to think that we may even trust each other more. Furthermore, it could be that executing the contract is a way of manifesting our trust to each other. Depending on the circumstances, executing the contract might be a very effective way of manifesting that trust. If it contains pro forma terms that one or other of us does not desire, executing the contract even though it contains undesired terms may manifest strongly the trust that has led to the execution. So may not discussing or even reading such terms.

To acknowledge that trust and contract are not necessarily inconsistent, and that executing a contract may, in some circumstances, enhance or even manifest trust, is only partly to answer the question whether contractual relationships are well- or ill-suited to the manifestation of trust. An examination of coercive aspects of contractual relationships might assist in reaching a fuller answer to that question. Obviously, entering into a contract is itself not usually a coercive action. However, in some circumstances, having recourse to the mechanisms by which the law enables contractual obligations to be enforced may be coercive in aim and effect. As Kimel

points out, seeking to enforce contractual obligations is often accompanied by, and may manifest, beliefs about basic rationality that are trusting in a trivial sense.⁵⁵ To that extent, coercive actions and the manifestation of at least that trivial trust may coincide in a contractual relationship. Moreover, it is possible to imagine cases in which parties who seek to enforce contractual obligations nonetheless trust other parties in a non-trivial sense to discharge those obligations. For example, if you and I are parties to a long-term supply agreement and have, over the years, come to trust each other in a profound sense, I may, in a non-trivial sense, trust you to pay me an outstanding debt even though I have – perhaps because it is my standard practice – sent you a formal letter of demand that threatens legal action. And you may disregard the letter, precisely because you know that I trust you to pay despite my ostensibly coercive action.

This example reveals that coercion in contractual relationships does not always preclude even non-trivial trust being manifested. However, the question that stands to be answered is whether contractual relationships, to the extent that parties to them seek to enforce contractual obligations, are well- or ill-suited to manifesting trust. In the example, my letter of demand did not manifest my trust; nor did it manifest distrust. It manifested neither attitude, because neither I nor you took it seriously, given our longstanding trusting relationship. Presumably, my trust in you had been manifested in countless actions over the years, which is why you disregarded the letter. The suitability of my letter of demand to manifesting my trust may be better appreciated if the example is changed slightly so that, instead of disregarding the

⁵⁵ *Ibid*, 59.

letter, you take it seriously. If you take the letter seriously, it is difficult to see how you could interpret my sending it as the action of a person who trusts you. The most plausible interpretation of that action does not entail me having an attitude of optimism about your ability or inclination to pay the outstanding debt; it entails me having a pessimistic attitude about those matters. In other words, the most plausible interpretation of my action entails that I distrust you, especially if you receive the letter against the backdrop of years of informal trusting dealings between us. That is true even if I trust you and, for whatever reason, send the letter to you because I trust you.⁵⁶

It is possible that you will interpret my sending the letter as the action of a trusting person, but it is very unlikely that you – or anyone else, for that matter – will interpret it so.⁵⁷ The conclusion to be drawn is that seeking to enforce contractual obligations, like more extreme forms of coercion, is ill-suited to manifesting trust. In many contractual relationships, a trusting party will not seek to enforce the contract at all but will instead deal with potential disputes informally and diplomatically. Moreover, even if a trusting party seeks to enforce the contract, her action in seeking enforcement is likely to be performed despite, not because of, her trust. And finally, in very few instances will seeking the enforcement of a contract be interpreted, particularly by the person against whom enforcement is sought, as the action of a person who trusts. The more likely interpretations of such actions will entail the belief that the one who seeks enforcement distrusts. It must be emphasised again that

⁵⁶ I may send the letter to you because I trust you if, for example, my usual *modus operandi* with respect to outstanding debts is to hire goons to break the debtor's legs.

⁵⁷ If you know that I usually send goons to 'encourage' debtors to pay, you may interpret my sending the letter as the action of a trusting person.

trust *may* be manifested in coercive actions within contractual relationships, just as it may be manifested in other coercive actions. But – putting to one side the trivial trust that Kimel identifies in contractual relationships generally – there is no reason to assume that coercion pursuant to contracts is any better suited to manifesting trust than coercion generally. Trust is not manifested easily in any coercive action, and all coercive actions are ill-suited to the manifestation of trust as a result.

C *Entrusting*

To entrust is to expose voluntarily, to the discretion of another person, interests that one cares about, with a trusting attitude towards and usually also trusting expectations of that other person.⁵⁸ By entrusting, one allows that other person to affect the interests concerned in the exercise of her discretion. Interests may be entrusted in many ways. For instance, I may entrust to you some tangible item by handing it to you, or withdrawing control over it, or authorising you to deal with it. I may entrust my children or my life to you. I may entrust interests to you in another way by seeking your advice on a matter of importance to me, or involving you in my plans, goals and aspirations. In each case, I voluntarily expose interests that I care about to you, and allow you to affect those interests in the exercise of your discretion. In addition to my own interests, I may entrust interests that are not my own, so long as I care about those interests. A striking example is the exposure of interests that characterises the express discretionary trust in law. In cases where the settlor of such a trust trusts the trustee, she may manifest that trust not only by exposing her interests

⁵⁸ I say 'usually' to account for the possibility that a person may entrust spontaneously, without having formed trusting expectations of the trusted.

in the trust assets to the discretion of the trustee – by transferring those assets to the trustee – but also by exposing the interests of the beneficiaries of the trust to the trustee’s discretion.⁵⁹

Entrusting may be contrasted with another way of voluntarily exposing interests, which is not usually accompanied by an attitude of trust or trusting expectations: abandonment. I abandon my interests when I no longer care about them, such as when I throw my old shoes into a municipal rubbish bin, having just bought new shoes. In that example, I am unlikely to have any attitude or expectations about the choices that people will make with regard to my old shoes. I am likely to forget all about them after throwing them into the bin. To that extent, my action cannot manifest trust, because I have no trust to manifest. I might throw my old shoes into the bin believing that a needy person will come along, find them, and take them. Such a belief, if accompanied by the attitude of optimism characteristic of trust, is properly described as a (most likely, interests-based) trusting expectation of needy people in my town. However, to the extent that I throw my old shoes into the bin with a trusting expectation, I do not *really* abandon them, because to the extent that I have a trusting expectation, I care about what happens to my shoes. It is only when I stop caring about my shoes that I will truly abandon them.

Entrusting is also distinct from giving. I give when I intend that someone else treat my interests as hers. That usually entails the intention to relinquish legal rights with respect to the interests, and is usually accompanied by acts that are recognised in law

⁵⁹ Or whatever interests the purposes of the trust serve, if the trust is a trust for purposes.

as being sufficient to effect that relinquishment of legal rights. However, I can give, in the sense of intending that someone else treat my interests as hers, without satisfying the legal requirements for making a valid gift. So, I may be said to give my house to you where I hand you the keys to the front door with the requisite intention, even though in law my gift is incomplete because the necessary formalities have not been complied with. Moreover, I may give by intending that someone else treat my interests as hers, even though the law does not recognise that a gift may be made of the interests in question. Thus, I may be said to give my children to you by intending that you care for them from now on, even though children are not property and therefore may not be the subject of a valid gift.

Giving may amount to entrusting. It may not. Whether or not my giving to you amounts to entrusting depends on the expectations that I have when I give. In some cases, I may give with no expectations other than the expectation that you will treat my interests as your own. To illustrate, imagine that I hand my old shoes to a down-and-out acquaintance, not thinking for a moment about what she might do with them because, after all, they are her shoes now. Giving with expectations of this type is similar to, but not the same as, abandonment.⁶⁰ In other cases, I may give with non-trusting, or even distrusting, expectations. For example, I hand my old shoes to the down-and-out acquaintance, believing that she will probably lose them. Such expectations are not likely to accompany giving, but neither do they preclude it. In still other cases, I may give with trusting expectations, and such cases demonstrate both giving and entrusting. One example is where I hand my old shoes to my down-

⁶⁰ It is not the same as abandonment because, to the extent that I intend my acquaintance to treat the shoes as hers, I care about what happens to the shoes.

and-out acquaintance, believing that she will care for them as well as I did. Another is where my grandmother gives me a family heirloom, intending that I treat the item in question as my own, but believing that I will value it and refrain from selling it to the highest bidder or using it as a doorstep.

Philip Pettit alludes to the nature of entrusting when he writes of trust in the sense of placing one's interests in the hands of another with a trusting expectation of that other.⁶¹ Annette Baier also captures something of entrusting in her Tanner Lectures on the subject of trust, delivered in 1991.

For to trust is to give discretionary powers to the trusted, to let the trusted decide how, on a given matter, one's welfare is best advanced, to delay the accounting for a while, to be willing to wait to see how the trusted has advanced one's welfare.

...

To trust is to let another think about and take action to protect and advance something the truster cares about, to let the truster *care for* what one cares about.⁶²

⁶¹ Pettit, 'The Cunning of Trust', above n 15, 204.

⁶² AC Baier, 'Trust' in *Tanner Lectures on Human Values* (Volume 13, University of Utah Press, Salt Lake City, 1991) 109-11 (Baier's emphasis). See also AC Baier, 'What Do Women Want in a Moral Theory?' in her *Moral Prejudices: Essays on Ethics* (Harvard University Press, Cambridge, Massachusetts and London, 1994) 1, 15.

Both Pettit and Baier describe entrusting in terms broadly consistent with the view propounded here: that one entrusts when one exposes interests to the discretion of another.

However, Pettit and Baier seem to equate entrusting with trust itself. Pettit describes placing one's interests in the hands of another with a trusting expectation as one sense of trust. Baier also refers to the exposing of interests to the discretion of another that constitutes entrusting as trust. Yet trust and entrusting are not the same.⁶³ Trust is an attitude, and expectations that are accompanied by the attitude of trust may also be described as trusting. Entrusting is an action that is performed in light of trust. It is important to acknowledge the distinction between trust and entrusting, because a person can trust without also entrusting to the trusted. For example, I may trust you to send my mother a birthday card on her birthday, but in no sense does that necessarily entail me exposing any interests that I care about to your discretion.⁶⁴ In other cases, my trust may be contingent, such as where I trust you to donate blood to me should I ever need it. Only if and when I come to need your blood may it be said that I expose my interest in having blood to your discretion.

By contrast, a person cannot entrust without also trusting. Just as expectations may be called trusting only where they are accompanied by the attitude of trust, so may an action be called entrusting only if it is accompanied by that attitude and usually also

⁶³ See Jones, 'Trust as an Affective Attitude', above n 1, 18-9, for a critique of Baier's theory for failing to distinguish trust from entrusting.

⁶⁴ Insofar as I care about my mother's interest in having her birthday acknowledged by you, an interest that I care about is exposed to your discretion. However, I have not exposed it to your discretion, and therefore I cannot be said to have entrusted it to you.

those expectations. To expose interests to the discretion of another is, broadly speaking, to rely on that other. Entrusting is one type of reliance – reliance that is accompanied by a trusting attitude – but there are other types of reliance as well, which may be accompanied by other attitudes about the choices that people will make, including distrust.⁶⁵ For example, it makes sense to say that I rely on you to repair my train set but that I distrust you to repair it if, for example, I was compelled to have you repair it.⁶⁶ Moreover, it is possible for reliance to be accompanied by an attitude that is not about the choices that people will make. I rely on my train set to work when I switch it on, but this reliance is most likely to be accompanied by an attitude of confidence in the mechanics of the set.

It is possible that trust and entrusting are sometimes confused because entrusting is so well-suited to manifesting trust. There are at least three reasons why that is so. First, one cannot entrust unless one also trusts. Therefore, the first condition that must be met if trust is to be manifested – that the agent actually trusts – is always met in cases of entrusting. If I expose interests to your discretion but I do not trust you with respect to those interests, I do not entrust them to you, despite the fact that I may rely on you with respect to them. Secondly, entrusting responds to the freedom of the trusted to make choices with respect to the interests that have been entrusted to her. In that, entrusting may be compared with certain types of coercive action, which do not respond to that freedom and are ill-suited to manifesting trust as a result. Finally, entrusting is likely to be interpreted, by the trusted and by others, as the action of a

⁶⁵ Jones, ‘Trust as an Affective Attitude’, above n 1, 19.

⁶⁶ DO Thomas distinguishes what he calls reliant trust from other forms of reliance: ‘The Duty to Trust’, above n 29, 91. That distinction is unclear. It is better to distinguish trust from reliance *simpliciter*: the former is an attitude; the latter describes action.

person who trusts. That is because entrusting is widely understood as an effective way of showing trust, and because entrusting sometimes occurs pursuant to practices – like promising – in which trust plays an important role. The suitability of entrusting to manifesting trust is considered below with respect to three types of entrusting: pursuant to invitations to trust in the form of promises; pursuant to non-invitational inducements to trust; and unsolicited giving in trust.

1 *Inviting Trust*

The practice of promising facilitates the manifestation of trust in a specific way. In his recent book on promising and contract, Dori Kimel explains how trust is manifested through that practice.

To promise is to invoke trust; on the promisee's part, to take the promise seriously, as intended, is (normally) to give that trust, to show that it exists; and to keep the promise is to justify the promisee's trust, to prove trustworthy, to show respect. Promises are intrinsically valuable, if you like, as an exercise in the deployment of trust and respect in the framework of the relationship between promisor and promisee.⁶⁷

Elsewhere, Kimel explains how trust may be manifested through promising where the promisor and the promisee do not have an existing relationship. Discussing a hypothetical promise that he makes to a stranger, Kimel says,

⁶⁷ Kimel, *From Promise to Contract*, above n 46, 27.

By the very act of putting the practice of promising into use – I by making the promise, inviting trust, suggesting respect; the promisee by taking the promise as a source of confidence, by trusting – we emulate the behaviour of people in a relationship. The keeping of the promise then closes a circle through which we establish a bond of trust and respect, thus somewhat removing ourselves, so to speak, from the domain of strangerhood.⁶⁸

Kimel's account of the role of trust in promising demonstrates how a person, by making a promise, invites the trust of another person. Moreover, the account is consistent with the view that a promisee's belief that a promisor will keep her promise is, in the ordinary case, a trusting expectation, being accompanied by an attitude of optimism about the choices that the promisor will make in keeping the promise. It is possible to imagine extraordinary cases in which a promisee's belief that a promisor will keep her promise is accompanied by attitudes other than optimism about the choices that are entailed in keeping that promise. 'I promise to kill you when you least expect it' or 'I promise to be capricious when determining your claim' are likely to generate such cases. In those cases, the belief that a promisor will keep her promise is not, to the extent that it is accompanied by attitudes other than optimism, a trusting expectation. It is likely to be an expectation that is best characterised as neither-trust-nor-distrust, and will possibly be accompanied by an attitude of resignation, disappointment or fear. The extraordinary cases assume that the promisee believes that the promisor will keep her promise. If the promisee believes

⁶⁸ Ibid, 31.

that the promisor will certainly or probably *not* keep her promise, that belief, being accompanied by an attitude of pessimism, is a distrusting expectation.

Charles Fried claims that the practice of promising gives trust its 'sharpest, most palpable form'.⁶⁹ Fried's claim suggests that promising offers a particularly effective way of manifesting trust. However, having a trusting expectation in the form of a belief that a promisor will keep her promise does not, by itself, manifest trust. In order to manifest the trust that has enabled a promisee to form the trusting expectation that the promisor will keep her promise, a promisee must usually act by entrusting to the trusted. And the promisee will usually entrust to the promisor interests in respect of which the promise was initially made. Imagine that you promise to paint my house. I trust you to do what you have promised to do, in the sense that I believe that you will do it because you have promised to do it and am optimistic about that state of affairs. But I had previously arranged for your sister to paint my house for me. I will not reveal that I trust you unless and until I act, most probably, unless exceptional circumstances prevail, by cancelling my prior arrangement with your sister, and making that known – directly, through your sister or in some other way – to you. By so acting, I entrust to you my interest in having my house painted, by allowing you, not your sister, to exercise your discretion with respect to that interest. If I do not act at all, you may interpret my response to your promise in a number of ways, only some of which involve me trusting you, and some of which may even involve me distrusting you. While interpretations that do not involve me trusting you remain plausible to you, I have not successfully manifested my trust to you.

⁶⁹ C Fried, *Contract as Promise: A Theory of Contractual Obligations* (Harvard University Press, Cambridge, Massachusetts and London, 1981) 8.

Acting in order to manifest trust in response to a promise need not entail anything as drastic as cancelling a prior arrangement. It may entail nothing more than communicating to you the fact that I trust you to keep your promise. It may entail me refraining from doing or procuring that which you have promised to do. It may simply entail me continuing a relationship with you, which, in the circumstances, demonstrates to you that I trust you to keep your promise. What is required in order to manifest trust in a promisor will vary from case to case. But in no case will a simple trusting expectation that a promisor will keep her promise, unknown to the promisor because unaccompanied by some act that reveals trust, manifest trust to that promisor. And in every case where I act or even refrain from acting such that you are shown that I trust you to keep your promise, I may be said to entrust to you, because my action or inaction signals that I am exposing, to your discretion, interests that I care about, even if only my interest in having my trust justified.

2 *Inducing Trust*

A promise is an explicit invitation to trust. However, there are many ways of helping to bring about, or encouraging, trust that do not amount to explicitly inviting it. In his book, *What We Owe to Each Other*, TM Scanlon provides one evocative example of such a way of inducing – without inviting – trust. Scanlon asks us to imagine him stranded in a strange land with nothing to eat. He fashions a spear and hurls it incompetently at a deer, only to find that he has thrown it across a fast-running river and that it is now lodged in the opposite bank. As he contemplates his situation, a boomerang sails across the river and lands near him. A stranger appears on the

opposite bank. The stranger notices Scanlon's spear next to him and then looks around, wondering what happened to his boomerang. Scanlon writes,

It now occurs to me that I might regain my spear without getting wet by getting this person to believe that if he throws my spear across the river I will return his boomerang. Suppose that I am successful in this: I get him to form this belief; he returns the spear; and I walk off into the woods with it, leaving the boomerang where it fell.⁷⁰

In the example, Scanlon does not explicitly invite the trust of the stranger, but he acts such that the stranger is encouraged to form the expectation that Scanlon will return his boomerang if he returns Scanlon's spear.⁷¹ Moreover, the most plausible account of the stranger's expectation entails that it is accompanied by an attitude of optimism about the choice – to return the boomerang – Scanlon will make. In other words, the most plausible account of the stranger's expectation entails that it is trusting.⁷²

Scanlon's disappointment of the stranger's trusting expectation is taken up in Chapter 2. For now, it will be sufficient to concentrate on what the stranger does in light of

⁷⁰ TM Scanlon, *What We Owe to Each Other* (Belknap Press, Cambridge, Massachusetts, 1998) 296-7.

⁷¹ In the example, it is clear that Scanlon intends to encourage the stranger to form that expectation. Cases may be imagined in which a person does not intend to encourage another person to form an expectation, but the effect of the first person's actions is that the other forms the expectation in question. There is a distinction between these two types of case when it comes to the obligations owed by the first person to the second. This is discussed in Chapter 2. However, that distinction does not affect the point in the text here, which depends only on the fact that Scanlon's actions have played a part in causing the stranger to form his expectation, whether Scanlon intended them to or not.

⁷² If, implausibly, the stranger believes that returning Scanlon's spear will lead to the return of his boomerang, but he either does not want the boomerang returned or does not care whether it is returned or not, then his expectation will be most likely non-trusting.

his trusting expectation. He returns the spear. Assuming that he has a trusting expectation, the stranger entrusts to Scanlon when he returns Scanlon's spear. When he returns the spear, the stranger voluntarily exposes his interest in having his boomerang back to Scanlon's discretion. That interest was already involuntarily exposed to Scanlon's discretion because Scanlon was aware that the stranger's boomerang was lying at his (Scanlon's) feet. However, it was not until the stranger acted by divesting himself of the spear – the one 'bargaining chip' under his control – that he rendered that exposure of his interest to Scanlon's discretion voluntary. Moreover, by returning the spear, the stranger is likely to manifest to Scanlon his trusting expectation. To Scanlon, the most plausible interpretation of the stranger's action is that it is the action of a trusting person, particularly as Scanlon has encouraged the stranger to trust to begin with.⁷³

Scanlon's example illustrates just one way in which trust may be manifested through entrusting in response to an inducement to trust. Such inducements need not entail, as the inducement in Scanlon's example did, making known one's dispositions or motivations to the would-be truster. For instance, I may induce you to trust me by holding myself out as having some capacity, knowledge or ability that you wish to access, or, in some circumstance, simply by allowing you to voluntarily expose your interests to my discretion. As an example of the former, imagine that I know that you are looking for a financial adviser, and I inform you – in conversation, by advertising

⁷³ This is even more clearly the case with promising. As Scanlon points out, a promise may be described as a statement of intention, followed by the exhortation, 'Trust me!': *What We Owe to Each Other*, above n 70, 306. If I exhort you to trust me, and you then act as I would expect you to act if you trusted me, I am almost certain to interpret your action as the action of a person who trusts me. The practice of promising is a particularly effective way of manifesting trust because it makes such interpretations of trusters' actions so highly plausible.

publicly or in some other way – that I am a financial adviser. Making it known that I am a financial adviser may induce you to trust me with respect to your financial affairs, depending on the circumstances. As an example of the latter, imagine that you launch into telling me a secret, and that I do not stop you. That I have allowed you to divulge your secret to me may encourage you to trust me with respect to it and possibly also future secrets that you wish to divulge.

3 Giving in Trust

When a truster gives in trust, she voluntarily exposes her interests to the discretion of the trusted, without having been invited or induced to do so. Giving in trust may be distinguished readily from entrusting in response to invitations to trust, whether pursuant to the practice of promising or following exhortations like ‘Trust me!’. However, it may not be distinguished so readily from entrusting in response to inducements to trust. One way of drawing that latter distinction might be to say that a person gives in trust whenever she entrusts even though the trusted has not intentionally acted so as to encourage trust. In that way, the stranger’s response to Scanlon’s actions in the example considered above could be described as entrusting in response to an inducement to trust, because Scanlon’s intention was to induce that trust. By contrast, had the stranger simply returned Scanlon’s spear before Scanlon formed any intentions, the stranger would have given in trust. However, to draw such a distinction would lead to the conclusion that the stranger had given in trust even if the stranger believed that Scanlon had the intention to induce trust, so long as Scanlon actually had no intention to induce trust. Whether or not a truster has given in trust surely depends, at least in part, on whether or not the truster believes that she has

given in trust. So the distinction is better drawn between cases in which a person entrusts with the belief that the trusted has induced her trust and cases in which a person entrusts with no such belief. If the distinction is to be drawn thus, only cases in the latter class entail giving in trust.

If that distinction holds, whether or not a person has entrusted by giving in trust, rather than in response to an inducement to trust, depends entirely on that person's beliefs at the time of entrusting. As a result, caution must be exercised in generalising about what constitutes giving in trust. For example, if I stop you on the street and ask you how to get to the post office, my action – voluntarily exposing my interest in getting to the post office to your discretion – will usually amount to giving in trust. That is because, in the ordinary case, I will not ask you for directions with the belief that you have induced me in any way to trust you. My trusting expectations of you will usually entail beliefs about the honesty and good will of people in general, or of people I perceive to be like you. However, the case may not be an ordinary one. I may have observed you for some time and formed the belief that you – perhaps by gesturing at me or by looking at me suggestively – have encouraged me to trust you. If I then ask you for directions with that belief, I have entrusted in response to an inducement to trust, or, at least, in response to what I take to be an inducement to trust.

Although caution must be exercised in generalising about what constitutes giving in trust, because whether or not a person has given in trust depends on her beliefs at the time of entrusting, two claims about giving in trust may be made plausibly. First, there are cases in which a person entrusts without any belief that she has been invited

or induced to do so. That is not to say that there are cases in which a person entrusts without any relevant beliefs at all. Even when a person entrusts spontaneously, without trusting expectations of the trusted, her action will usually be accompanied by beliefs about people in general or about people perceived to be like the trusted. It is rather to say that a person may entrust without the specific belief that the trusted has sought her trust. Secondly, giving in trust is commonplace. Given that trusting expectations may be formed for reasons to do with what the truster perceives to be, *inter alia*, the good will, roles, relationships, integrity and interests of the trusted, and given that the truster may entrust to the trusted in light of such trusting expectations, the fact that giving in trust is commonplace should not be surprising. There are many reasons, and many good reasons, to form trusting expectations and to entrust. A belief that the trusted has induced one's trust is only one such reason.

Giving in trust differs from other types of entrusting in that it is initiated by the truster. By contrast, to entrust at the invitation or because of the inducement of the trusted is to respond to an initiative of the trusted. Because it is not responsive, giving in trust entails giving not only that which is entrusted but also, in a special way, trust itself.⁷⁴ Of course, a truster may be said to give her trust to the trusted whenever she manifests that trust to the trusted, even if it has been invited or induced. However, to give trust in response to an invitation or inducement to trust is, in a sense, to give it

⁷⁴ To give trust by giving in trust may be to give in a sense similar to that described by JT Godbout and A Caillé, *The World of the Gift* (D Winkler (trans), McGill-Queen's University Press, Montreal, Kingston, London and Ithaca, 1998) 20: 'Any exchange of goods or services with no guarantee of recompense in order to create, nourish or recreate social bonds between people is a gift.' Trust does not fit the description 'goods or services', but the same idea may apply to it. See also J Mansbridge, 'Altruistic Trust' in ME Warren (ed), *Democracy and Trust* (Cambridge University Press, Cambridge, 1999) 290 for the idea of trust as a gift. The next section considers how giving trust may bring about the creation, nourishment or recreation of what Godbout and Caillé call 'social bonds'.

less readily than is the case when trust is given even though it is not solicited or encouraged in any way. That is because a trusted, by inviting or inducing trust, usually supplies the truster with specific reasons to form trusting expectations and to give trust by entrusting.

Those reasons may include that the trusted has invoked a practice, like promising, pursuant to which individuals undertake obligations voluntarily and that, therefore, the truster may be assured that her trust, if given, will be justified. The reasons may include that the trusted has signalled that she has certain intentions which, if carried out, will lead to the justification of the truster's trust. They may also include the attitudes – like friendship, empathy or respect – that the trusted has manifested to the truster by inviting or inducing the truster's trust. To the extent that a truster would not give her trust – in the sense of manifesting that trust through entrusting – were it not for the presence of those specific reasons to do so, such trust as she does give has been given conditionally. The condition is the presence of the specific reasons to form trusting expectations and to give trust that the trusted has provided the truster with by inviting or inducing her trust. By contrast, a truster who gives in trust gives her trust to the trusted even though the trusted has, by her own actions, provided no specific reasons for trusting expectations to be formed or for trust to be given through entrusting. Such trust has been given, in a sense, unconditionally.

It is not entirely accurate to say that giving in trust entails giving trust unconditionally. Trust may be said to be given conditionally whenever that trust would not be given were it not for the presence of whatever reasons have led the truster to form trusting expectations and to give her trust. It follows that trust is

always given conditionally except where the truster believes that there are no reasons for forming trusting expectations and giving her trust. The distinction that this section argues for is between a case in which trust is given conditionally, the conditions including the presence of reasons to form trusting expectations and to give trust that have been supplied by the actions of the trusted, and a case in which trust is given conditionally, the conditions not including the presence of such reasons. An instance of the latter case might be where I give you my trust because I believe that you occupy a certain role and I have trusting expectations of occupants of that role, even though you have not held yourself out to me as an occupant of that role and therefore have not induced my trust in any way.

In order to illustrate the points just made, consider an example. I would like you to provide me with a reference for a scholarship application. It is important to me that you provide a supportive reference. Because I trust you to provide a supportive reference, I write to you with my request, enclosing all the information that you will require, and leaving the rest to you. You receive my request and interpret it as the action of a person who trusts you. I have, by making my request and leaving the rest to you, manifested my trust by entrusting to you, and I have entrusted to you by giving in trust. In so doing, I have also given you my trust in the unconditional way described above. Now contrast that example with one in which I write to you explaining that I would like you to provide me with a reference, but that it is important that the reference be supportive. I ask you to respond, letting me know whether you feel able to provide a supportive reference, before I send you the information that you will require in order to write it. You respond by promising that you will supply a glowing endorsement of my abilities. Your promise provides me

with specific reasons to form trusting expectations of you and to entrust my interest in having a supportive reference to you. Now, in light of those specific reasons, I send you the necessary information and leave the rest to you. In so doing, I have – so long as you interpret my action as the action of a truster – manifested my trust by entrusting to you. I have also given you my trust, but not unconditionally. I have given it to you only in light of the specific reasons for doing so provided by your promise.

Giving in trust, and thereby giving trust unconditionally, is an important type of entrusting, but not because it is better suited to the manifestation of trust than other types of entrusting. Indeed, it is likely that the type of entrusting best-suited to manifesting trust – because it occurs pursuant to a practice in which trust plays, and is widely believed to play, a special role – is that in which giving trust is most clearly responsive to the initiative of the trusted: entrusting in response to a promise. Giving in trust is an important type of entrusting because it enables trusters to be proactive, rather than reactive, in manifesting their trust. Why does it matter whether trusters are proactive or reactive in manifesting their trust? The answer to that question depends on the answer to a more fundamental question, which has been latent throughout the discussion of manifesting trust and which now must be addressed squarely. Why manifest trust?

D *Why Manifest Trust?*

The Introduction pointed out that, although nothing may be said from a moral point of view about trust *per se*, trust is usually a three part relation: A trusts B to do X.

Therefore, if B is not trustworthy, it may be that A's trust is misplaced. My trust in a con artist to play fair is an example. Moreover, depending on what X specifies, B may have good reasons, even moral obligations, to act in ways that leave A's trust unjustified. For example, if I trust you to detonate a bomb under the Houses of Parliament, you clearly ought not to justify my trust. When considering why it is important to manifest trust, and therefore why it is important to trust, these two observations must be kept in view. If they are, the temptation to claim that it is important to manifest trust because showing trust – and therefore having trust to show – is good may be resisted.⁷⁵ Trust is not always good, nor is its manifestation. Whether or not trust, and showing trust, is good depends on whether the trusted is trustworthy and on the value of that which the truster trusts the trusted to do. Where the trusted is not trustworthy, manifesting trust to her is not usually good, even if it is understandable. Neither is manifesting trust good where the truster trusts the trusted to do that which is base or worthless. Therefore, when considering why it is important to manifest trust, this section concentrates on cases in which the trusted is trustworthy and in which what the truster trusts the trusted to do is itself of value. Manifesting trust in such cases is good in two ways.

First, it is good to entrust to the extent that entrusting makes possible what would not have been possible otherwise. By entrusting, a truster often seeks the cooperation of the trusted. Bernard Williams describes cooperation as follows.

⁷⁵ By 'good' I mean prudent, or sensible (all things considered) and therefore desirable. As I made clear in the Introduction, I make no claim that having or manifesting trust is morally obligatory.

Two agents cooperate when they engage in a joint venture for the outcome of which the actions of each are necessary, and where a necessary action by at least one of them is not under the immediate control of the other.⁷⁶

This might occur in a variety of ways. For example, we might cooperate if I seek your opinion on a medical question: I by attending your clinic; you by making available to me your skills and expertise as a doctor. As I lack those skills and that expertise, I make the impossible possible by attending the clinic and cooperating with you.⁷⁷ Take another example. I wish to open a café. I am experienced at managing cafés, but I cannot cook. You are a chef. In order to make possible a successful café despite the fact that I cannot cook, I seek cooperation with you when I employ you to work for me. In both examples, assuming that I trust you, I entrust my interests to you, because the action that is necessary on your part if we are to cooperate entails you exercising your discretion with respect to my interests. As the goals of our cooperation – the maintenance of my health, the opening and running of a successful business – are in both examples valuable, entrusting to you in seeking that cooperation is good.

In both examples, I entrusted to you in seeking cooperation with you. Therefore, both examples assumed that I trusted you, because, as was explained above, one cannot entrust to another unless one also trusts that other. However, in neither example was

⁷⁶ BAO Williams, 'Formal Structures and Social Reality' in D Gambetta (ed), *Trust: Making and Breaking Cooperative Relations* (Basil Blackwell, New York and Oxford, 1988) 3, 7.

⁷⁷ Strictly speaking, it is not impossible for me to access the skills and expertise of a doctor if I do not consult a doctor, because I can train as a doctor myself. However, it need only be practically impossible, or even inconvenient, to achieve a valuable goal without the assistance of another person before it may be said that entrusting to her in seeking her cooperation is good.

it necessary for me to trust you in order to realise the valuable goals for which I sought your cooperation. Those goals may have been realised through cooperation even if I did not trust you, and even if I distrusted you. In other words, I may have secured my valuable goals, by cooperating with you and by relying on you in ways that did not constitute entrusting. For instance, such might have been the case where my reliance was accompanied, not by an attitude of trust, but by an attitude of confidence in the regulatory system within which you carry out your role.⁷⁸ Such non-trusting reliance – which, to the extent that it enables cooperation, makes the impossible possible in the same way as entrusting – is good like entrusting but it does not manifest trust.

Moreover, even assuming that I did trust you in the two examples above, in neither example was it necessary for me to manifest that trust to you in order to secure my valuable goals through cooperation with you. You may have cooperated with me, and thereby made the impossible possible, even though you did not interpret my actions in entrusting my interests to you as the actions of a person who trusted you. Entrusting which fails to manifest trust but which helps to bring about valuable goals for the achievement of which cooperation is necessary is good in the same way as entrusting, in pursuit of the same goals, that manifests trust.

The first way in which manifesting trust, through entrusting, is good is therefore the same way in which all reliance in seeking cooperation in the pursuit of valuable goals

⁷⁸ Given that trusting expectations may be role-based and even interests-based, such instances of non-trusting reliance are likely to be rare. Nonetheless, reliance must be accompanied by a trusting attitude if it is to be called entrusting.

is good. Such reliance is good because it enables those valuable goals to be realised. The second way in which manifesting trust is good relates to more than the value of goals whose achievement is sought through entrusting and cooperation. The second way in which manifesting trust is good relates to the value of trusting relationships themselves. Relationships characterised by mutual trust and trustworthiness – at least where they are in pursuit of valuable goals – are intrinsically valuable.⁷⁹ One effective way of creating or sustaining such a relationship is to trust another person and to show that person that one trusts her. By manifesting my trust to you, I make it known to you that you are trusted. Knowing that you are trusted, you have the opportunity to prove trustworthy, whether by justifying my trust or in some other way. If you do prove trustworthy, I have one more reason to – and to that extent it is more likely that I will – trust you again. The value of trusting relationships inheres in this cycle of trust and trustworthiness, which one may begin, if one trusts, by manifesting that trust. Moreover, by manifesting my trust, I may show you not only that I trust you, but also that I am committed to a relationship with you in which the cycle of trust and trustworthiness may play a role. By signalling my commitment to such a relationship, I indicate to you that I understand and accept the cycle of trust and trustworthiness and therefore that, should you trust me, I will prove trustworthy as well.

The ways in which the cycle of trust and trustworthiness may be completed, reinforced, damaged or destroyed are taken up in Chapter 2. To conclude this chapter, it will suffice to consider one way in which a person may start the cycle of

⁷⁹ On the nature of intrinsic value, see Raz, *The Morality of Freedom*, above n 50, 177-8.

trust and trustworthiness even though she does not trust, without inviting or inducing the trust of another. Such a person may act *as if* she trusts the other, even though her attitude towards that other is not trusting.⁸⁰ For example, she may rely on the other as if she were entrusting to that other. Such reliance may start the cycle of trust and trustworthiness if it is interpreted by the other – mistakenly – as the action of a person who trusts. That other may then respond to what she takes to be an opportunity to prove trustworthy in a way that helps to generate a trusting attitude in the one who engaged in the ‘as if’ behaviour to begin with. As a result, the person who initially acted as if she trusted may come to trust, and a relationship truly characterised by trust and trustworthiness may be possible. It has been suggested that, in certain circumstances, individuals may have a moral obligation to engage in such ‘as if’ behaviour, in order to show others that they can be trusted and thereby encourage them to prove trustworthy.⁸¹ Whether that is the case is beyond the scope of this chapter. However, to the extent that acting as if one trusts can bring about the cycle of trust and trustworthiness in relationships, it is good in the same way as manifesting trust where it exists.

⁸⁰ ‘As if’ behaviour is discussed in Gambetta, ‘Can We Trust Trust?’ above n 8, 228-9; R Holton, ‘Deciding to Trust, Coming to Believe’ (1994) 72 *Australasian Journal of Philosophy* 63; Ullmann-Margalit, ‘Trust, Distrust and In Between’, above n 2, 69-70. See also, more generally, RS Downie and E Telfer, *Respect for Persons* (Allen and Unwin, London, 1969) 17.

⁸¹ Baker, ‘Trust and Rationality’, above n 26, 8; Govier, *Dilemmas of Trust*, above n 1, 151, 170-4; Thomas, ‘The Duty to Trust’, above n 29, 101; Uslaner, *The Moral Foundations of Trust*, above n 3, 18-9.

CHAPTER 2 – RESPONDING TO TRUST

The Introduction pointed out that trust is usually a three-part relation: A trusts B to do X. In such a situation, B may respond to A's trust in a multitude of ways. This chapter explores some of those ways. The analysis offered is far from exhaustive. Just like trust, responses to trust are highly situation-specific. Therefore, just as was the case when trusting expectations were analysed in Chapter 1, this chapter can only hope to identify some broad themes that may help to organise thinking about responses to trust. Four such themes are introduced and considered. Two – disappointment of trust, and betrayal – describe responses to trust that are usually taken to reveal the trusted to be untrustworthy. The other two – justification of trust, and loyalty – describe responses to trust that are usually taken to reveal the trusted to be trustworthy. The chapter assumes that to be trustworthy is, simply, to be worthy of trust. However, as it considers disappointment of trust, betrayal, justification of trust and loyalty, the chapter also considers what is entailed in being worthy of trust and why being – and proving – trustworthy matters in the cycle of trust and trustworthiness.

An analysis of responses to trust differs in two important ways from an analysis of trust. First, unlike trust, responses to trust may not be analysed with reference to unifying concepts. In Chapter 1, it was claimed that trust is, in a basic sense, an attitude of optimism about the choices that people will make. That claim enabled trust to be analysed, despite its highly situation-specific nature, as something with some degree – however small – of conceptual unity. In analysing responses to trust, even such modest claims about conceptual unity may not be made. It might be

thought that a conceptual framework within which to analyse responses to trust could be constructed around the distinction between trustworthiness and untrustworthiness. However, trustworthiness – being worthy of trust – is a judgment; it states a conclusion about responses to trust that may be drawn only once those responses have been evaluated.¹ The evaluation itself obviously cannot rely on its conclusion, and therefore the concept of trustworthiness plays no role in evaluating responses to trust. Any analysis of responses to trust, to the extent that it seeks to evaluate them, must acknowledge that the principles in light of which that evaluation is to occur will differ depending on the response to trust in question. Therefore, although this chapter organises responses to trust according to whether they are usually taken to reveal trustworthiness or not, it does so in order to illuminate aspects of the cycle of trust and trustworthiness, and not because it draws any conceptual distinction between responses to trust that are, by their nature, trustworthy and responses to trust that are, by their nature, untrustworthy. Such a conceptual distinction is illusory.

Secondly, unlike trust, responses to trust may be analysed from a moral point of view. In other words, while it makes little sense to ask whether one ever has an obligation to trust,² it makes a great deal of sense to ask whether one has obligations when responding to trust and, if so, what they are. The chapter examines the four themes describing responses to trust with that question in view. Underlying the question is the deeper question whether one ever owes an obligation because, and only because,

¹ That is not to say that a judgment of trustworthiness always follows responses to trust. The judgment may be predictive. Indeed, in one sense, trust itself is a predictive judgment of trustworthiness. See R Hardin, *Trust and Trustworthiness* (Russell Sage Foundation, New York, 2002) 148-9.

² Not all writers agree with this claim but, as the Introduction argued, they bear the heavy burden, which they have not discharged – most likely because it cannot be discharged – of demonstrating what could justify an obligation to decide to acquire or shed an attitude or a belief: see above 9.

one is trusted, in the same way as one may owe an obligation because, and only because, one has made a promise. Answering questions about what obligations are owed when responding to trust entails sensitivity to the situation-specific nature of trust and responses to it. For example, in some situations, a trusted may be unaware that she is trusted. In others, she may be aware that she is trusted but does not want to be trusted. In yet others, the truster may trust the trusted to do what is impossible, unreasonable, immoral or illegal. The trusted may have invited or induced the truster's trust. The truster may be vulnerable to the trusted, or in a position of relative disadvantage. All of these variables, and many more, demand to be taken into account when considering what obligations those who are trusted owe to those who trust them. The chapter is sensitive to such variables, but it makes no claim to discuss them all. Its conclusions about the obligations that trusteds owe are therefore tentative and general, with one exception. The exception, the operation of which in the fiduciary setting is taken up in Chapter 5, is the obligation not to betray a truster by abusing her trust, and thereby using her, for self-interested or partisan reasons.

I UNTRUSTWORTHY RESPONSES

Chapter I pointed out that a truster, by manifesting her trust to the trusted, gives the trusted an opportunity to prove trustworthy and continue the cycle of trust and trustworthiness that characterises trusting relationships. Certain types of response to trust are usually taken to prove a trusted untrustworthy and therefore tend to weaken, jeopardise or even destroy the cycle of trust and trustworthiness. Two such types of response to trust are considered in this section: disappointment of trust; and betrayal. Exactly why these responses to trust are often considered to reveal untrustworthiness

may be seen more clearly in light of the discussion below of what being worthy of trust means. For now, two observations about disappointment of trust and betrayal ought to be kept in view. First, a person does not always prove untrustworthy by disappointing trust or betraying someone who trusts her. Whether she proves untrustworthy or not depends on how her response to trust is interpreted, either by the truster or by someone other than the truster. Disappointment of trust and – to a much greater extent – betrayal are likely to be interpreted as the actions of someone who is not worthy of trust, but they are not always so interpreted. Secondly, a person who disappoints trust is not always untrustworthy. In other words, where a person disappoints trust, a judgment of untrustworthiness is not always justified. However, a person who betrays someone who trusts her is always, to that extent, untrustworthy, owing to the nature of betrayal.³ As this section shows, those facts are reflected in the obligations owed by those who are trusted.

A Disappointing Trust

If A trusts B to do X, and B does not do X, B disappoints A's trust. Disappointing trust is therefore failing to meet trusting expectations, irrespective of whether A feels disappointed because her trusting expectations have not been met. Where A trusts B to do X, under what circumstances might B have an obligation to do X? In other words, when might B have an obligation to act so that A's trust is not disappointed? Responses to trust being highly situation-specific, only some tentative and general

³ Such a person may not be untrustworthy on the whole – her betrayal may occur against a long history of trustworthiness – but her betrayal will, owing to its nature, always constitute evidence in favour of a judgment of untrustworthiness. I am grateful to Dori Kimel for this point.

answers to that question may be given here. The question is considered with reference to two types of case: first, the simple case in which the trusted has not invited or induced trust; and secondly, where the trusted has invited or induced trust. The section concludes that, although only tentative and general observations may be made about what obligations a trusted owes in each of these types of case, one conclusion may be drawn with confidence: in none of these cases does the simple fact that A trusts B to do X mean that B owes A an obligation to do X.

A person who is trusted but is unaware that she is trusted does not, all else being equal, owe an obligation to the truster to respond in any way to the trust in question. If that claim – which is uncontroversial – is accepted, it follows that the simple fact that A trusts B to do X does not necessarily mean that B owes A an obligation to do X. But the claim contains a *ceteris paribus* clause, which invites the question: when is all else not equal? It might be thought that all else is not equal if the trusted *should* be aware that she is trusted. To the extent that the trusted, who is unaware that she is trusted, should be aware that she is trusted, she may be treated in the same way morally as the trusted who is aware that she is trusted.⁴ However, it cannot be assumed that a person who is trusted and is aware that she is trusted owes an obligation to respond to the trust in question any more than does a person who is trusted and is unaware that she is trusted.

⁴ I do not know when an unaware trusted should be aware that she is trusted, but I imagine that a variety of considerations bear on that question: whether the truster has attempted to manifest her trust to the trusted; whether the trusted has deliberately avoided situations in which she might come to know of the truster's trust; whether basic requirements of respect demand that individuals achieve a standard of awareness of the interests and needs of others, and so on.

Does a person ever owe an obligation to respond to trust simply because she is trusted and is aware of that fact? It seems plausible to say that such an obligation may be owed in certain circumstances, and that it is grounded in the requirements of respect for other people. Immediately, caution must be exercised with that claim. There are many senses of respect, and it is in a weak sense that respect figures in the claim. In that weak sense, respect is generally believed to involve a requirement

to take due notice of other people's interests in all actions which affect them, or at any rate not to act in ways which cannot be justified by an account which gives their interests their due recognition.⁵

Particular emphasis must be placed on the requirement to take *due* notice. Due notice may be cursory notice, or even no notice at all, where the interests in question do not warrant a more extensive response.

The requirements of respect, in its weak sense, may sometimes ground an obligation to respond to trust of which one is aware, when to respond to that trust is to take due notice of the interests of the truster. That may not be the case where the truster trusts one to do what is impossible, unreasonable, immoral or illegal. The appropriate response to such trust, given the requirements of respect in the weak sense, may be to

⁵ J Raz, *Engaging Reason* (Oxford University Press, Oxford, 1999) 275. Raz refers to that sense of respect when arguing that how people must be respected, beyond what is entailed in the weak sense of respect, is an 'open question'. For accounts of respect in a stronger sense, see RS Downie and E Telfer, *Respect for Persons* (Allen and Unwin, London, 1969) Chapter 1, and SL Darwall, 'Two Kinds of Respect' (1977) 88 *Ethics* 36. For an exposition of some of the difficulties of such accounts, see WK Frankena, 'The Ethics of Respect for Persons' (1986) 14 *Philosophical Topics* 149.

ignore it.⁶ But where the truster trusts one to do what is possible, reasonable and morally and legally permissible, respect may require some sort of response. What sort of response is required depends on the specific circumstances in which one is trusted. In some situations, respect may require nothing more than an explanation to the truster that one is not prepared to do what she trusts one to do. In others, more may be required. In situations where the truster has entrusted interests to one, respect requires that due notice be taken not only of the truster's interest in her trust being justified, but also of the interests that the truster has exposed to one's discretion. What one must do when responding to the truster's trust in such situations may, as a result, be more extensive than in situations where the truster has not entrusted to one.⁷

Sometimes, the requirements of respect, in its weak sense, may ground an obligation to do what one is trusted to do. Such may be the case where there is no way to take due notice of the interests of a truster other than to do what she trusts one to do. The effect of discharging such an obligation is to justify trust. However, the obligation is not an obligation to justify trust; it is an obligation to respect the truster, the effect of the discharge of which is that the truster's trust is justified. It derives normative force from the requirements of respect, not from the fact of the truster's trust. That is why, where there are ways to take due notice of a truster's interests when responding to her

⁶ However it may not if, for example, to ignore the trust in question is likely to cause serious detriment to the truster. Whether respect requires a response to trust, and, if it does, what sort of response it requires, always depends to a great degree on the specific circumstances in which trust is reposed.

⁷ Of course, the requirements of respect in the weak sense apply to trusters as well as to those who are trusted. To entrust to the trusted may violate those requirements where, for instance, one does not care much for the interests entrusted and where that which one trusts the trusted to do with respect to those interests is burdensome to her. What obligations the trusted owes in responding to such trust may be affected by the fact that the truster has violated requirements of basic respect. For instance, it may be that the appropriate response to such trust is to ignore it and to refuse to take responsibility for the interests entrusted to one. See G Cupit, 'How Requests (and Promises) Create Obligations' (1994) 44 *The Philosophical Quarterly* 439, 454.

trust other than justifying that trust, a trusted may satisfy the requirements of respect even though she disappoints trust. For example, imagine that you trust me to deliver a speech at your birthday party and I respond by apologising profusely and explaining to you in detail why I am not able to do so. Whatever the requirements of respect, I appear to have satisfied them, despite the fact that I have disappointed your trust.

In cases where the trusted has invited or induced trust, the trusted may owe one or more specific obligations the effect of the discharge of which is to justify that trust. However, as in simple cases where trust has not been invited or induced, the obligations owed by a trusted who has invited or induced trust do not derive normative force from the fact that she is trusted. Therefore, in neither type of case may it be said that the fact that A trusts B to do X means that B owes an obligation to A to do X, even if, for other reasons, B owes an obligation to A to do X.

First, consider a case in which trust is invited. In Chapter 1, it was pointed out that a person, by promising, invites trust. Imagine that I promise you that I will take you out to dinner on Friday night. By the very act of making that promise, I undertake voluntarily an obligation to do what I have promised to do. That obligation derives normative force from the principle that one must keep one's promises.⁸ The justification of that principle almost certainly depends, at least in part, on the fact that to make a promise and then subsequently break it frequently entails abuse of the trust

⁸ J Raz, 'Promises and Obligations' in PMS Hacker and J Raz (eds), *Law, Morality and Society: Essays in Honour of HLA Hart* (Clarendon Press, Oxford, 1977) 210; J Raz, 'Book Review: Promises in Morality and Law' (1982) 95 *Harvard Law Review* 916.

that one has invited by making the promise.⁹ However, the normative force of my obligation to do what I have promised to do does not depend on the fact that you trust me. That obligation binds me whether you trust me or not, depending, as it does, on the fact that I have voluntarily undertaken it as well as the principle that one must keep one's promises. It follows that, although in the example I have an obligation, all else being equal, to take you out to dinner on Friday night, and although, unless unusual circumstances prevail, you trust me to take you out to dinner on Friday night because I have promised to do so, my obligation is not grounded in the fact that you trust me. I would owe exactly the same obligation if you did not trust me.

A promisor binds herself to do precisely what she promises to do. Therefore, given that promising is a way of inviting trust, it is unsurprising that a promisee usually trusts a promisor to do precisely what she promises to do, and that keeping a promise usually also justifies trust, even though the obligation to keep a promise is not grounded in the fact of trust. There are, in addition to promising, many other ways in which obligations may be undertaken voluntarily.¹⁰ One such way may entail a person holding herself out as occupying some role, in which role her cooperation may be sought by another person in the pursuit of valuable goals. By holding herself out in such a fashion, a person may demonstrate that she intends to bind herself – and may thereby bind herself – to obligations that are generally understood to attach to the

⁹ See D Kimel, *From Promise to Contract: Towards a Liberal Theory of Contract* (Hart Publishing, Oxford and Portland, Oregon, 2003) 22-7.

¹⁰ Joseph Raz alludes to the fact that there are numerous ways in which obligations may be undertaken voluntarily by non-promissory behaviour when he calls promising, particularly within existing interpersonal relationships, an 'extreme form' of undertaking an obligation voluntarily: 'Book Review', above n 8, 928.

role in question.¹¹ It may be that what gives normative force to obligations undertaken voluntarily by non-promissory behaviour is, broadly, what gives the obligation to keep a promise its normative force as well. To that extent, trust is likely to feature in the justification of principles that lend such obligations their normative force.¹² But the fact that a person who, by non-promissory behaviour, undertakes obligations voluntarily is trusted does not help to explain why what she has undertaken are obligations.

Cases in which trust is invited or induced, but which may not be described as voluntary undertakings of obligations, are of two types. First, there are cases in which, although it may not be said that an obligation has been undertaken voluntarily, trust has been invited or induced intentionally. Secondly, there are cases in which trust has been induced unintentionally.¹³ An example of the first type of case was introduced in Chapter 1 in the discussion of Scanlon and the stranger. There, Scanlon deliberately encouraged the stranger to form the expectation – almost certainly trusting – that Scanlon would return his boomerang if he returned Scanlon's spear. It is likely that, after the stranger returned Scanlon's spear to him, Scanlon owed a cluster of obligations to the stranger. Requirements of respect in the weak sense described above almost certainly meant that Scanlon had an obligation to respond in

¹¹ For example, a duty of loyalty, in the sense explored in Chapter 5: see below 278-300.

¹² Raz writes that among the 'moral presuppositions' of promising – and therefore of the obligation to keep one's promise – are 'the desirability of special bonds between people and the desirability of special relations that are voluntarily shaped and developed by the choice of participants': 'Book Review', above n 8, 928. It follows from my analysis in the text that I take such special bonds and relations to include those characterised by the cycle of trust and trustworthiness.

¹³ I take it that one cannot invite trust unintentionally, because inviting trust entails the deliberate communication of a desire that one be trusted.

some way to the stranger's trust. Moreover, for reasons set out below, Scanlon owed an obligation not to respond to the stranger's trust by abusing it in self-interested or partisan ways. However, within the boundaries established by the weak obligation to respond and the strong obligation not to betray, what obligations, if any, did Scanlon owe?

The trusting expectation that Scanlon intentionally induced the stranger to form was an expectation that, if he returned Scanlon's spear, Scanlon would return his (the stranger's) boomerang. In light of that expectation, the stranger entrusted to Scanlon by returning Scanlon's spear and divesting himself of his one 'bargaining chip'. Scanlon thus manipulated the stranger's beliefs and actions. And as a consequence of that manipulation, Scanlon was able to determine unilaterally whether the stranger would walk away from their encounter with his boomerang or without his boomerang. In other words, by manipulating the stranger's beliefs and actions, Scanlon brought about a situation in which he alone could decide whether the stranger would depart the scene worse off or not. Having manipulated the stranger's beliefs and actions, Scanlon owed the stranger an obligation not to leave him worse off, unless there were good reasons for doing so. In law, such an obligation is recognised in principles of estoppel. And Scanlon, in his own book, introduces the example of his interaction with the stranger to illustrate that an obligation not to leave someone in the position of the stranger worse off is grounded in what he calls the principle forbidding unjustified manipulation.¹⁴ In general philosophical terms, the principle forbidding unjustified

¹⁴ 'In the absence of special justification, it is not permissible for one person, A, in order to get another person, B, to do some act, X (which A wants B to do and which B is morally free to do or not to do but would otherwise not do), to lead B to expect that if he or she does X then A will do Y (which B wants but believes that A will otherwise not do), when in fact A has no intention of doing Y if B does X, and

manipulation is best understood as an outworking of the Kantian insight that people should not be treated as means to other people's ends.¹⁵

An obligation not to manipulate a person's beliefs and actions and then leave her worse off implicates trust where the person who has been deliberately encouraged to form an expectation and who then acts in light of that expectation also trusts. That was almost certainly the case in the example of Scanlon and the stranger, because the stranger's expectation was almost certainly trusting. However, such an obligation may be owed even though the person whose beliefs and actions have been manipulated does not trust. The obligation derives its normative force from a principle – the principle forbidding unjustified manipulation – that is in play whenever one person relies on another in light of an expectation that she has been deliberately encouraged to form. That expectation may be trusting, in which case the reliance in question takes the form of entrusting. But it may not be trusting; the reliance in question may be accompanied by attitudes other than trust, such as confidence in a normative or regulatory system. According to the principle forbidding unjustified manipulation, it is just as wrong to exploit the reliance of those who do not trust as it is to exploit the reliance of those who do.

A can reasonably foresee that B will suffer significant loss if he or she does X and A does not reciprocate by doing Y': TM Scanlon, *What We Owe To Each Other* (Belknap Press, Cambridge, Massachusetts, 1998) 298. Strictly, Scanlon introduces the example to illustrate that the principle forbidding unjustified manipulation grounds an obligation not to raise expectations in the circumstances to which the principle refers. However, I take it as uncontroversial that the principle also grounds an obligation, owed by those who have raised expectations in the circumstances to which the principle refers, not to leave those who rely on the strength of such expectations worse off if there are no good reasons to do so: see N MacCormick, 'Voluntary Obligations and Normative Powers I' (1972) Supp Vol 46 *Proceedings of the Aristotelian Society* 59; J Raz, 'Voluntary Obligations and Normative Powers II' (1972) Supp Vol 46 *Proceedings of the Aristotelian Society* 79. Only the latter obligation – the obligation not to leave the reliant party worse off – may be owed where A trusts B to do X. The former obligation prohibits B from bringing it about that A trusts B to do X.

¹⁵ The Kantian insight is discussed below 118-21.

Thus far, it may be concluded that the obligation not to manipulate a person's beliefs and actions and then leave her worse off after she relies on one does not derive normative force from the fact that the reliant person trusts, even though in many cases the fact that the person trusts may help to explain her reliance. To that conclusion, another should be added. Even where the reliant person trusts, the effect of the discharge of the obligation not to leave her worse off is not always to justify her trust. Sometimes, discharging the obligation has that effect. Sometimes it does not. Where there is no way of discharging the obligation other than doing what the reliant person trusts one to do, the effect of discharging that obligation is to justify her trust. However, cases may be imagined in which the obligation is discharged by acting in ways that disappoint such trust as the reliant person has. For example, imagine that I intentionally induce you to form the trusting expectation that I will purchase some land from you if you improve it in certain ways. In light of your expectation, you expend time and money improving the land. I have manipulated your beliefs and actions so that you rely on me. In doing so, I have brought about a situation in which I am able to determine unilaterally, by deciding whether to purchase the land or not, whether you will walk away from our encounter worse off or not. If I decide not to purchase the land, but compensate you for the expense you have incurred in improving the land because you expected me to purchase it, I have discharged my obligation not to leave you worse off, having manipulated your beliefs and actions so that you rely on me. However, I have disappointed your trust.¹⁶ The example

¹⁶ The example is based on the facts of a High Court of Australia case on estoppel: *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387. In that case, no offer was made to compensate the reliant party, which is why litigation was commenced.

demonstrates that in cases where B intentionally induces the trust of A, so that as a result A trusts B to do X and entrusts to B in light of that trusting expectation, A may not owe B an obligation to do X.

The second type of case in which trust is invited or induced is that in which trust is induced unintentionally. Cases in which trust is induced unintentionally may be arranged usefully along a continuum. At one end of the continuum are cases in which one person's actions encourage another person to form a trusting expectation and, even though the first person does not intend to encourage the other to form that expectation, it is reasonable for the other to form that expectation. In such cases, obligations may be owed whose normative force arises from a derivative of the principle forbidding unjustified manipulation. At the other end of the continuum are cases in which one person's actions are interpreted by another as inducing her to trust, but, in the circumstances, no reasonable person would interpret the actions in question in that way. In such cases, it is likely that only obligations grounded in the requirements of respect in the weak sense are owed. At that end of the continuum may be cases in which a person who believes, unreasonably, that she has been induced to trust entrusts to another, bringing about a situation in which the other may determine whether or not to leave her worse off. In such cases, requirements of respect in the weak sense may ground an obligation not to leave her worse off unless there are good reasons to do so, even though her trust is unreasonable and, presumably, unwanted.¹⁷

¹⁷ For example, imagine that the stranger interprets Scanlon's actions unreasonably as encouraging him (the stranger) to form the trusting expectation that Scanlon will return his boomerang if he returns Scanlon's spear. Notwithstanding that the stranger's interpretation of Scanlon's actions, and his resultant expectation, is unreasonable, if the stranger returns Scanlon's spear, Scanlon may owe an

Importantly, no matter where cases in which trust has been induced unintentionally fall on the continuum, obligations owed by those whose actions have encouraged trust, even though they did not intend to encourage trust, do not gain normative force from the fact of that trust. Just as in cases where trust is intentionally invited or induced, those obligations gain normative force from principles such as those entailed in the requirements of respect in the weak sense or those whose justification points ultimately to broad moral themes like the Kantian insight. Gaining their normative force from such principles, the obligations would be owed even if the person to whom they were owed did not trust. And, even where the person to whom those obligations are owed does trust, the obligations are not obligations to justify trust, even though the effect of the discharge of one or more of them may be to justify trust. In no case where A trusts B to do X does B thereby owe an obligation to A to do X. Nor, irrespective of whether B has invited or induced or is taken by A – reasonably or unreasonably – to have encouraged A to trust, does the fact of A's trust ground any obligation in B. However, in every case where A trusts B to do X, B owes A one obligation whose content may not be understood, even if its normative force must, without reference to A's trust. That is the obligation not to betray A.

obligation, grounded in the requirements of respect in the weak sense, to return the favour. Even the weakest sense of respect seems to entail a norm of basic reciprocation.

B *Betrayal*

To betray a person is to abuse her trust, in the sense of using it wrongly, for self-interested or partisan reasons and against her interests.¹⁸ To betray a person is therefore to use her. In this section, several aspects of betrayal are considered: first, the abuse of trust that it entails; secondly, its self-interested or partisan nature; and thirdly, the connection between betrayal and using people. In considering this last aspect of betrayal, the section considers what may ground an obligation, owed by all those who are trusted, not to betray those who trust them.

1 *Abuse of Trust*

Betrayal entails the abuse of trust in the sense of using trust wrongly; it entails the use of trust for self-interested or partisan reasons and against the interests of the truster. To say that a trusted uses trust is to employ the word ‘use’ as a metaphor; the metaphor expresses what happens when a trusted believes that she is trusted and makes that belief a reason for action. It is by letting the belief that she is trusted figure in her practical reasoning that a trusted may be said to use trust. If a person believes that she is trusted, but is not in fact trusted, she cannot be said to use trust even though she makes her belief a reason for action. In such cases, there is no trust to use. However, if a person is trusted, and believes that she is trusted, and makes that belief a reason for action, the metaphor of using trust may be invoked to describe that

¹⁸ One may betray objects other than people: a cause, or one’s country, to name two examples. I concentrate in this chapter on the betrayal of people; therefore I make no claims about what betrayal describes where what is betrayed is not a person. However, I tend to think that what betrayal describes in such cases entails the abuse of generalised, rather than interpersonal, trust. One may also betray a relationship, and I consider betrayal in that special sense below at 116-7.

aspect of her practical reasoning. If she combines the reason that is her belief that she is trusted with other, self-interested or partisan, reasons and then decides to act on the strength of those combined reasons against the interests of the truster, she has used trust wrongly and has betrayed the truster as a result.¹⁹

A trusted may combine the reason that is her belief that she is trusted with self-interested or partisan reasons in a number of ways. Her belief that she is trusted may ground a belief that the truster will not discover her self-interested or partisan plans and, in light of that latter belief, she may decide to carry out those plans. The unfaithful lover, secure in the belief that her trusting partner will not monitor her activities in the way a more suspicious person would, may be cited as an example. Or a trusted may, because she believes that she is trusted, come to believe that her self-interested or partisan plans will be successful and decide to proceed with those plans as a result. A good example is the confidence trickster, whose scam depends on the gullibility of trusting victims.²⁰ A trusted may combine the reason that is her belief that she is trusted with self-interested or partisan reasons when choosing to lie to the truster. Because a liar's intention is to generate a false belief in the mind of another

¹⁹ As Dori Kimel has pointed out to me, where a trusted combines the belief that she is trusted with other, self-interested or partisan, reasons and then decides to act on the strength of those combined reasons in a way that is not against the interests of the truster, it is difficult to conclude that the truster has been betrayed. For example, think of a trusted who justifies the truster's trust on the strength of her belief that she is trusted and her self-interested desire to prove trustworthy to others. The difficulty of such cases has led me to confine my account of betrayal to only those cases where the trusted acts against the interests of the truster.

²⁰ 'Criminals, not moral philosophers, have been the experts at discerning different forms of trust': AC Baier, 'Trust and Antitrust' (1986) 96 *Ethics* 231, 234.

person, she is more likely to lie if she believes that the other person trusts her to tell the truth.²¹ The connection between lying and betrayal is thus simple, and strong.

The account of betrayal offered here emphasises the deliberate nature of the abuse of trust that it entails. However, claims about the deliberate nature of betrayal can be taken too far. For example, Judith Shklar writes that

[f]or a simple act of betrayal, one person should have both intentionally convinced another person of his future loyalty and then deliberately rejected him.²²

Shklar's claim appears to be that betrayal entails deliberately inviting or inducing trust. There can be no question that inviting or inducing trust and then using it in the pursuit of self-interested or partisan ends clearly constitutes betrayal. However, betrayal is not always planned. For example, imagine that we are close friends and that you spontaneously entrust a secret to me. After a while, I come to realise that I have an opportunity to enrich myself by selling the secret to the highest bidder, an opportunity that I may realise with relative ease because you trust me to keep your secret and are not suspicious of my motives or my actions. If I decide to sell your secret, I abuse your trust, in the sense of using it wrongly, for self-interested reasons.

²¹ BAO Williams, *Truth and Truthfulness* (Princeton University Press, Princeton, 2002) 96: 'I take a lie to be an assertion, the content of which the speaker believes to be false, which is made with the intention to deceive the hearer with regard to that content.' For a similar definition, see C Fried, *Right and Wrong* (Harvard University Press, Cambridge, Massachusetts and London, 1978) 59.

²² J Shklar, *Ordinary Vices* (Belknap Press, Cambridge, Massachusetts and London, 1984) 140-1.

I betray you, but my betrayal is opportunistic, not calculated.²³ Because Shklar's claim accounts for calculated betrayal only, it is too ambitious as a claim about betrayal generally.

Because the metaphor of using trust expresses what happens when the trusted lets the belief that she is trusted figure in her practical reasoning, a trusted may use only trust of which she is aware. It follows that only trust that has been successfully manifested to the trusted can be abused in the way entailed in betrayal. How trust is successfully manifested was considered at length in Chapter 1. One conclusion of that chapter was that entrusting – voluntarily exposing interests that one cares about to the discretion of another – is particularly well-suited to manifesting trust successfully. As a consequence, it is not surprising that betrayal often follows the manifestation of trust through entrusting. However, care must be taken to avoid asserting that betraying a person who entrusts to one necessarily entails abusing what is entrusted. Annette Baier rightly points out that '[o]ne way to abuse trust is to abuse what is entrusted', but Baier's claim is not about betrayal.²⁴ There are many ways to abuse trust, and only one of them – betrayal – entails using that trust for self-interested or partisan reasons. Where trust has been manifested through entrusting, and that trust is used by the trusted for self-interested or partisan reasons and against the interests of the

²³ By cultivating our friendship, I may convince you of my future loyalty. If I cultivate our friendship with the intention of so convincing you, my betrayal fits Shklar's description. However, the example assumes that our friendship has developed, as friendships usually do, in a spontaneous, artless fashion, so that you believe me to be a loyal friend, but not because I have intentionally convinced you of that fact.

²⁴ AC Baier, 'Trusting Ex-Intimates' in G Graham and H Lafollette, *Person to Person* (Temple University Press, Philadelphia, 1989) 269, 274.

truster, it often follows that what is entrusted is also abused. But it is not necessarily so.²⁵ To see why, consider the abuse of trust entailed in breaking a promise.

In Chapter 1, promising was introduced as a practice that facilitates the manifestation of trust by enabling one person to invite another to trust. In the ordinary case, a promisee who believes that a promisor will keep her promise has a trusting expectation of the promisor. However, having that trusting expectation does not, by itself, manifest trust to the promisor. In order to manifest her trust to the promisor, the promisee must act. Usually, a promisee will manifest trust to a promisor by entrusting to the promisor. For example, imagine that you have been worried about the state of my health for some time and I promise you that I will quit smoking. You respond by clasping my hand, thanking me and telling me earnestly that you believe that I will keep my promise. Unless unusual circumstances prevail, your actions show me that you trust me.²⁶ Moreover, by your actions you have entrusted to me your interest relating to my health and your interest in me keeping my promise.²⁷ Now imagine that I break my promise by continuing to smoke secretly, thinking that I will escape having to confess and defend my actions to you because you trust me and

²⁵ Moreover, one may abuse what is entrusted to one without betraying the trust of the entruster. For example, imagine that you entrust your cat to me for the day and I tease and taunt the animal relentlessly for my own amusement. If I do not believe that you trust me, I may not betray you. However, I still abuse what was entrusted to me because my treatment of the cat is wrongful.

²⁶ In an unusual case, you may say that you believe me even though you do not believe me, perhaps to encourage me. Or I may not interpret your actions as the actions of a person who trusts me. Perhaps I construe them as exaggerated and doubt that they are genuine as a result.

²⁷ This latter interest might be more helpfully described as your interest in the discharge of an obligation that is owed to you: here, your interest in the discharge of my voluntarily undertaken obligation to keep my promise.

therefore believe that I have quit. Such an instance of inviting trust and using it for self-interested reasons and against your interests clearly amounts to betrayal.²⁸

In this example of betrayal, I abuse your trust. My belief that you trust me figures in my practical reasoning when I deliberate about whether I will quit smoking or not, and, when combined with my self-interested reasons to continue smoking, leads me to decide not to quit. However, I do not necessarily abuse what you entrusted to me. Of course, I may believe that you have voluntarily exposed to my discretion an interest in my health, and I almost certainly believe that you have voluntarily exposed to my discretion an interest in me keeping my promise.²⁹ But, in the example, there is no indication that I make those beliefs reasons to continue smoking. Indeed, such beliefs are most likely to figure in my practical reasoning as reasons *against* breaking my promise, even if I am disposed to use your trust in the ways entailed in betrayal.

The example could be refined so that a belief that you have voluntarily exposed interests that you care about to my discretion does figure in my practical reasoning as a reason to break my promise. Indeed, that might be the case if I desire maliciously to harm you. However, to refine the example in such a way would not yield any conclusions about betrayal, because malicious desires are not present in all cases of

²⁸ ‘Using [a] promisee’s trust, having intentionally invoked it, in a way which is not compatible with his interests, let alone in a way which amounts to positively harming him, would be a clear cut and a rather extreme case of taking advantage, of using a person’: Kimel, *From Promise to Contract*, above n 9, 26.

²⁹ If I did not have such a belief, I would almost certainly misunderstand what promising means.

betrayal and there is no reason to believe that they are present even in many cases.³⁰ And in cases where malice is lacking, a trusted may take the interests that have been entrusted to her as reasons not to carry out self-interested or partisan plans. She may assign significant weight to such reasons, but ultimately decide that they are outweighed by her self-interested or partisan reasons. In doing so, she will not, in the ordinary case, abuse what is entrusted to her.³¹ However, if she takes the truster's trust as a reason for believing that her plans will succeed or remain undetected, and she then decides to carry out her plans in light of her belief, she will abuse that trust.³²

It might be objected that the account of betrayal offered here is counter-intuitive, because of the notion of abuse of trust that it employs. Surely a trusted can abuse trust in ways other than making the belief that she is trusted a reason for acting in self-interested or partisan ways. And surely it makes sense to speak of some of those ways as betrayal. Consider two examples that might be invoked in support of such an objection. First, imagine that we are married and that I am unfaithful to you after a wild office party. I am drunk at the time and not thinking about the nature or the consequences of my actions, except that I think that what I am doing is wrong. However, I drive that thought from my mind. When I arrive home in the early hours of the morning, having sobered up, I confess to you what I have done and seek your

³⁰ That is especially true of betrayal in loving and friendly relationships, which seems to be accompanied less often by malice than by a weakness of resolve, a fear of conflict, or a lack of commitment.

³¹ But she may fail to discharge an obligation that she owes. In the example discussed in the text above, I did not abuse what you entrusted to me when I took those interests as reasons not to continue smoking, but I nonetheless breached an obligation that I owed to you, because I did not keep my promise.

³² Because she lacks malice and recognises that the interests entrusted to her are reasons against being self-interested or partisan, such a person is likely to feel regret for having abused the truster's trust.

forgiveness. A belief that you trusted me did not figure in my practical reasoning at the time of my infidelity; indeed, my action was more or less unthinking and not the product of deliberation and choice. However, after the infidelity, I believe that I have betrayed you, and after my confession, you believe that you have been betrayed. Why have I not betrayed you?

Secondly, imagine that we both belong to a church that is intolerant of homosexuality. You reveal to me that you are gay, and ask me not to tell anyone in the congregation until you are ready for the fact to be more widely known. At a church picnic I am gossiping with some old ladies and, to satisfy their taste for scandal, I tell them what you have told me. I believe that you trust me with your secret and, as I deliberate about whether or not I should share that secret with the gossipmongers, I take my belief as a reason *not* to share it. But I just cannot resist the urge to reveal it anyway. Immediately afterwards, I regret my action and believe that I have betrayed you. When you find out what I have done, you believe that you have been betrayed. Once again, why have I not betrayed you?

Earlier, it was argued that betrayal entails the abuse of trust in the sense of using trust wrongly. However, to use trust wrongly is not the only way to abuse it. Another way in which a trusted may abuse trust is by failing to take trust seriously.³³ Another – admittedly awkward – way of putting that is to say that a trusted may abuse trust by failing to make the belief that she is trusted a reason for action; she may abuse trust by

³³ Whether or not a failure to take trust seriously amounts to an abuse of trust depends on a variety of factors, such as whether the trusted believes that she is trusted, and what the trusted is trusted to do. I assume that any conditions that must be met before a failure to take trust seriously amounts to an abuse of trust are met in the first example.

failing to use it at all. That is what happened in the first example. The objection to the account of betrayal offered here claims that abusing trust by using it for self-interested or partisan reasons and failing to use trust at all, again, for self-interested or partisan reasons, both amount to betrayal. The objection is to be taken seriously in that it does not stretch sense to describe both types of abuse of trust as betrayal. However, it appears that there is a moral distinction between the two types of abuse of trust, even if both may be described as betrayal.

In the first example, after I confess my infidelity to you, you are likely to demand to know more about how and why it happened. One reason why you might wish to know more, particularly after emotions such as anger have subsided, is to be able to judge my actions appropriately. The future of our relationship may depend on how you judge my actions, and on whether you forgive me, so – assuming that our relationship matters to you – what you come to believe about my actions is likely to matter to you. Imagine that you believe what is true: that I did not act deliberately and that I have not tried to conceal my actions in a way that has used your trust. Because of your beliefs, you may judge my actions less harshly than you would have had you believed that I was unfaithful deliberately and tried to conceal my infidelity. You may be more likely to forgive me as a result because you believe that, while I have abused your trust, I have not exploited it with my own advantage in mind. You may believe that the damage done to the cycle of trust and trustworthiness in our relationship, while undeniable, is not irreparable. You may have such beliefs while also believing that you have been betrayed.³⁴ Of course, believing that one has been

³⁴ You may also believe that I have betrayed our marriage. To betray a relationship is to betray in a sense different from that which I discuss in the text. To say that a person has betrayed a relationship is

betrayed and having been betrayed are not the same, but, in the example, it seems that you have good grounds for your belief.

Now contrast the first example with one in which I have conducted a secret extra-marital affair for two years. Again, you are likely to wish to know more about this affair if I confess it to you, and it is likely to matter to you that my infidelity – perpetrated over such a long period of time – was deliberate and that I have hidden it from you by using your trust. Indeed, it is perfectly plausible that these elements of deliberateness and ongoing concealment will matter to you more than my infidelity itself. You may judge my actions as entailing an exploitation of your trust so egregious that the cycle of trust and trustworthiness in our relationship is irreparably damaged. In light of that, you may be unable to forgive me.³⁵ The contrast between this example and the first one introduced above shows the intuitive plausibility of drawing a moral distinction between abusing trust through not taking it seriously and abusing trust through using it wrongly. Moreover, the contrast shows that it is intuitively plausible to regard the second type of abuse of trust, the one that entails the exploitation of trust, as the more serious. Even though both abuses of trust may be described as betrayal, simply to describe them as such and to say no more about them risks obfuscating the moral distinction that may be drawn sensibly between them.

to point to her failure to be truly engaged in or committed to the relationship in question. See J Raz, *The Morality of Freedom* (Clarendon Press, Oxford, 1986) 354.

³⁵ T Govier, *Dilemmas of Trust* (McGill-Queen's University Press, Montreal, Kingston, London and Ithaca, 1998) 183 argues that forgiveness itself requires some degree of trust, and that that degree of trust might not be present where what stands to be forgiven has destroyed trust between the one whose trust has been abused and the one who has abused it.

In the second example, I take your trust seriously. When I am deliberating about whether or not to disclose your secret to the gossiping ladies, I take my belief that you trust me to be a reason against disclosure. Nonetheless, I give in to temptation and reveal what you told me in confidence. Undoubtedly, I disappoint your trust, and it also seems plausible to say that I abuse it and even to say that I betray it. However, the fact that I immediately regret my actions and believe that I have betrayed you indicates that I take your trust seriously; it is because I took my belief that you trusted me as a reason not to reveal your secret before revealing that secret, and because I still recognise the force of that reason after revealing the secret, that I have regret. Moreover, even though you believe that you have been betrayed, if you come to believe what is true – that I took your trust seriously but had a lapse of judgment and resolve – you are likely to cease believing that you have been betrayed and to start believing that, even if I am not trustworthy, I am not the kind of person who exploits the trust of others for self-interested or partisan reasons. These observations suggest that, although my behaviour in the second example may be described as betrayal, more must be said about it if it is to be distinguished from that behaviour, also – and perhaps more plausibly – described as betrayal, which is characterised by the exploitation of trust.

2 Self-Interested or Partisan Reasons

Betrayal entails the abuse of trust for self-interested or partisan reasons. Self-interested or partisan reasons are those which point to the utility or value of serving

the interests of the trusted or someone else other than the truster.³⁶ In his book, *Truth and Truthfulness*, Bernard Williams discusses different types of deceit, and reserves the phrase ‘sheer betrayal’ for the case of a lie told with self-interested or partisan aims in mind.³⁷ However, to acknowledge that self-interested or partisan behaviour constitutes the central case of betrayal is not necessarily to accept that *only* such behaviour may be described as betrayal. In order for that claim to be accepted, it must be demonstrated that it makes no sense to speak of selfless and non-partisan betrayal. Before attempting that demonstration, one distraction must be set aside. In *The Morality of Freedom*, Joseph Raz writes,

Many a soap opera has capitalised on the idea of the lover who is disloyal in order to break the relationship because he realises, correctly, that that is in the best interests of his loved one. Such cases may show that being false to one’s pursuit or relationships is, sometimes, justified. But even a justified betrayal is a betrayal.³⁸

In this passage, Raz appears to argue that betrayal may be selfless and non-partisan. However, Raz refers to betrayal in a sense different from that discussed in this

³⁶ John Gardner and Timothy Macklem point out that every reason is value-laden in the sense that it contains an operative component that reveals the value that would be served by the action for which it is a reason: ‘Reasons’ in J Coleman and S Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press, Oxford, 2002) 440, 450.

³⁷ Williams, *Truth and Truthfulness*, above n 21, 118, 294 n 42. The quotation is on 118. One aspect of Williams’ analysis requires clarification. He should not be taken to mean that, in order to amount to betrayal, deceit must take the form of a lie. One may betray another by deceiving her in ways other than lying to her. Williams’ point appears to be rather that lying to someone is a brazen, straightforward, and effective way of betraying her and that attitudes and beliefs about the moral wrongness of lying as opposed to other forms of deceit have been influenced by that fact.

³⁸ Raz, *The Morality of Freedom*, above n 34, 354.

chapter. The betrayal to which Raz refers is betrayal of a relationship, not of a person. As Raz points out, one may betray a relationship – in the sense of failing to be truly engaged in or committed to it – in order to serve what one takes to be the interests of another person, and such betrayal may be justified.³⁹ But no conclusions may be drawn from that observation about whether one may betray a person in the same way.

One way of ascertaining whether the betrayal of a person may be selfless and non-partisan is to take a case that may be described as a selfless and non-partisan abuse of trust and ask whether it also makes sense to describe it as betrayal. Consider the case of deceit whose aim is to spare someone's feelings. According to Bernard Williams, even if such deceit is justified, it may lead to regret, and that regret seems to acknowledge that the person deceived is not given the chance to form her own reactions to facts about the world but instead is given a picture of the world that is a product of the will of the deceiver. According to Williams, such regret entails an understanding that the deceiver has replaced, for the deceived, the world with her will, thereby taking away the freedom of the deceived.⁴⁰ Moreover, in Williams' view, regret for justified deceit often entails a sense of having abused the trust of the deceived.⁴¹ Thus, regret for justified deceit is likely to include a sense that deceit

³⁹ I am not sure how the example of the disloyal lover helps to make Raz's point that the selfless betrayal of a relationship may be justified. It is not clear to me why disloyalty – which, in the soap opera plot, presumably takes the form of sexual infidelity – is justified when the lover could disengage from the relationship simply by deciding to do so and communicating that decision to the other person.

⁴⁰ Williams, *Truth and Truthfulness*, above n 21, 118-9. See also Fried, *Right and Wrong*, above n 21, 67 ('When I lie, I lay claim to your mind') and S Bok, *Lying: Moral Choices in Public and Private Life* (Harvester Press, New York, 1978) 19 ('Lies distort ... our situation as we perceive it, as well as our choices').

⁴¹ Williams, *Truth and Truthfulness*, above n 21, 118.

entails the abuse of trust generally speaking. Given what is entailed in regret for deceit whose aim is to spare someone's feelings, such deceit may be described sensibly as a case of selfless and non-partisan abuse of trust.

Is the case of deceit whose aim is to spare someone's feelings described sensibly as a case of betrayal? As is discussed below, betrayal is a way of using someone. Therefore, if deceit whose aim is to spare someone's feelings is to be described as a case of betrayal, it should make sense to say that it amounts to using the person whose feelings stand to be spared. Obviously, to say that a person may be used in her own interests is strained. Indeed, Williams argues that the awkwardness of such invocations of the concept of using someone indicate that the concept should be given a meaning more in keeping with intuition than that given it by Kant himself.⁴² The better view recognises that when a person is deceived to spare her feelings, she is not used in any morally significant sense, even if she may be used in a strict, philosophical, sense. Because such a person is not used in any morally significant sense, it is misleading to describe the deceit to which she has been subjected in terms that denote serious moral wrongdoing, and therefore it is misleading to describe that deceit as betrayal. It may even be – and Williams may be read as inferring – that to deceive a person to spare her feelings is not to abuse her trust at all, and that regret for such deceit entails nothing more than a sense that, *in the ordinary case*, deceit amounts to an abuse of trust and therefore that deceit is to be avoided whenever possible, even when it is justified.

⁴² Ibid, 122: 'We should hold on to Kant's insight that we need to understand the deeper implications of trust, and its value, in terms of individual freedom and the avoidance of manipulation, but we should resist his obsession (which indeed conflicts with that insight) that those concerns should speak to us in the form of an exceptionless and simple rule'.

3 *Betrayal and Using People*

Consider some examples in which someone is used by being treated, in some sense, as a means to someone else's ends. I may drug you and use you as a doorstop. Or I may force you at gunpoint to drive me to the supermarket. I may manipulate you into providing me with free legal advice. Or I may lend money to you at a scandalously high rate of interest. In the first example, you have been used as a physical object. In the second, you have been coerced and, in a sense, your will has been used. In the third example, I have used your knowledge and skills to benefit myself. And in the fourth, I have used your desire to borrow money from me to enrich myself unreasonably. In none of the examples do I necessarily betray you. That is because in none of the examples do you necessarily trust me, and betrayal, at least in the sense explored in this chapter, entails the abuse of trust. Of course, if you do trust me in the examples, they may be examples of betrayal. For instance, vary the fourth example so that we are brothers. It may now be that, by extracting huge interest payments from you, I abuse trust that you have reposed in me on account of our relationship. To that extent, I may be said to betray you. The examples do not show that using a person in certain ways cannot amount to betrayal. They show that there are many ways in which a person may be used, and only one of them is betrayal.

Betrayal entails the abuse of trust in the sense of using trust wrongly. In what sense is using a person's trust wrongly using *her*? Two observations about trust assist in answering that question. First, a person's trust is a matter of her attitudes and usually also her beliefs. Therefore, a person's trust is, in a profound sense, hers. It is

inextricably bound up with her as a person. Secondly, as was pointed out in Chapter 1, by manifesting her trust, a truster is able to contribute to the cycle of trust and trustworthiness that characterises trusting relationships. Because trusting relationships in the pursuit of valuable goals are intrinsically valuable, a truster is able to generate value by manifesting her trust successfully. That trust – *her* trust – is therefore valuable too, because of the potential that it possesses. In light of these two observations about trust, it may be said that to use a person’s trust wrongly is to use what is profoundly hers and what is of value, to her and potentially to others too.⁴³ Such behaviour so clearly amounts to using someone that it is not far-fetched to suggest that it is a central case of that wrong.

Two further points with respect to betrayal and using people must be addressed. First, it was argued earlier that using a person’s trust entails making the belief that one is trusted a reason for action. It was also argued that where the reason that is the belief that one is trusted is combined with partisan or self-interested reasons for action, and a decision is made on the strength of those combined reasons, against the interests of the truster, that trust is used wrongly. Thus, it was seen that the metaphor of ‘use’ describes an aspect of the practical reasoning of a trusted who betrays trust. When a trusted betrays a truster, she uses the truster herself in the same metaphorical sense. That which cannot be separated from the truster as a person – *her* trust – figures in the practical reasoning of the trusted as a means to an end; to that extent, the trusted fails to recognise that the truster is a person who is an end in herself. As Bernard Williams

⁴³ If her trust is manifested in the pursuit of worthless or base goals, it lacks value. However, because it is nonetheless inextricably bound up with her as a person, to wrongfully use it is still to use her in a morally significant sense. There may be many reasons – indeed, there may be obligations – to disappoint trust where the trusted is trusted to do what is impossible, unreasonable, immoral or illegal. But not by using such trust for self-interested or partisan ends.

writes with respect to the betrayal entailed in self-interested deceit: ‘Kant’s phrase about treating other people as ends and not “merely as means” comes naturally to hand when we try to say what is wrong with it.’⁴⁴

Secondly, the Kantian insight about what is wrong with betrayal helps to explain why a person has a moral obligation not to betray those who trust her. If it makes sense to speak of a moral obligation not to use another person, it also makes sense to speak of a moral obligation not to betray another person, because betraying a person is a way of using her. However, the Kantian insight, by itself, offers no way to distinguish between the case of using a person in her own interests, which is morally insignificant, and the case of using a person for self-interested or partisan reasons, which is wrong in a morally significant sense. Some other principle must be invoked if that distinction is to be made. This chapter does not attempt to make such a distinction; it is enough for now, looking ahead to the analysis of fiduciary obligation in Chapter 5, to be satisfied that there is an obligation not to betray trust. The scope of such an obligation need not be determined.⁴⁵

⁴⁴ Williams, *Truth and Truthfulness*, above n 21, 119. See I Kant, *Groundwork of the Metaphysics of Morals* (M Gregor (trans and ed), Cambridge University Press, Cambridge, 1997) 38: ‘So act that you use humanity, whether in your own person or in the person of any other, always as an end, never merely as a means.’ I agree with Williams (see n 42 and accompanying text) that the duty not to use others is not justified adequately by the requirement of respect for the moral law. However, the duty may be understood as deriving normative force from the requirement of respect for other persons *qua* persons. See also J Raz, *Value, Respect and Attachment* (Cambridge University Press, Cambridge, 2001) 134.

⁴⁵ It is worth pointing out that one consideration is irrelevant to any meaningful distinction between cases of using a person in her own interests and cases of using a person for self-interested or partisan reasons: the extent to which the person used feels hurt. Trudy Govier is one scholar who seems to argue for a close connection between betrayal and feelings of profound hurt: *Dilemmas of Trust*, above n 35, 144. However, although it makes sense to say that betrayal that causes such feelings is especially regrettable, it is not correct to say that abuse of trust can amount to betrayal only in such cases. A person may be used in a morally significant sense, even though she does not feel hurt as a result. Indeed, cases may be imagined in which using a person such that she does not feel hurt is more reprehensible than using her such that she does. Think, for instance, of a group of friends who pretend to include another in their circle, but socialise with her only so that they may laugh at her expense

It hardly needs to be said that betrayal, more than any other response to trust, is liable to damage or destroy the cycle of trust and trustworthiness. Moreover, betrayal – or, at least, feeling betrayed – may cause an attitude of trust to be replaced by an attitude of distrust in the mind of the person betrayed. Therefore, betrayal is capable not only of bringing trusting relationships to an end, but also of preventing trusting relationships from developing in the future. Indeed, particularly painful experiences of betrayal may generate distrust that is directed, not only at the one formerly trusted, but also at groups, types of people, or people generally. The experiences of individuals who were subjected to sexual abuse when they were children and whose ability to form trusting relationships is impaired as a result attest tragically to that fact.⁴⁶

II TRUSTWORTHY RESPONSES

There are many ways of proving trustworthy, and justifying trust and proving loyal describe, in broad terms, only two of those ways. To that extent, much is missing from this section. Moreover, how one proves trustworthy by justifying trust or by proving loyal is highly situation-specific: a matter, in each case, of the attitudes, beliefs and actions of the truster and the trusted. To that extent, even what is not

when she is absent. By deliberately not hurting her feelings, the group deceives her so as to prolong the cruel game in a way that is particularly offensive. On the distinction between being used and being hurt, see L. Blum, 'Deceiving, Hurting and Using' in A. Montefiore (ed), *Philosophy and Personal Relations: An Anglo-French Study* (Routledge and Kegan Paul, London, 1973) 34.

⁴⁶ Trudy Govier argues that when a person is betrayed by a family member, the detrimental effect on that person's disposition to trust is often profound and wide-ranging: *Dilemmas of Trust*, above n 35, 76.

missing from this section is incomplete. However, the aim of the section is not to supply a comprehensive account of what is entailed in proving trustworthy. Rather, the aim is to sketch, in outline, the role of justifying trust and proving loyal in building interpersonal relationships. Given that aim, the incompleteness of the analysis is – hopefully – forgivable. It is also true that what is discussed, in this section, with reference to trust and trustworthiness may just as well be discussed without reference to those concepts. Again, given the aim of the section, that – although true – is not significant. A choice must be made about the concepts to be deployed in analysis. Given that the theme of this chapter is responses to trust, the choice, in this section, to explore relationship building in terms of trust and trustworthiness is defensible.

A Justifying Trust

If A trusts B to do X, and B does X, B justifies A's trust. Justifying trust is therefore meeting trusting expectations, irrespective of whether those expectations are justified in the sense of being reasonable or proper. Earlier, it was argued that the simple fact that A trusts B to do X does not mean that B owes A an obligation to do X. Such obligations, if any, as B owes in that situation, including any obligation to do X, are grounded in reasons other than the fact that A trusts her. In this section, questions of obligation are set aside. The focus is instead on how justifying trust contributes to the cycle of trust and trustworthiness that characterises trusting relationships. The section argues that, by justifying trust, a trusted may prove trustworthy to a truster, thereby making the truster aware of a reason to trust the trusted that she did not have previously: the demonstrated trustworthiness of the trusted. Being aware of one more

reason to trust the trusted, the truster is – all else being equal – more likely to trust the truster in the future, potentially deepening and widening the cycle of trust and trustworthiness as a result.

Before considering how justifying trust, and thereby proving trustworthy, contributes to the cycle of trust and trustworthiness, it is worth pausing to consider what it means to be trustworthy and to prove trustworthy. What does it mean to be worthy of trust? One intuitively plausible answer to that question is that to be worthy of trust is to be disposed to respond to trust appropriately and actually to respond appropriately to trust that has been reposed in one and of which one is aware. Responding to trust appropriately entails discharging whatever obligations one owes to those who trust one; some such obligations were discussed above. However, appropriate responses to trust may entail more than simply discharging obligations. In particular, whether responses to trust are appropriate or not may be a question of attitudes. Appropriate responses to trust may, depending on the relationship between the truster and the trusted, entail having attitudes like respect for the truster, or empathy, friendship or love. Such responses may entail having other attitudes as well.

To illustrate, consider two examples. First, imagine that I make a promise to you, and that you trust me to keep my promise. The appropriate response to your trust is not just to keep my promise, although in the ordinary case it certainly entails that. Unless unusual circumstances prevail, the appropriate response to your trust, given that I have invited it by making a promise to you, is to keep my promise and to take my

obligation to keep it seriously with an attitude of respect for you.⁴⁷ Secondly, imagine that we are close friends, and that you trust me not to speak ill of you to others. The appropriate response to your trust is not just to refrain from badmouthing you; it is to refrain from badmouthing you with an attitude of friendship or love for you. If I refrain from badmouthing you grudgingly, or even because I make it a principle never to badmouth anyone, my response to your trust – given our friendship – is not entirely appropriate.

Appropriate responses to trust may entail attitudes that are not directed towards the trustor. For example, if you trust me to discharge legally enforceable obligations that I owe to you, the appropriate response to your trust, assuming that the legal system within which those obligations are imposed on me is just, is not only to discharge the obligations in question for fear of sanction if I do not. The appropriate response to your trust is to discharge those obligations with an attitude of respect for the law.⁴⁸ If, within a just legal system, you trust me to discharge legally enforceable obligations and I respond to that trust by discharging the obligations solely for fear of sanction, not with an attitude of respect for law, my response to your trust is inappropriate. If, in the future, you trust me again to discharge legally enforceable obligations, but this time I believe I will not be caught if I breach them, I am likely to disappoint your trust without there being any good reason to do so. To that extent, I am not worthy of that

⁴⁷ That is not to say that I have an obligation to have an attitude of respect for you. I do not. It is to say that having an attitude of respect for you is appropriate, given that I have invoked the practice of promising, because, as Dori Kimel points out, the intrinsic value of that practice inheres in its suitability to bring about and nourish interpersonal relationships whose foundations consist of attitudes of trust and respect: *From Promise to Contract*, above n 9, 27-9.

⁴⁸ On respect for the law, see J Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press, Oxford, 1979) Chapter 13.

trust. Another attitude entailed in appropriate responses to trust is self-trust, in the sense of optimism about one's own choices. Given that trust is an attitude about the choices that other people will make, self-trust is almost always appropriate when responding to trust. To the extent that a person is pessimistic about her capacities, dispositions and motivations when forming judgments, deliberating about reasons, and making choices, she usually responds inappropriately to the optimism of others about those same matters.⁴⁹

In general terms, being worthy of trust – responding to trust appropriately – entails a disposition to act in conformity with the demands of reason whenever one is trusted, whether or not those demands present themselves in the form of obligations, as well as a disposition to have appropriate attitudes about one's community and its institutions, one's relationships, and oneself. But what does it mean to *prove* worthy of trust? In Chapter 1, it was argued that the attitude of trust has only the potential to generate value unless and until it is manifested. The same is true of attitudes entailed in appropriate responses to trust. To prove trustworthy is to manifest such attitudes as are entailed in appropriate responses to trust that has been reposed in one and of which one is aware. By manifesting those attitudes, one shows the truster that one is disposed to, and does, respond appropriately to trust; as a result, the truster may form the judgment that one is trustworthy.⁵⁰ Exactly what contribution a judgment of

⁴⁹ The role of self-trust in trustworthiness is pointed out by Govier, *Dilemmas of Trust*, above n 35, 104 and Hardin, *Trust and Trustworthiness*, above n 1, 32.

⁵⁰ Because she is optimistic about the choices that the trusted will make, and to the extent that she has manifested her trust because she desires to give the trusted an opportunity to prove trustworthy, a truster may be said to be disposed to form a judgment of trustworthiness or even to have formed a *prima facie* judgment of trustworthiness that she is prepared to revise if the trusted proves untrustworthy: see Hardin, *Trust and Trustworthiness*, above n 1, 148-9. It follows that, all else being

trustworthiness may make to the cycle of trust and trustworthiness is taken up below. But first, more must be said about proving trustworthy.

Chapter 1 made two observations about the manifestation of trust: one cannot manifest trust unless one trusts; and one cannot manifest trust unless and until one's actions are interpreted as the actions of a person who trusts. Similar observations may be made about proving trustworthy. One cannot manifest such attitudes as are entailed in appropriate responses to trust unless one has the attitudes in question, even if trusters or others – mistakenly – interpret one's actions as revealing those attitudes. Recall the example in which we are friends and you trust me not to speak ill of you to others. If I refrain grudgingly from badmouthing you, my action does not manifest the attitude of friendship entailed in the appropriate response to your trust, because I do not have the attitude, at least when not speaking ill of you. That is so even if you mistakenly think that I refrain from badmouthing you out of friendship. Nor can one manifest attitudes entailed in appropriate responses to trust unless and until one's actions are interpreted as the actions of a person with those attitudes. If I refrain from badmouthing you out of genuine friendship, but – for whatever reason – you believe that I do so grudgingly, I do not manifest my attitude of friendship to you. It follows that a trusted proves trustworthy only when she has whatever attitudes are entailed in appropriate responses to trust and when her actions are interpreted in ways that reflect that.

equal, it is likely to be easier for the trusted to prove trustworthy to the truster than it is for the trusted to prove trustworthy to someone – like a third party observer – who does not trust her.

Sometimes, the manifestation of an attitude is not entailed in proving trustworthy. Such is the case where the appropriate response to trust does not entail the trusted having any particular attitude. Appropriate responses to trust are likely not to entail attitudes in cases where the trust in question is trivial. For example, imagine that I trust my secretary to photocopy a document. Given what I trust her to do, and given the nature of our relationship, the appropriate response to my trust entails her having no particular attitude. The appropriate response to my trust is simply to photocopy the document, unless there are good reasons not to do so.⁵¹ However, where trust is non-trivial, and particularly where a person is trusted to exercise discretion, attitudes are an integral aspect of appropriate responses to trust, and proving trustworthy usually entails their manifestation. Moreover, even in cases where trust is trivial, attitudes matter when it comes to proving trustworthy. In the example involving me and my secretary, although the appropriate response to my trust does not entail my secretary having any particular attitude, it certainly entails her *not* having certain attitudes, like malice and resentment.⁵² To the extent that my secretary has, and manifests, such attitudes when responding to my trust, she is unlikely to prove trustworthy to me, even though she does what I trust her to do.

⁵¹ As Chapter 1 pointed out, an act of delegation that does not delegate power to exercise discretion, like my delegation of the photocopying task, is ill-suited to the manifestation of such trust as I have: see above 60-2. That fact, as well as the fact that the appropriate response to my trivial trust is simply to photocopy the document and not to have any particular attitude when doing so, points to the intuitively plausible conclusion that this interaction between me and my secretary is likely to contribute very little, if anything, to the cycle of trust and trustworthiness in our relationship.

⁵² That assumes that, in the circumstances, I trust my secretary to do what is reasonable. If it is not reasonable that she photocopy the document – say because she is extremely overworked and I have nothing to do all day – the appropriate response to my trust may entail her having an attitude like resentment. And because I trusted her to do what was unreasonable, any damage done to the cycle of trust and trustworthiness in our relationship may be attributed ultimately to me. Third parties who are aware that my trust is unreasonable and to whom my secretary’s resentment is manifested may form the judgment that she is trustworthy even if I do not, because they may believe that, just as she responds appropriately to unreasonable trust, she may also respond appropriately to reasonable trust.

That leads directly to the question with which this section began: how does justifying trust contribute to the cycle of trust and trustworthiness that characterises trusting relationships? In Chapter 1, it was argued that entrusting is well-suited to manifesting trust because, by entrusting, a person responds to the freedom of another to make choices with respect to the interests that have been entrusted. Just as entrusting is well-suited to manifesting trust, justifying trust is well-suited to manifesting attitudes whose manifestation is entailed in proving trustworthy. By justifying trust, the trusted verifies the beliefs – the trusting expectations – of the truster, usually by making decisions about interests that the truster cares about that the truster welcomes. To verify the truster’s beliefs by making decisions about what she cares about and that she welcomes is, in the ordinary case, to do that which she is likely to construe favourably. Therefore, the truster whose trust is justified is likely to believe that the trusted has attitudes that are entailed in being trustworthy; forming such beliefs is a way of construing the actions of the trusted favourably. Exactly what attitudes a truster whose trust is justified is likely to attribute to the trusted depends on what the truster perceives to be the circumstances in which her trust has come to be justified. Those perceptions might relate to the good will of the trusted, the roles that the trusted performs, the relationship between the truster and the trusted, the integrity of the trusted, and what interests the truster has. Therefore, what attitudes a truster whose trust is justified is likely to attribute to the trusted depends, at least in part, on her trusting expectations of the trusted.

Although justifying trust is well-suited to manifesting attitudes whose manifestation is entailed in proving trustworthy, cases may be imagined in which trust is justified but

the attitudes that are manifested thereby do not prove the trusted trustworthy. For example, imagine that we are friends. You trust me to pick you up and take you to an appointment. I do so, but while we are in the car, I am sullen and eventually tell you that I would rather be at home watching the television. By doing what you trust me to do, I justify your trust. However, in doing so, I almost certainly manifest an attitude that is not entailed in an appropriate response to that trust: sullen resentment. The appropriate response to your trust entails me justifying it cheerfully, because it is of the nature of friendship that people perform favours for friends cheerfully.⁵³ Because the attitude I manifest is not entailed in an appropriate response to your trust, I am unlikely to prove trustworthy to you to the extent that I manifest it. That is not to say that I am unlikely to prove trustworthy *tout court*; just that I am unlikely to prove worthy of the trust that friends place in friends to lend a helping hand cheerfully.

Putting to one side cases in which a trusted justifies trust but does not prove trustworthy, it may be said that a trusted often contributes to the cycle of trust and trustworthiness by justifying trust. That is because, to the extent that the trusted proves trustworthy by justifying trust, the trusted makes the truster aware of a reason to trust the trusted that she did not have previously. That reason is the demonstrated trustworthiness of the trusted. Demonstrated trustworthiness is a reason to have an attitude of trust and makes it more likely that such an attitude will come to be had.⁵⁴ Moreover, demonstrated trustworthiness is a reason to form expectations of the trusted that, if accompanied by the attitude of trust, may be called trusting. For

⁵³ As with the earlier example involving me and my secretary, this example assumes that it is reasonable to trust you to drive me to my appointment.

⁵⁴ Demonstrated trustworthiness is not, however, a reason to choose to form an attitude of trust, because an attitude may not be formed simply by choice. On the attitude of trust, see above 30-5.

example, if you trust me to keep a secret, and I keep it, my demonstrated trustworthiness is a reason for you to form the expectation that, should you entrust another secret to me, I will keep it as well. Demonstrated trustworthiness may also be a reason to form trusting expectations of people other than the trusted. This may be the case where the demonstrated trustworthiness of certain occupants of a role grounds trusting expectations of occupants of that role generally: what in Chapter 1 were called role-based trusting expectations.

Where proving trustworthy entails not only the justification of trust but also the manifestation of attitudes, demonstrated trustworthiness is a reason to form trusting expectations that may be relatively extensive. That is because the demonstrated trustworthiness of a person who manifests an attitude, say, of friendship is a reason to form trusting expectations that the person in question will, all else being equal, act as a person with an attitude of friendship acts. For example, imagine that you and I are friends and that you trust me to keep a secret. Imagine that I keep your secret out of friendship, and that you interpret my behaviour in a way that reflects that fact. I have proven trustworthy to you. My demonstrated trustworthiness is a reason, not only for you to entrust future secrets to me, but also for you to trust me to do whatever a person with an attitude of friendship ordinarily does. That might include not badmouthing you, defending you against maligners, thinking of ways to please you, and so forth. Another way of describing how I prove trustworthy in the example is to say that I prove myself a loyal friend. The idea of proving trustworthy by proving loyal – demonstrating true commitment to a relationship – is taken up in the next section.

Much more may be said about how a truster may form a judgment of the trustworthiness of a trusted who justifies trust, and about how, on the strength of such a judgment, the truster may form trusting expectations that widen and deepen the cycle of trust and trustworthiness. However, as this section aims only to sketch, in outline, the role of justifying trust in building interpersonal relationships, just one further observation will be made on the subject. In Chapter 1, it was pointed out that a person may start the cycle of trust and trustworthiness in a relationship even though she does not trust, by acting as if she trusts. To that, it must be added that a person may start the cycle of trust and trustworthiness in a relationship even though she is not trusted, by proving trustworthy. A person who does not trust may, notwithstanding that fact, form a judgment of the trustworthiness of another, and may, in light of that judgment, come to have a trusting attitude and trusting expectations of that other. One way in which a person who is not trusted by another may act such that the other judges her to be trustworthy is by performing an altruistic act. By acting altruistically, she may prove herself worthy of the trust that is placed in those who are demonstrably motivated purely by the needs and interests of other people: in other words, the trust that is placed in the selfless.⁵⁵

⁵⁵ On altruism, see T Nagel, *The Possibility of Altruism* (paperback edn, Princeton University Press, Princeton, 1978). Nagel writes (at 79), 'By altruism I mean not abject self-sacrifice, but merely a willingness to act in consideration of the interests of other persons, without the need of ulterior motives.'

B Loyalty

There are several senses of loyalty. In one sense, loyalty describes the ‘willing and practical and thoroughgoing devotion of a person to a cause.’⁵⁶ In another sense, it describes a person’s unwavering preference for, allegiance to or identification with a group, like a political party or a football team.⁵⁷ A person may be judged to be loyal if she exhibits constancy of character or steadfastness of mind.⁵⁸ In yet another sense, loyalty describes the virtue of true commitment to a relationship, an organisation or a community.⁵⁹ It is loyalty in this last sense that is taken up in this section. Specifically, the section examines loyalty where it describes true commitment to a trusting relationship. In other words, the section examines what is entailed in true commitment to a relationship characterised by the cycle of trust and trustworthiness. Three aspects of loyalty as true commitment to a trusting relationship are considered. First, what is meant by true commitment? Secondly, does loyalty to a trusting relationship always require deliberation? And finally, how does loyalty contribute to the cycle of trust and trustworthiness?

⁵⁶ J Royce, *The Philosophy of Loyalty* (paperback edn, Vanderbilt University Press, Nashville and London, 1995) 9. The book was first published in 1908.

⁵⁷ It seems to be loyalty in this sense to which Richard Rorty refers in his essay, ‘Justice as a Larger Loyalty’ in R Bontecoe and M Stepaniants (eds), *Justice and Democracy: Cross-Cultural Perspectives* (University of Hawaii Press, Honolulu, 1997) 9.

⁵⁸ GP Fletcher, *Loyalty: An Essay in the Morality of Relationships* (Oxford University Press, Oxford, 1993) 47.

⁵⁹ Raz, *The Morality of Freedom*, above n 34, 354.

1 True Commitment

A person cannot be loyal to a relationship unless she is committed to it. Joseph Raz writes that commitment ‘signifies that one is engaged [in a relationship] as a predictable result of one’s own conduct.’⁶⁰ Raz’s statement is vague, but it seems to imply that commitment entails acting such that one’s engagement in a relationship is manifested. Actions may manifest engagement in a relationship in many ways, from waving to a neighbour every morning to marrying someone.⁶¹ By contrast, engagement in a relationship is not manifested, for example, by deciding not to hire someone as an employee or assiduously ignoring an irritating suitor. Such actions show that an agent is not committed to the relationship in question and, therefore, it makes no sense to describe the agent as loyal or disloyal. Questions may be asked about whether the agent in such situations should be committed to the relationship in question, but those questions are different from questions about whether an agent, once committed, is loyal.

Although a person cannot be loyal to a relationship unless she is committed to it, commitment and loyalty are not the same. Loyalty is more than commitment to a relationship; it is *true* commitment to a relationship. A person is truly committed to a relationship when she acts in conformity with the normative dimensions of that relationship.⁶² And the normative dimensions of a relationship are constituted by all

⁶⁰ Ibid, 355.

⁶¹ Contrasting these two examples also demonstrates that engagement in a relationship is a matter of degree and intensity.

⁶² Raz expresses this idea by saying that ‘[b]eing true to pursuits and relations is being engaged in them according to their terms’: *The Morality of Freedom*, above n 34, 355.

the reasons for action that are entailed in being in the relationship in question.⁶³ To illustrate, consider an unfaithful spouse who, despite her infidelity, would not dream of ending her marriage and who tries to be faithful. One of the normative dimensions of marriage – at least, as marriage has been understood traditionally in Western cultures – is an undertaking to be faithful. The fact of that undertaking is a reason – indeed most would say it grounds an obligation – to be faithful. The unfaithful spouse, while committed to the relationship that is constituted by her marriage – after all, she would not dream of ending it and she still takes her undertaking to be faithful seriously – does not act in conformity with one of the fundamental normative dimensions of that relationship. As a result, the unfaithful spouse is falsely, not truly, committed to her marriage; disloyal, rather than loyal.

To the extent that a relationship is trusting, true commitment to it entails acting in conformity with the normative dimensions of a trusting relationship. As was discussed in Chapter 1, relationships are trusting insofar as they are characterised by the cycle of trust and trustworthiness. Therefore, true commitment to a trusting relationship entails acting in conformity with reasons for action that are entailed in the cycle of trust and trustworthiness. Those reasons point ultimately to the value of trusting relationships, at least in the pursuit of valuable goals.⁶⁴ Given the cycle of trust and trustworthiness, the fact that the truster trusts the trusted is a reason for the trusted to respond to that trust in ways that manifest attitudes – like friendship, empathy or respect – entailed in being trustworthy. In other words, the normative

⁶³ On the relationship between normativity and reasons for action, see J Raz, *Practical Reason and Norms* (revd paperback edn, Oxford University Press, Oxford, 1999).

⁶⁴ See above n 36.

dimensions of a trusting relationship include that the trusted prove trustworthy *precisely because she is trusted*, and not just because she has reasons to prove trustworthy other than the fact that she is trusted. Therefore, a trusted who is committed to a trusting relationship is loyal to the extent that she conforms, by proving trustworthy, with the reason that is the fact that she is trusted.⁶⁵

2 *Deliberation*

Earlier in this chapter, the discussion of betrayal emphasised its deliberate nature; it was pointed out that betrayal is wrong because it entails the deployment of a belief that one is trusted, in one's practical reasoning, in ways that offend the moral injunction against using people as means and not as ends. The virtue of loyalty – at least loyalty to a trusting relationship – appears to be a plausible candidate for description as formally similar, but substantively opposite, to betrayal. But it may only be described as such to the extent that it, like betrayal, is deliberate. Therefore, it is worth asking to what extent loyalty to a trusting relationship entails deploying the belief that one is trusted in one's practical reasoning. In considering that question, this section makes and defends two claims. First, true commitment to a relationship, including a trusting relationship, need not entail deliberation. Secondly, in certain types of trusting relationship, deliberation may be inconsistent with true commitment. In light of those two claims, the section concludes that loyalty to trusting relationships is only sometimes deliberate.

⁶⁵ Because one cannot be loyal or disloyal to a relationship unless one is committed to that relationship, a trusted who is not committed to a trusting relationship – for instance because she never wanted to be trusted – may not be described as either loyal or disloyal insofar as that relationship is trusting.

The first claim with which this section is concerned is that true commitment to a relationship, including a trusting relationship, need not entail deliberation. Recall that a person is truly committed to a relationship when she acts in conformity with the normative dimensions of that relationship. Recall also that the normative dimensions of a relationship are constituted by all the reasons for action that are entailed in being in the relationship in question. Often, acting in conformity with a reason entails acting for that reason, in the sense of letting the reason figure in one's practical reasoning as a reason for the action that it demands. For example, if I have made a promise to you, I act for the reason that is my promise if, after deliberating about whether to keep or break the promise, I decide to keep it because I have made it. However, acting in conformity with a reason need not entail acting for that reason.⁶⁶ For example, I may keep my promise notwithstanding that I have forgotten that I made it. I had a reason to keep it, and I conformed with that reason by keeping it, but I did not keep it for that reason.

Now imagine that you and I are partners in a business. Our partnership agreement and the law set out our rights and obligations as partners. These are reasons for action that are entailed in our relationship. They constitute normative dimensions of our partnership. Unless we act in conformity with them, we will not be truly committed to our partnership. Indeed, to an extent, they have peremptory force; to that extent, unless we act in conformity with them, we may be exposed to legal sanctions.⁶⁷ At

⁶⁶ See generally Raz, *Engaging Reason*, above n 5, Chapter 5.

⁶⁷ See generally Raz, *Practical Reason and Norms*, above n 63, Chapter 2.

the beginning of our partnership, we may act deliberately for the reasons that are our rights and obligations as partners. However, over time, as our relationship as partners settles, and as we come to act in routine and habitual ways, we may be less likely to act deliberately for those reasons and more likely to act, whether deliberately or not, in conformity with them. To take a specific example, we may, at the beginning of our partnership, deliberately meet as regularly as required by our partnership agreement. However, over time, we may come to meet with that regularity not because it is required but simply because we desire to share information and discuss matters, or even just because that is the way we have always done it.

Earlier, it was argued that the normative dimensions of a trusting relationship include that the trusted prove trustworthy precisely because she is trusted, and not only because she has independent reasons to do so. In other words, in a trusting relationship, the fact of the truster's trust is a reason demanding that the trusted prove trustworthy. That is not to say that a trusted *must* prove trustworthy because she is trusted: it has already been demonstrated that the fact that one is trusted, by itself, grounds no obligation whatsoever. It is just to say that, insofar as a relationship is trusting, the fact of the truster's trust is a reason for the trusted to prove trustworthy. It follows that, to the extent that the relationship is trusting, true commitment to that relationship entails the trusted acting in conformity with the reason that is the fact that she is trusted.

Whether acting in conformity with the reason that is the fact that one is trusted entails acting *for* that reason depends on the situation. Imagine that we are friends. We are committed to our friendship, including to the extent that it is a trusting relationship. If

I take the fact that you trust me to pick up your children from school to be a reason for doing so, and I do so, I both conform with that reason and act for it.⁶⁸ By contrast, if you trust me to pick up your children from school and I do so, but I do so because I like you and want to lend you a helping hand, I conform with the reason that is the fact that you trust me, but I do not act for that reason. In both cases, my conformity with the reason that is the fact that you trust me amounts to conformity with one of the normative dimensions of a trusting relationship. In both cases I show myself to be truly committed to that relationship as a result, and therefore, insofar as our relationship is trusting, I am loyal.⁶⁹

In the second case – the one in which I picked up your children from school because I liked you and wanted to lend you a helping hand – the fact that you trusted me did not figure in my practical reasoning as a reason to prove trustworthy. Yet, despite the fact that I did not deliberate about the fact that you trusted me, I showed myself to be truly committed to a relationship with normative dimensions including those entailed in the cycle of trust and trustworthiness, because I acted in conformity with the reason that was the fact that you trusted me. To that extent, I showed myself to be loyal. The

⁶⁸ That assumes that you *do* trust me to pick up your children from school. If I believe that you trust me to pick up your children from school, and I take that belief to be a reason for doing so, but you do not trust me to do so, I neither conform with nor act for the reason that is the fact that you trust me when I pick the children up, because there is no such reason. Nonetheless, my action may, depending on the circumstances, prove me trustworthy and give you a reason to trust me to pick up the children in the future. Thus, although I may not exhibit loyalty by my action, it may contribute to the cycle of trust and trustworthiness in our relationship.

⁶⁹ Of course, both examples assume that we are committed to a trusting relationship. If we are not committed to such a relationship, perhaps because we are not friends but occasionally meet as our children attend the same school, then there is not yet scope for me to be loyal by making the fact that you trust me a reason for action. Making that fact a reason for action is likely to lead me to prove trustworthy to you and, if I do so, you have one more reason to trust me again in the future. Making that fact a reason for action is thus likely to nourish the cycle of trust and trustworthiness. And the wider and deeper that cycle grows, the more likely we are to become committed to a trusting relationship. Once we may be said to be committed to such a relationship, the virtue of loyalty, in the sense of true commitment to a trusting relationship, is in play.

second case demonstrates that loyalty to a trusting relationship does not necessarily entail deliberation. Of course, in some cases, loyalty describes the deployment of a belief that one is trusted in one's practical reasoning as a reason to prove trustworthy. But in other cases, loyalty describes behaviour other than deliberation about the fact that one is trusted and, in some cases, it describes behaviour that is non-deliberative *tout court*.

Recall the second claim with which this section is concerned: in certain types of trusting relationship, deliberation may be inconsistent with true commitment. As John Gardner and Timothy Macklem point out, because deliberation is itself an activity, there may be, in any given situation, reasons for and against it.⁷⁰ For example, if a child is about to fall from a high cliff, and I am able to prevent this from happening by reaching out and grabbing her arm, there are strong reasons for me not to deliberate on the reasons for and against saving the child. I will best conform with reason if I do not deliberate but simply act. In some situations, the fact that a person has a certain type of relationship with another person is a reason not to engage in the activity of deliberation. One such type of relationship is friendship.

Consider what Joseph Raz says about friendship.

Friendship is an expressive reason for those actions which are (in the agent's culture) fitting to the relationship and against the unfitting ones. ...

Expressive reasons are so called because the actions they require express the

⁷⁰ Gardner and Macklem, 'Reasons', above n 36, 461.

relationship or attitude involved. The fact that the agent regards himself as bound by such reasons is a criterion for his being a friend.⁷¹

In some circumstances, the activity of deliberation is fitting to friendship. For example, imagine that two friends invite me to their respective weddings, which are to take place on the same day. It seems that my friendship with my two friends requires that I give some thought to which wedding I will attend, rather than choosing spontaneously. To choose spontaneously would be to regard events of great significance in my friends' lives with a nonchalance that is not fitting to friendship.⁷² However, in other circumstances, the activity of deliberation may not be fitting to friendship. For example, imagine that you and I are friends, that you invite me to your wedding, and that prior to receiving your invitation, I had resolved to spend the day in question at home, eating my favourite foods and listening to my favourite music. All else being equal, weighing up the reasons for and against attending your wedding after receiving the invitation will not, in this situation, express friendship with you.⁷³ Rather, it will reveal that I have an unusual, and seemingly inadequate, understanding of friendship.⁷⁴ My friendship with you is an expressive reason to

⁷¹ Raz, *The Authority of Law*, above n 48, 255.

⁷² To choose spontaneously might express my friendship with both of my friends if, foreseeing just such dilemmas, I previously adopted a policy of spontaneous choice. Similarly, I might express my friendship if, after agonising over which wedding to attend, I conclude that the only fair way to decide is to flip a coin.

⁷³ All else will not be equal if your wedding will take place in a distant location, or if I know that you do not particularly care whether or not I attend your wedding, to give just two examples.

⁷⁴ '[T]hink of the person who only recognises and discharges her special obligations thanks to *The Comprehensive Guide to Friendship*, a publication that lists all the possible obligations (and other responsibilities) one owes to one's friends and all the possible circumstances in which these obligations arise, together with their precise implications in every such case. Whatever her motives to follow the guide and however accurately she does so, it seems very doubtful that such a person could be described

forget about my plans, and decide to attend your wedding, *without* deliberating about the matter. If I respond to the invitation in that way, I will act in a way that is fitting to friendship.

What has this to do with loyalty? Loyalty is true commitment to a relationship. As was discussed above, true commitment is commitment, not just to a relationship, but to the normative dimensions of the relationship that one is in. Thus, true commitment to a friendship is commitment to a relationship with the normative dimensions of friendship, including that friendship itself is an expressive reason for that which is fitting to friendship. To the extent that a friendship is a trusting relationship, true commitment to it entails acting in conformity with the cycle of trust and trustworthiness, which requires conformity with the reason that is the fact that one's friend trusts one. However, to the extent that a trusting relationship is a friendship, true commitment to it requires acting without deliberation where that is fitting to friendship. Sometimes, these two demands overlap. In such situations, true commitment to a friendship insofar as it is trusting may require a person to act in conformity with the reason that is the fact that she is trusted by her friend, but not to do so deliberately.

To illustrate, consider an example. We are good friends, and you entrust your house to me while you are on holiday. To the extent that our relationship is trusting, I am loyal to it if I conform with the reason that is the fact that you trust me, say, not to

as a real friend at all, let alone a good one (or, for that matter, doubtful that *The Comprehensive Guide to Friendship* is worthy of its title)': Kimel, *From Promise to Contract*, above n 9, 70.

read the diaries that are sitting on your desk.⁷⁵ However, because we are friends, I am likely to be most loyal to our relationship if I conform with that reason because it does not occur to me to read your diaries. Non-deliberation in that matter is fitting to our friendship, and therefore true commitment to the friendship seems to demand it. Once I begin to deliberate on the matter – even if I conclude that you trust me not to read the diaries and that I, as your good friend, should not abuse your trust – I appear to be less truly committed to our friendship than I would have been had I not deliberated at all but simply not read the diaries. A person who thinks about abusing a friend’s trust is, in a sense, not as loyal as a person to whom such a thought would never occur, even though neither person would actually abuse that trust.⁷⁶

Compare that example with one in which you entrust your house to me while you are on holiday but we are neighbours who know each other slightly, not good friends. To the extent that our relationship as neighbours is trusting – which it is likely to be if, for instance, we have done favours and kind deeds for each other in the past – I am loyal to that relationship if I conform with the reason that is the fact that you trust me not to read your diaries. However, because we are not friends, my loyalty to our relationship is not diminished if I refrain from reading your diaries only after thinking about whether I should read them or not and concluding that I should not. The normative dimensions of our relationship are not such that I have a reason not to

⁷⁵ I am loyal if I conform with the reason that is the fact that you trust me to do whatever it is that you trust me to do. By not reading your diaries, I conform with that reason to the extent that you trust me not to read them.

⁷⁶ It is clear from the text that I regard loyalty as a matter of degree. So, broadly, a person to whom it never occurs to abuse the trust of her friends in any way may be said to be thoroughly loyal; a person to whom that thought sometimes occurs but who suppresses it may be said to be loyal on the whole; the loyalty of a person to whom that thought occurs frequently and who suppresses it may be called into question; and a person to whom that thought occurs frequently and who acts on it is disloyal.

deliberate about that matter. Indeed, it is precisely because I deliberate and choose not to abuse your trust that I may be described as loyal in this case. That is not to say that I am disloyal if it does not occur to me to read the diaries. Because the normative dimensions of our relationship do not extend to the situation where I do not read the diaries because it does not occur to me to do so, non-deliberation in that matter does not show me to be loyal or disloyal. Loyalty and disloyalty cannot be manifested through non-deliberation where true commitment to a relationship does not demand or prohibit non-deliberation.

The case of friendship demonstrates that deliberation is sometimes inconsistent with true commitment to a relationship, and therefore that there are instances in which only non-deliberative behaviour may be described, without qualification, as loyal. That is not to say that loyal friends never deliberate with respect to their friendships; nor is it to say that only friends are sometimes required to behave non-deliberatively if they are to be described as loyal. The case of friendship shows that there is at least one type of relationship in which deliberation, some of the time, and in respect of some matters, may be inconsistent with true commitment. That is enough to support the second claim with which this section is concerned. *A fortiori*, the case of friendship also supports the first claim of this section: that true commitment to a relationship need not entail deliberation. That which is, in some circumstances, inconsistent with true commitment cannot, in those circumstances, be entailed in it.

3 *Loyalty and the Cycle of Trust and Trustworthiness*

Earlier, it was argued that, in the ordinary case, justifying trust contributes to the cycle of trust and trustworthiness because it manifests attitudes whose manifestation is entailed in proving trustworthy and because when a trusted proves trustworthy, she gives the truster one more reason to form trusting expectations in the future.⁷⁷

Loyalty, in the sense of true commitment to a trusting relationship, usually entails justifying trust.⁷⁸ To that extent, loyalty contributes to the cycle of trust and

trustworthiness in a relationship. But does loyalty make any contribution of its own?

In other words, does loyalty contribute to the cycle of trust and trustworthiness apart from the fact that a loyal trusted usually justifies trust? In a sense, this question has already been addressed: in the previous section, it was argued that where proving trustworthy entails the manifestation of attitudes like friendship, demonstrated trustworthiness is a reason to form trusting expectations that may be relatively extensive. Moreover, it was suggested that another way of describing how a person proves trustworthy by manifesting attitudes like friendship is to say that she proves herself a loyal friend. In this section, the same point is made again, but from a slightly different perspective: the manifestation of true commitment is emphasised rather than the manifestation of attitudes. To begin, consider the case of the loyal trusted who justifies trust and thereby not only proves trustworthy, but proves loyal as well.

⁷⁷ I emphasise, as I did earlier, that this is true only in the ordinary case: one may prove trustworthy even though one disappoints trust, and one may, by justifying trust, manifest attitudes whose manifestation is not entailed in proving trustworthy. See above 46 and 129-30.

⁷⁸ Again, I emphasise that this is true only in the ordinary case: see above 46 and below 148-9.

Recall the second story that was set out in the Prologue. My friend asks me to sell off her valuable collection of paintings and divide the proceeds of the sale among her children. I agree to do as she asks, and she therefore transfers ownership of the paintings to me and empowers me to sell them. Assume that my friend asks me to sell her collection because she trusts me to do so.⁷⁹ Imagine that, instead of abusing my friend's trust by selling her collection so as to generate substantial profit for myself at the expense of her children, I diligently sell the collection to the highest bidder and then distribute the proceeds carefully and fairly among the children. In doing so, I justify my friend's trust. Assume that my friend interprets my actions as the actions of a person with an attitude of respect for her interests and the interests of her children, and an attitude of friendship towards her. If I have these attitudes – and there is no reason to doubt that I do – my actions will manifest them successfully. I will prove trustworthy. My friend will now have a reason to trust me, and possibly others, in the future, at least with respect to similar matters, that she did not have before: my demonstrated trustworthiness.

Now assume that my friend also interprets my actions as the actions of a loyal friend; that is, as the actions of a friend who is truly committed to the normative dimensions of friendship, who really understands what friendship means.⁸⁰ If I am loyal – and, again, there is no reason to doubt that I am – and my friend interprets my actions as the actions of a loyal friend, I will prove not only trustworthy but also loyal by my

⁷⁹ In the Prologue, this was not assumed, although the story lacks plausibility if my friend does not trust me.

⁸⁰ I take it that a person may manifest an attitude of friendship but not thereby prove loyal. For example, imagine that you and I are friends, but that recently I have let you down badly. By justifying your trust, I may prove trustworthy and show you that I have an attitude of friendship, but you may not (yet) interpret that action as the action of a loyal friend, given our recent history.

actions. By proving loyal, just like by proving trustworthy, I make my friend aware of a reason to trust me in the future that she did not have before. However, my demonstrated loyalty is likely to be taken by my friend as a reason to trust me with respect to a wider range of matters than is my demonstrated trustworthiness. Because my friend believes that I am loyal, she is, in the future, likely to trust me to do that which friends ordinarily trust their friends to do. For, to the extent that she believes that I am loyal, my friend is likely to believe that I am committed to being trustworthy whenever the normative dimensions of friendship demand it, because I am truly committed to our friendship. If I do not manifest my loyalty in my actions, my friend may not come to believe that she has a reason to trust me in a relatively unbounded way. She is more likely to believe that she has a reason to trust me in matters like that in respect of which I prove trustworthy: in the example, the sale of her art collection.

Of course, proving loyal does not always contribute to the cycle of trust and trustworthiness. Whether it does or not depends on the extent to which the truster forms the belief that she may trust the loyal trusted in a relatively unbounded way, which depends partly on what reasons, other than the proven loyalty of the trusted, she has to form that belief. Similarly, justifying trust may contribute to the cycle of trust and trustworthiness by helping to ground a belief that leads to relatively unbounded trust. Again, whether it does or not depends on the truster's beliefs in light of the proven trustworthiness of the trusted, and therefore on the reasons for those beliefs other than the fact that the truster's trust has been justified. In both cases, the truster's disposition to trust generally speaking is also relevant. The point is that justifying trust and proving loyal is *more likely* to widen and deepen the cycle of trust and trustworthiness than is justifying trust and proving trustworthy but not

proving loyal. That is unsurprising; it explains, for example, why a friend who frequently proves trustworthy but whose character is ever-changing is often not trusted to the same extent as a friend who frequently proves trustworthy and whose character is constant. It is the commitment of the second friend to one of the normative dimensions of friendship – the demand that friends be of constant character – that makes the difference. That kind of true commitment is loyalty.

To emphasise the contribution that loyalty may make to the cycle of trust and trustworthiness, consider finally the case in which a friend is loyal but disappoints trust. In Chapter 1, an example of ‘tough love’ was introduced. I had a gambling problem, and asked my friend to place the last of my savings on a horse. My friend declined to do so because she believed that my best interests would not be served thereby.⁸¹ Imagine that I trusted my friend to do what I asked her to do, and that she knew that I trusted her to do so. By not doing so, she disappointed my trust. However, by not doing so because she believed that my best interests would be served thereby, she was loyal. One of the normative dimensions of friendship – indeed, some would argue, the defining normative dimension of friendship – is the demand that a friend act for the sake of her friend, including the demand that a friend act, at least some of the time, in the best interests of her friend.⁸² True commitment to friendship – being a loyal friend – entails acting in conformity with that normative dimension.

⁸¹ See above 46.

⁸² See, eg, JM Finnis, *Natural Law and Natural Rights* (Clarendon Press, Oxford, 1980) 141-4.

If, in this example, I interpret my friend's refusal to squander the last of my savings as the action of a loyal friend, she proves loyal. I may interpret her action in this way if, for instance, my initial disappointment that she did not do what I trusted her to do is replaced by gratitude that she did not assist me in yielding to temptation at a time when I needed her to be firm even though I was not. If she proves loyal, she contributes to the cycle of trust and trustworthiness in our friendship, because even though she disappoints my trust in this instance, she also shows herself to be worthy of a profound kind of trust; she is worthy of the trust that one person places in another to look after her interests even when she cannot trust herself to look after those interests. In other words, she is worthy of a kind of trust that friends and intimates often repose in each other and which may even be regarded as characteristic of ideal friendship. She therefore gives me a reason to trust her that I did not have before, and which I would not have had if she had justified my trust. She gives me a reason to trust her to care about what is best for me even when I do not know what is best for me. Specifically, she gives me a reason to trust her to see me through difficult periods as I struggle with my gambling problem. The example shows that proving loyal but disappointing trust may make important and enduring contributions to the cycle of trust and trustworthiness that proving loyal and justifying trust may not make.

CHAPTER 3 – FIDUCIARY RELATIONSHIPS

The previous two chapters served the aim of this thesis to provide some analysis of trust, and responses to trust, from the moral point of view. This chapter serves another of the thesis's aims: to identify a fiduciary principle, and to explain how fiduciary obligation might be justified. Therefore, in light of the fact, pointed out in the Introduction, that trust is neither a necessary nor a sufficient condition for the existence of a fiduciary relationship, this chapter lays to one side questions relating to trust and responses to trust. Those themes are taken up again in Chapters 4 and 5. Instead, this chapter concentrates on answering the question, 'What makes a relationship fiduciary?' Given the overarching aim of the thesis – to consider to what extent, and in what ways, the fiduciary relationship has trust at its core – that question must be addressed. For it is not possible to determine the connection between trust and the fiduciary – if there be one – in the absence of some understanding of what a fiduciary relationship is.

What makes a relationship fiduciary? Almost any plausible answer to that question will identify a fiduciary principle. However, as the Introduction pointed out, an answer to the question need not necessarily identify a principle that explains every aspect of fiduciary relationships. The aim is to identify *a* fiduciary principle, not *the* fiduciary principle. A fiduciary principle supplies one basis on which to distinguish relationships that are fiduciary from relationships that are not, but it does not claim to exhaust analysis of fiduciary relationships. Other principles may be developed as well. With that in mind, the chapter concentrates on developing a principle that states that, to the extent that one person, by exercising discretion to affect the interests of

another person, is able to carry out some responsibility the purpose of which is to benefit that other person, a fiduciary relationship exists between those two people. The chapter considers the two concepts on which that fiduciary principle rests: discretion and responsibility. Before doing so, it comments on attempts to base a fiduciary principle on consent or reasonable expectation. It also comments on two purportedly non-functional considerations that courts have used to limit the application of fiduciary principles generally: the fact that a plaintiff invokes fiduciary law to protect personal interests; and arm's length dealing between two parties. After considering the two concepts on which the fiduciary principle rests, the chapter considers two leading cases on the subject of the fiduciary relationship to see the extent to which the principle is reflected in the judgments of the courts in those cases.

I TWO UNSATISFYING APPROACHES

A Consent

Before examining in detail the fiduciary principle that depends on the concepts of discretion and responsibility, it will be helpful to set aside two influential but unsatisfying approaches to the question of what makes a relationship fiduciary. The first of these approaches depends on the concept of consent. More specifically, it depends on the proposition that a fiduciary consents to act for the benefit of her principal. The approach usually refers to a fiduciary undertaking so to act, and the notion of consent is implicit in the notion of undertaking, because one cannot undertake to X without at the same time consenting to X. Such an approach may be

traced back to the work of Austin Scott,¹ but is usually attributed to the early writings of Paul Finn,² and its influence has, since the publication in 1977 of Finn's book *Fiduciary Obligations*, been evident in judicial and scholarly accounts of the fiduciary relationship.³ Lionel Smith states the central claims of the consent-based approach as follows.

[Fiduciary] relationships arise through a voluntary undertaking on the part of the fiduciary. This is either an undertaking to put another person's interests ahead of one's own, or an undertaking to accept some position to which the law has attached the fiduciary duty.⁴

Those claims possess considerable intuitive appeal, especially in respect of relationships that equity presumes to be fiduciary in nature. For example, the trustee of a discretionary trust may usually be said to have consented to act as a trustee, and

¹ AW Scott, 'The Fiduciary Principle' (1949) 37 *California Law Review* 539.

² PD Finn, *Fiduciary Obligations* (The Law Book Company, Sydney, 1977). In his later writings on fiduciary relationships, Finn propounds an approach that depends on reasonable expectation: see below 156-9.

³ In judicial accounts, the influence is evident in judgments of the High Court of Australia. See, eg, *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41; *Mabo v Queensland (No 2)* (1992) 175 CLR 1; *Warman International Ltd v Dwyer* (1995) 182 CLR 544; *Breen v Williams* (1996) 186 CLR 71; *Pilmer v The Duke Group Ltd (in liq)* (2001) 207 CLR 165. In scholarly accounts, the influence may be seen in, eg, WMC Gummow, 'Compensation for Breach of Fiduciary Duty' in TG Youdan (ed), *Equity, Fiduciaries and Trusts* (The Carswell Co, Toronto, 1989) 57; A Mason, 'The Place of Equity and Equitable Remedies in the Contemporary Common Law World' (1994) 110 *Law Quarterly Review* 238; LD Smith, 'Fiduciary Relationships – Arising in Commercial Contexts – Investment Advisers: *Hodgkinson v Simms*' (1995) 74 *Canadian Bar Review* 714; LD Smith, 'Constructive Fiduciaries?' in PBH Birks (ed), *Privacy and Loyalty* (Clarendon Press, Oxford, 1997) 249; D Hayton, 'Fiduciaries in Context: An Overview' in PBH Birks (ed), *Privacy and Loyalty* (Clarendon Press, Oxford, 1997) 283; LD Smith 'The Motive, Not the Deed' in J Getzler (ed), *Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn* (LexisNexis, London, 2003) 53. Hayton's account (at 296) depends on an admixture of undertaking and reasonable expectation. I address reasonable expectation below at 156-9.

⁴ Smith, 'The Motive, Not the Deed', above n 3, 54.

thereby to be bound by the fiduciary obligation that trustees of discretionary trusts owe, because she has not disclaimed the trusteeship. However, for two reasons, the claims may not be accepted as claims about what is either necessary or sufficient for the establishment of a fiduciary relationship. To that extent, they are unsatisfying as claims about what makes a relationship fiduciary.

First, fiduciary relationships arise where the fiduciary has not consented to act for the benefit of her principal, either through undertaking so to act or through accepting a fiduciary role.⁵ A good illustration is *United Dominions Corporation Ltd v Brian Pty Ltd*.⁶ Three companies were negotiating a land development joint venture. The High Court of Australia held that a fiduciary relationship arose between two of them even though the parties had not consented formally to any aspect of the joint venture by executing a contract. Moreover, the Court held that a fiduciary relationship may arise during negotiations for a contract that will never be executed. Consent – whether by undertaking or the acceptance of a fiduciary role – does not found the fiduciary relationship in such a case. According to the Court, what founds the fiduciary relationship is the fact that the parties in question have embarked on the conduct of the joint venture in a climate of mutual trust and confidence.⁷ *United Dominions Corporation Ltd v Brian Pty Ltd* is uncontroversial. It is widely acknowledged that parties negotiating for partnerships or fiduciary joint ventures may stand in fiduciary

⁵ Smith refers to an undertaking to put another's interests ahead of one's own. I refer to an undertaking – or consenting – to act for the benefit of another. I take it that cases of the latter constitute a wider class than cases of the former, and therefore that I am putting the argument at its strongest for the purposes of criticising it.

⁶ (1984-5) 157 CLR 1.

⁷ (1984-5) 157 CLR 1, 11-2 per Mason, Brennan and Deane JJ. Chief Justice Gibbs (at 7-8) and Dawson J (at 14) agreed.

relationships for reasons other than their consent to act for the benefit of each other or to accept a fiduciary role.⁸ Consent-based theories do not account for at least that class of cases.

Cases like *United Dominions Corporation Ltd v Brian Pty Ltd* demonstrate that a fiduciary's consent to act for the benefit of her principal or to accept a fiduciary role is not a necessary condition for the establishment of a fiduciary relationship. Where such consent is present, such as where a fiduciary assumes what she knows to be a role to which fiduciary obligation attaches, that consent may be said to be a sufficient condition for the establishment of a fiduciary relationship. But in other cases, a court may determine, *ex post facto*, that a person has been a fiduciary owing to the existence of facts other than consent. In such cases, fiduciary characterisation is clearly imposed on a relationship; it does not arise from consent.

The second reason why claims that consent makes a relationship fiduciary are unsatisfying is that, even where a person has undertaken to act for the benefit of another and to subordinate her interests to those of the other, a fiduciary relationship may not arise. To illustrate, imagine that I make a vow to suppress my interests in favour of yours, and to further your interests, with respect to some matter. My vow is an undertaking; morally, it almost certainly binds me just as a promise would.

⁸ See the discussion of the authorities and the literature in GMD Bean, *Fiduciary Obligations and Joint Ventures* (Clarendon Press, Oxford, 1995) Chapter 7; P Parkinson, 'Fiduciary Obligations' in P Parkinson (ed), *The Principles of Equity* (The Law Book Company, Sydney, 2003) 339, 385-6. See also E Fox-Decent, 'The Fiduciary Nature of State Legal Authority' (2005) 31 *Queen's Law Journal* 259, 296-8, for an argument that fiduciary relationships are not consent-based.

However, it does not, by itself, create a fiduciary relationship between us.⁹ Despite my vow, I may not be in a position to prosecute your interests ahead of my own. Moreover, even if I am in such a position, it may be that, notwithstanding my vow, I am not responsible for prosecuting your interests in the sense necessary to generate a fiduciary relationship. Such might be the case where I am empowered or even required by law to act against or with indifference to your interests. Imagine that, at the time when I make my vow to prosecute your interests, I am required by law to prosecute the interests of someone else with respect to the same matter because I am a fiduciary vis-à-vis that other person. My vow does not generate a fiduciary relationship between you and me. Indeed, it is evidence of a breach of the fiduciary obligation I owe to the other person to avoid conflicts of interest.

Consent-based approaches to what makes a relationship fiduciary are unsatisfying because they do not explain uncontroversial cases in which courts impose fiduciary relationships, and the obligation characteristic of such relationships, on parties irrespective of what those parties have consented to. Moreover, such approaches are unsatisfying because they do not explain cases in which parties have consented to fiduciary relationships and obligation, but courts refuse to recognise such relationships and obligation. Each of these conclusions suggests that, although consent is often a sufficient condition for the establishment of a fiduciary relationship, it is not always a sufficient condition and it is not a necessary condition. It seems that some concept other than consent is likely to best define a fiduciary principle. Some

⁹ It might be doubted that my vow constitutes an undertaking: see Parkinson, 'Fiduciary Obligations', above n 8, 384, discussing cases of 'self-appointment'. However, to doubt that a vow, or any unilateral and non-promissory assumption of obligation, constitutes an undertaking is to take too narrow a view of undertaking. It is to equate non-promissory undertaking with agreement.

have argued that reasonable expectation is that concept. However, the reasonable expectation-based approach is, for a different reason, also unsatisfying.

B *Reasonable Expectation*

Just as the consent-based approach to what makes a relationship fiduciary may be associated with the early writings of Paul Finn, the approach that depends on reasonable expectation may be associated with his later writings. In his essay, ‘The Fiduciary Principle’, written in 1989, Finn’s *volte-face* is manifest. He writes, ‘A fiduciary responsibility, ultimately, is an imposed not an accepted one.’¹⁰ He then sets out his new approach to what makes a relationship fiduciary.

[A] person will be a fiduciary in his relationship with another when and insofar as that other is entitled to expect that he will act in that other’s or in their joint interest to the exclusion of his own several interest.¹¹

Finn’s invocation of the concept of *entitlement* to expect indicates that he contemplates fiduciary relationships arising where, even though the principal does not actually have a fiduciary expectation, conditions are present under which it would be reasonable for the principal to have such an expectation. That is why Finn’s approach may be described as one resting on the concept of reasonable expectation. Finn has reiterated the reasonable expectation-based approach elsewhere, and it has won favour

¹⁰ PD Finn, ‘The Fiduciary Principle’ in TG Youdan (ed), *Equity, Fiduciaries and Trusts* (The Carswell Co, Toronto, 1989) 1, 54.

¹¹ *Ibid.*

(in conjunction with the notion of undertaking) with at least one other scholar, and with courts.¹² In particular, the approach seems to have gained the approval of La Forest J of the Supreme Court of Canada, leading the majority in *Hodgkinson v Simms*¹³ and of Kirby J of the High Court of Australia in dissent in *Pilmer v The Duke Group Ltd (in liq)*.¹⁴

When will a fiduciary expectation be reasonable? In his dissenting judgment in *Pilmer v The Duke Group Ltd (in liq)*, Kirby J listed some factors that bear on the question whether such an expectation is reasonable or not. His list referred to: the existence of a relationship of confidence; inequality of bargaining power; undertaking to act as a fiduciary; scope for an exercise of discretion to affect the interests of another person; dependency or vulnerability; and community or industry expectations of occupants of professional roles.¹⁵ To these might be added, at least where the fiduciary is a professional adviser, the complexity and technicality of the matter in respect of which the fiduciary's expert assistance is sought.¹⁶ The extent to which any

¹² PD Finn, 'Contract and the Fiduciary Principle' (1989) 12 *University of New South Wales Law Journal* 70, 94; Hayton, 'Fiduciaries in Context: An Overview', above n 3, 296. See also the judgments of the Full Court of the Federal Court of Australia in *News Ltd v Australian Rugby Football League Ltd* (1996) 139 ALR 193 and *Gibson Motorsport Merchandise Pty Ltd v Forbes* [2006] FCAFC 44.

¹³ (1994) 117 DLR (4th) 161, 177. Justices L'Heureux-Dubé and Gonthier concurred (at 210). Justice Iacobucci concurred in the result, and expressed broad approval of La Forest J's reasons (at 228). Despite La Forest J's endorsement of a reasonable expectation-based approach, the *ratio decidendi* of the majority was far from clear, invoking notions of undertaking, reliance and market efficiency as well: see Smith, 'Fiduciary Relationships – Arising in Commercial Contexts', above n 3.

¹⁴ (2001) 207 CLR 165, 219. Justice Kirby had earlier endorsed the reasonable expectation-based approach in his judgment (as Kirby P) in the New South Wales Court of Appeal in *Breen v Williams* (1994) 35 NSWLR 522, 544.

¹⁵ (2001) 207 CLR 165, 220. On community and industry expectations, see also *Hodgkinson v Simms* (1994) DLR (4th) 161, 178-9 per La Forest J.

¹⁶ *Hodgkinson v Simms* (1994) DLR (4th) 161, 178 per La Forest J.

one, or a combination, of these factors makes a fiduciary expectation reasonable is an open question. That question is not pursued here. Instead, it will be sufficient to point out that the concept of reasonable expectation does not contribute to understanding what makes a relationship fiduciary. It supplies a convenient way of describing the fact that a relationship is fiduciary. In other words, it states a conclusion, not an argument.¹⁷

When it is said that a relationship between two people is a relationship of reasonable expectation, two meanings might be intended. First, it might be meant that one person in the relationship has an expectation of the other, and that that expectation is reasonable in all the circumstances. Of course, the presence of such an actual fiduciary expectation is not what makes a relationship fiduciary. The trustee of a discretionary trust, for example, is a fiduciary notwithstanding that the beneficiaries of the trust have no expectation of the trustee and may not even know that the trust exists. Secondly, it might be meant that, whether or not one person in the relationship has an expectation of the other, a reasonable person in the position of the first person would have the expectation in question. When the concept of reasonable expectation is invoked in formulating a fiduciary principle, it is invoked with the second meaning in mind.¹⁸ So much is clear, as was spelt out above, from Finn's use of the concept of entitlement to expect. When reasonable expectation is invoked with that second

¹⁷ Even Kirby J in *Pilmer v The Duke Group Ltd (in liq)* acknowledged that the reasonable expectation-based approach may be 'tautologous'. Nonetheless, Kirby J believed that the concept of reasonable expectation 'represents the best attempt to express what is involved': (2001) 207 CLR 165, 219.

¹⁸ Although see the decision of the Full Court of the Federal Court of Australia (Davis, Sheppard and Gummow JJ) in *Commonwealth Bank of Australia v Smith* (1991) 102 ALR 453, where it appears that reasonable expectation was meant in the former sense, the expectation in question being reasonable because it was induced by the defendant.

meaning in mind, the notion of expectation does not assist in understanding what makes the relationship in question fiduciary. After all, the second meaning does not depend on one person actually having an expectation of the other. So, the proposition that a relationship is fiduciary when it would be reasonable to have a fiduciary expectation resolves itself into the simpler proposition that a relationship is fiduciary when it is reasonable to make it fiduciary.

When is it reasonable to make a relationship fiduciary? The answer to that question is the same as the answer to the question with which this chapter began: what makes a relationship fiduciary? For it is reasonable to make a relationship fiduciary whenever the conditions for the imposition of a fiduciary relationship are present. Otherwise it is not reasonable to make a relationship fiduciary. Moreover, it is reasonable to have a fiduciary expectation when, and only when, the conditions for the imposition of a fiduciary relationship obtain. All therefore depends on what those conditions are. Justice Kirby's judgment in *Pilmer v The Duke Group Ltd (in liq)* listed some contenders. This chapter argues in favour of others. Regardless of what the conditions are, the concept of reasonable expectation assumes that those conditions are known, which is why it states a conclusion, not an argument. Accounts of what makes a relationship fiduciary that purport to depend on reasonable expectation are unsatisfying because they complicate analysis unnecessarily through introducing the notion of expectation. Such accounts depend not at all on expectation, but instead depend entirely on the presence of whatever makes a relationship fiduciary.

II NON-FUNCTIONAL LIMITATIONS

The Introduction pointed out that the justification of fiduciary liability may be regarded as non-functional from one perspective and as functional from another perspective.¹⁹ In Chapter 4, the functionalist perspective is taken up, and functional considerations that limit the application and effect of fiduciary principles are examined. Two examples of such considerations may be given here. First, there is the law's goal of ensuring that rights of ownership are not disturbed easily, which means that plaintiffs who demonstrate that a fiduciary misappropriated trust property may not assert an equitable interest in that property against a person who has purchased it in good faith.²⁰ Secondly, there is the law's goal of ensuring that individuals are willing to take on fiduciary roles, which leads to defaulting fiduciaries being remunerated where they have expended time, effort and money of their own in the course of their breach of obligation.²¹ As Chapter 4 argues, such functional considerations rightly limit the application and effect of fiduciary principles, because they respond to the proper goals and purposes of the law. However, on occasion courts have purported to limit the application and effect of fiduciary principles for what they have taken to be non-functional reasons. In doing so, courts have not claimed to serve goals and purposes of the law. They have claimed that, owing to certain considerations, fiduciary principles are inherently limited, irrespective of the goals and purposes of the law. With respect to two considerations, such claims are wrong.

¹⁹ On the distinction between functional and non-functional considerations, see above 15-7.

²⁰ Such rights may be asserted against an innocent volunteer: *Re Diplock* [1948] Ch 465.

²¹ *Boardman v Phipps* [1967] 2 AC 46; *Warman International Ltd v Dwyer* (1995) 182 CLR 544.

A Personal Interests

Judges have imposed what they claim to be a non-functional limitation on the application of fiduciary principles in response to invocations of fiduciary law by plaintiffs seeking to protect personal, or non-economic, interests. Here, a distinction may be drawn between the approaches of Australian and Canadian courts. Australian courts have refused to apply fiduciary principles in cases where plaintiffs have sought to vindicate personal interests. Canadian courts have applied fiduciary principles in such cases. The distinction is particularly evident in two cases dealing with the sexual abuse of children, one Australian and one Canadian, in which fiduciary law was invoked by the plaintiffs in the hope of overcoming statute bars to their common law actions in tort.

In *Paramasivam v Flynn*, the plaintiff alleged that the defendant, who had cared for the plaintiff when the plaintiff was a child and who eventually became the plaintiff's guardian, had sexually abused him over a number of years.²² An action in the tort of assault was barred by statutes of limitation.²³ The Full Court of the Federal Court of Australia²⁴ considered whether an action for breach of fiduciary obligation was also statute barred, which entailed reviewing the trial judge's assessment of the strength of the plaintiff's fiduciary claim. The court held that the trial judge was correct in

²² (1998) 160 ALR 203.

²³ (1998) 160 ALR 203, 211-3. The statutes were the Limitation Act 1985 (ACT) and the Limitation Act 1969 (NSW).

²⁴ Justices Miles, Lehane and Weinberg.

concluding that the fiduciary claim had no real prospect of success, and that as a result there was no justification for disturbing the statute bar.²⁵ The court's reasoning pointed to the nature of the interests that the plaintiff sought to vindicate.

Equity, through the principles it has developed about fiduciary duty, protects particular interests which differ from those protected by the law of contract and tort, and protects those interests from a standpoint which is peculiar to those principles.²⁶

Elsewhere, the court made it clear that the interests equity protects through the application of fiduciary principles are economic, not personal, in nature.²⁷ It was because the interests that the plaintiff sought to vindicate were personal, being interests in bodily and sexual integrity, that the court thought the plaintiff's fiduciary claim would almost certainly fail.

The judgment of the Full Court of the Federal Court of Australia in *Paramasivam v Flynn*, which that court has since affirmed,²⁸ reflects an approach to the protection of personal interests that is also evident in the jurisprudence of the High Court of Australia.²⁹ That approach rests on two claims. The first claim is that the interests

²⁵ (1998) 160 ALR 203, 221.

²⁶ (1998) 160 ALR 203, 219.

²⁷ (1998) 160 ALR 203, 218.

²⁸ *Cubillo v Commonwealth* (2001) 183 ALR 249, 366-7 per Sackville, Weinberg and Hely JJ.

²⁹ *Breen v Williams* (1996) 186 CLR 71, 94 per Dawson and Toohey JJ, 110 per Gaudron and McHugh JJ, 136 per Gummow J.

that fiduciary principles protect are different from the interests protected by the law of contract and the law of tort. The second claim is that the nature of fiduciary principles is such that they should protect only economic interests. The first claim, if read as descriptive rather than as normative, may be accepted. It is true, for instance, that impermissible interferences with bodily integrity are usually redressed in civil law through invocations of the law of tort.³⁰ However, the second claim, which is normative, should be rejected insofar as it purports to establish a non-functional limitation on the application of fiduciary principles, rather than a limitation whose justification may be understood in terms of the proper goals and purposes of the law.

The reference in the judgment of the Full Court of the Federal Court of Australia in *Paramasivam v Flynn* to ‘a standpoint which is peculiar to [fiduciary] principles’ is vague.³¹ Nonetheless, it may be interpreted to mean that fiduciary principles are suited only to the protection of economic interests. Implicit in that interpretation is the second claim set out above, that the nature of fiduciary principles is such that they should protect only economic interests. However, the fiduciary principle argued for in this chapter is not suited only to the protection of economic interests, nor is it poorly suited to the protection of personal interests. Rather, it is suited by its nature to the protection of whatever interests may be affected by an exercise of discretion by a fiduciary who is thereby able to carry out a responsibility the purpose of which is to benefit her principal. Such interests may be economic *or* personal. In most instances,

³⁰ Of course, the law of tort protects economic interests as well: examples are the torts of trespass, conversion and even negligence (see, eg, *Hedley Byrne v Heller* [1964] AC 465). Moreover, one of the primary purposes of the law of contract is the protection of economic interests that have arisen through bargains. As a result, the first claim, even if read as descriptive, cannot be accepted wholly.

³¹ (1998) 160 ALR 203, 219.

they will be economic, owing to the types of responsibilities – the management of property, the provision of advice, the conduct of a business, to name three – fiduciaries ordinarily have. However, and crucially, they need not be.

To say that a fiduciary principle that rests on discretion and responsibility is suited to the protection of personal, as well as economic, interests does not compel the conclusion that fiduciary law should protect personal interests. It merely compels the conclusion that there is no non-functional limitation, inherent in the nature of that fiduciary principle, precluding the application of the principle in order to protect personal interests. There may be good reasons for refusing to extend fiduciary protection to such interests. For example, it might be thought that to protect interests in bodily and sexual integrity through permitting actions for breach of fiduciary obligation will have the undesirable consequence of undermining statutory regimes that limit actions in the tort of assault.³² But that is a functional consideration, whose merit is to be assessed with reference to the proper goals and purposes of the law. If the functional nature of such considerations is acknowledged, and not permitted to influence analysis of the non-functional nature of fiduciary principles themselves, the risk of errors and injustice in the development of fiduciary doctrine will be much reduced.

In *M(K) v M(H)*, the Supreme Court of Canada adopted a more satisfactory approach to the protection of personal interests through the application of fiduciary principles.³³

³² In *Paramasivam v Flynn*, the Full Court of the Federal Court of Australia expressed such a concern: (1998) 160 ALR 203, 220.

³³ (1992) 96 DLR (4th) 289.

The plaintiff had, as a child, been the victim of incest with her father. In the Supreme Court, it was held that her actions in the torts of assault and battery were not statute barred because she became aware of the causal link between the incest and the psychological harm she suffered as a result only when she became an adult.³⁴ However, the court also found that the plaintiff's father had acted in breach of fiduciary obligation. That the interests the plaintiff sought to vindicate were interests in her bodily and sexual integrity, and that the harm suffered was psychological not material, did not preclude the application of fiduciary principles. Delivering the leading judgment, La Forest J quoted from and approved Wilson J's dissenting judgment in *Frame v Smith*.

To deny relief because of the nature of the interest involved, to afford protection to material interests but not to human and personal interests would, it seems to me, be arbitrary in the extreme.³⁵

That statement is correct in light of the analysis presented here. However, one qualification to it must be acknowledged. To refuse to protect personal interests through the application of fiduciary principles would not be arbitrary if functional considerations provided adequate reasons for withholding protection. Clearly, the Supreme Court of Canada in *M(K) v M(H)* did not believe that any such functional

³⁴ (1992) 96 DLR (4th) 289, 298-315 per La Forest J. Justices Gonthier and Cory (at 339) and Iacobucci (at 340) concurred. Justices L'Heureux-Dubé (at 337-8) Sopinka (at 338-9) and McLachlin (at 339-40) concurred subject to minor qualifications.

³⁵ (1992) 96 DLR (4th) 289, 325 quoting from *Frame v Smith* (1987) 42 DLR (4th) 81, 104. See also R Joyce, 'Fiduciary Law and Non-Economic Interests' (2002) 28 *Monash University Law Review* 239.

considerations were present, and was therefore able to afford the plaintiff's interests the protection of equity.

B *Arm's Length Dealing*

The second purportedly non-functional limitation that judges have imposed on the application of fiduciary principles has been developed in response to arm's length dealing between parties to commercial transactions. Arm's length dealing has been invoked to deny relief to plaintiffs alleging breach of fiduciary obligation in at least two leading cases. In *Hospital Products Ltd v United States Surgical Corporation*, a majority of the High Court of Australia was of the view that an arm's length dealing between two commercial actors almost always precludes a fiduciary relationship being present.³⁶ And in *Lac Minerals Ltd v International Corona Resources Ltd*, a majority of the Supreme Court of Canada found that a fiduciary relationship could not have arisen between two mining companies with access to professional advisers who were able, in theory at least, to utilise the law of contract to protect their commercial interests.³⁷ In both cases, the courts awarded remedies to the plaintiffs – in the first case, through finding a breach of contract; in the second case, through finding a breach of confidence – but they refused to acknowledge in either case that the relationship between the parties could be fiduciary in nature.³⁸

³⁶ (1984) 156 CLR 41, 70 per Gibbs CJ, with whom Wilson J (at 118-9) and Dawson J (at 149-50) agreed.

³⁷ (1989) 61 DLR (4th) 14, 68-9 per Sopinka J, with whom McIntyre J (at 15) and Lamer J (at 15-6) agreed.

³⁸ In *Lac Minerals Ltd v International Corona Resources Ltd* (1989) 61 DLR (4th) 14, a majority of the Supreme Court of Canada declared a constructive trust over a gold mine acquired through breach of confidence, thereby achieving the remedial outcome that presumably motivated the plaintiff to argue

The judgments of the majorities in *Hospital Products Ltd v United States Surgical Corporation* and *Lac Minerals Ltd v International Corona Resources Ltd* reflected a long tradition of caution with respect to the imposition of equitable doctrines and remedies on parties to commercial transactions. That caution was clearly expressed in an oft-cited passage from the judgment of Bramwell LJ in *New Zealand & Australian Land Co v Watson*.

Now I do not desire to find fault with the various intricacies and doctrines connected with trusts, but I should be very sorry to see them introduced into commercial transactions, and an agent in a commercial case turned into a trustee with all the troubles that attend that relation.³⁹

The same cautious approach has been evident in the case law since that time.⁴⁰ Moreover, scholars have exhibited sympathy for it on occasion. Paul Finn has argued that equitable principles, designed to regulate simple dealings between individual human beings, are not always suited to complex dealings between group actors like corporations.⁴¹ And AJ Oakley has pointed out that equitable principles – fiduciary principles in particular – have been invoked by litigants in commercial settings with

breach of fiduciary obligation in the first place. In *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, the plaintiff had to be satisfied with damages for breach of contract.

³⁹ (1881) 7 QBD 374, 382.

⁴⁰ See generally JRF Lehane, 'Fiduciaries in a Commercial Context' in PD Finn (ed), *Essays in Equity* (The Law Book Company, Sydney, 1985) 95; GA Kennedy, 'Equity in a Commercial Context' in PD Finn (ed), *Equity and Commercial Relationships* (The Law Book Company, Sydney, 1987) 13; PD Finn, 'Fiduciary Law and the Modern Commercial World' in E McKendrick (ed), *Commercial Aspects of Trusts and Fiduciary Obligations* (Clarendon Press, Oxford, 1992) 7.

⁴¹ Finn, 'Fiduciary Law and the Modern Commercial World', above n 40, 20.

remedial aspirations in mind, and that courts are right to view such strategic aims with scepticism.⁴²

There is disagreement about the extent to which equity's cautious attitude to commercial transactions is justified.⁴³ That disagreement is about the proper aims and purposes of the law when regulating commerce. It is a disagreement about functional limitations on equitable – including fiduciary – principles. However, in both *Hospital Products Ltd v United States Surgical Corporation* and *Lac Minerals Ltd v International Corona Resources Ltd*, the desire to deny fiduciary status to commercial relationships characterised by arm's length dealing led certain judges to assert a non-functional limitation of fiduciary principles that has since been the subject of much criticism. In the former case, a distributor reverse engineered products he had undertaken to the manufacturer to distribute, and then introduced the reverse engineered products into the market with the aim of supplanting the manufacturer. Dawson J stated that

[t]here is, however, the notion underlying all the cases of fiduciary obligation that inherent in the nature of the relationship itself is a position of disadvantage or vulnerability on the part of one of the parties which causes

⁴² AJ Oakley, 'The Liberalising Nature of Remedies for Breach of Trust' in AJ Oakley (ed), *Trends in Contemporary Trust Law* (Clarendon Press, Oxford, 1996) 217, 230-3.

⁴³ In *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 99-100, Mason J thought that it was overly simplistic to assume that a commercial setting could never generate a fiduciary relationship. The decision of the High Court of Australia in *United Dominions Corporation Ltd v Brian Pty Ltd* (1984-5) 157 CLR 1 suggests that Mason J was correct. Elsewhere, writing extra-judicially, Sir Anthony Mason has recognised that fiduciary principles have been the 'spearhead of equity's incursions into the area of commerce': 'The Place of Equity and Equitable Remedies', above n 3, 245. AJ McClean has gone further, arguing that the full rigour of fiduciary rules is needed in commercial settings to maintain confidence and high standards of conduct: 'The Theoretical Basis of the Trustee's Duty of Loyalty' (1969) 7 *Alberta Law Review* 221, 237.

him to place reliance upon the other and requires the protection of equity acting upon the conscience of that other.⁴⁴

On that basis, Dawson J held that the distributorship – in his opinion, an arm's length commercial relationship governed by a contract – was not fiduciary.

In the latter case, the plaintiff shared confidential information with the defendant during negotiations for the development of a valuable mining site, in light of which the defendant secretly purchased the site for itself and developed it into an extremely profitable gold mine. In deciding the case, Sopinka J referred approvingly to Dawson J's judgment in *Hospital Products Ltd v United States Surgical Corporation*. Justice Sopinka emphasised that in the case before him the plaintiff had no 'physical or psychological dependency' on the defendant. Moreover, Sopinka J asserted that the plaintiff was not vulnerable to the defendant in the sense of lacking legal or practical means to prevent the defendant adversely affecting the plaintiff's interests. According to Sopinka J, the plaintiff was not vulnerable in that sense because it could have demanded that the defendant undertake not to use the confidential information for its own benefit.⁴⁵ As a result, Sopinka J concluded that the relationship between the plaintiff and the defendant was not fiduciary.

The idea that a person may be legally liable for taking advantage of someone in a position of vulnerability or dependency is familiar in equity. It underlies doctrines

⁴⁴ (1984) 156 CLR 41, 142.

⁴⁵ (1989) 61 DLR (4th) 14, 68-9.

relating to undue influence and unconscionable dealing. Those doctrines are invoked in situations where there has been a transaction between two persons from which one has benefited, and which the other seeks to have set aside. Equity's interest in such situations is in ascertaining the extent to which the intentions of the vulnerable party have been influenced in impermissible ways by the other party to the transaction, and the extent to which the consent of the vulnerable party to the transaction has been compromised by the other party.⁴⁶ An instance is *Tate v Williamson*.⁴⁷ There, a young man with a drinking problem and mounting debts, who was described by Lord Chelmsford LC as 'extravagant and necessitous', was manipulated by a relative into selling land to that relative for less than its value.⁴⁸ Lord Chelmsford LC set the transaction aside. In doing so, he referred to the relationship between the young man and his relative as fiduciary, but it is clear from his judgment that he impugned the transaction because of undue influence: 'the Defendant ... procured a considerable advantage in the price which the seller was induced to take'.⁴⁹

In *Hospital Products Ltd v United States Surgical Corporation*, Dawson J cited *Tate v Williamson* as authority for the proposition that a relationship is fiduciary where the principal is vulnerable to the fiduciary.⁵⁰ However, because *Tate v Williamson* was decided as a case of undue influence, it does not stand as authority for the nature of

⁴⁶ See generally RP Meagher, JD Heydon and MJ Leeming (eds), *Meagher, Gummow and Lehane's Equity Doctrines and Remedies* (4th ed, Butterworths, Sydney, 2002) Chapters 15 and 16.

⁴⁷ (1866) 2 Ch App 55.

⁴⁸ (1866) 2 Ch App 55, 66. Owing to his dissolute lifestyle, the plaintiff died before trial, at the age of 24.

⁴⁹ (1866) 2 Ch App 55, 67.

⁵⁰ (1984) 156 CLR 41, 142.

the fiduciary relationship generally. Moreover, it should not. Disadvantage, vulnerability and dependency are properly taken into account in determining the propriety or otherwise of a transaction between two parties, because those factors are relevant to questions of impermissible influence and consent. However, the fiduciary relationship does not always entail a transaction between the fiduciary and her principal. The discretionary trust is evidence of that fact. Moreover, fiduciary relationships are commonly presumed to arise where the principal is not, in any meaningful sense, vulnerable to her fiduciary. The relationship between a large public company and its directors is an example. Furthermore, even when a principal is clearly vulnerable to her fiduciary, the fiduciary characterisation of the relationship does not necessarily depend on that vulnerability. If, in my dealings with you, I am in a position of disadvantage, vulnerability, or dependency, and I enter into an agency agreement with you, we come to be in a fiduciary relationship because you have fiduciary responsibilities from the time the agreement is in force, and in carrying them out you are able to affect my interests by exercising your discretion.⁵¹ That I am vulnerable to you is irrelevant.

By asserting that relationships are fiduciary when the principal is vulnerable to the fiduciary, Dawson J in *Hospital Products Ltd v United States Surgical Corporation* and Sopinka J in *Lac Minerals Ltd v International Corona Resources Ltd* were able to conclude that commercial relationships characterised by arm's length dealing are not fiduciary because they fall beyond a non-functional limitation that is inherent in a fiduciary principle. However, because vulnerability plays no role in what makes a

⁵¹ This example assumes that the agreement will not be set aside owing to undue influence or unconscionable dealing.

relationship fiduciary – even if it does play a role in doctrines of undue influence and unconscionable dealing – no fiduciary principle is so inherently limited. It follows that, if arm's length commercial relationships are to be denied fiduciary status just because they are arm's length commercial relationships, it must be for functional reasons. Functional reasons may exist to deny fiduciary status to commercial relationships characterised by arm's length dealing. Such reasons may point, for instance, to the value of certainty and consistency in commerce. However, functional reasons for limiting the application of fiduciary principles do not justify limiting the principles themselves by incorporating into those principles concepts, like vulnerability, that do not explain what makes a relationship fiduciary.⁵²

III DISCRETION

The fiduciary principle with which this chapter is concerned asserts that fiduciaries, *qua* fiduciaries, exercise discretion. The principle therefore depends on the claim that, to the extent that a person may not exercise discretion, she is not a fiduciary. Exercising discretion entails making decisions that are, to some degree, matters of personal judgment and assessment.⁵³ So another way of putting the claim on which

⁵² Some writers argue that a principal is vulnerable to her fiduciary because a person is vulnerable whenever her interests may be affected by the exercise of another's discretion: EJ Weinrib, 'The Fiduciary Obligation' (1975) 25 *University of Toronto Law Journal* 1, 6; T Frankel, 'Fiduciary Law' (1983) 71 *California Law Review* 795, 810; R Flannigan, 'Fiduciary Obligation in the Supreme Court' (1990) 54 *Saskatchewan Law Review* 45, 63; R Flannigan, 'Commercial Fiduciary Obligation' (1998) 36 *Alberta Law Review* 905, 917; R Flannigan, 'Fiduciary Regulation of Sexual Exploitation' (2000) 79 *Canadian Bar Review* 301, 301; Fox-Decent, 'The Fiduciary Nature of State Legal Authority', above n 8, 299-300. Those arguments are consistent with the fiduciary principle defended in this chapter, but I refrain from referring to the vulnerability of principals in that sense to avoid confusion with vulnerability in the sense evident in the judgments of Dawson J in *Hospital Products Ltd v United States Surgical Corporation* and Sopinka J in *Lac Minerals Ltd v International Corona Resources Ltd*.

⁵³ DJ Galligan, *Discretionary Powers: A Study of Official Discretion* (Clarendon Press, Oxford, 1986) 8.

the fiduciary principle depends is to say that fiduciaries, *qua* fiduciaries, are able to make decisions entailing personal judgment and assessment, and the range of such decisions that fiduciaries are able to make constitutes the discretion that they may exercise. When this chapter refers to fiduciaries making decisions, it is to decisions entailing personal judgment and assessment that it refers.⁵⁴ A survey of the types of relationship that equity presumes to be fiduciary suggests that to draw a necessary connection between discretion and the fiduciary is uncontroversial. For example, the trustee of a discretionary trust makes decisions when exercising such administrative and dispositive powers as the terms of the trust allow. Partners usually make decisions in the conduct of their partnerships, and their decisions bind each other. Solicitors make decisions with respect to the matters that clients charge them with. And many agents, such as those with wide ranging powers of attorney, make decisions about the legal relations to which their principals are to be bound, and the terms on which that is to occur.

However, some relationships that equity presumes to be fiduciary cast doubt on the claim that a fiduciary relationship necessarily entails the exercise of discretion. For example, a ‘sleeping’ partner may make no decisions in the conduct of the partnership, and an agent who is authorised solely to execute a contract on behalf of her principal may make no decisions within the scope of her agency. Yet the orthodox view is that all partners and agents are fiduciaries except to the extent that agreements between them and their partners or principals provide otherwise. There

⁵⁴ Such decisions do not include decisions that are required by law. An example might be the decision to transfer a sum of money pursuant to a contract.

are two ways in which such doubt might be addressed. The first is to deny a necessary connection between discretion and the fiduciary. However, given that fiduciary obligation – particularly the obligation to avoid conflicts of interest – is directed at discretion,⁵⁵ to deny that there is a necessary connection between discretion and the fiduciary is to remove a vital component of the justification of fiduciary obligation.⁵⁶ It is difficult to see what could justify imposing an obligation, the aim of which is to prevent making decisions for the wrong reasons, on a person who is not able to make decisions as the bearer of the obligation.

The second way in which doubt about a necessary connection between discretion and the fiduciary might be addressed is to refuse to recognise, as fiduciary, relationships in which partners, agents or other would-be fiduciaries may not exercise discretion. Thus, the sleeping partner and the agent whose authority is limited to the execution of a single document are not fiduciaries, precisely because they may not make decisions in their roles as partner and agent. Such an approach is inconsistent with the tradition, especially noticeable in the decisions of English courts, of presuming all instances of certain types of relationship – such as partnership and agency – to be fiduciary. It is an example of what, in the Introduction, was referred to as ‘top down’ rather than

⁵⁵ See below 253-67.

⁵⁶ In Chapter 5, I argue that the no profit rule is justified by the same moral obligation that justifies the no conflict rule, and that the justificatory moral obligation may be breached only by exercising discretion. However, even if the no profit rule has an independent justification that has nothing to do with discretion, those who would deny the necessary connection between discretion and the fiduciary must explain how what is usually regarded as the core fiduciary obligation – to avoid conflicts of interest – makes sense in relationships where the bearer of the obligation is able to exercise no discretion. Such an explanation would have to justify the no conflict rule without reference to discretion, which would almost certainly require the invocation of some concept, other than discretion, capable of unifying fiduciary relationships. Those demands seem drastic and ungainly given that the advantage to be achieved is to bring relatively few and arguably marginal cases under the fiduciary umbrella.

‘bottom up’ reasoning.⁵⁷ The reasons given there for preferring top down reasoning may therefore be invoked in support of the second approach. If there is no reason grounded in principle for describing all partners and all agents as fiduciaries, then all partners and all agents should not be so described, even if courts have traditionally adhered to such descriptions. Moreover, as there are principled reasons for denying fiduciary characterisation to relationships in which the would-be fiduciary may make no decisions – including that a plausible understanding of fiduciary obligation may be preserved thereby – the second approach, which refuses to recognise the sleeping partner and the agent with no authority to exercise discretion as fiduciaries, is to be preferred.

The bare trust is another relationship traditionally described as fiduciary, but which should not, once the necessary connection between discretion and the fiduciary relationship is affirmed, be considered fiduciary after all. A bare trust arises where a trustee has no obligation to perform except to transfer the trust assets to the beneficiary, or some other person, upon demand.⁵⁸ To hold and then transfer the trust assets upon demand, honestly and in good faith, is the irreducible core obligation of trusteeship.⁵⁹ It has traditionally been assumed that all trusts entail fiduciary relationships between trustees and beneficiaries. This assumption applies to the bare trust – which is composed of the irreducible core obligation of trusteeship and nothing more – as well as to trusts with more complex forms. Yet the bare trust, despite being a trust, entails no fiduciary relationship between its trustee and its beneficiary. That is

⁵⁷ See above 25-8.

⁵⁸ *Herdegen v Federal Commissioner of Taxation* (1988) 84 ALR 271, 281 per Gummow J.

⁵⁹ *Armitage v Nurse* [1998] Ch 241, 253-4 per Millett LJ.

not because the bare trustee has no obligation other than the obligation to transfer the trust assets upon demand. It is because the bare trustee has no powers and is therefore not able to exercise her discretion *qua* trustee.⁶⁰ By contrast, the trustee of a discretionary trust has powers – most importantly, powers of appointment – and therefore is able to exercise her discretion *qua* donee of those powers.⁶¹ To the extent that the trustee of a discretionary trust has such powers, she is a fiduciary and must exercise the powers subject to fiduciary obligation.

This analysis of bare trusts invites a startling conclusion about trusts generally. Trusts do not entail fiduciary relationships because they are trusts. If they did, the bare trust would entail a fiduciary relationship. Trusts entail fiduciary relationships because they are usually accompanied by powers. Moreover, they entail fiduciary relationships only to the extent that they are accompanied by powers. There is nothing about the irreducible core obligation of trusteeship that requires the relationship between the trustee and the beneficiary of a trust to be fiduciary. Despite being regarded as the *locus classicus* of the fiduciary relationship, the trust, taken in isolation, does not explain what makes a relationship fiduciary and reference to it may even mislead in seeking that explanation.⁶² If one wished to address the question of

⁶⁰ For the same reason, the trustees of resulting and constructive trusts often owe no fiduciary obligations. In ‘Constructive Fiduciaries?’ in PBH Birks (ed), *Privacy and Loyalty* (Clarendon Press, Oxford, 1997) 249, 262-4, Lionel Smith argues that resulting and constructive trustees do not owe fiduciary obligations, but he bases his argument on the fact that such trustees do not consent to taking on the obligation of trusteeship. I agree with Smith’s conclusion but, as this chapter makes clear, not with his consent-based reasoning.

⁶¹ On powers of appointment, see G Thomas, *Powers* (Sweet and Maxwell, London, 1998) 7-12.

⁶² Lionel Smith writes, ‘We began by imposing onerous duties on trustees; then we generalised and decided that persons in certain other defined positions are so like unto trustees that we will impose the same duties. The next step was to decide that anyone can put himself or herself into a trustee-like position ... There is a question as to whether there is to be another step, in which the historical ties

what makes a relationship fiduciary by analogising from a central class of cases, it would be better to take the position of donees of powers, rather than that of trustees of trusts, as that central class. In that way, the importance of discretion to the fiduciary relationship would not be overlooked.

To point out the significance of discretion to the fiduciary relationship is not novel. The first to do so was Ernest Weinrib, in an article that has greatly influenced the development of fiduciary principles in the Supreme Court of Canada. For Weinrib, the ‘core’ of the fiduciary concept entails two propositions: a fiduciary must have scope for the exercise of discretion; and, by exercising that discretion, the fiduciary must be able to affect the legal position of her principal. In such a situation, according to Weinrib, the principal is ‘at the mercy of’ the fiduciary, necessitating the imposition of equitable obligations to ensure that the fiduciary exercises her discretion ‘beneficently’.⁶³ Weinrib’s influence has been felt in the Canadian Supreme Court since 1984, when Dickson J, in his leading judgment in *Guerin v The Queen*, referred to Weinrib’s ideas,⁶⁴ and especially since 1987, when Wilson J, in her dissenting judgment in *Frame v Smith*, adopted those ideas.⁶⁵ Justice Wilson’s dissenting judgment and Weinrib’s article have been cited with approval in subsequent judgments of the Canadian Supreme Court.⁶⁶ Moreover, aspects of Weinrib’s theory

between the modern concept of fiduciary and the office of the trustee are to be weakened further, or perhaps cut altogether’: ‘Fiduciary Relationships – Arising in Commercial Contexts’, above n 3, 730.

⁶³ Weinrib, ‘The Fiduciary Obligation’ above n 52, 4-5.

⁶⁴ (1984) 13 DLR (4th) 321, 340.

⁶⁵ (1987) 42 DLR (4th) 81, 99-100.

⁶⁶ *Lac Minerals Ltd v International Corona Resources Ltd* (1989) 61 DLR (4th) 14, 27 per La Forest J, 62-3 per Sopinka J; *Canson Enterprises Ltd v Boughton & Co* (1991) 85 DLR (4th) 129, 155 per McLachlin J; *Norberg v Wynrib* (1992) 92 DLR (4th) 449, 488-9 per McLachlin J; *M(K) v M(H)* (1992)

are identifiable in Mason J's influential judgment in *Hospital Products Ltd v United States Surgical Corporation*,⁶⁷ which was handed down three years before Wilson J delivered her judgment in *Frame v Smith*.

Despite being influential, Weinrib's account, which explains the core of the fiduciary concept with reference to discretion, is too narrow and potentially too broad. It is too narrow because it recognises relationships as fiduciary only to the extent to which one person is able to exercise her discretion to affect the *legal* position of another.⁶⁸ To illustrate, consider the administrative powers of trustees.⁶⁹ In virtue of such powers, a trustee may invest the trust fund. By investing the trust fund, the trustee does not affect the legal position of a beneficiary of the trust; a beneficiary neither acquires nor loses any legal rights or obligations because the trustee has exercised discretion pursuant to an administrative power to invest. Yet it is clear that such exercises of discretion are, and should be, within the scope of fiduciary relationships, because they may affect the *non-legal* position of a beneficiary considerably. Indeed, a fraudulent exercise of discretion pursuant to an administrative power to invest could bring about the loss of the whole trust fund. Weinrib's reference to 'legal position' should be replaced with a reference to a broader concept like the concept of interests that figures in the fiduciary principle defended in this chapter.

96 DLR (4th) 289, 324 per La Forest J; *Hodgkinson v Simms* (1994) 117 DLR (4th) 161, 175-6 per La Forest J, 215 per Sopinka and McLachlin JJ.

⁶⁷ (1984) 156 CLR 41, 96-7.

⁶⁸ In this, Weinrib's account is consistent with the account of powers and liabilities in WN Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (Yale University Press, New Haven, 1919) 36, 50-3.

⁶⁹ On administrative powers, see Thomas, *Powers*, above n 61, 7.

Once that replacement is made, it becomes clear why Weinrib's account is potentially too broad. It is not true that all relationships in which one person is able to exercise her discretion to affect the interests of another are fiduciary relationships.⁷⁰ Countless examples may be adduced to support that claim, but two should suffice here. I engage you to decorate my house. You can choose a colour scheme that is tasteful and will add value to the house, or you can choose a vile colour scheme that will cause the house to diminish in value. My interest in maintaining the value of my house is in your hands. Yet, all else being equal, we are not in a fiduciary relationship. I ask you when the train is coming. You can choose to tell me the truth – it has been cancelled – or you can choose to lie to me. My interest in not wasting my time waiting for a train that will never come is in your hands, but it would be ludicrous to suggest that you are a fiduciary vis-à-vis me. Weinrib's account is too broad because it is incomplete. In addition to discretion, a fiduciary principle depends on some further, limiting, concept. Discretion, then, is a necessary but not a sufficient ingredient in what makes a relationship fiduciary.⁷¹ In the next section, it is argued that the missing

⁷⁰ Even if Weinrib's account were not too narrow owing to its reference to 'legal position', JC Shepherd demonstrates why that account would still be too broad. Shepherd notes that the donee of a general power of appointment may exercise her discretion to affect the legal position of another by choosing to appoint to that other. However, such a donee is not a fiduciary: *The Law of Fiduciaries* (The Carswell Co, Toronto, 1981) 86. I return below, at 194-5, to the position of donees of bare powers like general powers of appointment.

⁷¹ The same point is made by FH Easterbrook and DR Fischel, 'Contract and Fiduciary Duty' (1993) 36 *Journal of Law and Economics* 425, 436: 'Recent academic theories link the fiduciary relation to A's holding power over decisions important to B, and having discretion in the exercise of that power. Back to principals and agents! Agency is a necessary but not sufficient condition. (If it were sufficient, then all business relations would be fiduciary, and the category would lose its distinctive quality.) What kind of power, under what circumstances, with what ensuing duties?' However, Easterbrook's and Fischel's own theory, that fiduciary relationships are contractual, runs into the same difficulties as all consent-based theories: see above 151-6.

ingredient is to be understood with reference to a particular conception of responsibility.

Another writer who recognises the significance of discretion to the fiduciary relationship is JC Shepherd.

A fiduciary relationship exists whenever any person acquires a power of any type on condition that he also receive with it a duty to utilise that power in the best interests of another, and the recipient of the power uses that power.⁷²

Shepherd's account, which he calls the theory of the 'transfer of encumbered power',⁷³ requires that a fiduciary be in a position to exercise discretion, because it would make no sense for a person to have a duty to utilise a power in the best interests of another if that person were not able to make decisions within the scope of the power. Only by making decisions could such a duty be discharged.

The notion of power – and, by necessary implication, the notion of discretion – that Shepherd employs is broad enough to avoid the difficulty that Weinrib's theory encounters because of its narrow scope. Shepherd's notion includes power to affect non-legal, as well as legal, interests. Moreover, it is difficult to think of an acquisition of encumbered power that does not also generate a fiduciary relationship. Many

⁷² Shepherd, *The Law of Fiduciaries*, above n 70, 96. See also JC Shepherd, 'Towards a Unified Concept of Fiduciary Relationships' (1981) 97 *Law Quarterly Review* 51, 75. In his article, Shepherd uses the phrase 'whenever any person *receives* a power' (emphasis added). The difference in language is of no consequence to the argument presented here, and, if anything, strengthens it.

⁷³ Shepherd, *The Law of Fiduciaries*, above n 70, 96.

central cases of fiduciary relationships – including most relationships between trustees and beneficiaries of express trusts, agents and principals, and partners – are explicable in terms of Shepherd’s theory. Yet, just like Weinrib’s theory, Shepherd’s theory is incomplete. That is because, even assuming that every acquisition of encumbered power generates a fiduciary relationship, fiduciary relationships arise where there has been no acquisition of encumbered power.

First, fiduciary relationships arise where it stretches sense to speak of an acquisition of power because the power in question did not exist prior to its assumption by the fiduciary. For example, imagine that I incorporate a company and make you one of its first directors. Prior to its incorporation, no-one has the powers of a director of the company. On incorporation, you assume those powers. However, they have not been acquired by you. Another way of putting the point is to say that they have not been given to you. They have been *raised in you for the first time* through the combined operation of statute, general law and the constitution of the company. Although you have not acquired the powers, from the moment you have them you are a fiduciary vis-à-vis the company. It might be objected that the notion of acquisition contemplates cases where a power has been assumed, not transferred. However, that is clearly not the notion of acquisition that Shepherd has in mind. His theory refers to the ‘transfer’ of a power, as well as to a power being ‘offered’ and ‘accepted’.⁷⁴ Offer, acceptance and transfer are possible only where what is offered, accepted and transferred – in this case, a power – exists.⁷⁵ Moreover, even if Shepherd’s notion of

⁷⁴ Ibid, 100-1.

⁷⁵ Any doubt that Shepherd really means to assert that powers exercised by fiduciaries have been transferred to them and therefore pre-exist their assumption by the fiduciaries in question should be

acquisition did contemplate cases where a power has been assumed, not transferred, it is not clear what work the notion of acquisition would do in his theory. The theory would then be one that depended on the *possession*, not the acquisition, of encumbered power.

Secondly, fiduciary relationships arise where, although it makes sense to speak of a power being acquired, it cannot be said that the power in question is acquired on condition that the acquirer also receive a duty to utilise the power in the best interests of another.⁷⁶ Shepherd spells out what he means by conditional acquisition by saying that ‘the fiduciary accepts the power, which power has only been offered on condition that the duty be accepted as well.’⁷⁷ However, a fiduciary relationship can arise where a power has been offered and accepted subject to no condition at all. To illustrate, imagine that I appoint you as trustee of a discretionary trust, the beneficiaries of which are my parents, and that you do not disclaim the trusteeship. Imagine further that neither of us knows that trusteeship entails acting in the best interests of the beneficiaries of the trust. All we know is that, by making you trustee, I am empowering you to deal with certain assets with my parents’ needs in mind. Powers have been offered, accepted, and transferred, according to Shepherd’s theory, but not on condition that you also accept a duty to utilise those powers in the best

dispelled by his argument that such powers, prior to transfer, are the property of the principal (or, in the case of an express trust, the settlor): *ibid*, 110-9. See JRF Lehane, ‘Book Review: *The Law of Fiduciaries*’ (1984) 7 *University of New South Wales Law Journal* 396, 398 for criticism of Shepherd’s assertion that non-legal powers are property.

⁷⁶ I leave to one side the question whether a duty to act in the best interests of another is a fiduciary obligation. That question is addressed in Chapter 5.

⁷⁷ Shepherd, *The Law of Fiduciaries*, above n 70, 101.

interests of my parents. Yet you are undoubtedly a fiduciary from the moment you assume the trusteeship.

The two shortcomings of the transfer of encumbered power theory demonstrate that the theory is incomplete because it depends on the consent of the fiduciary to acquiring a duty as well as a power. Like consent-based theories which depend on the fiduciary undertaking to act as a fiduciary, Shepherd's theory does not account for cases where fiduciary relationships, and the obligation that characterises such relationships, are imposed on parties by the courts. It might be argued that the transfer of encumbered power theory could be altered to make only the more modest claim that a fiduciary relationship arises *whenever it may be said reasonably* that a transfer of encumbered power has occurred. However, if the theory were to make that more modest claim, it would need to set out the conditions under which it is reasonable to say that a transfer of encumbered power has occurred. As a result, it would no longer be a consent-based theory that depended ultimately on the transfer of encumbered power. Instead, it would be theory that depended ultimately on the presence of those conditions, and would needlessly complicate analysis in the same way as theories that depend on the concept of reasonable expectation. Just as Weinrib's theory is incomplete because a fiduciary principle based on discretion depends also on a limiting concept, Shepherd's theory is incomplete because that limiting concept is broader than consent. It is responsibility.

IV RESPONSIBILITY

A Role Responsibility

According to the principle set out at the beginning of this chapter, I am a fiduciary only to the extent that, by exercising my discretion to affect your interests, I am able to carry out some responsibility that I have, the purpose of which is to benefit you. The previous section examined the concept of discretion that figures in that principle, and pointed out that fiduciary discretion is discretion to affect the legal and non-legal interests of principals. However, the previous section also pointed out that a concept other than discretion must limit the fiduciary principle, because a fiduciary principle that depends on discretion alone – like that employed in Ernest Weinrib’s theory once the theory is adapted to acknowledge that fiduciaries may affect their principals’ non-legal interests – is too broad. Yet the limiting concept is broader than consent, and it is obfuscated by references to reasonable expectation. JC Shepherd’s theory of the transfer of encumbered power fails ultimately to recognise those facts. As was alluded to above, the fiduciary principle defended in this chapter, while based on discretion, is limited by the concept of responsibility. In his seminal article on responsibility, published in 1967, HLA Hart distinguishes between four varieties of responsibility, one of which he calls ‘role responsibility’.⁷⁸ It is to role responsibility, in the sense described by Hart, that the fiduciary principle of this chapter refers, and

⁷⁸ HLA Hart, ‘Varieties of Responsibility’ (1967) 83 *Law Quarterly Review* 346. The discussion of role responsibility is at 347-8. The other three varieties of responsibility are ‘causal’, ‘liability’ (which Hart views as the primary form of responsibility) and ‘capacity’. In his *Punishment and Responsibility* (Clarendon Press, Oxford, 1968) 211-30, Hart expands his list to five varieties of responsibility – ‘role’, ‘causal’, ‘legal liability’, ‘moral liability’ and ‘capacity’ – but his analysis of role responsibility remains the same as in his article of the previous year.

therefore a close examination of his account of the nature of role responsibility is necessary here.

Hart begins his account by listing a number of examples of role responsibility: the sea captain's responsibility for the safety of the ship; the parent's responsibility for bringing up the children; the sentry's responsibility for alerting the guard to the approach of the enemy; the clerk's responsibility for the accounts.⁷⁹ Hart then argues that the examples suggest that

whenever a person occupies a distinctive place or office in a social organisation to which specific duties are attached to provide for the welfare of others, or to advance in some specific way the aims or purposes of the organisation, he is properly said to be responsible for the performance of these duties or doing what is necessary to fulfil them. Such duties are a person's responsibilities.⁸⁰

This is, in essence, what Hart means by role responsibility. However, he qualifies his account of role responsibility in two important ways. First, he acknowledges that role responsibility can arise even though the responsible person does not occupy a role in the ordinary sense, so long as that person has, whether by agreement or otherwise, been assigned a task. The example he gives is of two friends who go mountaineering on the understanding that one will look after the food and the other will look after the

⁷⁹ Ibid, 347. Hart lists one further example: the husband's responsibility for the maintenance of his wife. That example no longer possesses the intuitive attractiveness that it might have had in 1967, which is why it has been relegated here to a footnote.

⁸⁰ Ibid.

maps. On Hart's qualified account of role responsibility, the friends are responsible for the food and the maps respectively.⁸¹ Secondly, Hart acknowledges that, even where a person occupies a role in the ordinary sense, it is not necessarily true that every one of the duties entailed in the role is also one of that person's responsibilities. Here, his example is of a soldier who must obey the order of his commanding officer to present arms. Presenting arms is not the responsibility of the soldier, although it is his duty.⁸² Having explained the second qualification of his account of role responsibility, Hart draws a tentative conclusion.

I think, though I confess to not being sure, that what distinguishes those duties of a role which are singled out as responsibilities, is that they are duties of a relatively complex or extensive kind, defining a "sphere of responsibility" requiring the exercise of discretion and care usually over a protracted period of time, while short-lived duties of a very simple kind to do or not do some specific act on a particular occasion, are not termed responsibilities.⁸³

One further qualification should be added to Hart's account of role responsibility. His account refers to duties to provide for the welfare of others or to advance the aims or purposes of organisations. The responsibilities of parents *qua* parents are a good example of the former; the responsibilities of a committee of management are a good example of the latter. However, understood even in the widest sense possible, such duties to promote and advance do not seem to exhaust the range of role

⁸¹ Ibid.

⁸² Ibid.

⁸³ Ibid, 347-8.

responsibilities. Included among such responsibilities are surely also duties to prevent and protect. Peter Cane gives the example of the surf life-saver whose responsibility it is to prevent surfers from drowning, and the example of the driver whose responsibility it is to protect other users of the road from harm by driving carefully.⁸⁴ It may be true to say that, *in the ordinary case*, role responsibility refers to duties to promote and advance. However, it is important to bear in mind that role responsibility can refer to preventive and protective duties as well. Moreover, Hart's own account of role responsibility is not diminished once such duties are acknowledged.

Hart's account of role responsibility is undoubtedly of a commonplace phenomenon. Two examples from everyday life adduced by Hart illustrate this point: the responsibility of a host for the comfort of her guests; and the responsibility of a referee for keeping order among the players on the field.⁸⁵ To those examples could be added countless others where individuals have responsibilities – whether regulated by law or not – because of some role or task they perform. Indeed, so commonplace is role responsibility, as it is described by Hart, that Cane suggests that Hart's distinction between duty and responsibility cannot be sustained. Cane argues that all human activities can have responsibilities attached to them, and that a person is responsible to the degree that she takes seriously whatever responsibilities attach to what she does.⁸⁶ If Cane's argument is accepted, then Hart's account of role

⁸⁴ P Cane, *Responsibility in Law and Morality* (revd paperback edn, Hart Publishing, Oxford and Portland, Oregon, 2003) 32. Cane's own distinction is between 'productive' and 'preventive' responsibilities.

⁸⁵ Hart, 'Varieties of Responsibility', above n 78, 348.

⁸⁶ Cane, *Responsibility in Law and Morality*, above n 84, 32-3.

responsibility is nothing more than an account of the many duties – duties and responsibilities being synonymous – that people have in doing what they do. Such a conception of role responsibility would be far too broad to assist meaningful analysis of the fiduciary relationship. Therefore, before a fiduciary principle which depends on role responsibility can be accepted, Cane's argument must be rejected.

Cane's argument is at odds with Hart's tentative conclusion that only some of the duties entailed in a role – including an assignment of a task by agreement or otherwise – are within the 'sphere of responsibility'. One of Hart's examples serves to illustrate. Hart distinguishes between a soldier who is told to remove a piece of paper from the general's path and a soldier whose task it is to keep the camp clean and tidy for the general's visit. The second soldier, according to Hart, has responsibilities; the first has only a duty.⁸⁷ Cane's argument is that the first soldier can also be said to have a responsibility, just one different from the responsibilities of the second soldier. Presumably, the responsibility of the first soldier is to remove the piece of paper from the path, and the responsibilities of the second soldier are to inspect the camp and assess what needs to be cleaned and tidied, to clean and tidy the camp or at least delegate and supervise the performance of those tasks, to ensure that the camp does not become dirty and messy again before the general comes, and so on.

It does not defy sense to say that the first soldier has a responsibility. But it does not follow that a distinction may not be drawn between the relatively complex and ongoing responsibilities of the second soldier and the relatively simple and transient

⁸⁷ Hart, 'Varieties of Responsibility', above n 78, 348.

responsibility of the first. It is that distinction that Hart is reaching for in his tentative remarks on the ‘sphere of responsibility’. And, if the distinction is to be drawn, it arguably aids analysis to describe the situation of the second soldier as one of responsibility, and the situation of the first soldier as one of duty, rather than to say that each has different responsibilities. In other words, if the distinction can be drawn, there is much to be said for rejecting Cane’s claim that ‘[a]ll human activities can have ... responsibilities attached to them’, and for asserting instead that some activities, because of their very nature, do not entail responsibilities even if they entail duties.⁸⁸ What could ground such a distinction, and thereby generate more certainty about it than Hart himself felt?

The soldier who is told to remove a piece of paper from the path of a visiting general, and who does so, is simply following an order. If his action in picking up the piece of paper is questioned or challenged, perhaps by the general, he is likely to respond by pointing to the officer who issued the order and ‘passing the buck’. The soldier who is told to clean up the camp for the general’s arrival, and who does so, is also following orders, but not simply. If his actions are questioned or challenged, he may have to admit that, even though he was following orders, to a certain extent ‘the buck stops here’.⁸⁹ It is tempting to say that the ‘buck stops’ with the second soldier but

⁸⁸ Cane, *Responsibility in Law and Morality*, above n 84, 32. To be more precise, there is much to be said for asserting that some activities do not entail *role* responsibilities even if they entail duties, because a failure to discharge a duty – like a failure to pick up a piece of paper one has been ordered by a legitimate authority to pick up – usually gives rise to what Hart calls liability responsibility, which often triggers the imposition of a sanction.

⁸⁹ That expression is associated with US President Harry Truman. A friend of Truman’s was visiting a prison in Oklahoma and saw a sign saying ‘The Buck Stops Here’. He asked the Warden whether a similar sign could be made for Truman’s desk at the White House. The sign was made, and it was given to Truman in 1945. On the reverse side, the sign says ‘I’m from Missouri’. It has been on display at the Truman Library since 1957: see <http://www.trumanlibrary.org/buckstop.htm>.

not with the first soldier because only the second soldier may exercise discretion when following his orders. Yet this is not the case. Even the first soldier is able to exercise discretion when following his simple order; he is able to choose, for example, which hand he will use to pick up the piece of paper, whether he will bend from the waist or the knees when picking it up, and which bin he will deposit it in. The distinction between the two cases must be sought elsewhere.⁹⁰

That distinction may be seen once the role played by discretion in each of the cases is considered. It is true that both soldiers are able to exercise discretion in following their orders. However, it may be said only of the second soldier that he is not able to follow his orders unless he exercises discretion. The first soldier is able to follow his order without thinking about his task at all, simply by picking up the piece of paper. By contrast, because of the relatively complex and extensive nature of what the second soldier has been ordered to do, he must deliberate and make choices if he is to follow those orders. This distinction, between duties whose discharge may but does not necessarily entail the exercise of discretion, and responsibilities whose discharge does necessarily entail the exercise of discretion, appears to be, at least in part, what Hart is reaching for in his comments about a ‘sphere of responsibility’.

Yet that is not all that may be said usefully about the distinction between duties and responsibilities. Imagine that you delegate to me the task of purchasing some flowers for you at the florist’s shop, and you ask me to purchase either red ones or white ones. My task – or, indeed, my role as your delegate – necessarily entails the exercise of

⁹⁰ I am grateful to Dori Kimel for this observation.

discretion because I must choose between the red and the white flowers. It follows that, in one sense, it may be said plausibly that the task entails a responsibility. However, in another sense, it may not be said plausibly that my task entails a responsibility, because the task is trivial and transitory in nature. This suggests that there is another feature of the discretion entailed in role responsibility that must be drawn out if the distinction between duties and responsibilities is to be better understood. Indeed, Hart alludes to that other feature in his remarks on the ‘sphere of responsibility’.

The other feature of the discretion entailed in role responsibility that must be drawn out if the distinction between duties and responsibilities is to be understood is the variety and seriousness of considerations that make demands on it. Hart’s allusion to that feature of the discretion entailed in role responsibility is in his reference to ‘duties of a relatively complex or extensive kind’ and in his reference to the exercise of ‘care’.⁹¹ There is a sense in which the exercise of discretion entailed in role responsibility requires the responsible person to deliberate on, weigh, and choose among, reasons that relate to the purpose of that person’s role or task. Such reasons may refer to the interests of others, or to the values or practices of an organisation or group, or to desirable outcomes.⁹² Moreover, there is a sense in which role responsibility requires that the responsible person exercise discretion with due regard to the fact that she has a degree of control over the matters entailed in her task or

⁹¹ Hart, ‘Varieties of Responsibility’, above n 78, 347-8.

⁹² Fox-Decent, ‘The Fiduciary Nature of State Legal Authority’, above n 8, 301 refers to such reasons when arguing that the discretionary powers that attract fiduciary regulation may be best described as powers of ‘administration’.

role.⁹³ Role responsibility is thus usually meant to be carried out carefully and cautiously.

Therefore, it may be said that the central case of role responsibility arises where a person occupies some role or performs some task, and the exercise of discretion is necessarily entailed in carrying out the role or performing the task, and where a variety of serious considerations make demands on that person's discretion when she exercises it in carrying out the role or performing the task in question. As Hart and Cane point out, those considerations will usually give rise to a duty to exercise discretion in ways that promote, advance, prevent detriment to or protect the welfare of another or others or the aims or purposes of an organisation. Exactly when that mixture of ingredients will be present is a question of fact, the answer to which is highly situation-specific. It might be thought that a concept as situation-specific as role responsibility is of little assistance when determining what makes a relationship fiduciary. However, it must be acknowledged that whether or not a relationship is fiduciary is a question of fact which cannot be answered in a particular case except by examining all the details of that case.⁹⁴ Separate from the question whether or not a relationship is fiduciary is the question of the nature of any obligation that such a relationship generates. The answer to that latter question is ultimately one of principle, not fact, and is therefore not situation-specific. It is taken up in Chapter 5.

⁹³ In his important work on responsibility, Tony Honoré emphasises control when referring to role responsibility: *Responsibility and Fault* (Hart Publishing, Oxford and Portland, Oregon, 1999) 126.

⁹⁴ Fox-Decent, 'The Fiduciary Nature of State Legal Authority', above n 8, 299.

One way in which the concept of role responsibility is of significant assistance when determining what makes a relationship fiduciary is clear from Hart's account. Role responsibility may arise from sources other than consent. Of course, it may arise from consent, whether in the form of an agreement or a unilateral undertaking. However, it may also arise where a role or a task is assigned to a person in a way that does not entail any form of consent – express or implied – on the part of the person responsible.⁹⁵ In other words, Hart's account is consistent with role responsibility being imposed on those who have not consented to it and who cannot be taken reasonably to have consented to it (because, say, the reasonable person in their situation would consent to it or because they have assumed roles that entail, and would be known by the reasonable person to entail, that responsibility).⁹⁶ Therefore, a fiduciary principle that depends on the concept of role responsibility avoids the difficulties, discussed above, of consent-based accounts of what makes a relationship fiduciary. Moreover, it does so while avoiding the difficulties of accounts that depend on reasonable expectation, because it recognises explicitly the conditions that must be present in order for a relationship to be fiduciary, instead of obfuscating those conditions with references to expectation. Furthermore, it supplies the limiting

⁹⁵ So much is clear from Hart's reference to a 'task assigned to any person by agreement or otherwise': 'Varieties of Responsibility', above n 78, 347. Incidentally, in light of this reference, it is difficult to see the point of Peter Cane's objection that Hart denies the 'accolade "responsible" to a person who takes their undertakings and agreements seriously': *Responsibility in Law and Morality*, above n 84, 32. Perhaps Cane's argument is that a person's undertakings and agreements are her responsibilities just as much as tasks or roles that she must perform pursuant to those undertakings and agreements. But Hart's account of role responsibility does not deny that. It is capable of recognising two types of role responsibility: the responsibility that is the task of keeping faith with one's undertaking or agreement; and the responsibility that is entailed in the task or role one has undertaken or agreed to perform.

⁹⁶ Honoré, *Responsibility and Fault*, above n 93, 126-8. See also Chapter 2 of that book ('Responsibility and Luck') and J Gardner, 'Obligations and Outcomes in the Law of Torts' in P Cane and J Gardner (eds), *Relating to Responsibility: Essays for Tony Honoré on his Eightieth Birthday* (Hart Publishing, Oxford and Portland, Oregon, 2001) 111, 126-41 on why it may be said that we are responsible even when we have not consented to be.

concept that is needed in Ernest Weinrib’s discretion-based account once that account is revised – as it must be – to acknowledge that fiduciaries may exercise discretion to affect the non-legal positions of their principals.

Earlier, it was argued that a bare trust does not entail a fiduciary relationship because the trustee of a bare trust has no powers and therefore is not able to exercise her discretion *qua* trustee. The donee of a bare power is able to exercise her discretion *qua* donee, yet she is not a fiduciary either.⁹⁷ That is because she has no responsibilities. An example of such a bare power is a general power of appointment. Such a power may be exercised in favour of anyone at all, including the donee, or it may not be exercised.⁹⁸ The donee of a general power of appointment has no responsibilities because, although she may exercise her discretion with respect to the power – for example, by choosing whether or not to exercise it – exercising discretion is not required by her role as donee. So much is clear from the fact that she is not required to exercise the power at all and may, *qua* donee, simply ignore it. It is sometimes said that, where its donee occupies a fiduciary role such as the role of a trustee, a general power of appointment is a fiduciary, rather than a bare, power.⁹⁹ However, as Geraint Thomas points out, to call such a power ‘fiduciary’ says nothing about the power, but only draws attention to the fact that the power is conferred on a person who would be a fiduciary whether the power were conferred on her or not.¹⁰⁰ Insofar as the person in question is the donee of the power, she has no responsibilities.

⁹⁷ On bare powers, see Thomas, *Powers*, above n 61, 20-6.

⁹⁸ *Ibid*, 8.

⁹⁹ *Ibid*, 25.

¹⁰⁰ *Ibid*. See also Finn, *Fiduciary Obligations*, above n 2, 3.

As a fiduciary, she has responsibilities. Importantly, she gains no additional responsibilities by virtue of having the power. From the time when the power is conferred on her, her pre-existing responsibilities may entail a duty to consider the exercise of the power, but that duty is explained by those pre-existing responsibilities, and not by the fact that she is the donee of the power.¹⁰¹ The donee of a general power of appointment who does not occupy a fiduciary role will not even have that duty.¹⁰²

B *Fiduciary Responsibility*

Earlier, it was pointed out that Hart's account of role responsibility is of a very commonplace phenomenon, and that two of Hart's examples – the responsibility of a host for the comfort of her guests, and the responsibility of a referee for keeping order among the players on the field – attest to that. Neither of those examples of role responsibility entails a fiduciary relationship. Therefore, even a conception of role responsibility that depends on the centrality of a discretion that must respond to a variety of considerations is too broad to help answer the question of what makes a relationship fiduciary. Just like the concept of discretion, the concept of role responsibility must be limited by some further factor if it is to be of utility in a fiduciary principle. The fiduciary principle proposed at the beginning of this chapter

¹⁰¹ Thomas, *Powers*, above n 61, 21. Lionel Smith argues that the fiduciary donee of a power, including a general power of appointment, has a duty to act so as to fulfil the purposes for which the power was conferred: 'Understanding the Power' in W Swadling (ed), *The Quistclose Trust: Critical Essays* (Hart Publishing, Oxford and Portland, Oregon, 2004) 67, 70. But even if a fiduciary donee of a general power of appointment has such a duty, a non-fiduciary donee of a general power of appointment does not.

¹⁰² Thomas, *Powers*, above n 61, 21.

recognises that. It states that a fiduciary relationship between me and you arises only to the extent that, by exercising discretion to affect your interests, I am able to carry out responsibilities *the purpose of which is to benefit you*. Such responsibilities may be called fiduciary responsibilities.

I am a fiduciary only to the extent that I have responsibilities whose purpose is to benefit you. Whether the purpose of some responsibility that I have is to benefit you must be determined by considering exactly what the responsibility in question entails. Recall that role responsibilities entail duties to promote, advance, prevent detriment to or protect the welfare of another or others or the aims or purposes of an organisation. To the extent that a particular responsibility entails such a duty to promote, advance, prevent detriment to or protect *your* welfare (or *your* aims and purposes, if you are an organisation), its purpose is, *prima facie*, to benefit you. Thus, if I am your financial adviser, my responsibilities, to the extent that they entail duties to promote and protect your financial interests, are fiduciary responsibilities which place me in a fiduciary relationship with you.

Responsibilities may entail duties to promote, advance, prevent detriment to and protect the welfare, aims and purposes of people and organisations other than you, and yet may, if they are carried out, benefit you as well. For example, consider the responsibilities of a company director. Such responsibilities entail duties owed to the company, but individual shareholders of the company usually benefit when those responsibilities are carried out. The responsibilities of a company director are fiduciary responsibilities, and their discharge usually benefits individual shareholders of the company, but the relationships between a company director and individual

shareholders of the company are not fiduciary. Those relationships are not fiduciary because the fiduciary responsibilities entailed in the role of a company director do not have the purpose of benefiting individual shareholders. The purpose of those responsibilities is to benefit the company. Of course, the individual shareholders of the company benefit when the company as a whole is benefited. But they benefit indirectly, owing not to the discharge of the director's fiduciary responsibilities, but rather to their place in the structure of the company. If the shareholders are grouped into different classes, each of which has different sets of rights, some of them may not benefit even indirectly from a discharge of the director's fiduciary responsibilities.

The example of the company reveals that whether the purpose of a responsibility is to benefit a person is not to be determined by asking who actually benefits from the discharge of the responsibility in question. It is rather to be determined by asking whose benefit best explains and justifies that responsibility. In the case of the company director, it is the company whose benefit figures in such an explanation and justification, and that is because of the structure of the company itself.¹⁰³ If the structure of the company were ever to be reconceived, one consequence might be that directors come to have fiduciary responsibilities whose purpose is to benefit individual shareholders.¹⁰⁴

¹⁰³ In *Parker v McKenna* (1874) 10 Ch App 96, the directors of a joint stock bank assisted an individual shareholder to fulfil a contract and made a profit thereby. Although the actions of the directors benefited that shareholder, they amounted to a breach of fiduciary obligation, because the fiduciary responsibilities of the directors had the purpose of benefiting the company as a whole.

¹⁰⁴ This is already the case in certain unusual circumstances: *Coleman v Myers* [1977] 2 NZLR 225; *Brunninghausen v Glavinics* (1999) 46 NSWLR 538.

Earlier, it was said that the purpose of responsibilities which entail duties to promote, advance, prevent detriment to or protect your welfare (or your aims and purposes, if you are an organisation) is, *prima facie*, to benefit you. However, it may be that, on closer inspection, such responsibilities have the purpose of benefiting no-one, despite the duties that they entail. If the purpose of a person's responsibilities is not to benefit anyone, then there is no justification for subjecting that person to fiduciary obligation.¹⁰⁵ That is why the referee in Hart's example is not a fiduciary. The purpose of his responsibilities as a referee is the orderly conduct of play in accordance with the rules of the game. It is not to benefit the players although, if the game is played in an orderly fashion in accordance with the rules, the players – along with spectators, lovers of sport and anyone else with an interest in the game – will benefit indirectly.¹⁰⁶

For the same reason, the soldier in Hart's other example who is responsible for cleaning up the camp in preparation for the general's arrival is not a fiduciary. The purpose of that soldier's responsibilities is not to benefit the general, his commanding officer, or even the army, even though those responsibilities entail duties to further the aims and purposes of the army. The purposes of his responsibilities are the

¹⁰⁵ According to Sarah Worthington, 'fiduciary obligations should be imposed not simply when certain descriptors are apt, but when the very *function* or *purpose* or *reason* for one party's role in the relationship demands that the party operate on the basis of self-denial': 'Fiduciaries: When Is Self-Denial Obligatory?' (1999) 58 *Cambridge Law Journal* 500, 506 (Worthington's emphasis). I would add only that roles call for self-denial when the purpose of their responsibilities is to benefit another.

¹⁰⁶ What about Hart's example of the host? There are two ways in which that example may be handled. The first is to say that the host's responsibility does not have the purpose of benefiting her guests, but rather has the purpose of bringing about an outcome – a convivial evening, say – which will benefit each guest only indirectly. The second and, to my mind, more plausible way is to say that the host's responsibility for the comfort of her guests is a fiduciary responsibility but that breaches of the fiduciary obligation owed by hosts to their guests are too insignificant ever to be disputed legally: *de minimis non curat lex*.

maintenance of order and discipline and the demonstration of respect for a senior officer. The achievement of both purposes indirectly benefits a variety of individuals as well as the army as a whole. But that benefit itself is not the purpose of the soldier's responsibilities.¹⁰⁷ The two examples illustrate how responsibilities whose best explanation and justification is that it is desirable, or even obligatory, to bring about an outcome other than another person's benefit do not give rise to fiduciary relationships, even if that other person's benefit is secured indirectly through bringing about the outcome in question.

Consider another example. I am your solicitor. My responsibilities as your solicitor have the purpose of benefiting you and, to that extent, our relationship is fiduciary.¹⁰⁸ However, my responsibilities as the solicitor of my other clients have the purposes of benefiting those clients. To that extent, I am a fiduciary vis-à-vis the other clients, not you. Thus, where I exercise my discretion to affect your interests in carrying out a responsibility that I have, but the responsibility in question has the purpose of benefiting one of my other clients, I do not act as your fiduciary. Such might be the case where I act for a client in the purchase of your wine cellar, if you have not

¹⁰⁷ In *Reading v R* [1949] 2 KB 232, a sergeant of the British Army serving in Cairo during World War II received payments for accompanying, in uniform, lorries containing illegal goods. He thereby ensured that the lorries were not searched by civilian police. The Court of Appeal found that a fiduciary relationship existed between Sergeant Reading and the Crown. The House of Lords, in *Reading v Attorney-General* [1951] AC 507, approved the Court of Appeal's decision. While it cannot be disputed that Sergeant Reading had responsibilities as an officer of the Army, it is not correct to say that the purpose of those responsibilities was to benefit the Crown. Therefore, Denning J at trial was right to deny a fiduciary characterisation to the relationship before him, and the Court of Appeal should have denied such a characterisation as well.

¹⁰⁸ My primary responsibility as your solicitor is to carry out your instructions with care and skill, in accordance with the requirements of the law and the profession. The best explanation and justification of that responsibility points to your benefit and therefore its purpose is to benefit you. If you instruct me to act for the benefit of someone other than you, my responsibilities have the purpose of benefiting you *and* that other person. Consequently, I will almost certainly come to be in a fiduciary relationship with you both. Such a situation might arise where I am your solicitor and you instruct me to hold money, previously held for your benefit in my trust account, for the benefit of someone other than you.

engaged me as your solicitor with respect to the cellar.¹⁰⁹ If a fiduciary relationship were not limited with reference to responsibilities whose purpose is to benefit the principal, fiduciaries with multiple principals, like solicitors, would act as fiduciaries with respect to all of their principals whose interests were affected, every time they exercised their discretion. As a result, the rule against conflicts of interest would be breached in circumstances where there was no justification for its operation, and the law would impugn self-interested or partisan decision-making for no principled reason.

V TWO LEADING CASES

This chapter has aimed to defend a fiduciary principle in theoretical terms. It has done so by identifying the shortcomings of approaches to what makes a relationship fiduciary that depend on consent and reasonable expectation, as well as by considering why courts have erred in limiting fiduciary principles where parties have sought to protect personal interests and where a relationship has arisen through arm's length dealing. The chapter has argued that one way of determining what makes a relationship fiduciary is to ask whether the relationship in question is characterised by a combination of discretion and fiduciary responsibility. In doing so, it has explained how certain types of relationships may be called fiduciary and how certain other types of relationship may be denied fiduciary characterisation. An example has been the discussion of the relationships entailed in the bare trust, the discretionary trust and the

¹⁰⁹ Of course, if you have engaged me as your solicitor with respect to the cellar, then I have acted as a fiduciary vis-à-vis you *and* the other client and I have, in the absence of consent from both clients, mired myself in a classic conflict of interest.

bare power. However, the chapter has made no claims about the extent to which the fiduciary principle it proposes is reflected in the decisions of courts which have determined the question whether or not a particular relationship is fiduciary. That is in keeping with the ‘top down’ methodology that was adopted in the Introduction. Nonetheless, the Introduction argued that top down reasoning should be tempered by the technique of reflective equilibrium, according to which theoretical understandings are to be assessed against intuitively plausible judgments and possibly revised as a result. The Introduction also argued that such intuitively plausible judgments might emanate from courts as well as individuals and communities.

Therefore, it is worthwhile to assess the fiduciary principle that depends on discretion and fiduciary responsibility against some leading judgments on the subject of the fiduciary relationship to see the extent to which those judgments reflect that principle. Given that the underlying methodology of the thesis invokes top down reasoning, and given the constraints of space, it is not possible or desirable to introduce all, most, or even a representative sample, of such judgments. Instead, only two will be considered here. They demonstrate that the fiduciary principle defended in this chapter is capable of explaining courts’ findings on the question whether a fiduciary relationship exists. Although no firm conclusions may be reached as a result about the applicability of the principle to decided cases generally, some assurance may be gained that the principle is at least capable of meeting the demands of reflective equilibrium.

In *Aas v Benham*, the defendant, a partner in a ship-broking firm, made profits by assisting in the formation of a ship-building company.¹¹⁰ The opportunity to become involved had arisen through the defendant's ship-broking work, and he had used the letterhead of the firm to write letters when assisting in the formation of the company. His partners sought an account of profits. In the Court of Appeal, they were unsuccessful. According to Lindley LJ,

there is no principle or authority which entitles a firm to benefits derived by a partner from the use of information [obtained in the course of the partnership business] for purposes which are wholly without the scope of the firm's business.¹¹¹

The formation of a ship-building company was outside the scope of the business of the partnership and therefore the defendant was entitled to profit by his involvement in the ship-building venture.

Although the language of fiduciary relationships and obligation was not employed by the Court of Appeal in *Aas v Benham*, the case clearly turned on fiduciary principles. The fiduciary principle defended in this chapter helps to show why *Aas v Benham* was decided as it was. Bearing that principle in mind, the first question to ask is whether the defendant exercised discretion to affect the interests of the plaintiffs. With respect to his involvement in the ship-building business, this is unlikely. As the plaintiffs had

¹¹⁰ [1891] 2 Ch 244.

¹¹¹ [1891] 2 Ch 244, 256. Lord Justice Bowen agreed (at 257) and Kay LJ delivered a judgment in similar terms (at 259-61).

no interests relating to ship-building – because it fell outside the scope of their business – it is difficult to see how the defendant could have affected the interests of the plaintiffs by making decisions about the formation of the ship-building company.¹¹² However, even if it could be said that the defendant affected the plaintiffs' interests by exercising his discretion, it could not be said that the defendant was thereby able to carry out responsibilities whose purpose was to benefit the plaintiffs. He certainly was able to, and did, carry out responsibilities, first as a consultant and then as a director of the ship-building company, but the purpose of those responsibilities was either to bring about an outcome – the formation of the company – or to benefit the company once it was formed. It was not to benefit the partners of the ship-broking firm because their business was not ship-building.

As Lindley LJ recognised, it would have been otherwise had the ship-broking firm conducted the business of ship-building.

As regards the use of information obtained by [a partner] in the course of the transaction of partnership business, or by reason of his connection with the firm, the principle is that if he avails himself of it for any purpose which is within the scope of the partnership business, or of any competing business ... he must account to the firm for any benefits which he may have derived.¹¹³

¹¹² Of course, to the extent that the defendant exercised discretion with respect to ship-broking, he would have affected the interests of the plaintiffs, because ship-broking was their business. However, it was not doubted in the case that the defendant and the plaintiffs were in a fiduciary relationship with respect to the partnership business. What was disputed was whether the relationship was fiduciary with respect to matters outside the partnership business.

¹¹³ [1891] 2 Ch 244, 255-6.

That statement implies what the fiduciary principle based on discretion and fiduciary responsibility makes explicit. If the plaintiffs in *Aas v Benham* had been in the business of ship-building, then the defendant would clearly have affected their interests by making decisions relating to the formation of a separate ship-building company. Moreover, by making those decisions, the defendant would have been able to carry out responsibilities whose purpose was to benefit the plaintiffs. Of course, had the plaintiffs been in the business of ship-building, the defendant would not have carried out his responsibilities to the plaintiffs by making decisions to assist in the formation of a company from which the plaintiffs were not to benefit in any way. As Chapter 5 reveals, such decisions, had they been made, would have entailed breaches of fiduciary obligation. However, the defendant could have carried out his responsibilities to the plaintiffs by exercising his discretion if, for instance, he made decisions to pursue the ship-building venture for the plaintiffs' benefit.

In *Canadian Aero Service Ltd v O'Malley*, the president and executive vice-president of Canaero negotiated, on Canaero's behalf, for a lucrative contract for the topological mapping of Guyana.¹¹⁴ They later resigned from Canaero, formed their own company, and tendered for the contract themselves. Canaero sought to strip its former officers of the profits they made following the acceptance of that tender. In the Supreme Court of Canada, Canaero was successful. Justice Laskin, delivering the judgment of the Court, characterised the relationship between the defendants and

¹¹⁴ (1973) 40 DLR (3rd) 371. There was some doubt as to whether the defendants were also duly appointed directors of Canaero prior to their resignation, but the Supreme Court did not regard that as important: 381 per Laskin J.

Canaero, prior to their resignation, as fiduciary. In doing so, he drew a distinction between agents and servants, and concluded that

[a]lthough [the defendants] were subject to supervision of the officers of the controlling company, their positions as senior officers of a subsidiary, which was a working organisation, charged them with initiatives and with responsibilities far removed from the obedient role of servants.¹¹⁵

In that passage, Laskin J suggested that the defendants, as senior executives, were required to exercise discretion in respect of a variety of aspects of Canaero's business in just the way necessary to give rise to role responsibilities.¹¹⁶ Moreover, Laskin J considered that those role responsibilities were fiduciary in nature, because he stated that '[i]t follows that [the defendants] stood in a fiduciary relationship to Canaero'.¹¹⁷

The defendants' responsibilities were fiduciary because the purpose of those responsibilities was to benefit Canaero, and not to benefit some other entity or to bring about some other outcome. Thus, when making decisions as officers of Canaero, which would affect Canaero's business interests, the defendants were able to carry out their responsibilities by benefiting Canaero. This they did for as long as

¹¹⁵ (1973) 40 DLR (3rd) 371, 381. The defendants were subject to the supervision of officers of a controlling company because Canaero was a wholly owned subsidiary of a US company, Aero Service Corporation.

¹¹⁶ Justice Laskin referred explicitly to the concept of control later in his judgment: 'Strict application against directors and senior management officials is simply recognition of the degree of control which their positions give them in corporate operations, a control which rises above day [*sic*] accountability to owning shareholders and which comes under some scrutiny only at annual general or at special meetings': (1973) 40 DLR (3rd) 371, 384.

¹¹⁷ (1973) 40 DLR (3rd) 371, 381-2.

they negotiated for the Guyana contract on Canaero's behalf. Once they resigned and pursued the Guyana contract on their own behalf, matters became more complicated, because after their resignation, the defendants no longer occupied roles entailing responsibilities whose purpose was to benefit Canaero. Nonetheless, Laskin J found that the relationship between the defendants and Canaero continued to be fiduciary even after their resignation. His reasons for so finding were vague, although those reasons seemed to be related closely to the specific facts of the case as found by the trial judge. Justice Laskin said that, in light of those facts, 'I find no obstructing considerations to the conclusion that [the defendants] continued, after their resignation, to be under a fiduciary duty'.¹¹⁸

The fiduciary principle based on discretion and fiduciary responsibility helps to explain why, in *Canadian Aero Service Ltd v O'Malley*, Laskin J found that the relationship between the defendants and Canaero continued to be fiduciary even after they resigned from their positions at Canaero. Given that Canaero wished to obtain the Guyana contract, the defendants continued to affect Canaero's interests by making decisions with respect to that contract even after they resigned. Moreover, even though from the time of their resignation the defendants ceased to occupy roles entailing fiduciary responsibilities, their fiduciary responsibilities prior to their resignation entailed duties to promote and protect Canaero's interests that survived their resignation. Indeed, it would make little sense to say that the defendants had had fiduciary responsibilities in the first place if they could have avoided the duties entailed in such responsibilities by voluntarily ceasing to occupy the role to which the

¹¹⁸ (1973) 40 DLR (3rd) 371, 390.

fiduciary responsibilities attached.¹¹⁹ Exactly when the duties entailed in fiduciary responsibilities survive those responsibilities is situation-specific. Some relevant considerations were alluded to by Laskin J.

Among them are the factor of position or office held, the nature of the corporate opportunity, its ripeness, its specificness [*sic*] and the director's or managerial officer's relation to it, the amount of knowledge possessed, the circumstances in which it was obtained and whether it was special or, indeed, even private, the factor of time in the continuation of fiduciary duty where the alleged breach occurs after termination of the relationship with the company, and the circumstances under which the relationship was terminated, that is whether by retirement or resignation or discharge.¹²⁰

Importantly, however, nothing in the nature of the fiduciary principle that depends on discretion and fiduciary responsibility is inconsistent with a finding that a relationship is fiduciary even after the person whose fiduciary responsibilities have enabled that relationship to be so characterised has ceased to have the responsibilities in question.

¹¹⁹ Indeed, Lionel Smith argues that the defendants were improperly motivated when resigning, and that their resignations constituted breaches of fiduciary obligation as a result: 'The Motive, Not the Deed', above n 3, 78.

¹²⁰ (1973) 40 DLR (3rd) 371, 391.

CHAPTER 4 – FIDUCIARY REGULATION

The stage is now set to consider the extent to which the fiduciary relationship has trust at its core. In doing so, this chapter and the next draw together the analysis of trust and responses to trust from Chapters 1 and 2, and the analysis of the fiduciary principle based on discretion and responsibility from Chapter 3. This chapter, like Chapter 3, begins by asking a question: why make a relationship fiduciary? What is it about relationships in which one person has a responsibility that entails exercising her discretion to affect the interests of another, and whose purpose is to benefit that other, that attracts the intervention of equity? Most obviously, equity identifies such relationships as fiduciary in order to render them susceptible to the imposition of fiduciary obligation. However, that explanation raises a further question: why does equity wish to impose fiduciary obligation on the relationships that it is prepared to identify as fiduciary? Answering that question requires an understanding of why it is considered necessary or important to regulate fiduciary relationships through the imposition of fiduciary obligation. Put another way, it requires an understanding of the point of fiduciary regulation.

From one perspective, to ask questions about the point of fiduciary regulation – or about the point of imposing any private law obligation – is to misunderstand the nature of that regulation.

Private law is to be grasped only from within and not as the juridical manifestation of a set of extrinsic purposes. If we *must* express this

intelligibility in terms of purpose, the only thing to be said is that the purpose of private law is to be private law.¹

That perspective, which seeks the justification of fiduciary liability in the requirements of corrective justice, was latent in Chapter 3 and is adopted explicitly in Chapter 5, in the analysis of the rule against conflicts of interest. In this chapter, a different perspective is adopted. The perspective adopted here is functionalist. In other words, this chapter seeks an understanding of the point of fiduciary regulation in light of the proper goals and purposes of law. Corrective justice theorists, like Ernest Weinrib, would argue that such a perspective is invalid, insofar as it leads to conclusions about the justification of fiduciary obligation. However, as the Introduction made clear, this thesis takes no sides in the debate about whether fiduciary liability may ever be justified on functional grounds. It supplies a non-functionalist account of liability for breach of the no conflict rule, as well as a functionalist account of fiduciary regulation generally speaking. Whether conclusions about fiduciary obligation may be drawn from that functionalist account is taken up in Chapter 5, in the discussion of the duty of loyalty.

The chapter is broken into two sections. The first section adopts a functionalist perspective that is adjectival to the non-functionalist perspective latent in Chapter 3. It examines functional considerations that presuppose and affect fiduciary liability, even to the extent that such liability is justified according to the requirements of corrective justice. The second section adopts a purely functionalist perspective. It

¹ EJ Weinrib, *The Idea of Private Law* (Harvard University Press, Cambridge, Massachusetts and London, 1995) 5 (Weinrib's emphasis).

examines the point of fiduciary regulation with reference to goals that the law properly pursues: supporting trusting relationships, and securing the autonomy of individuals.

I FUNCTIONAL CONSIDERATIONS

Chapter 3 contended that a fiduciary principle may be described with reference to a feature of the fiduciary relationship. To that extent, Chapter 3 anticipated the argument, mounted in Chapter 5, that the justification of fiduciary liability, at least for breach of the rule against conflicts of interest, is not functional. However, functional considerations presuppose and affect fiduciary liability in many ways. Indeed, it would be surprising if any private law relationship – of which the fiduciary relationship is just one type – were regulated solely by rules reflecting the internal intelligibility of private law and not at all by rules serving law's proper goals and purposes. There is insufficient space here to deal with all the functional considerations bearing on fiduciary liability. Instead, three are dealt with, in order to indicate the ways in which fiduciary liability can be affected by considerations other than those which, for the corrective justice theorist at least, justify it. The first is the law's goal – within appropriate constitutional structures – of preserving the legislative supremacy of the parliament. This goal may affect fiduciary liability by displacing it in certain types of case. The second is the law's goal of securing the autonomy of individuals, which affects fiduciary liability by limiting it in a multitude of ways. The third is the law's goal of deterring wrongful conduct, which affects fiduciary liability by supplementing and bolstering it. Each is addressed in turn.

A Parliamentary Sovereignty

The law's goal of preserving the legislative supremacy of the parliament has arisen in two seminal Australian indigenous land rights cases. In *Mabo v Queensland (No 2)*, the plaintiffs argued, *inter alia*, that the Crown owed them fiduciary obligations in its dealings with land over which they held native title rights.² In the High Court of Australia, only Toohey J upheld that claim.³ In doing so, he stated that

[a] fiduciary obligation on the Crown does not limit the legislative power of the Queensland Parliament, but legislation will be a breach of that obligation if its effect is adverse to the interests of the [native] titleholders, or if the process it establishes does not take account of those interests.⁴

Justice Toohey's comments require some clarification. According to his judgment, the Crown's fiduciary obligations arose owing to its prerogative power to alienate land over which native title was held, and the native title holders' lack of power to

² (1992) 175 CLR 1.

³ (1992) 175 CLR 1, 199-205. Two other judges considered the fiduciary claim. Justice Brennan (at 60) thought that it was unnecessary to consider the question whether the Crown owed fiduciary obligations in the case before him, but stated that fiduciary obligations might arise where native title rights were surrendered to the Crown with the expectation that the Crown would grant a tenure of that land to the former native title holders. This foreshadowed his comments in *Wik Peoples v Queensland* (1996) 187 CLR 1. Justice Dawson (at 163-4) thought that regardless of the basis on which the Crown might be said to owe fiduciary obligations to native title holders in other jurisdictions (the United States and Canada), those obligations could not arise in Australia because native title rights had been extinguished by the Crown at the time of acquisition of Australian territory.

⁴ (1992) 175 CLR 1, 205.

alienate their interests in that land to any person but the Crown.⁵ In respect of land in Queensland, the Crown relinquished control of its power of alienation to the Queensland Parliament in the nineteenth century.⁶ According to Toohey J, since that time the Crown has owed fiduciary obligations only to the extent that it has been empowered by statute to alienate land, and the Queensland Parliament, having assumed the power to alienate Crown land by legislation, now owes fiduciary obligations as well. Justice Toohey intended his comments to apply in both cases: the parliament has legislative supremacy, and the Crown may exercise its statutory powers, but private law obligations are not thereby displaced.

Justice Toohey concluded that the law's goal of preserving the legislative supremacy of the parliament – in *Mabo v Queensland (No 2)*, the Queensland Parliament – would not be compromised, in native title cases, by the imposition of fiduciary liability. In reaching that conclusion, he recognised a functional consideration of relevance to the regulation of fiduciary relationships. In *Wik Peoples v Queensland*, Brennan CJ also acknowledged the importance of preserving the legislative supremacy of the parliament but he reached a conclusion different from that of Toohey J in the earlier case.⁷ The Chief Justice distinguished between two types of power that the legislature might grant to the Crown. The first type is power whose exercise 'must affect

⁵ (1992) 175 CLR 1, 203.

⁶ New South Wales Constitution Act 1855 18 & 19 Vic c 54; Constitution Act 1867 (Queensland) ss 30, 40.

⁷ (1996) 187 CLR 1, 95-98. Chief Justice Brennan was the only judge to deal with the fiduciary claim. Justices Gaudron (at 167) and Gummow (at 168) referred to it but did not think it was necessary to consider it, as they decided the case on other grounds. Justices Dawson, Toohey, McHugh and Kirby did not refer to it at all.

adversely the rights or interests of individuals.’⁸ The power to alienate Crown land and thereby extinguish native title interests in that land is of that type.⁹ The second type is power whose exercise is to be ‘on behalf of, or for the benefit of, another or others’.¹⁰ According to Brennan CJ, the Crown would not be able to exercise a power of the first type if it owed fiduciary obligations in the exercise of that power.¹¹ The parliament’s grant of the power would therefore be effectively nullified by the imposition of equitable obligations. By contrast, a grant of power of the second type may well have to be exercised subject to fiduciary obligations, because the imposition of fiduciary obligations would not conflict with the Crown exercising the power on the terms of its grant.¹²

The distinction that Brennan CJ drew between these two types of statutory power makes sense only once the law’s goal of preserving the legislative supremacy of the parliament is taken into account. According to Brennan CJ, that functional consideration requires the displacement of fiduciary liability in cases where its imposition would preclude the exercise of powers that the parliament has granted by legislation. It might be thought that Toohy J’s approach is preferable. He

⁸ (1996) 187 CLR 1, 96.

⁹ (1996) 187 CLR 1, 97.

¹⁰ (1996) 187 CLR 1, 96.

¹¹ (1996) 187 CLR 1, 96.

¹² (1996) 187 CLR 1, 96. Chief Justice Brennan thought that the Crown power at issue in the leading Canadian case *Guerin v The Queen* (1984) 13 DLR (4th) 321 was of this type. In *Guerin v The Queen*, the Musqueam Indian Band had surrendered native title interests in certain land to the Crown, pursuant to statute, to enable the Crown to negotiate the lease of the land to a golf club. The relevant statute required the Crown to act on behalf of the Band and for their benefit. The Canadian Supreme Court found that the Crown owed fiduciary obligations, because of the terms of the grant of the power and because the power was to be exercised with respect to native title interests that had not themselves been granted by the legislature or the Crown: (1984) 13 DLR (4th) 321, 334-42 per Dickson J.

recognised that the parliament is unfettered in its legislative role. But he also maintained that legislation enacted by the parliament, and the exercise of resulting Crown powers, may entail consequences in private law. That is consistent with the view that fiduciary liability is to be understood in terms internally intelligible to private law, but that functional considerations properly regulate fiduciary relationships as well. Yet even Brennan CJ's approach is consistent with that view. Chief Justice Brennan's argument did not depend on the proposition that whatever justifies the imposition of fiduciary liability is absent where the Crown exercises certain types of statutory powers. It depended instead on the proposition that, even if fiduciary liability is justified in such cases, the law's goal of preserving parliamentary supremacy demands that fiduciary liability be displaced.¹³

B *Autonomy*

The law's goal of securing the autonomy of individuals is generally associated with freedom of contract. Freedom of contract has been described as

the notion that people should enjoy the general ability and necessary institutional facilities to make contracts, [and] that they enjoy a considerable

¹³ See also *Kinloch v Secretary of State for India* (1882) 7 App Cas 619, 625-6 per Lord Selborne LC; *Tito v Waddell (No 2)* [1977] 1 Ch 106, 139 per Megarry V-C; *Cubillo v Commonwealth* (2001) 183 ALR 249, 370 per Sackville, Weinberg and Hely JJ ('[A] fiduciary obligation cannot modify the operation or effect of a statute: to hold otherwise, would be to give equity supremacy over the sovereignty of parliament'). Cf Toohey J's interpretation of the former two cases in *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 201-2.

freedom to choose what kind of contracts to make and with whom to make them.¹⁴

Fiduciary relationships are often created, governed or affected by contracts. Therefore, it is not surprising that fiduciary liability is limited by the outworkings of freedom of contract in a large number of cases.¹⁵ Two types of limitation are considered here.

First, the extent to which a relationship is fiduciary may be determined by a contract between the fiduciary and the principal. The classic case is *Hospital Products Ltd v United States Surgical Corporation*.¹⁶ There, a majority of the High Court of Australia found that the terms of a distributorship agreement altogether precluded the existence of a fiduciary relationship.¹⁷ By contrast, Mason J found that the existence of a fiduciary relationship was consistent with the terms of that agreement.¹⁸ However, Mason J stated that the fiduciary relationship must ‘accommodate itself’ to the agreement, particularly as the agreement permitted the fiduciary to act self-

¹⁴ D Kimel, *From Promise to Contract: Towards a Liberal Theory of Contract* (Hart Publishing, Oxford and Portland, Oregon, 2003) 117. Of course, securing the autonomy of individuals is not the only functional consideration bearing upon freedom of contract, and itself competes with and sometimes yields to other goals of the law: see generally PS Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford University Press, Oxford, 1979).

¹⁵ In theory, fiduciary liability could also be augmented by contract. For instance, a fiduciary could, by contract, agree to avoid possibilities of conflicts of interest that the law would regard as fanciful. However, in practice contract is used only to limit fiduciary liability and not to augment it.

¹⁶ (1984) 156 CLR 41.

¹⁷ (1984) 156 CLR 41, 71 per Gibbs CJ, 118 per Wilson J, 147-8 per Dawson J.

¹⁸ (1984) 156 CLR 41, 101-2. Justice Deane (at 123) also left open the question whether a limited form of fiduciary relationship between the parties might have existed, but he decided the case as one of breach of contract.

interestedly in certain matters.¹⁹ By recognising that the scope of a fiduciary relationship may be limited by the terms of a contract agreed between the fiduciary and the principal, Mason J demonstrated that the law's goal of securing autonomy through freedom of contract limits fiduciary liability in certain cases. It does so by circumscribing the matters with respect to which that liability can arise.

Secondly, a contract may exclude liability for breach of fiduciary obligation. The permissible scope of exclusion clauses has been considered in recent years in respect of the express trust. Strictly speaking, an express trust is not a contract, as it is created only by the settlor. However, just as freedom of contract secures the autonomy of parties who undertake obligations by agreement, freedom to create an express trust secures the autonomy of settlors who wish to settle their property on trust, as well as the autonomy of trustees who undertake obligations on the settlor's terms. Where the settlor is also the trustee, freedom to create an express trust is manifested in the settlor's declaration of trust: the settlor herself undertakes the obligation of trusteeship. Where the settlor is not also the trustee, freedom to create an express trust appears to be inconsistent with the autonomy of the trustee, who is bound by the settlor to the obligation of trusteeship. However, the trustee's autonomy may be affirmed once it is recalled that the trustee is free to disclaim the trusteeship. By not so disclaiming, the trustee effectively binds herself to the obligation of trusteeship, her autonomy thereby preserved.²⁰ Moreover, where, as is commonly the case, the terms

¹⁹ (1984) 156 CLR 41, 99. A fiduciary relationship must also accommodate itself to the implied terms of an agreement: *Kelly v Cooper* [1993] AC 205.

²⁰ It does not necessarily follow that a trust may be construed as a contract or even an agreement. Although a trustee's autonomy is preserved because she may disclaim the trusteeship, a trust will not fail for want of a trustee. Nor will a trust fail because its trustee dies. These two aspects of the trust are

of a trust are negotiated and agreed between the settlor and the trustee, the principle of freedom of contract applies just as it does to any agreement between two parties.²¹

Therefore, it may be said that the law's goal of securing the autonomy of settlors and trustees is invoked where the terms of express trusts are permitted to exclude liability for breach of trustees' obligations, including fiduciary obligations. It is the extent to which that functional consideration *should* be invoked that has attracted attention in recent years. The leading case is *Armitage v Nurse*.²² There, an express trust deed purported to exclude liability for loss or damage except where it was caused by the 'actual fraud' of the trustee.²³ The Court of Appeal, led by Millett LJ, upheld the relevant clause, asserting that the terms of express trusts may exclude liability for all breaches of obligation by trustees except breaches of the 'irreducible core' of obligation owed by all trustees. According to Millett LJ, that irreducible core consisted of the obligation to 'perform the trusts honestly and in good faith for the benefit of the beneficiaries'.²⁴ Lord Justice Millett's judgment in *Armitage v Nurse*

inconsistent with regarding it as an agreement. I am grateful to Lionel Smith for this observation. Cf JH Langbein, 'The Contractarian Basis of the Law of Trusts' (1995) 105 *Yale Law Journal* 625.

²¹ In what sense is the autonomy of the beneficiaries of an express trust secured by the creation of the trust? The interests of the beneficiaries are either fixed by the settlor or determinable at the discretion of the trustee. The beneficiaries are therefore passive in the trust structure. Three observations are relevant to that question. First, if certain conditions are met, the beneficiaries may become active and wind up the trust: *Saunders v Vautier* (1841) 4 Beav 115. Secondly, it is irrelevant to speak of the autonomy of beneficiaries in respect of express trusts that have no beneficiaries (ie, charitable and non-charitable purpose trusts) and in respect of beneficiaries of express trusts who have not yet been born. Thirdly, a beneficiary may disclaim her interest under a trust. I am grateful to Lionel Smith for this third point.

²² [1998] Ch 241.

²³ [1998] Ch 241, 250.

²⁴ [1998] Ch 241, 253-4. Hutchison and Hirst LJJ agreed.

stands for the proposition that all but liability for breach of that necessary and sufficient obligation may be excluded by the terms of an express trust.²⁵

For reasons set out in Chapter 3, the irreducible core obligation of trusteeship is not a fiduciary obligation. Fiduciary obligations cannot attach to a trust *per se*. They can attach only to powers that accompany a trust. It follows that Millett LJ in *Armitage v Nurse* should be taken to say that the settlor of an express trust may exclude liability for any breach of fiduciary obligation by the trustee. Of course, a breach of the irreducible core obligation of trusteeship – such as a dishonest misappropriation of the trust assets – may also constitute a breach of fiduciary obligation, for instance where that misappropriation is for the trustee’s own benefit. However, liability for it may properly be excluded to the extent that it is a breach of fiduciary obligation. Breaches of fiduciary obligation that are not also breaches of the irreducible core of trusteeship, such as honest breaches of the rule against conflicts of interest, may properly be excluded entirely.

That the terms of express trusts are permitted to exclude liability for all fiduciary breaches *qua* fiduciary breaches indicates that the law’s goal of securing autonomy through freedom of contract (including freedom to create express trusts) has a wide operation in the fiduciary setting. Through permitting the use of exclusion clauses with that goal in mind, the law limits fiduciary liability not by circumscribing it but rather by refusing to recognise it in circumstances where it would ordinarily arise.

²⁵ The proposition is far from uncontroversial, however. For example, the Law Commission has formed the provisional view that professional trustees should not have the benefit of clauses that exclude liability for negligence: *Trustee Exemption Clauses: A Consultation Paper* (Law Com No 171, 2002) ix.

Importantly, such a limitation of fiduciary liability does not affect the nature of that liability itself. The fiduciary obligations owed by trustees who have the benefit of generous exclusion clauses are not of a type different than the fiduciary obligations owed by trustees, or other fiduciaries, which lack such protection. They just give way to the law's pursuit of the goal of securing autonomy. By contrast, the irreducible core obligation of trusteeship cannot yield to that goal. It is fundamental to the concept of a trust that the trustee owe an obligation of some kind.²⁶ If a settlor were able to exclude liability for all breaches of obligation by a trustee, it would no longer make sense to say that the settlor had created a trust. If such a person purported to declare herself a trustee, she would not have bound herself in any way and would remain the unfettered owner of the relevant assets. If such a person vested assets in another, the most plausible analysis is either that she would have made a gift or that the assets would be held on resulting trust for her.

C Deterrence

The law's goal of deterring wrongful conduct is most evident in criminal law and, to a lesser degree, in the law of torts.²⁷ By contrast, it is generally thought not to play a large role in the regulation of contractual relationships.²⁸ In the fiduciary setting, it is

²⁶ *Armitage v Nurse* [1998] Ch 241, 253 per Millett LJ. See also P Parkinson, 'Reconceptualising the Express Trust' [2002] *Cambridge Law Journal* 657; T Honoré, 'Trusts: The Inessentials' in J Getzler (ed), *Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn* (LexisNexis, London, 2003) 7.

²⁷ On the deterrence of crime, see, eg, A Ashworth, *Principles of Criminal Law* (4th ed, Oxford University Press, Oxford, 2003) 17-8. On the deterrence of torts, see, eg, JCP Goldberg, 'Twentieth Century Tort Theory' (2003) 91 *The Georgetown Law Journal* 513, 521-37.

²⁸ On the deterrence of breaches of contract, see, eg, LL Fuller and WR Perdue Jr, 'The Reliance Interest in Contract Damages' (1936) 46 *Yale Law Journal* 52, 57-66.

widely agreed that deterring wrongful conduct is an appropriate goal for the law to pursue. However, the extent to which that goal should be pursued in the fiduciary setting is a matter capable of provoking disagreement. Such disagreement might centre on the question whether the fiduciary relationship is more closely analogous to contract or to tort. It might be said that if the closer analogy is to contract, there is a relatively small role in fiduciary regulation for deterrence, and if the closer analogy is to tort, the role for deterrence is larger. Drawing analogies between the fiduciary relationship, contract, and tort may reveal aspects of each that would otherwise be obscured from view. However, such analogies also risk obscuring what is distinct about the fiduciary relationship, contract and tort: to that extent, they should be made carefully and with necessary qualifications. Rather than attempting such a careful and qualified analysis in order to obviate the risks entailed in analogising, this section takes the fiduciary relationship on its own terms.

The extent to which the law does and should pursue its goal of deterring wrongful conduct in regulating the fiduciary relationship is an open question, even when the fiduciary relationship is considered on its own terms. The question breaks down into two parts. First, to what extent is the imposition of fiduciary liability justified by the goal of deterrence? Secondly, to what extent do and should remedies for breach of fiduciary obligation aim to deter wrongful conduct? The first part raises a challenge to the claim of this thesis that fiduciary liability, at least for breach of the rule against conflicts of interest, is to be understood in non-functional terms, and it is taken up in the discussion of fiduciary obligation in Chapter 5. The second part – considered briefly here – does not raise that challenge, because understanding fiduciary liability

in non-functional terms does not entail understanding remedies for breach of fiduciary obligation in the same way.

The question whether remedies for breach of fiduciary obligation do and should pursue the goal of deterrence arises with respect to two categories of remedy. The first category consists of those remedies whose purpose is to compel the defaulting fiduciary to disgorge gain. The payment of profits after taking an account²⁹ – whether secured by an equitable lien or not³⁰ – and certain types of constructive trust³¹ are such remedies. Because these remedies do not aim to compensate the principal for loss caused by the fiduciary's breach of obligation or to restore to the principal such value as has been taken from her, it is sometimes said that they can be justified only because they deter fiduciaries who might be tempted to breach their obligations in order to make profits. To the extent that the rationale for disgorgement remedies includes the deterrence of wrongful conduct, it is clear that such remedies presuppose fiduciary liability and supplement it with functional considerations in mind.³² But they do not help to explain fiduciary liability itself.³³

²⁹ *Warman International Ltd v Dwyer* (1995) 182 CLR 544.

³⁰ *Scott v Scott* (1964) 109 CLR 649.

³¹ For example, the constructive trust of bribes or their traceable proceeds: *Attorney-General for Hong Kong v Reid* [1994] 1 AC 324; the constructive trust of an asset acquired by a fiduciary while pursuing an opportunity that should have been taken up, if at all, for the principal: *Boardman v Phipps* [1967] 2 AC 46; and the constructive trust of (a proportion of) an asset misappropriated from the principal, or its traceable proceeds, where the asset has increased in value: *Foskett v McKeown* [2001] 1 AC 102, cf A Berg, 'Permitting a Trustee to Retain a Profit' (2001) 117 *Law Quarterly Review* 366.

³² As Lionel Smith makes clear, the law would better serve its aim of deterrence by imposing disgorgement remedies *and* exemplary damages where defaulting fiduciaries make unauthorised profits, because such fiduciaries may not be deterred by the risk of having to hand over only the fruits of their wrongful conduct: 'The Motive, Not the Deed' in J Getzler (ed), *Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn* (LexisNexis, London, 2003) 53, 60.

³³ It has been argued that disgorgement remedies are concerned with the reversal of unjust enrichment: G Jones, 'Unjust Enrichment and the Fiduciary's Duty of Loyalty' (1968) 84 *Law Quarterly Review*

The second category is more controversial. It consists of just one remedy: exemplary or punitive damages. Exemplary damages have been awarded for breach of fiduciary obligation in New Zealand and Canada, but not in England or Australia.³⁴ It is nowhere disputed that their purpose, at least in part, is to deter wrongful conduct.³⁵ There is, however, profound disagreement as to whether they should be awarded in response to equitable wrongs. That disagreement is essentially one about whether and when courts may change the law. Importantly, it is not a disagreement about whether fiduciary liability is consistent with or somehow demands the award of exemplary damages in certain cases. In the leading Australian case *Harris v Digital Pulse Pty Ltd*, that point was made forcefully in the New South Wales Court of Appeal by Mason P, who supported the award of exemplary damages,³⁶ and also by Spigelman CJ and Heydon JA, who did not.³⁷ Although they dealt with the case differently because they disagreed about whether they should change the law, both Mason P and

472. This view has been the subject of debate: see, eg, PBH Birks, 'Misnomer' in WR Cornish et al (eds), *Restitution, Past, Present and Future: Essays in Honour of Gareth Jones* (Hart Publishing, Oxford and Portland, Oregon, 1998) 1; RC Nolan, 'Conflicts of Interest, Unjust Enrichment, and Wrongdoing' in WR Cornish et al (eds), *Restitution, Past, Present and Future: Essays in Honour of Gareth Jones* (Hart Publishing, Oxford and Portland, Oregon, 1998) 87. The view is anyway consistent with the argument of the thesis: it is precisely because breaching a fiduciary obligation is wrong that consequent enrichments may be said to be unjustly derived. Moreover, the wrong of breach of fiduciary obligation must be understood prior to and separately from any consideration of the appropriateness of a restitutionary (or, indeed, any other) remedy. As Peter Birks puts it, 'What is needed is, not names which distinguish civil wrongs according to their remedial consequences, but rather a steady resolve not to quadruple such wrongs with any one measure of response': *An Introduction to the Law of Restitution* (revd paperback edn, Clarendon Press, Oxford, 1989) 356-7.

³⁴ The authorities in each jurisdiction are set out and discussed in great detail in the judgments of the New South Wales Court of Appeal in *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298.

³⁵ It has been said that their other purposes are to punish the defendant and to vindicate the plaintiff's outraged sense of justice: *Digital Pulse Pty Limited v Christopher Harris* (2002) 40 ACSR 487, 503 per Palmer J.

³⁶ (2003) 56 NSWLR 298, 341.

³⁷ (2003) 56 NSWLR 298, 311 per Spigelman CJ, 394 per Heydon JA.

the majority recognised that there was nothing in the nature of fiduciary liability that either favoured or worked against an award of exemplary damages. That is surely correct. Whether exemplary damages are appropriate in a given case depends on whether the functional considerations justifying the award of such damages generally speaking – for example, the need to punish and deter contumelious disregard for plaintiffs' rights³⁸ – are present, irrespective of the nature of the obligation breached.

II THE POINT OF FIDUCIARY REGULATION

The first section of this Chapter revealed some of the many functional considerations that presuppose and affect fiduciary liability, even to the extent that such liability is justified according to the requirements of corrective justice. In this section, the aim is not to reveal adjectival functional considerations. Rather, the aim is to reveal functional considerations that underpin fiduciary regulation generally speaking. To that end, the section adopts a purely functionalist perspective that does not aim to be consistent with the requirements of corrective justice. As Chapter 5 will show, that purely functionalist perspective may yield conclusions about the justification of fiduciary obligation that would be rejected by a corrective justice theorist. However, as the Introduction pointed out, the thesis makes no claims as to whether fiduciary liability must always be justified by the requirements of corrective justice. As a result, the analysis of this section on the point of fiduciary regulation, as well as what it yields, is unlikely to persuade those who adhere strictly to the corrective justice view. But it does not aspire to do so.

³⁸ *Digital Pulse Pty Limited v Christopher Harris* (2002) 40 ACSR 487, 503 per Palmer J.

Surprisingly little of the extensive literature on fiduciaries discusses the point of fiduciary regulation, as opposed to the nature of fiduciary relationships and the obligations that are imposed on parties in them.³⁹ However, some attempts have been made. Most of those attempts revolve around claims that fiduciary relationships are socially useful or valuable.⁴⁰ For example, Robert Flannigan appeals to the ‘social utility’ of what he calls ‘limited access arrangements’ of a fiduciary character.⁴¹ Paul Finn describes the fiduciary principle as an ‘instrument of public policy’, used to ‘maintain the integrity, credibility and utility of relationships perceived to be of importance to society.’⁴² Ernest Weinrib makes a more ambitious claim, asserting that fiduciary regulation protects structures and institutions through which individuals conduct businesses, and therefore preserves the integrity of the market economy

³⁹ An observation also made by R Flannigan, ‘Fiduciary Regulation of Sexual Exploitation’ (2000) 79 *Canadian Bar Review* 301, 301.

⁴⁰ One recent attempt does not. Matthew Conaglen argues that the point of fiduciary regulation is to ensure that fiduciaries perform their non-fiduciary obligations. For example, the aim of making a director a fiduciary vis-à-vis her company is to ensure that she discharges her non-fiduciary obligations as a director under common law, equity and statute: ‘The Nature and Function of Fiduciary Loyalty’ (2005) 121 *Law Quarterly Review* 452, 460. See also DA DeMott, ‘Fiduciary Obligation in the High Court of Australia’ in P Cane (ed), *Centenary Essays for the High Court of Australia* (LexisNexis Butterworths, Sydney, 2004) 277, 290. Conaglen’s argument is consistent with claims that the point of fiduciary regulation is the social utility or value of fiduciary relationships. Moreover, it presumably depends on such a claim, because no-one would desire to make fiduciaries perform their non-fiduciary obligations unless the performance of those obligations furthered a socially useful or valuable pursuit like the management of a corporation. For those reasons, I put Conaglen’s argument to one side when considering claims about the point of fiduciary regulation.

⁴¹ R Flannigan, ‘The Boundaries of Fiduciary Accountability’ (2004) 83 *Canadian Bar Review* 35, 37.

⁴² PD Finn, ‘The Fiduciary Principle’ in TG Youdan (ed), *Equity, Fiduciaries and Trusts* (The Carswell Co, Toronto, 1989) 1, 26. See also PD Finn, ‘Contract and the Fiduciary Principle’ (1989) 12 *University of New South Wales Law Journal* 76, 84; LI Rotman, ‘Fiduciary Doctrine: A Concept in Need of Understanding’ (1996) 34 *Alberta Law Review* 821, 825-7; LI Rotman, ‘The Vulnerable Position of Fiduciary Doctrine in the Supreme Court of Canada’ (1996) 24 *Manitoba Law Journal* 60, 90-1; S White, ‘Commercial Relationships and the Burgeoning Fiduciary Principle’ (2000) 9 *Griffith Law Review* 98, 99; LI Rotman, ‘The Fiduciary Regulation of E-Commerce’ (2004) 29 *Queen’s Law Journal* 739, 743, 780-2; A Tuch, ‘Investment Banks as Fiduciaries: Implications for Conflicts of Interest’ (2005) 29 *Melbourne University Law Review* 478, 481.

itself.⁴³ These attempts to identify the point of fiduciary regulation are plausible: it would be strange indeed if equity protected relationships that were of no utility or value. However, by themselves, the claims about social utility and value supply an insufficient explanation of the point of fiduciary regulation, because, although they identify fiduciary relationships as useful and valuable, they do not explain *why* they are so.

In trying to ascertain why fiduciary relationships are useful and valuable, it is helpful to return to McLachlin J's assertion, discussed in the Introduction, that '[t]he fiduciary relationship has trust, not self-interest, at its core.'⁴⁴ As the Introduction made clear, trust is neither a necessary nor a sufficient condition for the establishment of a fiduciary relationship. However, the Introduction also alluded to the fact that trust may nonetheless help to explain the point of fiduciary regulation, and that that may be the meaning of McLachlin J's assertion. As was recognised in the Introduction, caution is required when considering how trust helps to explain the point of fiduciary regulation. Any assertion that equity characterises certain relationships as fiduciary in order to secure, protect and maintain either trust or the conditions of its existence is bound to be too simplistic. Not all fiduciary relationships are also trusting relationships, nor should they be.

This section is sensitive to those facts. It acknowledges the analogy between what, in Chapter 1, was described as entrusting, and the exposure of interests to the discretion

⁴³ EJ Weinrib, 'The Fiduciary Obligation' (1975) 25 *University of Toronto Law Journal* 1, 12-5. See also JC Shepherd, 'Towards a Unified Concept of Fiduciary Relationships' (1981) 97 *Law Quarterly Review* 51, 56-7.

⁴⁴ *Norberg v Wynrib* (1992) 92 DLR (4th) 449, 488.

of another that is characteristic of the fiduciary relationship. However, it also acknowledges the incompleteness of that analogy. Having presented the incomplete analogy, the section argues that fiduciary regulation supports the development of trusting relationships in cases where principals trust and fiduciaries prove trustworthy. To the extent that such trusting relationships aim to achieve valuable goals, they are to be supported. However, the section argues that fiduciary regulation also offers principals who do not have trusting expectations reasons to form relationships aimed at valuable goals, notwithstanding that they do not trust. Over time, such relationships may come to be characterised by trust, but they also may not. Ultimately, the point of fiduciary regulation is the freedom that it provides to principals to cooperate with their fiduciaries to achieve valuable goals, whether or not they trust. The section concludes by defending that claim with reference to the value of autonomy.

A The Analogy with Entrusting

Chapter 1 argued that entrusting – voluntarily exposing interests that one cares about to the discretion of another person with a trusting attitude towards, and usually also trusting expectations of, that person – is a type of action well-suited to the manifestation of trust. The way in which trust helps to explain the point of fiduciary regulation by helping to explain why fiduciary relationships are useful and valuable may be seen only once the analogy between entrusting and the fiduciary relationship is explored. Therefore, this section explores that analogy.

The fiduciary principle based on discretion and fiduciary responsibility concentrates on the position of the fiduciary. In exploring the analogy between entrusting and the fiduciary relationship, it is necessary to concentrate on the position of the principal. A fiduciary has responsibilities which she may carry out by exercising her discretion to affect the interests of her principal. Often, a fiduciary will be in that position because her principal, or someone else, has voluntarily exposed those interests to her discretion. A person may act in such a way in response to a promise made by her fiduciary,⁴⁵ or because she has been induced to form expectations by the actions of the fiduciary,⁴⁶ or for reasons that do not include that the fiduciary has made a promise or induced her to form expectations. Such voluntary exposures of interests to the discretion of fiduciaries are analogous to the voluntary exposure of interests that characterises entrusting, whether in response to a promise or an inducement to trust, or in the sense described in Chapter 1 as giving in trust.

However, the analogy between entrusting and the fiduciary relationship is incomplete for two reasons. First, in not every fiduciary relationship has someone voluntarily exposed interests to the discretion of the fiduciary. The relationship between a parent and her child – which, as discussed in Chapter 3, may be fiduciary even with respect to the child’s personal interests – is an example.⁴⁷ This first reason for the incompleteness of the analogy between entrusting and the fiduciary relationship

⁴⁵ *Van Rassel v Kroon* (1953) 87 CLR 298 may be read as such a case. Van Rassel offered to purchase a lottery ticket on behalf of his friend Kroon, whereupon Kroon gave him the money to effect the purchase. The relationship between the two men was fiduciary as a result. Van Rassel’s offer may be construed as a promise in the sense described by TM Scanlon: a statement of intention, and an (implied) exhortation, ‘Trust me!’. See above 78 n 73.

⁴⁶ See, eg, *Commonwealth Bank of Australia v Smith* (1991) 102 ALR 453.

⁴⁷ See the discussion of *M(K) v M(H)* (1992) 96 DLR (4th) 289, above 164-6.

shows that, although the fiduciary relationship may be characterised by trust – as is usually the case in the relationship between a parent and her child – that trust may not accompany entrusting. Secondly, a person cannot entrust unless she trusts, and a person who voluntarily exposes interests to the discretion of a fiduciary does not always have an attitude of trust towards, or trusting expectations of, that fiduciary. For example, I may appoint the Public Trustee as the trustee of a will trust for the benefit of members of my family, because I believe that the Public Trustee is well regulated and better-monitored than most trustees. My attitude in such a case is unlikely to be one of trust towards the Public Trustee; it is likely to be one of confidence in the regulatory and monitoring systems within which the Public Trustee operates. This second reason for the incompleteness of the analogy between entrusting and the fiduciary relationship shows that, although the fiduciary relationship is often characterised by reliance, such reliance does not always amount to entrusting.⁴⁸

B Supporting Trusting Relationships

The incompleteness of the analogy between entrusting and the fiduciary relationship suggests that if trust has to do with the point of fiduciary regulation, it plays its role whether or not fiduciary relationships are, in individual cases, trusting. Therefore, this section considers how trust has to do with the point of fiduciary regulation, first in cases where a principal trusts, and therefore entrusts to, her fiduciary and secondly, in

⁴⁸ On the distinction between entrusting and other forms of reliance, see above 71-2.

cases where a principal does not trust, but nonetheless relies on, her fiduciary.⁴⁹ In Chapter 1, the notion of the cycle of trust and trustworthiness was introduced, and it was argued that relationships characterised by that cycle may be described as trusting. This section concludes that fiduciary regulation supports the development of relationships characterised by the cycle of trust and trustworthiness both where principals trust their fiduciaries and where principals do not trust their fiduciaries.

Consider the case in which a principal voluntarily exposes interests that she cares about to her fiduciary's discretion because she trusts her fiduciary. As Chapter 1 made clear, such entrusting is ordinarily well-suited to manifesting trust. If the fiduciary interprets the principal's action as the action of a person who trusts her, the principal's trust has been successfully manifested to her. If the fiduciary then proves trustworthy to the principal, by justifying the principal's trust or in some other way, her response to that trust contributes to the cycle of trust and trustworthiness that characterises trusting relationships.

However, because there is a fiduciary relationship between the truster and the trusted, the cycle of trust and trustworthiness must develop against the backdrop of fiduciary regulation. In particular, it must develop against the backdrop of fiduciary obligation, breach of which is actionable in equity. It might be argued that, although entrusting is ordinarily well-suited to manifesting trust, where a principal entrusts to a fiduciary

⁴⁹ Given that fiduciaries always exercise discretion and that many fiduciary relationships entail fiduciaries performing complex and specialised roles, it could be argued that principals are more likely to trust their fiduciaries than parties to other types of legal relationship are to trust each other. Roger Cotterrell, for example, makes that argument in relation to the modern trust: 'Trusting in Law: Legal and Moral Concepts of Trust' (1993) 46(2) *Current Legal Problems* 75, 79. I think that Cotterrell is correct, but my argument in the text does not depend on that.

against a backdrop of fiduciary regulation, her entrusting is ill-suited to manifesting her trust precisely because of that backdrop. Such an argument would assert that to entrust against a backdrop of fiduciary regulation is to entrust ‘in the shadow of coercion’, and, as Chapter 1 argued, coercion is ill-suited to manifesting trust because a coercive action is unlikely to be interpreted as the action of a person who trusts.⁵⁰ Two points may be made in response to this argument.

First, to entrust in the shadow of coercion is not to coerce. Every time parties execute a contract, they may be said to act in the shadow of coercion to the extent that their contractual obligations are enforceable from the time the contract is executed, yet executing a contract – as opposed to seeking to enforce a contract – is not usually coercive in aim or effect.⁵¹ The same is true of parties, one of whom voluntarily exposes interests to the discretion of another, with a trusting attitude and, most likely, trusting expectations of that other, and who come to be in a fiduciary relationship as a result. In the Introduction, it was argued that, in *Chan v Zacharia*, the relationship between two partners continued to be fiduciary even after they no longer trusted each other in any meaningful sense.⁵² It may be assumed that the partners trusted each other until their relationship soured, that they entrusted to each other until that time, and that they understood each other’s actions as manifesting trust. Such trust ceased, and certainly ceased to be manifested, when the partners sought to enforce each

⁵⁰ The phrase ‘in the shadow of coercion’ is from LE Ribstein, ‘Law v. Trust’ (2001) 81 *Boston University Law Review* 553, 564. For a critique of Ribstein’s views, see FB Cross, ‘Law and Trust’ (2005) 93 *The Georgetown Law Journal* 1457, 1496-7.

⁵¹ This at least is true of relational contracts, which are closely analogous to, and often give rise to, fiduciary relationships. On relational contracts, see Kimel, *From Promise to Contract*, above n 14, 80-6.

⁵² (1984) 154 CLR 178. See the discussion above 19-20.

other's obligations under the partnership agreement, legislation, and general law. The same pattern – the successful manifestation of trust against the backdrop of fiduciary regulation, followed by the withdrawal of trust and subsequent coercion, often manifesting distrust – may be ascertained in many cases dealing with breach of fiduciary obligation. Those cases suggest that fiduciary regulation is usually no impediment to the development of trusting relationships, at least until such time as principals who have hitherto trusted their fiduciaries seek to enforce obligations that those fiduciaries owe. Moreover, in the vast majority of fiduciary relationships – those in which disputes never arise – principals who trust their fiduciaries never seek to enforce those obligations.⁵³ The academic lawyer, whose knowledge of the nature of relationships regulated by law is acquired largely through the study of situations in which such relationships break down, is apt to lose sight of that fact.

Secondly, fiduciary regulation may support the development of trusting relationships because it may give a person reasons to form trusting expectations of another person, in light of which the first person may entrust to the other and thereby create a situation in which a fiduciary relationship exists between the two. One way in which fiduciary regulation may do this is through equity's presumption that certain types of relationship are fiduciary. The categories of relationship that equity presumes to be fiduciary are not closed, but include trustee and beneficiary, agent and principal, solicitor and client, partners, and director and company.⁵⁴ A person who voluntarily exposes interests to the discretion of another in order to bring about such a

⁵³ 'The mere existence of the law does not produce some sociological imperative to use it': Cross, 'Law and Trust', above n 50, 1499.

⁵⁴ See generally RP Meagher, JD Heydon and MJ Leeming (eds), *Meagher, Gummow and Lehane's Equity Doctrine and Remedies* (4th ed, Butterworths, Sydney, 2002) 157-60.

relationship with that other often does so believing that the resulting relationship will be presumed to be fiduciary and therefore subject to fiduciary regulation. She may also believe, for instance if she is an experienced commercial player, that fiduciary regulation entails specific obligations, such as those entailed in the no conflict rule. However, she may believe only that, because of fiduciary regulation, a relationship of the type that is to be brought about usually requires selflessness or loyalty. Either way, such beliefs enable the formation of role-based, integrity-based or interests-based expectations which, if accompanied by a trusting attitude, may be called trusting.⁵⁵ And, such trusting expectations are themselves reasons for an exposure of interests to the discretion of the other which amounts to entrusting – and may therefore manifest trust – and brings about a fiduciary relationship.

For example, imagine that I wish to appoint you as trustee of a discretionary trust for the benefit of my sisters. If I believe that the law demands selflessness of trustees generally, I may form an expectation that you will be selfless in administering my trust because that is what is demanded of trustees generally, or because I believe you to be the type of person who takes seriously what the law demands of you, or because I believe that you believe that it is in your interests not to fall short of the law's demands. Those expectations may be described as role-based, integrity-based and interests-based respectively. If they are accompanied by an attitude of optimism about the choices you will make in administering my trust, they are trusting expectations. Having such expectations, I have reasons to entrust my interests and those of my sisters to you. If I did not believe that the law demands selflessness of

⁵⁵ On role-based, integrity-based and interests-based trusting expectations, see above 40-3, 47-54.

trustees, I would not have reasons to form those expectations and any trusting expectations that I formed would be based on other reasons.⁵⁶ If such other reasons were not present, I would be unlikely to form trusting expectations at all, and I would be unlikely to entrust to you – and therefore unlikely to manifest to you such trust as I have – as a result.

To summarise, in cases where a principal trusts, and entrusts to, her fiduciary, the backdrop of fiduciary regulation is usually no impediment to, and may support, the development of trusting relationships. Of course, cases may be imagined in which the backdrop of fiduciary regulation does impede the development of trusting relationships. For example, a principal will fail to manifest trust to her fiduciary if the fiduciary believes, not that the principal has entrusted to her, but rather that the principal has relied on her with an attitude of confidence in the system of fiduciary regulation. However, there is no reason to believe that such cases are numerous. Moreover, there is no reason to believe that such cases are more numerous than cases in which fiduciaries believe that their principals both trust them *and* are confident in the regulatory system within which their relationship is situated. Those who argue that trusting expectations may only be good-will based may find the claim implausible that many fiduciaries believe that their principals trust them. However, that claim is plausible if the argument of Chapter 1 – that trusting expectations may be role-based,

⁵⁶ Such trusting expectations may still be role-based, integrity-based or interests-based. For example, I might form a role-based expectation that you will be selfless in administering my trust if I believe that trustees generally adopt professional standards and practices of selflessness. Indeed, it seems plausible that trustees do generally adopt such standards and practices apart from their legal obligations and therefore that role-based expectations of trustees often include such a belief. Similarly, I might form an integrity-based expectation that you will be selfless in administering my trust if, for instance, I believe that you believe that it is virtuous to be selfless. And I might form an interests-based expectation that you will be selfless if, for instance, I believe that you believe that you will attract more business as a trustee if you are selfless.

integrity-based and interests-based – is accepted. And to the extent that fiduciaries believe that their principals trust them, assuming that their principals do trust them, there is opportunity for the cycle of trust and trustworthiness to develop between the fiduciaries and the principals in question.

Now consider the case in which a principal voluntarily exposes interests that she cares about to her fiduciary's discretion but does not trust her fiduciary. Her voluntary exposure of interests amounts to reliance. It may be accompanied by an attitude of confidence in the system of fiduciary regulation, or by some other attitude. It may be accompanied by an attitude of distrust towards the fiduciary. How does trust have to do with the point of fiduciary regulation in such a case? The answer is that, just as fiduciary regulation supports the development of trusting relationships in cases where principals trust their fiduciaries, that regulation also supports the development of trusting relationships in cases where principals do not trust their fiduciaries. But it does so in a different way.

A principal who does not trust her fiduciary cannot, by voluntarily exposing interests to the discretion of that fiduciary, manifest trust. As Chapter 1 pointed out, one cannot manifest trust unless one trusts. Therefore, subject to one qualification which is discussed below, such a principal cannot start the cycle of trust and trustworthiness that characterises trusting relationships. If that cycle is to be started, it must be started by the fiduciary. As Chapter 2 pointed out, the fiduciary may start the cycle of trust and trustworthiness by proving trustworthy to the principal. Proving trustworthy gives the principal a reason to trust that she did not have before and therefore makes it more likely that she will come to trust her fiduciary. However, in order to start the

cycle of trust and trustworthiness, the fiduciary must prove trustworthy against the backdrop of fiduciary regulation. And just as it may be argued that manifesting trust is impeded by fiduciary regulation, it may also be argued that proving trustworthy is so impeded.

Such an argument is made by Larry Ribstein. According to Ribstein, a person like a fiduciary who owes legally enforceable obligations cannot show that she is trustworthy by discharging those obligations. She can show only that she can respond to the coercion that is implicit in those obligations.

The existence of legal coercion means that one no longer can clearly demonstrate that he respects his promise [or prove trustworthy in other ways] regardless of self-interest, but rather can show only that he can be legally coerced into performing. This signal makes the other party reluctant to trust without costly constraints. In other words, the meaning of the behaviour is changed from the connotation associated with voluntary compliance to the connotation associated with coerced compliance. This likely inhibits the formation of a norm based on voluntary compliance.⁵⁷

Given that a fiduciary will usually prove untrustworthy unless she discharges her legally enforceable obligations,⁵⁸ Ribstein's argument, if it is accepted, means that a

⁵⁷ Ribstein, 'Law v. Trust', above n 50, 582.

⁵⁸ It is possible to imagine exceptional cases in which a fiduciary proves trustworthy even though she does not discharge her legally enforceable obligations. One such case might be *Boardman v Phipps* [1967] 2 AC 46, in which a fiduciary manifested loyalty to his principal, a family trust, only to be sued for breach of fiduciary obligation by a disgruntled beneficiary of the trust. The disquiet that has often

fiduciary cannot usually start the cycle of trust and trustworthiness and will usually bring that cycle to an abrupt end if it is started by a trusting principal.

For two reasons, Ribstein's argument cannot be accepted. First, Ribstein claims that discharging legally enforceable obligations cannot manifest attitudes – like respect, empathy and friendship – whose manifestation is usually entailed in proving trustworthy. Yet, as Chapter 2 explained, the successful manifestation of such attitudes depends on only two conditions being met: the trusted must have the attitude in question; and someone – usually the truster – must interpret the trusted's action as the action of a person who has that attitude. That the action in question discharges a legally enforceable obligation necessarily precludes neither condition being met. For example, if you and I are friends and partners in a firm of lawyers, we may manifest to each other attitudes of respect and friendship in the conduct of our partnership notwithstanding that we owe legally enforceable fiduciary obligations to each other as partners. For us, because we are friends as well as partners, the shadow of coercion is likely to be irrelevant.

It might be thought that the first objection to Ribstein's argument is based on an uncharitable reading of it. A more charitable reading might interpret his argument as stating that the manifestation of attitudes ordinarily entailed in proving trustworthy is not precluded, but is just unlikely to be successful, where the trusted's actions discharge legally enforceable obligations. The second reason why Ribstein's argument cannot be accepted obtains whether the argument is read charitably or not.

been expressed about the outcome in *Boardman v Phipps* might be attributable to a sense that, although he breached the rule against conflicts of interest, the defendant proved trustworthy by his actions.

That reason is that even discharging legally enforceable obligations precisely because they are legally enforceable obligations is itself likely to be interpreted as the action of a person with an attitude whose manifestation is entailed in proving trustworthy: the attitude of respect for the law. Those with an attitude of respect for the law show that they have that attitude by submitting voluntarily to the law's demands. To demonstrate such a commitment to the community whose laws are in question is usually to prove trustworthy.⁵⁹ Discharging legally enforceable obligations voluntarily, and thereby showing respect for the law, is to be contrasted with discharging such obligations under threat of sanction. Such might be the case, in the fiduciary setting, if a fiduciary avoids a conflict of interest because her principal has threatened her with legal proceedings if she does not. To discharge legally enforceable obligations in such circumstances is to be coerced, and is unlikely to manifest attitudes whose manifestation is entailed in proving trustworthy. However, cases in which principals actually seek to enforce obligations owed by their fiduciaries are relatively uncommon. Moreover, it is worth reiterating that relying on a person such that one's relationship with her is fiduciary is not itself usually coercive.

The two objections to Ribstein's argument show that fiduciary regulation does not usually impede the manifestation by a fiduciary of attitudes whose manifestation is entailed in proving trustworthy. To that extent, fiduciary regulation does not impede the development of trusting relationships even in cases where principals do not trust

⁵⁹ On respect for the law, see J Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press, Oxford, 1979) Chapter 13. Raz writes (at 259), 'A person identifying himself with his society, feeling that it is his and that he belongs to it, is loyal to his society. His loyalty may express itself, among other ways, in respect for the law of the community.'

their fiduciaries. Furthermore, fiduciary regulation supports the development of trusting relationships between non-trusting principals and fiduciaries in another way. It guarantees the trustworthiness of fiduciaries.⁶⁰ In other words, fiduciary regulation assures principals that their fiduciaries will act, at least to a degree, in the same way as trustworthy people act. One way in which this assurance is given is through the imposition of legally enforceable fiduciary obligation, which requires fiduciaries *qua* fiduciaries to subordinate their interests to the interests of their principals and also, at least in some jurisdictions, to act in the best interests of their principals. People who act selflessly – whether out of respect, empathy, friendship, or another attitude entailed in trustworthiness – when interests that others care about have been exposed voluntarily by those others to their discretion are, to that extent, trustworthy. By imposing legally enforceable obligation on fiduciaries to act selflessly, fiduciary regulation assures even non-trusting principals that, should they rely on fiduciaries, those fiduciaries are likely to discharge the legally enforceable obligation that has been imposed on them, and thereby act as trustworthy people would act.

This guarantee supports the development of a trusting relationship between a non-trusting principal and her fiduciary because it gives the principal a reason to rely on her fiduciary even though she does not trust that fiduciary. The fiduciary then has the opportunity to prove trustworthy – as opposed to acting as a trustworthy person would act – by manifesting attitudes whose manifestation is entailed in proving trustworthy. That, in turn, gives a principal a reason to, and therefore makes it more likely that she

⁶⁰ The idea that legal regulation can guarantee trustworthiness may be found in Cotterrell, 'Trusting in Law', above n 49, 78; R Hardin, 'Distrust' (2001) 81 *Boston University Law Review* 495, 519; E Fox-Decent, 'The Fiduciary Nature of State Legal Authority' (2005) 31 *Queen's Law Journal* 259, 303; and especially JS Coleman, *Foundations of Social Theory* (Belknap Press, Cambridge, Massachusetts and London, 1990) Chapter 8.

will come to, trust the fiduciary. If such trust is then manifested in the principal's actions, the cycle of trust and trustworthiness is underway. Who has started the cycle in such a case? Earlier, it was argued that a principal cannot start the cycle of trust and trustworthiness unless she trusts, subject to one exception. The exception is where a non-trusting principal acts *as if* she trusts her fiduciary. Such a principal may rely on her fiduciary by voluntarily exposing interests that she cares about to the discretion of the fiduciary, even though she lacks trust, and she may try not to manifest her lack of trust in her actions. As Chapter 1 explained, such 'as if' behaviour by a principal may start the cycle of trust and trustworthiness if it is interpreted by the fiduciary – mistakenly – as the action of a person who trusts. The fiduciary may then respond to what she takes to be an opportunity to prove trustworthy in a way that helps to generate trust in the principal. That legal regulation of fiduciary relationships guarantees the trustworthiness of fiduciaries means that principals have a reason for engaging in 'as if' behaviour, which may start the cycle of trust and trustworthiness, which they would not have if fiduciary relationships were not regulated by law.

C *Autonomy*

Fiduciary regulation supports the development of trusting relationships in cases where a principal trusts her fiduciary and in cases where a principal does not trust her fiduciary. In Chapter 1, it was argued that trusting relationships in pursuit of valuable goals are intrinsically valuable. Therefore, to the extent that fiduciary regulation supports the development of trusting relationships in pursuit of valuable goals, it is

also useful and valuable.⁶¹ However, to say that fiduciary regulation supports the development of trusting relationships in pursuit of valuable goals is only partly to answer the question with which this chapter began: why make a relationship fiduciary? Fiduciary regulation, through the imposition of fiduciary obligation, also supports relationships, in pursuit of valuable goals, that are not trusting and never will be trusting. It does so through guaranteeing the trustworthiness of fiduciaries, and therefore giving principals a reason to rely on those fiduciaries notwithstanding that they do not trust, in the way outlined above. The point of fiduciary regulation has to do not only with trust, but also with the freedom that principals in such relationships have to cooperate with their fiduciaries to achieve valuable goals, *whether or not they trust*. In other words, the point of fiduciary regulation has to do with principals' autonomy.

In Chapter 1, Bernard Williams' description of cooperation was introduced.

Two agents cooperate when they engage in a joint venture for the outcome of which the actions of each are necessary, and where a necessary action by at least one of them is not under the immediate control of the other.⁶²

⁶¹ To the extent that trusting relationships pursue base or worthless goals, fiduciary regulation should not support them. For instance, if I pay you a bribe, trusting you in your official capacity to favour my interests as a result, our relationship should not be characterised as fiduciary. As a result, should I fail to favour your interests, you should have no grounds, all else being equal, on which to claim the amount of the bribe back from me: see *Lister & Co v Stubbs* (1890) 45 Ch D 1 and *Attorney-General for Hong Kong v Reid* [1994] 1 AC 234.

⁶² BAO Williams, 'Formal Structures and Social Reality' in D Gambetta (ed), *Trust: Making and Breaking Cooperative Relations* (Basil Blackwell, New York and Oxford, 1988) 3, 7. See above 85-7.

It was pointed out that a person may entrust to another in seeking cooperation with her, but that cooperation may also be sought through reliance accompanied by attitudes other than trust. It was also pointed out that in all cases where cooperation is sought for the achievement of valuable goals, that cooperation is good, whether it entails entrusting or not. In every fiduciary relationship, the fiduciary has responsibilities whose discharge entails exercising discretion to affect the interests of the principal. To that extent, actions that are necessary to the relationship between a principal and her fiduciary – exercises of the fiduciary's discretion – are not under the immediate control of the principal. Principals and fiduciaries may always be said to cooperate as a result.

Because cooperation in the pursuit of valuable goals is good, whether or not it entails entrusting, one aim of fiduciary regulation is to ensure that principals who do not trust their fiduciaries still rely on, and thereby cooperate with, those fiduciaries. Given that fiduciary relationships entail the fiduciary exercising discretion to affect the interests of the principal, and given that such discretion is often exercised in the conduct of complex and specialised roles, a non-trusting principal would, in the absence of fiduciary regulation, be unlikely to rely on her fiduciary to the same extent as a trusting principal. For instance, in the absence of fiduciary regulation, a non-trusting principal would be likely to seek guarantees of trustworthiness in the form of detailed contractual terms spelling out a range of specific obligations that the fiduciary owes when exercising her discretion. Such a non-trusting principal would also be likely to monitor closely the activities of the fiduciary over time. Both courses of action would be likely to cost the principal time, effort and money. And in the many cases where neither course of action would be feasible, principals would be unlikely to rely on

their fiduciaries at all. As a result, the valuable goals for which they would otherwise have sought their fiduciaries' cooperation would be denied to them. Fiduciary regulation, specifically through the imposition of fiduciary obligation, guarantees the trustworthiness of fiduciaries so that non-trusting principals do not have to gain assurance of that trustworthiness in other, time-consuming and costly, ways.⁶³

This matters because principals should not be precluded from seeking fiduciaries' cooperation in the pursuit of valuable goals just because they do not trust those fiduciaries and have insufficient reasons to rely on the fiduciaries in question in the absence of trust. In one of the most influential examinations of personal autonomy in recent times, *The Morality of Freedom*, Joseph Raz writes,

Our life comprises the pursuit of various goals, and that means that it is sensitive to our past. Having embraced certain goals and commitments we create new ways of succeeding and new ways of failing. In embracing goals and commitments, in coming to care about one thing or another, one progressively gives shape to one's life, determines what would count as a successful life and what would be a failure. One creates values, generates, through one's developing commitments and pursuits, reasons which transcend

⁶³ In their seminal article, Frank Easterbrook and Daniel Fischel recognise that, in the absence of fiduciary regulation, principals would be forced to negotiate detailed contracts with, and closely monitor the activities of, their fiduciaries: 'Contract and Fiduciary Duty' (1993) 36 *Journal of Law and Economics* 425, 427. Insofar as this insight helps to explain the point of fiduciary regulation, it is correct. However, Easterbrook and Fischel use it as the basis for their argument that there is no distinctively fiduciary principle and that fiduciary relationships are species of contractual relationships. In Chapter 3, I argued that consent-based approaches to what makes a relationship fiduciary, like Easterbrook's and Fischel's, are unsatisfying: see above 151-6. Here, I add only that I cannot see the sense in an argument that fiduciary relationships are contractual because if they were not fiduciary relationships they would be contractual.

the reasons one had for undertaking one's commitments and pursuits. In that way a person's life is (in part) of his own making.⁶⁴

Raz continues:

There is ... a special connection between self-creation and the creation of values on the one hand and personal autonomy on the other. The ideal of autonomy picks on these features and demands that they be expanded. It requires that self-creation must proceed, in part, through choice among an adequate range of options.⁶⁵

Fiduciary regulation widens the range of options available to a non-trusting principal who wishes to pursue valuable goals but must cooperate with a fiduciary in order to do so. Because of fiduciary regulation, the range of options available to such a principal includes not only negotiating a detailed contract, or close monitoring of the fiduciary's activities, but also simple reliance in light of the law's guarantees. The value of autonomy is served as a result.⁶⁶ Fiduciary regulation also serves the value of autonomy by widening the range of options available to a trusting principal. Because it supports the development of trusting relationships between trusting principals and their fiduciaries, fiduciary regulation supports those principals and

⁶⁴ J Raz, *The Morality of Freedom* (Clarendon Press, Oxford, 1986) 387.

⁶⁵ Ibid.

⁶⁶ Of course, Raz does not say that, from the perspective of autonomy, the wider the range of options, the better. He says only that an *adequate* range of options must be available. My argument in the text depends on the claim, which I do not defend here but take to be plausible, that in many cases, the options of not relying on a fiduciary, or relying on a fiduciary in ways that are prohibitively time-consuming and costly, do not constitute an adequate range.

fiduciaries committing themselves to relationships in which the cycle of trust and trustworthiness plays a role. Such commitments are exactly the sort of self-creation that Raz refers to when writing about the value of autonomy. If fiduciary regulation somehow precluded trusting relationships from developing, the option of making commitments through the manifestation of attitudes entailed in trust and trustworthiness would not be available to principals and fiduciaries. Their autonomy would be diminished as a result. Lastly, to the extent that fiduciary regulation enables trusting relationships to develop even though principals do not – at the outset – trust their fiduciaries, it makes available the option of transforming a relationship in which the cycle of trust and trustworthiness plays no role into a relationship in which that cycle does play a role. Enabling the parties to such a relationship to transform it into a relationship characterised by commitment to the cycle of trust and trustworthiness enables them not only to pursue their valuable goals by cooperating, but also to create a normative foundation on which their cooperation is to be based. Transforming a relationship in such ways constitutes an excellent, perhaps even a central, example of what Raz calls self-creation.

CHAPTER 5 – FIDUCIARY OBLIGATION

The ambiguity in the title of this chapter is deliberate. To call the chapter ‘The Fiduciary Obligation’ or ‘Fiduciary Obligations’ would pre-empt its conclusions by implying either that fiduciaries *qua* fiduciaries owe only one obligation, or that there are two or more truly fiduciary obligations. Such an implication may not be made until the mischief to which the law responds in the fiduciary setting is isolated and analysed with reference to a fiduciary principle and in light of the point of fiduciary regulation. This chapter attempts that task. It does so with respect to two obligations. First, the chapter considers the centrepiece of fiduciary regulation: the rule against conflicts of interest. With reference to the fiduciary principle introduced in Chapter 3, and keeping in view the requirements of corrective justice that, according to theorists like Ernest Weinrib, underpin private law, the chapter argues that the no conflict rule aims to ensure, through prophylaxis, that fiduciaries discharge an underlying obligation not to make self-interested decisions when carrying out their fiduciary responsibilities. When considering why it is wrong for fiduciaries *qua* fiduciaries to make self-interested decisions, the chapter draws on the analysis of trust and responses to trust in Chapters 1 and 2. However, it concludes that the obligation not to make self-interested decisions in the fiduciary setting does not have to do with trust.

Secondly, the chapter considers what is sometimes referred to as the fiduciary’s duty of loyalty: the obligation to act in the best interests of the principal. The chapter argues that the duty of loyalty is not explained or justified by the fiduciary principle introduced in Chapter 3. However, the chapter also argues that the duty of loyalty

may be explained and justified with reference to the point of fiduciary regulation introduced in Chapter 4. Specifically, the duty of loyalty may help to guarantee the trustworthiness of a fiduciary who is not trusted by her principal. Finally, the chapter revisits the discussion of loyalty in Chapter 2, and concludes that the fiduciary duty of loyalty may be described better in some other way. The loyal fiduciary pursues the best interests of her principal out of true commitment to her relationship with her principal, not because she has an obligation to do so.

The chapter is guided by two insights from the case law. The first is that obligations imposed by law on fiduciaries may be broken down into two types: proscriptive, and prescriptive.¹ Proscriptive obligations are those that prohibit certain conduct or motivations. Prescriptive obligations are those that require certain conduct or motivations. To illustrate, consider two examples from the law of torts. The much-discussed rule in *Rylands v Fletcher* establishes a proscriptive obligation: do not allow something to escape from your land and damage your neighbour's land.² By contrast, the law of negligence has its foundation in a prescriptive obligation: take reasonable care. It is sometimes said that fiduciaries *qua* fiduciaries owe only proscriptive obligations.³ That claim may not be accepted unless and until it is shown why proscription is explained and justified by a fiduciary principle and in light of the point of fiduciary regulation, and why prescription is not so explained and justified.

¹ *Breen v Williams* (1996) 186 CLR 71, 113 per Gaudron and McHugh JJ, 137-8 per Gummow J; *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165, 198 per McHugh, Gummow, Hayne and Callinan J.

² (1866) LR 1 Exch 265.

³ *Breen v Williams* (1996) 186 CLR 71, 113 per Gaudron and McHugh JJ, 137-8 per Gummow J; *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165, 198 per McHugh, Gummow, Hayne and Callinan J.

Therefore, the chapter examines a proscriptive obligation – the obligation to avoid conflicts of interest – and a prescriptive obligation – the duty of loyalty – with reference to the fiduciary principle introduced in Chapter 3 and in light of the point of fiduciary regulation introduced in Chapter 4. By referring to the fiduciary principle and to the point of fiduciary regulation, the chapter aims to provide a conceptual and moral basis for evaluating the claim in favour of proscription, at least to the extent that the claim relates to the obligation to avoid conflicts of interest and to the duty of loyalty.

Secondly, the chapter is guided by the words of Millett LJ in *Bristol and West Building Society v Mothew*.

The expression ‘fiduciary duty’ is properly confined to those duties which are peculiar to fiduciaries and the breach of which attracts legal consequences differing from those consequent upon the breach of other duties. Unless the expression is so limited it is lacking in practical utility. In this sense, it is obvious that not every breach of duty by a fiduciary is a breach of fiduciary duty.⁴

Lord Justice Millett’s observation may appear trite, but it is of the greatest importance when considering the nature and scope of fiduciary obligation. When courts have not kept it in view, they have tended to characterise as breaches of fiduciary obligation

⁴ [1998] Ch 1, 16. See also *Hilton v Parker Booth and Eastwood (a firm)* [2005] 1 All ER 651, 660 per Lord Walker of Gestingthorpe. The word ‘duty’ in this passage from Millett LJ’s judgment is synonymous with the word ‘obligation’ as I use it in this chapter.

types of wrongdoing that are not explained, even in part, by a fiduciary principle, and they have not justified that characterisation with reference to the point of fiduciary regulation.⁵ When considering the obligation to avoid conflicts of interest and the duty of loyalty, this chapter is, in light of Millett LJ's observation, alive to the argument that one or both of those obligations may not be characterised properly as fiduciary. The chapter therefore justifies its conclusion that both obligations are properly so characterised. It does so by demonstrating why each obligation may be said to be, in Millett LJ's words, 'peculiar to fiduciaries'.

I CONFLICTS OF INTEREST

A *The Rule against Conflicts of Interest*

Equity proscribes fiduciary conflicts of interest. That proscription is expressed in the form of a rule that is generally taken to stipulate that a fiduciary must not be in a situation in which there is a possibility that her duty to her principal will conflict with her own interests or her duty to a third person.⁶ The duty to the principal to which the

⁵ For example, until recently, the company director's equitable duty to exercise care, skill and diligence was characterised as fiduciary. See the authorities discussed by Ipp J of the Full Court of the Western Australian Supreme Court in *Permanent Building Society (in liq) v Wheeler* (1994) 14 ACSR 109, 154-8. In that case, Ipp J clarified that the duty is not fiduciary.

⁶ *Keech v Sandford* (1726) Sel Cas Ch 61 per Lord King LC; *Aberdeen Railway Co v Blaikie Brothers* (1854) 1 Macq 461, 471 per Lord Cranworth LC; *Parker v McKenna* (1874) 10 Ch App 96, 118 per Lord Cairns LC; *Bray v Ford* [1896] AC 44, 51-2 per Lord Herschell LC; *Midcon Oil and Gas Ltd v New British Dominion Oil Co Ltd and Brook* (1958) 12 DLR (2d) 705, 716 per Read J; *Boardman v Phipps* [1967] 2 AC 46, 123-4 per Lord Upjohn; *Canadian Aero Service Ltd v O'Malley* (1973) 40 DLR (4th) 371, 382-4 per Laskin J; *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 103 per Mason J; *Chan v Zacharia* (1984) 154 CLR 178, 198 per Deane J; *Breen v Williams* (1996) 186 CLR 71, 113 per Gaudron and McHugh JJ, 137-8 per Gummow J; *Bristol and West Building Society v Mothew* [1998] Ch 1, 18 per Millett LJ; *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165 per McHugh, Gummow, Hayne and Callinan JJ. For a detailed investigation of

rule refers is constituted by what, in Chapter 3, were described as fiduciary responsibilities. In other words, the scope of a fiduciary's duty to her principal, in the sense entailed in the rule against conflicts of interest, is determined by what responsibilities the fiduciary has to exercise discretion to affect the interests of her principal, which responsibilities have the purpose of benefiting the principal. As a result, as Chapter 3 pointed out, the scope of a fiduciary's duty to her principal is a question of fact that is likely to be answered differently in each case. The interests of the fiduciary, and her duties to third persons, to which the rule against conflicts of interest also refers, vary from case to case according to a range of factors.⁷

The rule against conflicts of interest is contested in two ways. First, there is dispute as to whether the rule establishes the only proscriptive fiduciary obligation, or whether fiduciaries owe a separate obligation not to derive unauthorised profits from their position. Courts have, in some cases, referred to a separate rule against profit-making, which has generated controversy about the number of proscriptive obligations that fiduciaries owe to their principals.⁸ If the argument of this chapter is

the older English case law, see AJ McClean, 'The Theoretical Basis of the Trustee's Duty of Loyalty' (1969) 7 *Alberta Law Review* 221.

⁷ For convenience, this chapter refers only to conflicts between a fiduciary's duty to her principal and her own interests. However, those references should be taken to include conflicts between a fiduciary's duty to her principal and her duties to third persons. The arguments of the chapter apply, *mutatis mutandis*, to each case.

⁸ *Regal (Hastings) Ltd v Gulliver* [1942] 1 All ER 378; [1967] 2 AC 134, 144-5 per Lord Russell of Killowen, 153 per Lord Macmillan, 154 per Lord Wright, 157-8 per Lord Porter; *Brown v Inland Revenue Commissioners* [1964] AC 244, 256 per Lord Reid, 265 per Lord Upjohn; *Chan v Zacharia* (1984) 154 CLR 178, 198-9 per Deane J; and, in the literature, C Harpum, 'Fiduciary Obligations and Fiduciary Powers – Where Are We Going?' in PBH Birks (ed), *Privacy and Loyalty* (Clarendon Press, Oxford, 1997) 145, 146-8; P Cane, *Responsibility in Law and Morality* (revd paperback edn, Hart Publishing, Oxford and Portland, Oregon, 2003) 201-2; M Conaglen, 'The Nature and Function of Fiduciary Loyalty' (2005) 121 *Law Quarterly Review* 452, 467. For approaches that run the rules against conflicts and profits together, tending to the view that the rule against conflicts is the only proscriptive fiduciary rule, see *Bray v Ford* [1896] AC 44, 51-2 per Lord Herschell LC; *Boardman v Phipps* [1967] 2 AC 46, 123 per Lord Upjohn; *Moody v Cox and Hatt* (1971) 2 Ch 71, 81-2 per Lord

accepted, it is likely that only one proscriptive fiduciary obligation – to avoid conflicts of interest – is owed. However, even if that is the case, there may be sound reasons for a rule against unauthorised profit-making, particularly as the derivation of profit is one of the clearest and most commonplace indicators of a possible conflict of interest. Whether there should be a rule against unauthorised profit-making in addition to the rule against conflicts of interest is not taken up in this chapter. For now, it will suffice to observe that the analysis offered here of the obligation to avoid conflicts of interest yields the consequence that, if there are two rules, any breach of the rule against profit-making will also amount to a breach of the rule against conflicts of interest because it will reveal the possibility of a conflict of interest.

The second way in which the rule against conflicts of interest is contested is with respect to the measure of possibility of conflict that is required in order for a breach of the rule to occur. In the cases, the requirement varies, from any ‘possibility’⁹ of or ‘potential’¹⁰ for conflict, to what the reasonable observer would regard as a ‘real sensible possibility’¹¹ of conflict, to a ‘significant’,¹² ‘substantial’¹³ or even ‘sensible

Cozens-Hardy MR; *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1974-5) 132 CLR 373, 393 per Gibbs J; *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 67-8 per Gibbs CJ, 103 per Mason J; *Commonwealth Bank of Australia v Smith* (1991) 102 ALR 453, 455 per Davies, Sheppard and Gummow JJ; and, in the literature, PD Finn, *Fiduciary Obligations* (The Law Book Company, Sydney, 1977) 200. For an approach that rejects the no conflict and no profit rules altogether, see JC Shepherd, *The Law of Fiduciaries* (The Carswell Co, Toronto, 1981) 147-51.

⁹ *Boardman v Phipps* [1967] 2 AC 46, 88 per Viscount Dilhorne, 103 per Lord Cohen. See also *Aberdeen Railway Co v Blaikie Brothers* (1854) 1 Macq 461, 471 per Lord Cranworth LC (‘a personal interest conflicting, or which possibly may conflict’).

¹⁰ *Boardman v Phipps* [1967] 2 AC 46, 112 per Lord Hodson.

¹¹ *Boardman v Phipps* [1967] 2 AC 46, 124 per Lord Upjohn; *Queensland Mines Ltd v Hudson* (1978) 18 ALR 1, 4-5 per Lord Scarman.

¹² *Chan v Zacharia* (1984) 154 CLR 178, 198 per Deane J.

real or substantial'¹⁴ possibility of conflict. This chapter makes no claims as to what measure of possibility of conflict the rule against conflicts of interest should require. It is instead sufficient to note that, whatever measure of possibility of conflict is adopted, the rule contemplates breach notwithstanding that no actual conflict exists. The significance of that observation is taken up below in the discussion of the prophylactic nature of the rule.

The rule against conflicts of interest is, at least for a rule establishing a private law obligation, unusual. Other rules establishing private law obligations tend to be concerned with results.¹⁵ For example, the rules that make up the law of contract enable individuals to commit themselves to cooperative activity. The results of those commitments, to the extent that they are consistent with the principle of autonomy that undergirds contract law generally, are the concern of the rules of contract law. Thus, if I contract with you for the sale of my car, the rule stipulating that I must pay damages for failing to deliver the car recognises the result – the sale of the car – for which I contracted with you, and aims to make the situation as similar as possible to that result without interfering unduly with my autonomy.¹⁶ The rules of tort law are concerned with results in a different way. There, individuals are not enabled, but

¹³ *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 103 per Mason J; *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165, 199 per McHugh, Gummow, Hayne and Callinan JJ.

¹⁴ *Clay v Clay* (2001) 202 CLR 410, 436.

¹⁵ Rules establishing public law obligations are more commonly unconcerned with results. Administrative law duties of procedural fairness are a good example.

¹⁶ Indeed, in the case of some contracts, the law may (and perhaps should) aim to bring about exactly that result through an order for specific performance or an injunction to restrain breach: on specific performance, see generally D Kimel, *From Promise to Contract: Towards a Liberal Theory of Contract* (Hart Publishing, Oxford and Portland, Oregon, 2003) Chapter 4.

rather supplied with disincentives to interfere in impermissible ways with the interests of others. The result with which tort law is interested is the preservation, to the greatest extent possible, of the status quo; hence the award of tort damages according to the principle *restitutio in integrum*. The rules requiring the restitution of unjust enrichment are even more clearly concerned with results, aiming to restore to aggrieved persons what they have lost by compelling the disgorgement of what others have gained. And the rules of property law seek not to enable, nor to discourage, nor to restore normative or material balance, but instead to control the use and secure the allocation of wealth. Such uses and allocations as are consistent with the demands of justice are the results with which property law is rightly interested.¹⁷

The rule against conflicts of interest is unusual because it is not aimed at enabling, protecting against, restoring or securing any particular result.¹⁸ The well-known case *Boardman v Phipps* supplies an ample illustration of this point.¹⁹ There, the defaulting fiduciary had worked competently and effectively and had generated a profit for his principal, yet he was found to be in breach of the no conflict rule. The highly satisfactory result of his breach was irrelevant. *Boardman v Phipps* demonstrates not only that equity's rule against conflicts of interest is unconcerned with results, but also that the rule is proscriptive in an unusual way. Unlike the rule in *Rylands v Fletcher* and other proscriptive rules in private law, the rule against conflicts of interest does not prohibit conduct – including omissions – or motivations.

¹⁷ See generally JW Harris, *Property and Justice* (Clarendon Press, Oxford, 1996).

¹⁸ This makes the rule unusual in private law, but not unique, as rules requiring good faith negotiations in contract law attest.

¹⁹ [1967] 2 AC 46.

It prohibits possibilities. Thomas Boardman was in breach of it notwithstanding his honest and conscientious motivations, and, in theory at least, could have been in breach of it even if he had not engaged in or failed to engage in any conduct.²⁰ All that is required of a fiduciary according to the rule against conflicts of interest is that, *qua* fiduciary, she be free from the possibility of a conflict of interests. She may be able to satisfy that requirement without ever turning her mind to the matter and without ever doing or not doing anything at all.²¹

B *The Underlying Obligation*

The Introduction foreshadowed an analysis of the rule against conflicts of interest that sought its justification in the requirements of corrective justice.²² If the justification of the rule is to be sought in those requirements, in terms that are internally intelligible to private law, it must make sense to say that the rule is aimed against some wrongdoing in the sense of a breach of duty and an infringement of corresponding right. Against what wrongdoing might the rule against conflicts of

²⁰ By contrast, the duty of loyalty may be breached only where the fiduciary fails to be motivated in a certain way: see below 284-8.

²¹ In a similar way, a person may discharge her duty of care, not by being careful, but by happening not to harm anyone: J Gardner, 'Obligations and Outcomes in the Law of Torts' in P Cane and J Gardner (eds), *Relating to Responsibility: Essays for Tony Honoré on his Eightieth Birthday* (Hart Publishing, Oxford and Portland, Oregon, 2001) 111.

²² On corrective justice and its role in justifying rules of private law, see above 15-7, 209-10. Matthew Conaglen argues that the rule against conflicts of interest aims to increase the likelihood that fiduciaries will perform their non-fiduciary obligations. He thus argues that '[f]iduciary doctrine is fundamentally far more instrumentalist or functionalist in outlook than it is moralist': 'The Nature and Function of Fiduciary Loyalty', above n 8, 473. Conaglen's claim that the rule against conflicts of interest is not concerned with what morality requires of fiduciaries, together with his account of the rule as one that aims to increase the likelihood that other rules will be complied with, is not easily accepted. It means that the strictest obligation known to private law – the obligation to avoid conflicts of interest – is justified only functionally and adjectivally. That seems counter-intuitive if it is accepted that other, less onerous, private law obligations – like the duty of care – are justified non-functionally and are not adjectival.

interest be aimed? That wrongdoing cannot be the possibility of conflicts of interest itself. How can a possibility – as opposed to creating a possibility, or making a possibility more likely – amount to wrongdoing? Nor can that wrongdoing be an actual conflict of interests. To say that there is an actual conflict of interests is not to make a statement about any wrongdoing that has occurred, but is rather to make a statement about reasons. More precisely, it is to make a statement about the way reasons figure in the deliberations of a person who has to make a decision. When there is an actual conflict between a fiduciary's duty to her principal and her own interests, the fiduciary takes her duty to be a reason for deciding to do X and her own interests to be a reason for deciding to do Y. Other reasons are likely to weigh in favour of X or Y, or in favour of other options such as deferring decision, or deciding provisionally. The simplest case, however, illustrates the point sufficiently. Duty weighs in favour of X and interests weigh in favour of Y. The metaphor of conflict captures that aspect of a fiduciary's deliberations.

Three types of wrongdoing appear to be contemplated by the no conflict rule. That is because the rule entails three obligations, breach of which may be regarded as wrongful. The first obligation entailed in the no conflict rule is probably better described in the ordinary case as a set of obligations: it is what was referred to earlier as fiduciary duty. Therefore, the content and scope of the first obligation entailed in the no conflict rule depend on what responsibilities a fiduciary has *qua* fiduciary. It may be called a primary obligation, to draw attention to the fact that it is not triggered by the commission of a legal wrong. The second obligation entailed in the no conflict rule is the proscriptive obligation established by the rule itself, not to be in a situation of possible conflict of interest. It is breach of that primary obligation that triggers the

third, and secondary, obligation entailed in the no conflict rule: the obligation to submit to an appropriate remedy for having committed a legal wrong.²³

A failure to carry out fiduciary responsibilities may be said to be wrongful, if not legally, then at least – in the ordinary case – morally. A breach of the proscriptive obligation established by the no conflict rule may also be said to be wrongful, legally if not morally. And a breach of the secondary obligation to submit to an appropriate remedy for breaching the no conflict rule is certainly wrongful in law and may, depending on how such obligations are justified generally speaking, be wrongful in a moral sense as well. However, the rule against conflicts of interest is not *aimed* against any of those types of wrongdoing. Asking what the rule is aimed at involves asking what explains and justifies the rule. And none of the three obligations entailed in the rule helps to explain and justify it. Fiduciary duty helps to explain and justify the imposition of the rule only on fiduciaries, but does not help to explain and justify it as a rule against conflicts of interest. The other two obligations are explained and justified by the rule, and therefore cannot at the same time explain and justify it.

The wrongdoing against which the no conflict rule is aimed may be understood better in light of the fiduciary principle introduced in Chapter 3. That principle stipulates that a relationship is fiduciary to the extent that, by exercising discretion to affect a person's interests, another person is able to carry out some responsibility that she has, the purpose of which is to benefit the first person. Thus, a fiduciary may exercise discretion to affect her principal's interests, and she may do so *qua* fiduciary only

²³ This paragraph owes much to PBH Birks, 'Definition and Division: A Meditation on *Institutes* 3:13' in PBH Birks (ed), *The Classification of Obligations* (Clarendon Press, Oxford, 1997) 1.

because she has fiduciary responsibilities. To the extent that her responsibilities mean that she may exercise discretion to affect the interests of her principal, a fiduciary has options to choose from that she would not otherwise have. The nature and scope of those options depend on which of her principal's interests the fiduciary is able to affect by the exercise of her discretion. For instance, where a fiduciary has control of her principal's property, she has options to choose from with respect to the management and disposition of that property that she would otherwise lack. Where a fiduciary performs an advisory role, she has options relating to the form and content of her advice that she would not be able to choose from if her principal did not seek that advice. And where a fiduciary occupies a representative role, she has options to choose from that she would not have in the absence of the authority, access to information, and contacts that her representative role affords her.

Among the options to choose from that a fiduciary has in virtue of her responsibilities, there are some the choice of which will discharge – or, at least, help to discharge – those responsibilities. They are options, like maintaining a diverse portfolio of trust assets, which ordinarily entail benefiting the principal. The choice of other options will neither benefit the principal nor benefit the fiduciary. An example of such a choice might be the choice to call a trust account by one name rather than another; that is a choice that a trustee has only because she is a trustee, but it does not entail benefiting the beneficiaries of the trust. Then there are options, the choice of which will benefit the fiduciary. Such choices may or may not also benefit the principal. Consider, for example, the choice to invest a trust fund in a company in which the trustee has a personal interest. By choosing that option, a trustee, in the ordinary case, benefits herself, and may also benefit the beneficiaries of the trust if, for instance, the

company performs well as a result of the investment. The wrongdoing against which the no conflict rule is aimed arises in situations where a fiduciary is able to choose options that benefit herself. Therefore, such situations will be the focus of the rest of this section.

In Chapter 2, the Kantian insight was introduced; according to that insight, it is wrongful to use a person as a means to one's own ends. Where a person has responsibilities the purpose of which is to benefit another, and she exercises the discretion that such responsibilities entail to choose options that benefit herself, she may, in certain circumstances, use that other person as a means to her own ends. To that extent, an outworking of the Kantian insight is that she may be said to act wrongfully. Another way of putting that is to say that the Kantian insight grounds an obligation owed by a fiduciary not to use her principal by exercising discretion *qua* fiduciary to choose options that benefit herself. That obligation underlies the no conflict rule in the sense that it helps to explain and justify the rule. But before its explanatory and justificatory role can be considered in depth, more must be said about what grounds the underlying obligation.

How may a fiduciary use her principal by choosing options that benefit herself? Ordinarily, to choose options that benefit oneself is morally unimpeachable. For example, if someone offers me £100, it is not wrongful, all else being equal, for me to choose to take the money. Moreover, the same may be true where someone else's interests are in play. For example, imagine that someone offers me £100, and I know that if I do not take it, it will be offered to you. Again, all else being equal, I do not act wrongfully if I take the £100, and it certainly makes no sense to say that I use you

as a means to my own ends in choosing to take it. However, the situation may be different if you and I are in a fiduciary relationship. If I am offered £100 only because I have fiduciary responsibilities the purpose of which is to benefit you – in other words, if I would not have that option to choose were I not a fiduciary vis-à-vis you – I may, by choosing to take the money, use you as a means to my ends. That might occur in a variety of ways.

First, I might use you by betraying you. In Chapter 2, it was argued that to betray a person is to combine the belief that she trusts one with self-interested or partisan reasons and to decide to act, against her interests, on the strength of those combined reasons. By letting the belief that one is trusted figure in one's practical reasoning, one 'uses' trust in a metaphorical sense. By using trust for self-interested or partisan ends, and against the interests of the truster, one uses the truster as a means to those ends and therefore uses her trust, and her, wrongly. Consider again the example in which we are in a fiduciary relationship and I, *qua* fiduciary, am offered £100 that I know will be offered to you if I do not take it. Now assume that you have entrusted to me your interest in having the money; indeed, it may be the fact that you have entrusted that interest to me that has caused us to be in a fiduciary relationship. I betray you if I believe that you trust me with respect to your interest, and I combine that belief with my self-interested reasons for having the money, and I choose to take the money on the strength of those combined reasons. This I might do if, for example, I believe that, because you trust me, I may take the money with relative ease, undetected by you.²⁴

²⁴ *M(K) v M(H)* (1992) 96 DLR (4th) 289 appears to have been a case in which a fiduciary used his principal by betraying her. There, a daughter was the victim of incest with her father. In light of the

Betrayal entails the abuse of trust. However, as was pointed out in Chapter 4, even where a principal has voluntarily exposed interests that she cares about to the discretion of her fiduciary – which behaviour often amounts to entrusting – she may not have an attitude of trust towards, or trusting expectations of, that fiduciary. Her behaviour might amount to reliance accompanied, for example, by an attitude of confidence in the regulatory system within which the fiduciary operates. In other words, not all fiduciaries are trusted by their principals. It follows that, although those fiduciaries who are trusted by their principals owe those principals an obligation not to betray them, not all fiduciaries owe such an obligation to their principals. Moreover, the obligation not to betray is owed by those who are not fiduciaries but are trusted nonetheless. These facts point to the conclusion that no part of the explanation and justification of the obligation not to betray may be understood in light of a fiduciary principle. And that would be the case even if all fiduciaries were trusted by their principals.²⁵ This chapter seeks to understand the obligation underlying the no conflict rule in terms that are internally intelligible to private law. To understand the obligation in that way entails explaining and justifying it in light of a fiduciary principle, such as that set out in Chapter 3. In light of that aim, and given that the obligation not to betray is not explained and justified in light of such a principle, it may not be concluded that the obligation not to betray is the obligation underlying the no conflict rule.

facts of the case, which were discussed in Chapter 3, it appears that the daughter did not entrust to her father, but her trust was nonetheless used as a means to her father's ends: see above 164-6.

²⁵ In the same way, a fiduciary must not misappropriate her principal's property, but does not owe that obligation *qua* fiduciary, even though *qua* fiduciary she may be well placed to effect a misappropriation and even though her principal's rights with respect to recovery of the property in question may depend on her fiduciary status: *In re Hallett's Estate* (1879) 13 Ch 696.

Secondly, I might use you by manipulating your beliefs and actions. Chapter 2 introduced what TM Scanlon calls the principle forbidding unjustified manipulation.²⁶ According to that principle, I owe you an obligation not to manipulate your beliefs and actions so that you rely on me, and then leave you worse off. Such an obligation not to exploit your reliance derives normative force from the Kantian insight, and may therefore be described broadly as an obligation not to use you. Consider again the example in which I, *qua* fiduciary, am offered £100. Imagine that I have encouraged you to believe that I will pursue your interest in having that money and that in light of that belief you have exposed to my discretion your interest in having it. The principle forbidding unjustified manipulation grounds my obligation not to leave you worse off by taking the money myself. If I take the money, I breach that obligation and may be said to use you as a means to my own ends.²⁷

Although a fiduciary may use her principal by manipulating her beliefs and actions and then leaving her worse off in impermissible ways, the principle forbidding unjustified manipulation does not ground the obligation underlying the no conflict rule. That is because, just like the obligation not to betray, obligations that are grounded in the principle forbidding unjustified manipulation are not owed by all fiduciaries to their principals, and they are owed by those who are not fiduciaries.

Not all fiduciaries manipulate the beliefs and actions of their principals; to that extent,

²⁶ TM Scanlon, *What We Owe to Each Other* (Belknap Press, Cambridge, Massachusetts, 1998) 298.

²⁷ It is possible to read *Hodgkinson v Simms* (1994) 117 DLR (4th) 161 as such a case. There, an accountant advised a client to invest money in certain real estate developments in which he (the accountant) had an undisclosed personal interest. When the Canadian real estate market crashed in 1981, the client's investment was lost. The client argued that he would not have made the investment had he known of the accountant's undisclosed interest.

the principle forbidding unjustified manipulation does not ground any obligation that such fiduciaries owe to their principals. For example, the trustee of a discretionary trust may, when she assumes the trusteeship, have had no interaction with the beneficiaries of the trust. Having had no interaction with the beneficiaries, such a trustee cannot be said to have manipulated their beliefs and actions. Therefore, she cannot owe them any obligation grounded in the principle forbidding unjustified manipulation. Yet she is a fiduciary vis-à-vis the beneficiaries, and is subject to the no conflict rule, from the moment she assumes the trusteeship. Then there are cases where the principle forbidding unjustified manipulation grounds obligations that are owed by non-fiduciaries. The law responds to such cases by invoking the doctrines of estoppel.²⁸ In such cases, it is nowhere suggested that parties who are subject to such obligations ought also to be subject to the no conflict rule.

Because the obligation not to betray and obligations grounded in the principle forbidding unjustified manipulation are not owed by all fiduciaries and are owed by non-fiduciaries, they may not, consistently with an account of the no conflict rule that is internally intelligible to private law, be said to underlie that rule. However, there is a way in which I, *qua* fiduciary, might use you as a means to my own ends and thereby breach an obligation that all fiduciaries, *qua* fiduciaries, owe. I might use you by using your interests. In his recent article on the fiduciary nature of state authority, Evan Fox-Decent discusses how a fiduciary may use her principal by using her principal's interests.²⁹ Fox-Decent argues that a principal's interests are 'inviolable

²⁸ See, eg, *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387.

²⁹ E Fox-Decent, 'The Fiduciary Nature of State Legal Authority' (2005) 31 *Queen's Law Journal* 259.

embodiments of [the principal's] legal personality'.³⁰ The description of a principal's interests as embodiments of her legal personality points to the fact that they are, in a profound sense, hers; they are constitutive elements of her legal personality so that, if she did not have them, she would be a different legal person or would lack legal personality altogether.³¹ Fox-Decent's argument that a principal's interests are embodiments of her legal personality may be overly bold. For example, a beneficiary of a discretionary trust may have an interest in the trust fund being invested in a particular industry – an interest that the trustee may affect by exercising her discretion when investing the fund – but the beneficiary's rights, duties, privileges, powers and immunities, which make up her legal personality, would remain the same if she did not have that interest.³²

Nonetheless, Fox-Decent's argument may be accepted for present purposes. The question remains: if you and I are in a fiduciary relationship, how may I, *qua* fiduciary, use you by using your interests? It was argued above that a fiduciary may betray her principal by letting the belief that her principal trusts her figure in her practical reasoning as a reason to be self-interested. A similar argument may be made about using a principal's interests. It may be said that a fiduciary 'uses' her principal's interests in a metaphorical sense by combining those interests in her practical reasoning with self-interested or partisan reasons and deciding to act on the

³⁰ Ibid, 280.

³¹ This evokes what was said in Chapter 2 about a person's trust being hers in a profound sense: see above 119-20.

³² On what makes up legal personality, see generally WN Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (Yale University Press, New Haven, 1919).

strength of those combined reasons. Consider again the example in which you and I are in a fiduciary relationship and I, *qua* fiduciary, am offered £100 that I know will be offered to you if I do not take it. Now imagine that, when deliberating about whether or not to take the money, I take your interest in having the money to be a reason for me to take it because, say, I maliciously desire to thwart your interests. By letting your interests figure in my practical reasoning in that way – by letting them serve my malicious desire, so to speak – I may be said to use them as a means to my own ends, in a particularly offensive fashion.³³ The Kantian insight clearly grounds an obligation not to exploit your interests in that way.

Because a fiduciary is always able to exercise discretion to affect the interests of her principal, an obligation not to use a principal by using her interests may be owed by all fiduciaries. Such an obligation is therefore more easily reconciled with the fiduciary principle set out in Chapter 3 than are the obligation not to betray and obligations grounded in the principle forbidding unjustified manipulation. However, there is a reason to doubt that an obligation not to use a principal by using her interests is the obligation underlying the no conflict rule. A fiduciary who chooses an option that benefits herself does not, in the ordinary case, do so because she takes her principal's interests to be reasons to choose that option. In Chapter 2, a similar point was made about betrayal. There, it was argued that betrayal does not always entail an abuse of interests entrusted by the one betrayed. Indeed, it was argued that in the ordinary case of betrayal, interests that have been entrusted are likely to figure in the

³³ *Frame v Smith* (1987) 42 DLR (4th) 81 may have been such a case. In *Frame v Smith*, the marriage of the plaintiff and the defendant broke down, and the defendant refused the plaintiff access to their children. Her motivation for doing so is a matter for speculation, but it is at least arguable – particularly given that the plaintiff was granted generous access privileges by a court – that she desired to thwart the plaintiff's interest in having an ongoing relationship with the children.

practical reasoning of the trusted as reasons *not* to be self-interested or partisan, because betrayal is more often characterised by weakness of resolve, fear of conflict or lack of commitment than it is by attitudes such as malice. The same is true of the principal's interests in the fiduciary setting. A fiduciary who chooses an option that benefits herself is likely to do so despite the fact that she takes the principal's interests to be reasons *not* to choose that option; in such situations, the metaphor of conflict is appropriately invoked when describing her deliberations.³⁴ Or she might choose an option that benefits herself because she takes her interests *and* the principal's interests to be reasons to choose that option.³⁵

Earlier, it was argued that, to the extent that a fiduciary's responsibilities mean that she may, *qua* fiduciary, exercise her discretion to affect the interests of her principal, that fiduciary has options to choose from that she would not otherwise have. Moreover, it was argued that the nature and scope of those options depend on which of her principal's interests a fiduciary is able to affect by the exercise of her discretion. The choice of some of those options will benefit the principal, and to choose them is ordinarily to discharge fiduciary responsibilities. The choice of other options will benefit the fiduciary, and to choose them may be to fail to discharge fiduciary responsibilities if the principal does not also benefit by their choice. Another way of describing that situation is to say that a fiduciary, *qua* fiduciary, has

³⁴ Such was almost certainly the case in *Guinness plc v Saunders* [1990] 2 AC 663, where a director of Guinness tried to overcome what he presumably knew was a conflict of interest by seeking the consent of Guinness. He was found to be in breach of the no conflict rule because he gained the consent of a committee of the board of directors, and not that of the board itself. The committee had no authority, under the articles of association of Guinness, to bind the company.

³⁵ *Regal (Hastings) Ltd v Gulliver* [1942] 1 All ER 378; [1967] 2 AC 134 and *Boardman v Phipps* [1967] 2 AC 46 appear to have been such cases.

an opportunity to choose among options that she would not have if she were not a fiduciary. For convenience, call it the fiduciary opportunity.

It may not be said that the fiduciary opportunity is always given to a fiduciary by her principal.³⁶ Nonetheless, a fiduciary only has the fiduciary opportunity because she has responsibilities, entailing the exercise of discretion to affect the interests of her principal, whose purpose is to benefit that principal. If the principal did not have those interests, the fiduciary would lack the fiduciary opportunity. To that extent, the fiduciary opportunity may not be separated from those interests. The purpose of the fiduciary's responsibilities being to benefit the principal, the fiduciary must treat the principal's interests consistently with that purpose when using the fiduciary opportunity. And the fiduciary opportunity is an opportunity to choose among options that are only available to a fiduciary *qua* fiduciary.

By drawing together these aspects of the fiduciary opportunity, the obligation underlying the no conflict rule may be illuminated. In the example introduced earlier, I, *qua* fiduciary, am offered £100 that I know will be offered to you if I do not take it. I am offered the money *qua* fiduciary, which means that I am offered it only because I have responsibilities, entailing the exercise of discretion to affect your interests, whose purpose is to benefit you. You have an interest in having the money. If you did not have that interest, I would not have the opportunity that I now have to choose among at least two options: the first option being to take the money; and the second

³⁶ An argument to the effect that a principal gives the fiduciary opportunity to her fiduciary may be found in the work of JC Shepherd: *The Law of Fiduciaries*, above n 8; 'Towards a Unified Concept of Fiduciary Relationships' (1981) 97 *Law Quarterly Review* 51. In Chapter 3, I set out my objections to that argument: see above 180-3.

option being to refuse to take the money so that it is offered to you. When using that fiduciary opportunity, I must treat your interest in having the money consistently with the purpose of my fiduciary responsibilities, which is to benefit you. Because the fiduciary opportunity is an opportunity to choose among options, I may use it only by making a choice.

In my deliberations, I am likely to take your interest in having the money and the fact that the purpose of my responsibilities is to benefit you as reasons to choose the option of refusing to take the money so that it will be offered to you. I am also likely to take my interest in having the money as a reason to choose the option of taking it. That aspect of my practical reasoning is what was referred to metaphorically, earlier in this chapter, as an actual conflict between duty and interest. Now imagine that I choose the option of taking the money for the reason that is my interest in having it. By choosing that option for that reason, I have, in my practical reasoning, subordinated the reason that is my duty to the reason that is my interest, in the sense that I have chosen to act for the latter reason despite the force of the former reason. The Kantian insight grounds an obligation not to do that, and it is that obligation which underlies the no conflict rule. The obligation may be called, for want of a better description, an obligation not to make self-interested decisions *qua* fiduciary.

How does the Kantian insight ground the obligation not to make self-interested decisions? The key is in recognising that a fiduciary may use her principal by using the fiduciary opportunity to benefit herself. The fiduciary opportunity may not be separated from the interests of the principal whose exposure to the discretion of the fiduciary has brought the opportunity about. Therefore, to the extent that the

fiduciary opportunity is used as a means to the fiduciary's own ends, it may be said that the principal's interests are also used. And where a fiduciary deliberately subordinates her duty to her interest when choosing options that the fiduciary opportunity affords her – put simply, where a fiduciary *qua* fiduciary makes a self-interested decision – she may be said to use the fiduciary opportunity as a means to her own ends. That is so even if her self-interested decision is compatible with the interests of her principal. It is choosing for the reason that is her own interest and not for the reason that is her duty that constitutes impermissible use of the fiduciary opportunity; the nature of the option chosen is neither here nor there. The obligation underlying the no conflict rule is thus an obligation not to make choices for the wrong reasons; it is not an obligation to make choices with the right results.³⁷

C *Prophylaxis*

According to the Oxford English Dictionary, 'prophylaxis' refers to the 'preventive treatment of disease'.³⁸ The word, once freed of its medical connotation, is apposite to describe the rule against conflicts of interest.³⁹ The rule aims to ensure that a conflict never arises between a fiduciary's duty to her principal and her own interests.

That is why the rule prohibits even the possibility of conflict. At a deeper level, the

³⁷ Where a fiduciary *qua* fiduciary makes a self-interested decision that is compatible with the interests of her principal, her breach of obligation is not morally significant and may not deserve opprobrium. Nonetheless, owing to the categorical nature of the reason that she has not to make a self-interested decision, such a fiduciary is in breach of obligation even though her decision is compatible with her principal's interests. This distinction is obscured, in the fiduciary setting, by the prophylactic nature of the no conflict rule.

³⁸ JA Simpson and ESC Weiner (eds), *The Oxford English Dictionary* (2nd ed, Clarendon Press, Oxford, 1989) Vol XII, 644.

³⁹ Indeed, Heydon JA invoked the medical metaphor when discussing the no conflict rule in *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298, 407.

aim of the no conflict rule is to ensure that a situation never arises in which a fiduciary is able to breach her underlying obligation by making self-interested decisions when carrying out her fiduciary responsibilities. In that sense, the rule is doubly prophylactic; it aims to prevent actual conflicts of interest and thereby aims to prevent fiduciaries resolving such actual conflicts by making self-interested decisions. Of course, the case law reveals the extent to which the rule fails in its prophylactic aim; most breaches of the rule are flagrantly self-interested, such as those where a fiduciary misappropriates trust property for personal use. However, equally important to understanding the prophylactic aim of the rule are those cases – mainly hypothetical, but still contemplated by the rule – where liability is imposed on a fiduciary whose decisions have not been self-interested at all.

A prophylactic rule, like the rule against conflicts of interest, is bound to deliver occasionally unpalatable results. One instance, where liability was imposed on a fiduciary because of the possibility of a conflict of interest, even though there was no actual conflict and none looked likely, was *Boardman v Phipps*.⁴⁰ As Peter Birks argues, the only way in which the House of Lords' finding of liability in that case can be justified is with reference to prophylaxis.⁴¹ By contrast, commentators like Ernest Weinrib and Paul Finn, who do not emphasise the prophylactic nature of the no conflict rule, are led to criticise the decision of the House of Lords in *Boardman v*

⁴⁰ [1967] 2 AC 46.

⁴¹ PBH Birks, *An Introduction to the Law of Restitution* (revd paperback edn, Clarendon Press, Oxford 1989) 332-3, 338-43. See also PBH Birks, 'The Content of the Fiduciary Obligation' (2000) 34 *Israel Law Review* 3 and LD Smith, 'The Motive, Not the Deed' in J Getzler (ed), *Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn* (LexisNexis, London, 2003) 53, 56-7.

Phipps as ‘perhaps unduly harsh’⁴² or ‘remarkable’.⁴³ But if prophylaxis is able to justify imposing liability on fiduciaries, like Thomas Boardman, whose duty and interests have not conflicted, then what is able to justify prophylaxis? In other words, what is able to justify the imposition of liability in order to prevent a breach of an underlying obligation – making a self-interested decision – that need not even entail the causing of any harm? Where such preventive liability is imposed one would expect to find a strong justification.

There are several justifications of prophylaxis in the no conflict rule. The first was alluded to by Sir WM James LJ in *Parker v McKenna*, an early case on company law.

[The] rule is an inflexible rule, and must be applied inexorably by this Court, which is not entitled, in my judgment, to receive evidence, or suggestion, or argument as to whether the principal did or did not suffer any injury in fact by reason of the dealing of the agent; for the safety of mankind requires that no agent shall be able to put his principal to the danger of such an inquiry as that.⁴⁴

⁴² EJ Weinrib, ‘The Fiduciary Obligation’ (1975) 25 *University of Toronto Law Journal* 1, 7.

⁴³ Finn, *Fiduciary Obligations*, above n 8, 245. See also the critique of *Boardman v Phipps* in G Jones, ‘Unjust Enrichment and the Fiduciary’s Duty of Loyalty’ (1968) 84 *Law Quarterly Review* 472; Shepherd, *The Law of Fiduciaries*, above n 8, 150; JRM Gautreau, ‘Demystifying the Fiduciary Mystique’ (1989) 68 *Canadian Bar Review* 1; Conaglen, ‘The Nature and Function of Fiduciary Loyalty’, above n 8, 466 n 92.

⁴⁴ (1874) 10 Ch App 96, 124-5. See also *Industrial Development Consultants Ltd v Cooley* [1982] 1 WLR 443, 452, where Roskill J referred to that statement with approval, but questioned the suitability of its tone: ‘[i]n the nuclear age [it] may perhaps seem something of an exaggeration.’

That justification is similar to one offered by Lionel Smith in his recent essay on fiduciary obligation. Smith argues that the no conflict rule, being a prophylactic rule, relieves a principal from ‘litigation risks and expenses’ in connection with having to prove that her fiduciary was improperly motivated.⁴⁵ Smith elaborates on that justification further when he says that ‘[i]t would be a kind of disloyalty to leave your beneficiary wondering whether you had been disloyal, or to force him to prove disloyalty’.⁴⁶ According to Smith, it is in order to obviate that sort of disloyalty that the no conflict rule ‘forbids the fiduciary from being found in any situation that is liable to make his beneficiary wonder whether the fiduciary’s motives were pure or impure.’⁴⁷ That is the ‘danger’ to which Sir WM James LJ referred in *Parker v McKenna*.

The first justification of prophylaxis in the no conflict rule points to a benefit that is delivered to the principal, both by relieving the principal of heavy evidential burdens and by minimising the danger of the sort of compound disloyalty to which Smith alludes. A second justification points to a benefit that is delivered, not to the principal, but to the court which is called upon to adjudicate a dispute about an alleged breach of fiduciary obligation. This second justification was spelt out by Lord Eldon LC in two early nineteenth century cases. In *Ex parte James*, a case involving an illegitimate purchase by an assignee in bankruptcy, Lord Eldon LC ruled that

⁴⁵ Smith, ‘The Motive, Not the Deed’, above n 41, 75.

⁴⁶ Ibid, 76. Smith argues that the no conflict rule aims to prevent breaches of a prescriptive duty of loyalty, but his observations about the justification of the prophylactic nature of the rule apply equally to my account, which argues that the rule aims to prevent breaches of the underlying obligation not to make self-interested decisions.

⁴⁷ Ibid.

the purchase is not permitted in any Case, however honest the circumstances; the general interests of justice requiring it to be destroyed in every instance; as no Court is equal to the examination and ascertainment of the truth in much the greater number of Cases.⁴⁸

In *Ex parte Lacey*, where the allegation was of an illegitimate purchase by a trustee, Lord Eldon LC made the same point in stronger terms.

[T]hough you may see in a particular case, that [the trustee] has not made advantage, it is utterly impossible to examine upon satisfactory evidence in the power of the Court, by which I mean, in the power of the parties, in ninety-nine cases out of an hundred, whether he has made advantage, or not.⁴⁹

Lord Eldon LC's comments reveal that the second justification of prophylaxis in the no conflict rule is that courts would not be able to apply the rule without its prophylactic overlay. In a recent essay, John Langbein argues that the prophylactic overlay was developed in the late eighteenth and early nineteenth centuries to overcome defects in the fact-finding capacity of the Court of Chancery. According to Langbein, comments like those of Lord Eldon LC in *Ex parte James* and *Ex parte Lacey* reflect contemporary frustration at those defects. Langbein argues that, now that the procedure of courts exercising equitable jurisdiction has been reformed to

⁴⁸ (1803) 8 Ves 337, 345. See also *Furs Ltd v Tomkies* (1936) 54 CLR 583, 592-3 per Rich, Dixon and Evatt JJ; RP Austin, 'Fiduciary Accountability for Business Opportunities' in PD Finn (ed), *Equity and Commercial Relationships* (The Law Book Company, Sydney, 1987) 141, 148.

⁴⁹ (1802) 6 Ves 625, 627.

eliminate the defects that Lord Chancellors like Lord Eldon LC had to contend with, the second justification of prophylaxis in the no conflict rule no longer obtains.⁵⁰ Langbein's observations, insofar as they demonstrate that the fact-finding capacities of courts exercising equitable jurisdiction are now as extensive as those of any other civil courts, are surely correct. However, Langbein does not recognise that the second justification of prophylaxis in the no conflict rule obtains even when courts have available to them the full array of modern fact-finding procedure. That is because of the nature of breaches of the obligation underlying the rule against conflicts of interest.

To illustrate, imagine that the rule against conflicts of interest was not prophylactic. Imagine that the rule reflected exactly the underlying obligation, and therefore prohibited a fiduciary exercising her discretion self-interestedly. Suppose that a fiduciary entered into a transaction with her principal from which she derived profits. Working out whether that fiduciary had breached the no conflict rule would entail knowing the reasons for which she decided to enter into the transaction. If, for example, she decided to transact with her principal only in order to derive profits, she would be in breach of the no conflict rule. By contrast, if, for example, she decided to transact with her principal only because she thought it would benefit the principal, and her resulting profits were a happy coincidence that she never contemplated prior to transacting, she would not be in breach.

⁵⁰ JH Langbein, 'Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?' (2005) 114 *Yale Law Journal* 929, 945-7.

A court would know the reasons for which such a fiduciary decided to transact with her principal only if the fiduciary informed the court truthfully of those reasons. Nothing but the fiduciary's own testimony might constitute adequate evidence on the basis of which the court could make a finding of fact as to the fiduciary's reasons for the impugned decision. In such a situation, the court would have great difficulty distinguishing between the defaulting fiduciary who was lying to escape liability and the non-defaulting fiduciary who was telling the truth. Each would testify that her reasons were selfless. It might be thought that the court could draw conclusions as to the veracity of a fiduciary's testimony just as it does with respect to the testimony of any witness before it. However, the court would require independent grounds on which to draw such conclusions, and independent grounds for affirming or denying what the fiduciary claimed to be the reasons for her decision would not always exist. Evidence of the fiduciary's interests – such as evidence that she stood to gain in some way from the transaction in question – may not suffice. It may help to establish the fact of a possible or an actual conflict between those interests and the fiduciary's duty. But it would not necessarily help to establish whether or not the fiduciary resolved an actual conflict selflessly.

The second justification of prophylaxis – that because of it the no conflict rule demands only findings of fact that courts are able to make – is also arguably the strongest. A legal rule whose application depends on the existence of facts that courts cannot establish with a reasonable degree of certainty is either moribund, because it will not be applied at all, or susceptible of arbitrary application. By contrast, a rule whose application depends on the existence of facts that courts can reasonably establish is less susceptible of arbitrary application. The possibility of conflict

between a fiduciary's duty and interests can reasonably be established as a matter of fact, whereas the precise reasons for a fiduciary's exercise of discretion cannot. The no conflict rule has been criticised as unnecessarily rigorous, owing to its prophylactic quality. Whether those criticisms are well-founded depends on the proper extent of the rule's prophylactic reach. However, without at least some measure of prophylaxis, the no conflict rule may be open to criticism for not meeting, as fully as it could, at least one aspect of the ideal of the rule of law.

A third justification of prophylaxis refers, not to any benefit delivered to the principal as plaintiff or to the court as finder of fact, but instead to a benefit delivered to the fiduciary herself. As well as establishing the criterion by which fiduciary breach is established, the no conflict rule enables fiduciaries to guide their behaviour so that they minimise the risk of breaching their underlying obligation. The rule encourages fiduciaries to shield their discretion from the influence of their interests.⁵¹ A fiduciary might achieve this by relinquishing certain interests upon assuming the fiduciary role, or by disclosing interests and gaining the consent of the principal to taking them into account, or by adopting a policy of not taking them into account in the exercise of her discretion as a fiduciary. This third justification of prophylaxis operates only where an individual knows that she has fiduciary responsibilities, and also knows what that entails. However, as many fiduciary relationships arise upon the knowing assumption of a fiduciary role – trustee, solicitor, and company director, to name three – the third justification of prophylaxis is important and warrants consideration.

⁵¹ Ernest Weinrib refers to the no conflict rule as a device for 'purifying' the discretion of the fiduciary, at least where the fiduciary acts in an advisory or representative character: 'The Fiduciary Obligation', above n 42, 15. See also Conaglen, 'The Nature and Function of Fiduciary Loyalty', above n 8, 469.

The third justification of prophylaxis in the no conflict rule reflects one important role that rules play in practical reasoning generally.

[Rules] mediate between deeper-level considerations and concrete decisions. They provide an intermediate level of reasons to which one appeals in normal cases where a need for a decision arises. Reasons of that level can themselves be justified by reference to the deeper concerns on which they are based. The advantage of normally proceeding through the mediation of rules is enormous. It enables a person to consider and form an opinion on the general aspects of recurrent situations in advance of their occurrence. It enables a person to achieve results which can be achieved only through an advance commitment to a whole series of actions, rather than by case to case examination.⁵²

In the case of prophylaxis in the no conflict rule, however, enabling a fiduciary to avert a case by case examination with respect to the exercise of discretion is particularly advantageous. Given the nature of the wrong entailed in a breach of the underlying obligation not to make self-interested decisions, the examination of each individual case by a fiduciary seeking to avoid such a breach would be especially onerous. It would require the fiduciary to be aware of all the reasons bearing on her decision, assign the appropriate order and weight to those reasons, and decide accordingly. That would be inefficient, burdensome, and in some cases practically

⁵² J Raz, *The Morality of Freedom* (Clarendon Press, Oxford, 1986) 58. See also J Raz, 'Promises and Obligations' in PMS Hacker and J Raz (eds), *Law, Morality and Society: Essays in Honour of HLA Hart* (Clarendon Press, Oxford, 1977) 210, 223; J Raz, *Practical Reason and Norms* (revd paperback edn, Oxford University Press, Oxford, 1999) 76.

impossible (for instance, where the interests of the principal and the fiduciary were closely aligned).⁵³ Moreover, owing to the evidential difficulties that explain the second justification of prophylaxis in the no conflict rule, a fiduciary who exercised her discretion selflessly from case to case might nonetheless be susceptible to liability if a court were sceptical of her decision-making. That risk is minimised to the extent that the fiduciary does not attempt a difficult reconciliation of practical conflict each time it arises, but instead wards off such conflict by strict adherence to the prophylactic rule.

In Chapter 4, a question was raised but not answered: to what extent is the imposition of fiduciary liability justified by the goal of deterrence? The question implies a challenge to the claim of this thesis that liability for breach of the no conflict rule is to be understood in non-functional terms. One way of making that challenge is to assert that prophylaxis in the no conflict rule is justified because it deters fiduciaries from making self-interested decisions.⁵⁴ It might be thought that deterring fiduciaries from making self-interested decisions is the same as enabling fiduciaries to avert case by case examinations with respect to the exercise of their discretion, which was the third justification of prophylaxis in the no conflict rule. However, the two are not the same. Saying that, because it is prophylactic, the no conflict rule guides and assists fiduciaries when exercising their discretion is consistent with saying that liability for breach of the rule is only imposed properly on fiduciaries who have breached or are at

⁵³ '[I]t is true that when we deliberate we consider which reasons are most pressing in a way which transcends and defies the common division of practical thought into moral and self-interested (and other) considerations': J Raz, *Engaging Reason* (Oxford University Press, Oxford, 1999) 306.

⁵⁴ See, eg, *Digital Pulse Pty Limited v Christopher Harris* (2002) 40 ACSR 487, 513-4 per Palmer J; *Harris v Digital Pulse Pty Limited* (2003) 56 NSWLR 298, 406-7 per Heydon JA; Conaglen, 'The Nature and Function of Fiduciary Loyalty', above n 8, 464-5.

risk of breaching the underlying obligation not to make self-interested decisions. To that extent, the third justification of prophylaxis in the no conflict rule, while undoubtedly functional, recognises the non-functional justification of the obligation that underlies that rule.

By contrast, saying that, because it is prophylactic, the no conflict rule deters fiduciaries from making self-interested decisions is consistent with saying that liability for breach of the rule may be imposed on fiduciaries who are *not* at risk of breaching the underlying obligation not to make self-interested decisions, if imposing liability on such fiduciaries will deter *other* fiduciaries from breaching the underlying obligation. As Lionel Smith argues, that is to justify the imposition of liability on fiduciaries by pointing to reasons ‘outside’ the relationship between the fiduciary and her principal.⁵⁵ And insofar as Ernest Weinrib’s assertion that ‘private law is to be understood from within’ is accepted, such a justification is no justification at all.⁵⁶ Of course, it does not follow that deterrence is not a proper goal of the law when regulating fiduciary relationships. For instance, the law may properly aim to deter wrongful conduct by fiduciaries through the imposition of disgorgement remedies or exemplary damages. However, as was pointed out in Chapter 4, such remedies presuppose fiduciary liability and supplement it with functional considerations in mind; they do not help to explain fiduciary liability itself.⁵⁷

⁵⁵ Smith, ‘The Motive, Not the Deed’, above n 41, 61.

⁵⁶ EJ Weinrib, *The Idea of Private Law* (Harvard University Press, Cambridge, Massachusetts and London, 1995) 8.

⁵⁷ For that reason, Matthew Conaglen misses the mark when he says that the remedy of exemplary damages is a fundamental part of private law even though it may not be justified by the requirements of corrective justice: ‘The Nature and Function of Fiduciary Loyalty’, above n 8, 464-5. Although the award of that remedy may be justified – perhaps on grounds of deterrence – in response to a breach of

Therefore, if it is accepted that the justification of liability for breach of the no conflict rule is non-functional, then, although the no conflict rule may have a deterrent effect because it is a prophylactic rule, deterrence is no part of the justification of its prophylactic nature. If the prophylactic nature of the rule were justified by deterrence, the rule would, to that extent, be unintelligible as a rule establishing a private law obligation whose justification is to be found in the requirements of corrective justice. By contrast, the three justifications of prophylaxis in the no conflict rule discussed above are consistent with an understanding based on the requirements of corrective justice, not only of the wrongdoing against which the rule is aimed, but also of the way in which the rule, as a rule of private law, aims against that wrongdoing.

II LOYALTY

A *The Duty of Loyalty*

It is sometimes said that a fiduciary is loyal to the extent that she is not in a position of possible conflict of interest.⁵⁸ In other words, it is said that to be loyal is to conform with the no conflict rule. Fiduciary loyalty in that sense was the concern of the last section, although that section refrained from speaking of loyalty to avoid

private law obligation, such obligation is intelligible without the remedy and therefore the remedy is not a fundamental part of private law.

⁵⁸ *Bristol and West Building Society v Mothew* [1998] Ch 1, 18 per Millett LJ; *Hilton v Barker Booth and Eastwood (a firm)* [2005] 1 All ER 651, 660-1 per Lord Walker of Gestingthorpe; Conaglen, 'The Nature and Function of Fiduciary Loyalty', above n 8.

confusion with what is dealt with in this section. This section is concerned with fiduciary loyalty in a different sense; it is concerned not with the proscriptive obligation to avoid conflicts of interest, but rather with what is sometimes called equity's prescriptive duty of loyalty. It is said that the duty of loyalty, understood as a prescriptive obligation, requires a fiduciary, *qua* fiduciary, to act in the best interests of her principal. In that sense, the duty of loyalty is said to require more than avoiding conflicts of interest;⁵⁹ it is said to require that a fiduciary protect and promote the interests of her principal in every way possible when carrying out her fiduciary responsibilities.

1 *Proscription and Prescription*

Equity prescribes fiduciary loyalty only in certain jurisdictions. In this regard, a helpful comparison may be drawn between the Canadian and the Australian approaches to the prescriptive obligation. In Canada, the Supreme Court has, over the years, shifted from an adherence to proscriptive orthodoxy to an acceptance of the prescriptive duty of loyalty. In 1958, in *Midcon Oil and Gas Ltd v New British Dominion Oil Co Ltd and Brook*, Rand J stated that

[the fiduciary relationship] creates a standard of loyalty that calls for a refined sensibility to duty, the exclusion of all personal advantage and the total

⁵⁹ Smith, 'The Motive, Not the Deed', above n 41, 60: 'There is more to loyalty than avoiding things.'

avoidance of any personal involvement in the interests being served or protected.⁶⁰

However, by 1992, Canadian jurisprudence had developed such that the Supreme Court could assert that the relationship between doctor and patient, being a fiduciary relationship, entailed a duty to act ‘with the utmost good faith and loyalty’.⁶¹ A clear contrast may be drawn between the contemporary Canadian approach and that of the High Court of Australia. In *Breen v Williams*, Gaudron and McHugh JJ stated that

in this country, fiduciary obligations arise because a person has come under an obligation to act in another’s interests. As a result, equity imposes on the fiduciary proscriptive obligations – not to obtain any unauthorised profit and not to be in a position of conflict. ... But the law of this country does not otherwise impose positive legal duties on the fiduciary to act in the interests of the person to whom the duty is owed.⁶²

That statement, which has been approved subsequently by a majority of the High Court, illustrates that not all jurisdictions accept a fiduciary duty of loyalty.⁶³

⁶⁰ (1958) 12 DLR (2d) 705, 707. Justice Cartwright concurred with Rand J’s dissenting judgment. The majority, led by Locke J (at 726), rejected the fiduciary claim because the relationship between the parties was governed by a commercial contract. On the shortcomings of that approach, see above 166-72.

⁶¹ *McInerney v McDonald* (1992) 93 DLR (4th) 415, 423 per La Forest J.

⁶² (1996) 186 CLR 71, 113. Justice Gummow (at 137-8) expressed a similar view.

⁶³ *Pilmer v The Duke Group Ltd (in liq)* (2001) 207 CLR 165, 198 per McHugh, Gummow, Hayne and Callinan J.

Whether they should depends on the justification of such a duty, which is taken up below.

In some instances, whether fiduciaries *qua* fiduciaries owe a prescriptive duty of loyalty is irrelevant, because a fiduciary's wrongdoing may be cast as a breach of a proscriptive *or* a prescriptive obligation. Two examples from the case law will serve to illustrate. In *Norberg v Wynrib*, the defendant was the plaintiff's doctor.⁶⁴ He demanded sexual favours in exchange for issuing prescriptions of an analgesic drug to which the plaintiff had become addicted. The plaintiff sued the defendant for the torts of battery and negligence, for breach of contract, and for breach of fiduciary obligation. In the Supreme Court of Canada, two judges – L'Heureux-Dubé and McLachlin JJ – decided the case as one of breach of fiduciary obligation.⁶⁵ Justice McLachlin, with whom L'Heureux-Dubé J concurred, thought that the defendant had breached an obligation to act in the best interests of the plaintiff.

The essence of the fiduciary relationship ... is that one party exercises power on behalf of another and pledges himself or herself to act in the best interests of the other.⁶⁶

⁶⁴ (1992) 92 DLR (4th) 449.

⁶⁵ (1992) 92 DLR (4th) 449, 473 and 484-507. Justices La Forest, Gonthier and Cory (at 451-73 and 484) decided the case as one of battery, and Sopinka J (at 473-484) decided it as one of either breach of contract or negligence. Given that a majority of the Court did not identify any single cause of action as the basis for the plaintiff's successful claim, the *ratio decidendi* of the case must remain a mystery.

⁶⁶ (1992) 92 DLR (4th) 449, 487.

However, it is clear from McLachlin J's judgment that she also thought that the defendant had breached the rule against conflicts of interest.

[The defendant] placed his own interest in obtaining sexual favours from [the plaintiff] in conflict with and above her interest in obtaining treatment and becoming well.⁶⁷

From that, it may be concluded that, even if Canadian courts adhered to the view that only proscriptive obligations are truly fiduciary, McLachlin J would still have found the defendant to be in breach of fiduciary obligation.⁶⁸

In *Breen v Williams* itself, the defendant, a plastic surgeon, refused to release the medical records of the plaintiff, a former patient, unless she agreed to release him from any legal claims that might arise from his treatment of her.⁶⁹ The plaintiff refused, and chose instead to sue the defendant for, *inter alia*, breach of fiduciary obligation. In the High Court of Australia, the fiduciary argument was unsuccessful. The Court left open the question to what extent the relationship between doctor and patient is fiduciary.⁷⁰ However, it was unanimous in saying that, to the extent that

⁶⁷ (1992) 92 DLR (4th) 449, 495.

⁶⁸ Incidentally, it may also be concluded that if *Norberg v Wynrib* had come before an Australian court, the action for breach of fiduciary obligation would have been unsuccessful, whether the breach was regarded as a breach of a proscriptive or a prescriptive obligation. That is because Australian courts insist that fiduciary law does not protect personal interests, like interests in bodily and sexual integrity. As I have already argued, that insistence is misplaced: see above 161-6.

⁶⁹ (1996) 186 CLR 71.

⁷⁰ (1996) 186 CLR 71, 83 per Brennan CJ, 92 per Dawson and Toohey JJ, 107-8 per Gaudron and McHugh JJ, 134 per Gummow J. Cf *Norberg v Wynrib* (1992) 92 DLR (4th) 449, 495, per McLachlin J: 'perhaps the most fundamental characteristic of the doctor-patient relationship is its *fiduciary* nature' (McLachlin J's emphasis).

such a relationship is fiduciary, it does not entail prescriptive obligations such as would require the release of a patient's medical records on request.⁷¹ As was pointed out above, *Breen v Williams* is regarded as the high water mark of the Australian orthodoxy that only proscriptive obligations are truly fiduciary.

However, the plaintiff in *Breen v Williams* did not confine herself to arguing that she was owed prescriptive obligations. She also argued that the defendant had breached the proscriptive rule against conflicts of interest, by offering to release her records only on the condition that she release him from potential legal claims. The conflict was said to be between his duty to act in the best interests of his patient, and his personal interest in obtaining the release. The Court was not convinced by the conflict argument; in fact, only one judgment – that of Gaudron and McHugh JJ – addressed it at all. Justices Gaudron and McHugh rejected it because they did not believe that the fiduciary responsibilities of the defendant entailed any duty that could have come into conflict with his personal interest, given the facts of the case.⁷² Moreover, Gaudron and McHugh JJ argued that it would be 'anomalous' if a doctor were in breach of fiduciary obligation by denying a patient access to her medical records conditionally, but were not in breach of fiduciary obligation by denying a patient access unconditionally.⁷³ In light of the wrongdoing against which the no

⁷¹ (1996) 186 CLR 71, 83 per Brennan CJ, 98 per Dawson and Toohey JJ, 108 per Gaudron and McHugh JJ, 136-7 per Gummow J. By contrast, in Canada a doctor owes her patients a prescriptive fiduciary obligation to release their medical records on request: *McInerney v MacDonald* (1992) 93 DLR (4th) 415. In England, such an obligation is unknown: *R v Mid Glamorgan Family Health Services Authority: ex parte Martin* [1995] 1 All ER 356.

⁷² (1996) 186 CLR 71, 109.

⁷³ (1996) 186 CLR 71, 109.

conflict rule is aimed, such a situation may not be anomalous at all, because a conditional denial may reveal a self-interested decision in a way that an unconditional denial may not. It follows that one reason for which Gaudron and McHugh JJ rejected the conflict argument appears to have been wrong. Nonetheless, *Breen v Williams* illustrates that, in some cases, fiduciary wrongdoing may be cast – even if unsuccessfully – as a breach of proscriptive and prescriptive obligation.

2 What is Prescribed?

Even though in some instances fiduciary wrongdoing may be cast as a breach of proscriptive and prescriptive obligation, a breach of the duty of loyalty may entail wrongdoing that does not infringe the rule against conflicts of interest. A fiduciary may fail to act in the best interests of her principal in circumstances where her own interests are not implicated in any way and in which, as a result, there is no possibility of conflict between her interests and her duty to her principal.⁷⁴ If that were not the case, it would make no sense to speak of a duty of loyalty separate from the obligation to avoid conflicts of interest. Moreover, a fiduciary may act in the best interests of her principal such that she is in breach of the no conflict rule.⁷⁵ It follows that the avoidance of conflicts is not entailed in the duty of loyalty. However, the obligation not to make self-interested decisions, which underpins the no conflict rule, is usually entailed in the duty of loyalty. A fiduciary usually fails to act in the best interests of

⁷⁴ *McInerney v McDonald* (1992) 93 DLR (4th) 415 may be read as such a case. There, a doctor refused to release a patient's medical records on ethical grounds.

⁷⁵ See, eg, *Boardman v Phipps* [1967] 2 AC 46. John Langbein argues that the no conflict rule should not apply to trustees who benefit themselves while acting in their beneficiaries' best interests: 'Questioning the Trust Law Duty of Loyalty', above n 50.

her principal by making self-interested decisions that breach that underlying obligation.⁷⁶ Because not making self-interested decisions is often an aspect of the discharge of the duty of loyalty, in jurisdictions where both the no conflict rule and the duty of loyalty are imposed on fiduciaries, the obligation not to make self-interested decisions is asserted twice in legal form.

Therefore, the duty of loyalty has a partly proscriptive effect. But what is its prescriptive content? As was pointed out above, that content is said to be an obligation to act in the best interests of the principal. It might be thought that such an obligation is always entailed in fiduciary responsibilities, in which case it is not a free-standing obligation imposed on fiduciaries *qua* fiduciaries, but is rather one aspect of that which makes a relationship fiduciary. However, it is not the case that fiduciary responsibilities always entail an obligation to act in the best interests of the principal; sometimes they do, such as where the fiduciary has consented to such an obligation, but sometimes they do not. It is possible to have fiduciary responsibilities, entailing duties to protect and promote the interests of the principal, without those duties including an obligation to act in the best interests of the principal.

Clark Boyce v Mouat was such a case.⁷⁷ There, a solicitor acted for a mother in the mortgage of her house to secure a loan for the purpose of financing her son's expenses. The son was subsequently declared bankrupt, leaving his mother to repay

⁷⁶ But not necessarily. For instance, a fiduciary may be motivated, in all her actions *qua* fiduciary, by the desire to improve her reputation, and such a motivation may lead her to act in the best interests of her principal. In Chapter 2, a similar point was made using the example of the person who justifies a trustor's trust in order to prove trustworthy to others: see above 106 n 19.

⁷⁷ [1994] 1 AC 428.

the loan plus interest. The mother sued her solicitor for failing to advise her that agreeing to the mortgage was not in her best interests. The Judicial Committee of the Privy Council held that the solicitor had not breached any fiduciary obligation. Lord Jauncey of Tullichettle, for the Committee, held that, because the mother had not instructed her solicitor to advise her with respect to what was in her best interests, the solicitor was not in breach of fiduciary obligation for failing to do so.⁷⁸ The Committee's opinion reflected the fact that the solicitor's fiduciary responsibilities were to carry out his client's instructions with care and skill and nothing more. To carry out a client's instructions with care and skill is to promote her interests, to the extent that the client has an interest in her instructions being carried out. However, to carry out a client's instructions with care and skill does not entail otherwise acting in her best interests, for instance by advising her that she has options other than her plans on which she seeks advice, or, as was the case in *Clark Boyce v Mouat*, by advising her that her interests may not best be served by her plans.

Therefore, a duty requiring a fiduciary to act in the best interests of her principal may not be distilled from fiduciary responsibilities. However, there is way of understanding the duty of loyalty other than saying that it requires a fiduciary to act in the best interests of her principal. According to that other understanding, the duty of loyalty does not require a fiduciary to *do* anything. What a fiduciary is required to do is established by the duties entailed in her fiduciary responsibilities and the obligation underlying the no conflict rule. Instead, the duty of loyalty requires a fiduciary to

⁷⁸ [1994] 1 AC 428, 437-8. The mother also alleged that her solicitor had breached a fiduciary obligation owed to her by failing to disclose that another solicitor had refused to act in the matter. Lord Jauncey of Tullichettle held (at 437-8) that such information was not material and that as a result there was no obligation to disclose it.

carry out her fiduciary responsibilities *in a certain way*. That is the gist of an important essay on the duty of loyalty by Lionel Smith.⁷⁹ Smith locates the ‘heart’ of the duty of loyalty in what he calls ‘the surveillance and the justiciability of motive.’⁸⁰

Whatever powers a fiduciary has, he must exercise them (or not exercise them) with a particular motive. He must act (or not act) in what *he perceives to be* the best interests of the [principal].⁸¹

Smith finds support for his account of the duty of loyalty as a duty requiring that a fiduciary act with a certain motive in trusts law doctrines relating to what is often called ‘fraud on a power’ and in company law doctrines relating to the exercise of directorial powers for ‘proper purposes’.⁸²

The grounds on which Smith bases his argument are not explored here. Instead, the focus is on how his way of understanding the duty of loyalty resolves problems in identifying the prescriptive content of that duty. First, Smith’s argument is capable of explaining why all fiduciaries have the duty of loyalty, if it is married to the argument that all fiduciaries have responsibilities to which that duty may attach.⁸³ Chapter 3 makes such an argument, because it states that having responsibilities is a necessary

⁷⁹ Smith, ‘The Motive, Not the Deed’, above n 41.

⁸⁰ Ibid, 67.

⁸¹ Ibid (Smith’s emphasis).

⁸² Ibid, 67-72.

⁸³ Although it must be acknowledged that Smith regards consent as that which makes a relationship fiduciary: *ibid*, 54.

ingredient in what makes a relationship fiduciary. Secondly, because the duty of loyalty, according to Smith, requires that a fiduciary carry out whatever responsibilities she has *qua* fiduciary with a specific motive, its content is the same for all fiduciaries, even though the responsibilities to which it attaches differ from case to case. Smith's account, because it explains why all fiduciaries have a duty of loyalty with the same content, goes some way to explaining how a duty of loyalty may be said to be 'peculiar to fiduciaries'.⁸⁴ However, it does not go all the way, because it does not explain why *any* and why *only* fiduciaries have such a duty. That requires an account of what justifies the imposition of a duty of loyalty on fiduciaries, which is the subject of the next section.

Thirdly, Smith's argument is consistent with the fact that fiduciary responsibilities sometimes entail an obligation to act in the best interests of the principal and sometimes do not. In light of that argument, *Clark Boyce v Mouat* may be explained as a case in which a fiduciary was properly motivated when carrying out his fiduciary responsibilities, but in which those responsibilities did not entail an obligation to act in the best interests of his principal. That leaves cases where fiduciary responsibilities do entail an obligation to act in the best interests of the principal, say because the fiduciary in question has consented to such an obligation. There, it may be said in light of Smith's argument that, although the duty of loyalty requires only proper motive, that duty has no practical work to do because it has been superseded by the voluntary undertaking of a more onerous obligation whose discharge is measured, not by motive, but by results.

⁸⁴ *Bristol and West Building Society v Mothew* [1998] Ch 1, 16 per Millett LJ.

The duty of loyalty, as it is understood by Smith, is capable of helping to explain and justify several rules. One is the no conflict rule. Indeed, Smith argues that the no conflict rule is justified to the extent that it supports the duty of loyalty.⁸⁵ That is true, assuming that the duty of loyalty is itself justified. However, as this chapter argues, the no conflict rule is better justified with reference to the underlying obligation not to make self-interested decisions. The duty of loyalty may also be supported by a rule that requires a fiduciary to act, not in what she perceives to be the best interests of her principal, but in what a court determines, *ex post facto*, to have been the best interests of that principal. Such a rule appears to be currently in operation in jurisdictions, like Canada, where the duty of loyalty is recognised. Like the no conflict rule, it is prophylactic; it supports the duty of loyalty by impugning a range of behaviour wider than that which fails to discharge the duty. If such a rule is to be adopted, it might best operate as a rebuttable presumption. Thus, when a court determines that a fiduciary has not acted in what the court regards as the best interests of the principal, the fiduciary's motive is presumed to be other than that prescribed by the duty, but the presumption may be rebutted by the fiduciary leading evidence to show that her motive was correct, even if her choices have failed to benefit the principal.

B *Justifying the Duty of Loyalty*

The duty of loyalty is not explained or justified by the fiduciary principle set out in Chapter 3. According to that principle, a relationship is fiduciary to the extent that, by

⁸⁵ Smith, 'The Motive, Not the Deed', above n 41, 73-80.

exercising discretion to affect a person's interests, another person is able to carry out some responsibility that she has, the purpose of which is to benefit the first person. Because the nature of the fiduciary opportunity may be understood in light of that principle, the principle, along with the Kantian insight, helps to justify the obligation underlying the no conflict rule. However, a fiduciary does not owe the duty of loyalty because she has the fiduciary opportunity. That is because the fiduciary principle does not demand that the fiduciary opportunity be used only in the best interests of the principal. It demands that the fiduciary opportunity be used selflessly, and for the purpose of benefiting the principal, but it demands nothing more than that. For example, it does not demand that fiduciaries achieve a standard of care when using the fiduciary opportunity to discharge their responsibilities as fiduciaries. Often, fiduciaries must achieve a standard of care when using the fiduciary opportunity – both with respect to their principals' interests and with respect to the interests of others – but they are not required to do so *qua* fiduciaries.

Because the fiduciary principle does not explain and justify the duty of loyalty, liability for breach of that duty may not be understood in terms that are internally intelligible to private law, terms that refer to the nature of the fiduciary relationship itself. That may be why some courts, especially in Australia, refuse to accept that the duty of loyalty is a truly fiduciary obligation.⁸⁶ However, the Introduction foreshadowed that this chapter would not seek the explanation and justification of the duty of loyalty with reference to a fiduciary principle. Instead, it was pointed out that

⁸⁶ *Breen v Williams* (1996) 186 CLR 71, 113 per Gaudron and McHugh JJ, 137-8 per Gummow J; *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165, 198 per McHugh, Gummow, Hayne and Callinan J.

the duty of loyalty may be explained and justified, in functional terms, with reference to the point of fiduciary regulation. In Chapter 4, it was argued that the point of fiduciary regulation is revealed by two of its aims. First, fiduciary regulation aims to support the development of trusting relationships, in pursuit of valuable goals, between fiduciaries and their principals. Secondly, fiduciary regulation aims to secure the autonomy of individuals by ensuring that principals who do not trust their fiduciaries still rely on, and thereby cooperate with, those fiduciaries, again in pursuit of valuable goals. One way in which fiduciary regulation achieves those aims is by guaranteeing the trustworthiness of fiduciaries: through the imposition of legally enforceable fiduciary obligation, principals have a degree of assurance that their fiduciaries will act in the same way as trustworthy people act.

The duty of loyalty helps to guarantee the trustworthiness of fiduciaries, and, to that extent, it may be explained and justified in light of the point of fiduciary regulation. The duty of loyalty requires that fiduciaries, when deliberating about which options to choose in carrying out fiduciary responsibilities, turn their minds to the question of what is in the best interests of their principals, form a view on that matter, and make choices in light of that view. In Chapter 2, it was argued that to be worthy of trust is to be disposed to respond to trust appropriately and actually to respond appropriately to trust that has been reposed in one and of which one is aware. Assume that a principal trusts her fiduciary to carry out the responsibilities – entailing the exercise of discretion to affect the interests of the principal – that characterise their relationship as fiduciary, and assume that the fiduciary knows that fact. What is the appropriate response to such trust? That depends on all the circumstances in which the trust has been reposed. In some circumstances it may entail nothing more than carrying out the

responsibilities in question. In other circumstances, such as where the principal's trust has been reposed in response to a promise of the fiduciary, it may entail the manifestation of an attitude of respect for the principal. It may even entail manifesting an attitude like friendship, if the relationship between the fiduciary and her principal is a friendly one.

By requiring that a fiduciary be motivated by what she perceives to be the best interests of her principal, the duty of loyalty guarantees that the fiduciary's motive will be consistent with any appropriate response to trust that a principal might repose in her fiduciary *qua* fiduciary. That is not to say that in each case where a principal trusts her fiduciary, the appropriate response to that trust entails having the motive entailed in the duty of loyalty. Only in some cases is having that motive entailed in the appropriate response to a principal's trust. For instance, if I am a solicitor, and you trust me to provide you with advice on a legal matter, the appropriate response to your trust may entail being motivated by my beliefs about your rights and obligations in the matter and the ethical requirements and standards of the legal profession, and not by my perception of what is in your best interests. The duty of loyalty guarantees a level of trustworthiness higher than is always appropriate. However, because it applies in the same way to all fiduciary relationships, the duty of loyalty must set its guarantee at some level, and the height of the level at which the guarantee is set ensures that trustworthiness is guaranteed in all cases, and not only in some, or even in typical, cases.

Earlier, it was argued that asking what justifies the imposition of a duty of loyalty on all fiduciaries entails asking why *any* and why *only* fiduciaries have such a duty.

Because the duty of loyalty guarantees the trustworthiness of fiduciaries, and to that extent serves the point of fiduciary regulation, the imposition of the duty on any given fiduciary is justified in functional terms. However, because the duty of loyalty is not explained or justified with reference to a fiduciary principle, there appears to be no reason why that duty ought to be imposed only on fiduciaries and not also on non-fiduciaries. For the law may guarantee the trustworthiness of individuals, including by imposing a duty of loyalty on them, in order to serve its proper goals and purposes with respect to relationships other than fiduciary relationships. Moreover, the law may properly pursue the aims of supporting trusting relationships and supporting autonomy by enabling reliance and cooperation in the absence of trust beyond the fiduciary setting. To that extent, the duty of loyalty is not ‘peculiar to fiduciaries’ in the sense meant by Millett LJ in *Bristol and West Building Society v Mothew*.⁸⁷

The duty of loyalty is, however, peculiar to fiduciaries in a broader sense. Because, as was argued in Chapter 4, the fiduciary relationship is analogous to relationships characterised by entrusting, the law’s aim of supporting trusting relationships is likely to be pursued particularly effectively in the fiduciary setting. The analogy suggests that non-trusting fiduciary relationships are, with proper support, relatively likely to become trusting over time. Guaranteeing the trustworthiness of fiduciaries, including by imposing on them a duty of loyalty, is thus more likely, on the whole, to support trusting relationships than is guaranteeing the trustworthiness of non-fiduciaries. The functional justification of the duty of loyalty being strong in the fiduciary setting, it

⁸⁷ [1998] Ch 1, 16.

may be asserted reasonably that, in light of the point of fiduciary regulation, the duty is peculiarly, or especially, a fiduciary one.

C Loyalty or Altruism?

In his Lionel Cohen lecture, delivered in 2000 at the Hebrew University of Jerusalem, Peter Birks examined the content of fiduciary obligation.⁸⁸ In that lecture, Birks argued that a trustee has an obligation to act in the interests of her beneficiary and that, by analogy, a fiduciary has an obligation to act in the interests of her principal.⁸⁹ Such a prescriptive obligation is similar to what, in this chapter, is called a duty of loyalty. However, Birks expressed disquiet about whether the word ‘loyalty’ best captures what is entailed in the obligation. Beyond saying that loyalty entails a trustee being ‘on his beneficiary’s side’, Birks did not explain what he took loyalty to mean, nor what it denotes in the fiduciary setting.⁹⁰ However, he argued that the word ‘altruism’ better describes what is required prescriptively of fiduciaries.⁹¹ Drawing on the analysis of loyalty in Chapter 2, this section aims to explain why Birks might have felt disquiet about the use of the word ‘loyalty’ to describe the prescriptive obligation. However, it also argues that the prescriptive obligation may not be described best as one of altruism, and that another descriptor may be needed.

⁸⁸ The lecture was published as Birks, ‘The Content of Fiduciary Obligation’, above n 41.

⁸⁹ *Ibid*, 11. According to Birks, the adjective ‘fiduciary’ indicates nothing more than that the obligation is trustee-like, a view which, although etymologically correct, is apt to mislead: see above 176-7. At the end of his lecture (at 38), Birks argued that what is needed is a description of the facts which will justify the imposition of such trustee-like obligations; in other words, a description of what makes a relationship fiduciary. In Chapter 3, I attempted such a description.

⁹⁰ *Ibid*, 12.

⁹¹ *Ibid*.

In Chapter 2, it was argued that loyalty is true commitment to a relationship, and that a person is truly committed to a relationship when she acts in conformity with the normative dimensions of that relationship. The normative dimensions of a relationship are constituted by all the reasons for action that are entailed in being in the relationship in question. What are the normative dimensions of a fiduciary relationship? According to the fiduciary principle set out in Chapter 3, a relationship is fiduciary to the extent that one person has responsibilities the purpose of which is to benefit another, which responsibilities entail exercising discretion to affect the interests of that other. The normative dimensions of such a relationship include the obligation not to make self-interested decisions that underlies the rule against conflicts of interest. However, they include other reasons as well. The fact that a person has a responsibility is itself a reason for carrying out that responsibility.⁹² Where the purpose of the responsibility in question is to benefit another, having the responsibility is a reason for carrying it out for that purpose. It follows that one of the normative dimensions of a fiduciary relationship is that a fiduciary has a reason, because she has responsibilities the purpose of which is to benefit her principal, to carry out those responsibilities for that purpose.

By carrying out her fiduciary responsibilities for their purpose, a fiduciary conforms with one of the normative dimensions of fiduciary relationships. To that extent, she

⁹² That is true even if the person in question has a second responsibility, the carrying out of which makes carrying out the first responsibility impossible. Such a person may be unable to conform fully with all the reasons that apply to her: see generally J Raz, 'Personal Practical Conflicts' in P Baumann and M Betzler (eds), *Practical Conflicts: New Philosophical Essays* (Cambridge University Press, Cambridge, 2004) 172. In the fiduciary setting, the rule against conflicts of interest aims to ensure that such a situation never arises, by prohibiting the fiduciary assuming the second responsibility or compelling her to withdraw from the first.

may be called loyal.⁹³ Because the purpose of fiduciary responsibilities is to benefit the principal, a loyal fiduciary carries out those responsibilities for the reason that her principal's benefit will thereby be secured. It follows that a loyal fiduciary usually carries out her fiduciary responsibilities in what she perceives to be the best interests of her principal, because the principal's benefit is most likely to be secured through the pursuit of her (the principal's) best interests. Carrying out fiduciary responsibilities in that way is precisely what the duty of loyalty prescribes; to that extent, it might be thought that the duty of loyalty is aptly named, because it tracks what loyalty entails in a moral sense. However, and crucially, the loyal fiduciary does not carry out her fiduciary responsibilities in what she perceives to be the best interests of her principal for the reason that she has an obligation to do so. To the extent that a fiduciary is so motivated for the reason that is her duty of loyalty, she does not conform with the reason that she has, *qua* fiduciary, to be so motivated for the reason that is that her principal's benefit will be thereby secured.⁹⁴ And to that extent, she does not conform with all the normative dimensions of a fiduciary relationship and may not be described accurately as loyal.

Given what loyalty entails, to be motivated in the way required by the duty of loyalty because it is required by the duty of loyalty is to be less than fully loyal. Earlier, it

⁹³ Whether she thereby proves loyal is another question, depending on whether her actions are interpreted as the actions of a loyal fiduciary. See above 145-9.

⁹⁴ The duty of loyalty is itself a normative dimension of fiduciary relationships. Therefore, the loyal fiduciary acts in conformity with it. Where a fiduciary is motivated by what she perceives to be her principal's best interests for the reason that they are – to her, at least – the principal's best interests, and not for the reason that she has an obligation to be so motivated, she conforms with her duty of loyalty. By contrast, the loyal fiduciary simply cannot conform with the reason that she has to carry out her responsibilities for the reason that is that her principal's benefit will be thereby secured while at the same time being motivated in the way prescribed by the duty only because it is prescribed by the duty.

was argued that the duty of loyalty helps to guarantee the trustworthiness of fiduciaries. Another way of putting that is to say that the duty of loyalty guarantees that fiduciaries who are not loyal – in that they do not conform with all the normative dimensions of a fiduciary relationship – are motivated as if they were loyal. That may be why Birks felt disquiet about the description of the prescriptive obligation as a duty of loyalty. The duty is not a duty of loyalty; it is a duty in place of loyalty.

In his Lionel Cohen lecture, having questioned whether ‘loyalty’ was the best descriptor of the prescriptive obligation, Birks expressed his preference for describing the obligation as a duty of altruism. Birks defined altruism as ‘action in the interests of another or the disposition to act in the interests of another.’⁹⁵ He then distinguished between what he called ‘normative’ and ‘mechanical’ altruism: the first implies the capacity to make choices; the second does not and is, in a basic sense, ‘dictated by the chemistry of the body’.⁹⁶ Birks identified two types of normative altruism: that which is urged by morality; and that which is required by law.⁹⁷ According to Birks, although the altruism required by law may be classified as normative, it is largely altruism of a mechanical type. That is because Birks thought that the altruism required by the law is largely a matter of results, not motives.⁹⁸ Having isolated the altruism required by law, Birks then identified the altruism specifically required by the prescriptive duty of loyalty – what he called the ‘third degree of obligatory

⁹⁵ Birks, ‘The Content of Fiduciary Obligation’, above n 41, 14.

⁹⁶ *Ibid*, 14.

⁹⁷ *Ibid*, 15-6.

⁹⁸ *Ibid*, 16-7.

altruism’ – as requiring positive action in the interests of another person and selflessness.⁹⁹

This chapter has argued that the duty of loyalty requires that fiduciaries carry out their fiduciary responsibilities with a certain motive. If that argument is accepted, the duty of loyalty prescribes what Birks would call normative, rather than mechanical, altruism: altruism by choice and not by results.¹⁰⁰ Once that is recognised, the utility of Birks’ description may be called into question. What Birks called normative altruism is a matter not only of motivations but also of dispositions. As Thomas Nagel writes, altruism depends on the ‘recognition of the reality of other persons, and on the equivalent capacity to regard oneself as merely one individual among many.’¹⁰¹ A fiduciary obligation that prescribed such a disposition would prescribe too much, because prescriptive fiduciary obligation is justified to the extent that it guarantees the trustworthiness of fiduciaries, and trustworthy fiduciaries may be motivated properly without having the disposition that underlies altruism. For example, a trustworthy fiduciary may be motivated properly because she is friendly with or feels special empathy for her principal. She need not be disposed to recognise the reality of other

⁹⁹ Ibid, 20-22. According to Birks (at 17-9), the ‘first degree’ of obligatory altruism requires that one refrain from harming others. The duty of care is such a requirement. The ‘second degree’ of obligatory altruism requires that one act for the benefit of others. Birks (at 19-20) cites as an instance the duty to rescue, long denied by the common law but argued for by scholars: see, eg, E Weinrib, ‘The Case for a Duty to Rescue’ (1980) 90 *Yale Law Journal* 247. Birks does not regard the duty of loyalty as an example of obligatory altruism in the second degree because he argues that it entails selflessness. That pushes it into the third degree. I think that, if Birks’ classification is to be used, the duty of loyalty is an example of obligatory altruism in the second degree only, because it does not entail the avoidance of conflicts and it may be discharged by a fiduciary who pursues her own interests as well as those of her principal. Of course, such a fiduciary would be in breach of the no conflict rule but, unlike Birks, I argue for a justification of that rule independent of the duty of loyalty.

¹⁰⁰ Strictly, altruism by motive, not results, but normative altruism nonetheless.

¹⁰¹ T Nagel, *The Possibility of Altruism* (paperback edn, Princeton University Press, Princeton, 1978) 3.

persons – as opposed, say, to being egocentrically disposed to regard them as reflections of her own personality – nor need she be disposed to regard herself as an individual among many others, each of whom has interests that she may take as a reason to act, in order to be worthy of her principal's trust.¹⁰²

Birks argued that '[t]hings are ... not understood unless they are articulately differentiated from others which they closely resemble.'¹⁰³ Heeding his advice, and bearing in mind his exhortation that things should be said in as many different ways as possible,¹⁰⁴ some tentative conclusions may be drawn about how the duty of loyalty is best described. First, it may be described as a prescriptive obligation, because it requires a fiduciary to be motivated in a certain way. Secondly, the word 'loyalty' expresses what it is about only to a certain degree. That is because the duty is really one in place of loyalty, not one of loyalty. Thirdly, the word 'altruism' may be invoked because it points to the other-regarding nature of the obligation, as one that prescribes that a fiduciary be motivated by what she perceives to be the best interests of another. However, the obligation is not one of altruism – at least not in the normative sense – because it does not prescribe the dispositions that are entailed in that phenomenon. Those tentative conclusions suggest that another descriptor may be

¹⁰² Moreover, it is not clear whether an obligation to have a disposition is ever justified. The duty of loyalty prescribes a motive by requiring that a fiduciary turn her mind to the question of what is in the best interests of her principal, form a view on that matter, and choose in light of that view. All of that is within the capacity of a rational agent. To prescribe a disposition is to require that a fiduciary be motivated in light of certain background beliefs and attitudes. In the Introduction, it was pointed out that those who argue for an obligation to trust must explain how a person can have an obligation to decide to acquire or shed such attitudes or beliefs. The same is true of those who argue for an obligation to be normatively altruistic.

¹⁰³ Birks, 'The Content of Fiduciary Obligation', above n 41, 12.

¹⁰⁴ In that exhortation, Birks followed Isaiah Berlin: *ibid.*, 7.

needed. One plausible candidate is ‘partiality’, but whether the prescriptive fiduciary obligation is best described as a duty of partiality is a topic for another day.

CONCLUSION

I THE THESIS IN BRIEF

In exploring its two themes – trust and the fiduciary – this thesis pursued three aims. The overarching aim of the thesis was to consider to what extent, and in what ways, the fiduciary relationship is a relationship of trust or a relationship in the characterisation of which trust may play a role. The pursuit of that overarching aim required some understanding of what a relationship of trust is, of what a fiduciary relationship is, and of that which is entailed, in morality and in law, in trusting and fiduciary relationships. Hence the other two aims of the thesis. First, the thesis aimed to provide some analysis of trust, and responses to trust, from the moral point of view. Secondly, it aimed to identify a fiduciary principle, and to explain how fiduciary obligation might be justified.

In light of those aims, Chapter 1 introduced the phenomenon of trust as an attitude of optimism about the choices that people will make. Taking that simple conception of attitudinal trust as a starting point, the chapter explored what people believe in light of trust. It considered trusting expectations, which are beliefs about what will happen in the future that are accompanied by a trusting attitude. Many such beliefs may be arranged usefully according to themes; they may be based on perceptions of good will, roles, relationships, integrity and interests. Building on a sophisticated conception of trust as a matter of attitudes and expectations, the chapter then discussed what people do in light of trust. It was argued that trust may realise its potential as a building block of interpersonal relationships when it is manifested in

action. Certain actions – like acts of delegation and coercive actions – are ill-suited to manifesting trust. Others – like reliance accompanied by trust, which Chapter 1 called entrusting – are well-suited to manifesting trust, whether they occur in response to invitations or inducements to trust, or are initiatives of the truster. The chapter concluded by considering why it is important to manifest trust in action: it enables cooperation as well as the development of relationships characterised by a cycle of trust and trustworthiness. Such relationships, in pursuit of valuable aims, are intrinsically valuable.

The analysis of trust presented in Chapter 1 formed the foundation for Chapter 2, which explored responses to trust. The chapter arranged such responses according to four themes: disappointment of trust, betrayal, justification of trust, and loyalty. The chapter recognised that evaluating responses to trust must take into account their highly situation-specific nature, but concluded that in no situation does the fact that A trusts B to do X mean that B owes A an obligation to do X. Moreover, such obligations as B has derive normative force from sources other than the fact of A's trust, such as the requirements of respect, the principle that one must keep one's promises, and the principle forbidding unjustified manipulation. However, Chapter 2 also considered one obligation which, although it does not derive normative force from the fact of trust, may not be explained without reference to trust: the obligation not to betray a truster by abusing her trust and thereby using her. Chapter 2 then explored the ways in which justifying trust – and being and proving trustworthy – may contribute to the cycle of trust and trustworthiness. The chapter concluded by arguing that proving loyal, where that entails manifesting true commitment to a

trusting relationship, may make contributions to the cycle of trust and trustworthiness that proving trustworthy may not make.

Chapters 1 and 2 addressed one aim of the thesis: to provide some analysis of trust, and responses to trust, from a moral point of view. Chapter 3 addressed another aim of the thesis: to identify a fiduciary principle. The chapter sought an answer to the question, ‘What makes a relationship fiduciary?’ It sought an answer that is consistent with Ernest Weinrib’s view that private law obligation – including fiduciary obligation – is to be understood in terms of the requirements of corrective justice. To that end, accounts of the fiduciary relationship that depend on notions of consent and reasonable expectation were examined and found unsatisfying. So were attempts by judges to limit the scope of fiduciary principles in cases where relationships were characterised by arm’s length dealing or where plaintiffs sought to invoke fiduciary principles to protect personal interests. Chapter 3 proposed and defended a fiduciary principle that states that a relationship is fiduciary to the extent that one person, by exercising discretion to affect the interests of another person, is able to carry out some responsibility the purpose of which is to benefit that other person. The chapter explored the notions of discretion and responsibility which figure in that principle, considering the theories of fiduciary discretion of Weinrib and JC Shepherd, and drawing on the account of role responsibility developed by HLA Hart.

The stage was then set for Chapters 4 and 5, which drew together the analysis of trust and responses to trust of Chapters 1 and 2, and the analysis of the fiduciary principle based on discretion and responsibility of Chapter 3, when considering the extent to which the fiduciary relationship has trust at its core. Chapter 4 sought to answer the

question, 'Why make a relationship fiduciary?', by identifying the point of fiduciary regulation. Unlike Chapter 3, Chapter 4 did not attempt to reconcile its analysis with the view of private law held by corrective justice theorists like Weinrib. Instead, the chapter adopted a functionalist perspective, asking which of the proper goals and purposes of the law are pursued through the regulation of fiduciary relationships. The chapter argued that some functional considerations affect fiduciary liability adjectivally, irrespective of what justifies the imposition of such liability. These include parliamentary sovereignty, the autonomy of individuals, and the desirability of deterring wrongful conduct. Other functional considerations may be described as constituting the point, in one sense, of fiduciary regulation. Chapter 4 argued that, in light of such considerations, it may be said that the fiduciary relationship has trust at its core. Through fiduciary regulation, the law properly pursues its goal of supporting the development of trusting relationships, both where principals trust their fiduciaries and where principals do not trust their fiduciaries. The chapter explored each type of case. The chapter then considered another goal underlying fiduciary regulation: securing the autonomy of individuals. Fiduciary regulation guarantees the trustworthiness of fiduciaries, which gives principals a reason to rely on and thereby cooperate with their fiduciaries whether or not they trust those fiduciaries. Fiduciary regulation thus widens the range of options available to both trusting and non-trusting principals.

In Chapter 5, two fiduciary obligations were considered: that established by the rule against conflicts of interest, and the duty of loyalty. The no conflict rule, which is the centrepiece of fiduciary regulation, was analysed with the requirements of corrective justice in view, and in light of the fiduciary principle developed in Chapter 3. The

chapter concluded that the no conflict rule is a prophylactic overlay for an underlying obligation not to make self-interested decisions *qua* fiduciary. The ways in which a fiduciary might make self-interested decisions were explored. It was concluded that how a fiduciary, *qua* fiduciary, may breach the obligation underlying the no conflict rule has not necessarily to do with disappointing or betraying trust, but rather has to do with making impermissible use of the fiduciary position and the opportunities that it affords. The duty of loyalty, which is not recognised in all jurisdictions, was analysed with reference to the point of fiduciary regulation discussed in Chapter 4. Drawing on the work of Lionel Smith, the chapter concluded that the duty of loyalty is a duty to be motivated in a certain way when carrying out fiduciary responsibilities. It therefore guarantees the trustworthiness of fiduciaries and is, at least in jurisdictions where it is recognised, one way in which the law may pursue the goals of fiduciary regulation. However, Chapter 5 argued that a duty of loyalty may be owed by those who are not fiduciaries. Therefore, it may be described as a fiduciary obligation only in the sense that its imposition on fiduciaries is a particularly effective way for the law to fulfil its goals of supporting trusting relationships and securing the autonomy of individuals.

II EPILOGUE

In the Prologue, the themes of trust and the fiduciary were introduced in intuitively plausible ways through two stories. The stories were to function as criteria against which theoretical understandings of trust and the fiduciary might be assessed. They were to contribute to the methodology of reflective equilibrium that underlies this thesis, moderating the thesis's top down approach to the principles of law that

constitute part of its subject matter. It is to be hoped that the combination of top down reasoning and sensitivity to the requirements of reflective equilibrium has been appropriately deployed, so that neither theoretical insight nor intuitive judgment has been sacrificed unduly. If that is the case, to reread the stories in the Prologue in light of the thesis should prove illuminating; rather than obfuscating what seems clear and denying what seems certain, the thesis should, on the whole, help to explain why clarity and certainty are justified where they are felt, and why they are not justified where they are not felt. Judging the success of the methodological aims of the thesis is, to that extent, a matter for each individual reader.

In pursuing its three substantive aims, the thesis offers some arguments about the philosophical foundations of fiduciary law, and the title of the thesis reflects that fact. However, an Epilogue seems the appropriate place to point out that the thesis does not aim to provide a complete theory of fiduciary law, and that there is much about fiduciary relationships and obligation which may be understood better in light of philosophical analysis, but which the thesis does not address. Examples include the distinction (if there be one) between a duty of loyalty and a duty to act in good faith, and the justifications of remedies that are commonly imposed on defaulting fiduciaries. This thesis aims to fill just one gap in the study of the philosophical foundations of fiduciary law. However, given the frequency with which the assertion is made, particularly by courts, that the fiduciary relationship has trust at its core, the gap that the thesis fills is a considerable one. In concluding that the assertion is true, but only in some ways, in some cases and from certain points of view, the thesis makes a contribution to understanding the role played by a universal human phenomenon in a significant category of legal relationship. And if, as a consequence,

some light is shed on two often misunderstood concepts – trust and the fiduciary – so much the better.

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