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DIRECTORS AND FIDUCIARY DUTIES: THE STORY OF NOCTON V LORD ASHBURTON

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Introduction

The expression 'fiduciary duty' can be used with almost careless abandon. Perhaps nowhere is it in more common parlance than in relation to the duties of directors. Attaching the description 'fiduciary' to a particular duty can have serious consequences. And yet, some doubts have been expressed concerning whether the most common duty which is owed by directors is a fiduciary duty or not.

In this speech I will tell a story. It is the story of the litigation in a case called *Nocton v Lord Ashburton*. The case can lay fair claim to being the genesis of the modern law of fiduciary duties. Although it did not concern directors of a company the case may, in the future, assume significance in answering the question of whether the duties of a director are fiduciary duties.

But before I tell that story, I will explain a little history to the question of whether a director's duty of care and skill is a fiduciary duty, and why the question matters.

* My thanks to Long Pham for research assistance for this paper.

A director's duty of care and skill

Perhaps the most commonly litigated breach of duty by a director concerns the director's duty of care and skill. The liability of directors for breach of a duty of care and skill has existed for more than 250 years. In 1742 in *Charitable Corporation v Sutton*,¹ a bill was brought against members of a committee (the equivalent of directors) of the Charitable Corporation, which engaged in lending secured by pledge. The defendants were held liable for *crassia negligentia* for a variety of breaches in neglecting the business of the corporation.

A director's duties of care and skill in Australia have a statutory foundation. But they are not confined to statutory duties. Section 180(1) of the Corporations Act 2001 (Cth) provides as follows

Care and diligence--directors and other officers

- (1) A director or other officer of a corporation must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they:
- (a) were a director or officer of a corporation in the corporation's circumstances; and
 - (b) occupied the office held by, and had the same responsibilities within the corporation as, the director or officer.

This duty of care and skill of a director's is a duty which is owed to the company by both executive and non-executive directors. However, the nature of the duty will not necessarily be the same. Unlike a managing director, non-executive directors are not bound to give their continuous attention to the affairs of the corporation.² Their duties vary according to the nature of the company and the nature of the business activity. The duties have been described as being 'of an intermittent nature to be performed at periodic board meetings, and at meetings of any committee of the board upon which the director happens to be placed.'³

A recent case which considered the liability of non-executive directors for breach of their duties of care and skill was *Australian Securities and Investments Commission v Hellicar*.⁴ James Hardie Industries, and its subsidiaries, had manufactured and sold asbestos products. An announcement was sent to the Australian Stock Exchange by James Hardie Industries that conveyed the impression that a Medical Research and Compensation Foundation established by James Hardie Industries was fully funded. It was not. Claims were brought by the Australian Securities and Investments Commission against executive and non-executive directors of James Hardie Industries Ltd.

The claims against five of the non-executive directors (Mr Brown, Ms Hellicar, Mr O'Brien, Mr Terry and Mr Willcox) were based upon the fact that they approved a draft ASX announcement which conveyed, or was capable of conveying, four statements which each director ought to have known were misleading. In the New

¹ (1742) 2 Atk 400; 9 Modern 349.

² *AWA Ltd v Daniels* (1992) 7 ACSC 395 (Rogers CJ Comm Div). Approved in *Vrisakis v Australian Securities Commission* (1993) 9 WAR 390, 452 (Ipp J); *Streeter v Western Areas Exploration Pty Ltd (No 2)* [2011] WASCA 17, [451] (Murphy JA).

³ *AWA Ltd v Daniels* (1992) 7 ACSC 759, 867.

⁴ [2012] HCA 17.

South Wales Court of Appeal it was held that those five were not liable because ASIC had failed to prove that the draft announcement had been tabled and approved at the board meeting.⁵ On appeal the High Court rejected this conclusion and held that the directors were liable.

A separate appeal was brought by Mr Shafron, who was the general counsel and company secretary of James Hardie.⁶ The High Court upheld the finding of the New South Wales Court of Appeal that Mr Shafron had breached his statutory duty of care, skill and diligence under s 180 of the Corporations Act. In a joint judgment, French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ said of the duty of care and diligence that it includes *whatever* responsibilities the officer concerned had within the corporation, regardless of how or why those responsibilities came to be imposed on that officer.⁷

Is the director's duty of care and skill a fiduciary duty?

In *Permanent Building Society (in liq) v Wheeler*,⁸ Ipp J (with whom Malcolm CJ and Seaman J agreed) said that '*a director's duty to exercise reasonable care, though equitable (as well as legal) is not a fiduciary obligation*'.⁹ In saying this, Ipp J followed the lead of Southin J, La Forest J and Sopinka J in Canada.¹⁰

This obiter dictum¹¹ of Ipp J has been referred to with approval in a number of Australian,¹² English¹³ and New Zealand¹⁴ cases.

In contrast with other English cases, in one decision of the House of Lords in 1995, Lord Browne-Wilkinson, whilst accepting that a director's duty of care and skill is no different from any common law duty of care and skill,¹⁵ described the director's duty as fiduciary.¹⁶

⁵ [2010] NSWCA 331.

⁶ *Shafron v Australian Securities and Investments Commission* [2012] HCA 18.

⁷ *Shafron v Australian Securities and Investments Commission* [2012] HCA 18 [18].

⁸ (1994) 11 WAR 187, 237.

⁹ (1994) 11 WAR 187, 238.

¹⁰ *Girardet v Crease & Co* (1987) 11 BCLR (2d) 361, 362 (Southin J); *LAC Minerals Ltd v International Corona Resources Ltd* (1989) 61 DLR (4th) 14, 28 (La Forest J) 61 (Sopinka J).

¹¹ J D Heydon, 'Are the Duties of Company Directors to Exercise Care and Skill Fiduciary?' in S Degeling and J Edelman (eds), *Equity in Commercial Law* (2005) 204-205.

¹² *Green v Wilden Pty Ltd* [2005] WASC 83, [499] (Hasluck J); *Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9)* (2008) 39 WAR 1, 530 [4375]; [2008] WASC 239, [4375] (Owen J); *Parker v Tucker* (2010) 77 ACSR 525, 541 [70]; [2010] FCA 263, [70] (Gordon J); *Crusader Marine Holdings Pty Ltd (in liq) v Ballantyne* [2011] QSC 152, [50]; *Carey v Korda (No 2)* (2011) 85 ACSR 331, 337-338 [28]; [2011] WASC 220, [28] (Edelman J).

¹³ See, eg, *Bristol and West Building Society v Mothew* [1998] Ch 1, 17 (Millett LJ). See also the expression of the same principle in *Hilton v Barker Booth and Eastwood (a firm)* [2005] UKHL 8; [2005] 1 WLR 567, 575 [29] (Lord Walker).

¹⁴ See, eg, *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664, 680 (Gault J).

¹⁵ See also *AWA Ltd v Daniels* (1992) 7 ACSC 759, 873 (Rogers CJ, Comm Div).

¹⁶ *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 at 205. See also *White v Jones* [1995] 2 AC 207 at 271 (Lord Browne-Wilkinson). See also *Cowan v Scargill* [1985] Ch 270 at 276

In 2005, Heydon J published a comprehensive extrajudicial chapter addressing the question of whether the duties of company directors to exercise skill and care and fiduciary duties.¹⁷ He argued that they were. Amongst his arguments he referred to authority from the High Court of Australia to the effect that a *power* to exercise care and diligence was a fiduciary power.¹⁸ A recent decision of the Court of Appeal in England, in the context of trusteeship, characterised a duty to take matters into account as fiduciary; again this characterisation is difficult to reconcile with the obiter dictum in *Wheeler*.¹⁹

Subsequently to the article by Heydon J, the tide has been moving towards a challenge to the correctness of the obiter dictum from *Wheeler*.²⁰ This paper does not take a position in that debate. Instead, what I propose to do is to set out the reasons why the question is important and discuss a seminal case in relation to this issue, *Nocton v Lord Ashburton*. It is a case which relates to this very issue. It has been followed on 'times without number'²¹, although sometimes for very different propositions.

Consequences of describing the director's duty of care and skill as a fiduciary duty

Although there is no absolute consensus on which duties are fiduciary duties, or why fiduciary duties arise, it is well recognised that there are numerous consequences arising from the classification of a director's duty to exercise care and skill as fiduciary or not fiduciary, most of which are discussed by Heydon J.²² The consequences include:

- (1) If the duty is classified as fiduciary, common law tests for causation and remoteness of loss might not be applicable. A stricter approach to the award

(Megarry VC) discussed in J D Heydon, 'Are the Duties of Company Directors to Exercise Care and Skill Fiduciary?' in S Degeling and J Edelman (eds), *Equity in Commercial Law* (2005) 185, 188-189.

¹⁷ J D Heydon, 'Are the Duties of Company Directors to Exercise Care and Skill Fiduciary?' in S Degeling and J Edelman (eds), *Equity in Commercial Law* (2005) 185.

¹⁸ J D Heydon, 'Are the Duties of Company Directors to Exercise Care and Skill Fiduciary?' in S Degeling and J Edelman (eds), *Equity in Commercial Law* (2005) 235 citing *Partridge v Equity Trustees and Agency Co Ltd* (1947) 75 CLR 149, 163 (Starke, Dixon, Williams JJ).
¹⁹ *Futter v Futter* [2011] EWCA Civ 197 at [127] concluding that "*The trustees' duty to take relevant matters into account is a fiduciary duty*" but there will be no breach if the trustees rely on apparently competent advice. The distinction, if it exists, between such a breach of fiduciary duty and negligence is remarkably fine.

²⁰ See eg *ASIC v Rich* (2009) 75 ACSR 1, 611 [7190]; [2009] NSWSC 1229, [7190] (Austin J); *Weston v Publishing and Broadcasting Ltd* (2011) 83 ACSR 206, 340 [606]; [2011] NSWSC 433, [606] (Ward J).

²¹ R Meagher, D Heydon and M Leeming *Meagher, Gummow and Lehane's Equity Doctrines and Remedies* (4th edn, 2002) 832, referring, as examples, to *Mahoney v Purnell* [1996] 3 All ER 61; *Houghton v Immer (No 155) Pty Ltd* (1997) 44 NSWLR 46; *O'Halloran v R T Thomas & Family Pty Ltd* (1998) 45 NSWLR 262; *White v Jones* [1995] 2 AC 207; *Bailey v Namol Pty Ltd* (1994) 53 FCR 102.

²² J D Heydon, 'Are the Duties of Company Directors to Exercise Care and Skill Fiduciary?' in S Degeling and J Edelman (eds), *Equity in Commercial Law* (2005) 185, 189-191, 235.

of equitable compensation may apply, particularly in cases involving the unauthorised dissipation of a trust or company asset.²³

- (2) If the duty is classified as fiduciary, the applicable limitation period may differ.²⁴
- (3) If the duty is classified as fiduciary, a plaintiff may be entitled to proprietary remedies.²⁵ Although there was recently some doubt surrounding this point,²⁶ the Australian position has recently been clarified in favour of recognising a constructive trust,²⁷ even if there are limited circumstances in which the question might arise of recognising a trust of an asset personally acquired by a fiduciary as a result of a breach of a duty of care and skill.
- (4) If the duty is classified as fiduciary, a defendant may not be able to rely upon contributory negligence in order to reduce the sum of damages payable to a plaintiff.²⁸
- (5) If the duty is classified as fiduciary then there may be liability imposed on third parties for knowing participation in a breach of that fiduciary duty.²⁹

Where it all started: Nocton v Lord Ashburton

The protagonists

The two players in the drama which became *Nocton v Lord Ashburton* were Francis Denzil Edward Baring (the 5th Baron Ashburton), and William Nocton.

Francis Baring was a banker. At the age of 23, he succeeded to the title of Baron Ashburton, and took his seat in the House of Lords in 1899. He came from a family of bankers. His great, great, great grandfather, John Baring, had founded the London

²³ *Youyang Pty Ltd v Minter Ellison Morris Fletcher* [2003] HCA 15; (2003) 212 CLR 484, 500 [38]-[39] (Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ); *Re Dawson (deceased)* [1966] 2 NSW 211, 215 (Street J).

²⁴ *Chittick v Maxwell* (1993) 118 ALR 728, 741-742 (Young J).

²⁵ *Attorney General v Reid* [1994] 1 AC 324. Followed in Australia in *Zobory v Commissioner of Taxation* (1995) 64 FCR 86 (Burchett J); *Mainland Holdings Ltd v Szady* [2002] NSWSC 699 (Gzell J); *Western Areas Exploration Pty Ltd v Streeter [No 3]* (E M Heenan J); *Jones (as trustee of the property of Macneil-Brown, a bankrupt) v Southalland Bourke Pty Ltd* [2004] FCA 539 (Crennan J). See also *Consul Development Pty Ltd v DPC Estates Pty Ltd* [1975] HCA 8; (1975) 132 CLR 373, 395 (Gibbs J).

²⁶ *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2011] EWCA Civ 347 and J D Heydon and M J Leeming, *Jacobs' Law of Trusts in Australia* 7th edn, (Sydney: LexisNexis Butterworths, 2006) at p.274-275 both also citing significant contrary English authority prior to *Reid*.

²⁷ *Grimaldi v Chameleon Mining NL (No 2)* [2012] FCAFC 6.

²⁸ *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165, 201 [86] (McHugh, Gummow, Hayne and Callinan JJ).

²⁹ *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 159 [160], 164 [179]. See also *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373, 396-397 (Gibbs J).

merchant house of John & Francis Baring & Co, later known as Baring Brothers. From 1762 until 1995 Baring Brothers was one of England's oldest and most prestigious finance houses.³⁰

William Nocton was a solicitor hailing from Essex. He was a partner in the distinguished firm Broughton, Nocton and Broughton which practised from Great Marlborough Street in London. Nocton was well known in Essex and served as the High Sheriff in 1908. The Baring family, who owned Langham Manor in Essex, were clients of Nocton's.

Nocton had a history of engaging in personal transactions with the Baring family. The most significant was in relation to Langham Manor. Since 1830, the Baring family had owned the stunning Langham Manor in the county of Essex, an estate with a history dating back to Phin the Dane in 1066. In 1894, Nocton purchased Langham Manor from the Baring family.

The transaction

The transaction between Nocton and Lord Ashburton which was central to the litigation had its genesis in a venture between Nocton and Lord Ashburton's brother. On 15 January 1903, Lord Ashburton's brother, the Honourable Alexander ('Alick') Baring MP, agreed to purchase a freehold in Church Street, Kensington for £60,000. He intended to develop it. He entered into the purchase on behalf of himself and Mr Nocton and they agreed that all profit and loss would be divided between themselves in equal shares. Nocton invited Lord Ashburton, to join the venture but Lord Ashburton declined. On 24 June 1903 the purchase was completed. The purchase price was obtained from Parr's Bank, which took a mortgage over the Kensington property and also over other property owned by Baring.

On 10 February 1904, Baring entered a conditional sale of the Kensington property to builders, Holloway and Douglas, for £80,000. One of the conditions of the sale was that Holloway and Douglas would obtain a loan of £65,000 at 5% subject to a mortgage of the Church Street property. Another condition was that the vendors, Baring and Nocton, would lend Holloway and Douglas a further £20,000 with a second mortgage over the Church Street property.

On 3 May 1904, Nocton wrote to Lord Ashburton, proposing that Lord Ashburton should advance £65,000 to Holloway and Douglas. Nocton strongly encouraged Lord Ashburton to make the loan. He exhorted that Lord Ashburton could borrow the money at 4% and lend to Holloway and Douglas at 5 or 5.5% gaining a margin of 1 or 1.5% as well as £500 commission from Holloway and Douglas for the loan. Nocton rhapsodised about the credit and substance of Holloway and Douglas, "shrewd men of business", emphasising that Holloway enjoyed the confidence of the late Sir Blundell Maple.³¹ Nocton then said that the worst scenario was that if things went wrong then Lord Ashburton would end up with (1) the Kensington property and all buildings on it for only £65,000; (2) a personal liability of Holloway and Douglas as well as anyone

³⁰ In 1995 the bank was destroyed by the rogue trades of Nick Leeson, and sold to ING for £1.

³¹ Maple (1845–1903) was a baronet, a well known businessman, racehorse owner and breeder.

to whom they had sublet the property. Nocton said that he would not mind, in this event, if Lord Ashburton stepped in for the £65,000 plus the value of the buildings. He concluded by saying that there was “*no particular risk but a little bit to be made.*” Lord Ashburton agreed, subject to obtaining a satisfactory valuation which was duly provided.

Nocton’s partners were unhappy when they discovered that Nocton was about to become involved in such a large transaction with one of his clients. The partners immediately wrote to Lord Ashburton and urged him to withdraw from the transaction, explaining that the profit was inadequate in light of the risk; they reiterated that Nocton had a large financial interest in the property; they pleaded that Lord Ashburton obtain independent advice. Lord Ashburton ignored them, borrowed the money, and made the loan as Nocton had suggested.

On 26 September 1904, the Kensington property was sold to Douglas and Holloway for £80,000. Lord Ashburton was granted a first mortgage to secure the £65,000. Lord Ashburton gave his bankers (the Economic Life Assurance Society) a mortgage over other properties which he owned and also gave them a sub-mortgage of his mortgage of the Kensington property. Alexander Baring was granted a second mortgage to secure £15,000 which he contributed and, as a partner in the project, Nocton had a share in the second mortgage granted to Alexander Baring.

Douglas and Holloway began to develop the Kensington property into six blocks. The development was to be financed by leases over two of the blocks to a builder named Harry Johnson. However, after only two of the blocks were completed, Johnson was declared bankrupt. Desperately seeking funds so that the development could continue, Nocton wrote to the Economic Life Assurance Society and asked for a further loan of £20,000, or for a release of the security on the first block (Block A) to enable it to be sold. Nocton asserted that he had no doubt that Lord Ashburton would agree to this but said that he wanted an agreement from the Economic Life Assurance Society first.

The Economic Life Assurance Society agreed to release its security over Block A after it obtained a favourable survey which focused particularly on the value of Lord Ashburton’s other properties which also secured its loan. Nocton then wrote to Lord Ashburton explaining that the Economic Life Assurance Society had obtained a favourable survey and had agreed to release its security. Nocton implored Lord Ashburton also to release his security. Nocton did not enclose a copy of the survey; nor did he mention that the survey focused upon Equitable Life’s security over other of Lord Ashburton’s properties; nor did Nocton mention the possibility that Lord Ashburton’s remaining security over the Kensington property would be inadequate for the debt; nor did Nocton remind Lord Ashburton that the release of Lord Ashburton’s security would benefit Nocton personally since Nocton had a share of the second mortgage of Alexander Baring, which would become a first mortgage after the releases from Lord Ashburton and Equitable Life.

Lord Ashburton agreed to the release and entered into a deed of release on 28 December 1905. On 26 September 1909, Douglas and Holloway defaulted on the mortgage debt. On 10 March 1911, Lord Ashburton commenced an action against Nocton and all the parties interested in the Kensington property, including the Equitable Life Assurance Society.

The claim

Only the action against Nocton proceeded to trial. At the heart of Lord Ashburton's claim was paragraph 33 of the statement of claim which read as follows:

“The said Block A was in fact the most valuable part of the plaintiff's said security and when the same was so released as aforesaid the property remaining subject to the plaintiff's said mortgage was wholly insufficient as a security for the said sum of 65,000l. The defendant Nocton well knew when he advised the plaintiff to execute the said release that thereby the plaintiff's security would be rendered insufficient and his said advice was not independent advice and was not given in good faith but was given in his own personal interest without regard to the interest of the plaintiff to the intent that thereby he might get the benefit of a first charge upon the said Block A for the sum of 15,000l. secured by the said second mortgage of the 26th day of September 1904 to one moiety whereof he was entitled as aforesaid. The defendant Nocton in advising the plaintiff to execute the said release allowed the plaintiff to believe that he was advising the plaintiff independently and in good faith and in the plaintiff's interest. The plaintiff in executing the said release had no independent advice and acted entirely upon the advice of the defendant Nocton and with full confidence in him.”

The lower courts

The trial judge, Mr Justice Neville, had recently decided another case involving Nocton and Lord Ashburton. In that case, letters which Lord Ashburton had written to Nocton were subpoenaed from Nocton's clerk. The letters would probably have been privileged. The clerk attended court but was not called upon the subpoena. In serious breach of duty the clerk gave the letters to Pape who copied and returned them. Neville J ordered that Pape be restrained from using the copies except for the purposes of his bankruptcy proceedings (in which Lord Ashburton, as creditor to the tune of £139,000, was opposing his discharge). His decision was upheld on appeal and the injunction expanded.³²

Therefore, the trial judge in *Nocton v Lord Ashburton*, Neville J, was not a stranger to either party. His Lordship considered that paragraph 33 of the Statement of Claim was a plea of fraud. He heard evidence from both Lord Ashburton and Nocton but concluded that no fraud had been established. He considered that Nocton “*fell far short of the duty which he was under as a solicitor*” and that Nocton would probably have given different advice if he had not been personally interested in the transaction. However, he held that Nocton was not fraudulent and since the claim was pleaded as one of fraud it must fail.

³²

Lord Ashburton v Pape [1913] 2 Ch 469.

The Court of Appeal disagreed. The Court of Appeal found that in the circumstances Nocton had acted fraudulently. The Court of Appeal directed an enquiry as to damages before the official referee. At the subsequent inquiry as to damages, it was found that the diminution in the value of the security was £21,000 and this was ordered together with loss of rents of £3,789.³³

The House of Lords and fiduciary duties

In the House of Lords, five Law Lords sat on the case: Viscount Haldane LC, Lord Dunedin, Lord Atkinson, Lord Shaw of Dunfermline, and Lord Parmoor. The leading speech was delivered by the Lord Chancellor, Viscount Haldane. Lord Atkinson agreed with the Lord Chancellor. Lords Dunedin and Parmoor delivered separate speeches, although generally agreeing with Viscount Haldane. Lord Shaw delivered a short additional speech.

Their Lordships unanimously upheld the decision of the Court of Appeal, although (again unanimously) not on the basis of fraud, as the Court of Appeal had held. On the issue of fraud, all their Lordships were of the same opinion. As Viscount Haldane explained, the trial judge had seen and heard the witnesses. His view was consistent with the evidence and he should not have been overturned on this point.³⁴ Having so concluded there were two options left to the House of Lords if they were to find against Nocton based on wrongdoing:

- (1) they could find that Nocton was liable for “*mere negligence*”, or
- (2) they could find that Nocton was liable on some other basis such as breach of fiduciary duty.

In the leading speech, Viscount Haldane LC (with whom Lord Atkinson agreeing) relied on (2), saying that fiduciary duties were “*a third form of procedure to which the statement of claim approximated very closely, and that is the old Bill in Chancery to enforce compensation for breach of a fiduciary obligation.*”³⁵ This was the basis upon which he found liability. In contrast, Lord Shaw was more comfortable basing liability on the negligence of Nocton in a relationship akin to contract.

The Chancery bill for breach of fiduciary duty was not actually very old, as Viscount Haldane had suggested. Equity courts only began to speak of “fiduciary duties” in the 19th century. And the concept of a fiduciary duty which then existed was a very loose one. It was generally used in two different ways. The first use of the label ‘fiduciary’ was in relation to persons who had the management of property in which another was interested. The fiduciary duties (and liabilities) in these cases concerned the obligations of management of the asset. Fiduciaries in this context were said to be guardians, tenants for life, mortgagees, joint tenants, partners, directors, agents and solicitors.³⁶ One of the earliest cases to use the label ‘fiduciary duties’ in this sense

³³ *The Times*, March 31, 1913, p3.

³⁴ *Nocton v Lord Ashburton* [1914] AC 932 at 945.

³⁵ *Nocton v Lord Ashburton* [1914] AC 932 at 946.

³⁶ A Underhill *The Law Relating to Trusts and Trustees* (1st edition, 1878, Butterworths, London) at 77-79. The relationship of banker/client was not fiduciary; the banker did not manage money for the client but merely owed a personal debt, and the banker was entitled to profit from the receipt: *Foley v Hill* (1848) 11 HL Cas (Cl) 28; 9 ER 1002.

was *Docker v Somes*.³⁷ In that case, Brougham LC explained that an “attorney, guardian, or other person standing in a like situation” who speculates with a client’s money is treated as a trustee for the purpose of making him accountable. Lord Brougham explained that this remedy aimed to discourage breach by stripping gains if gains were made from the use of the entrusted funds, or by charging the fiduciary for losses incurred.

Secondly, ‘fiduciary’ was sometimes used in a much looser sense to describe various relationships of influence or confidence, whether or not they involved custody of the principal’s assets. The precise duty owed in each case would vary; the focus in these fiduciary cases was upon the influence exercised, or trust reposed. Examples were relationships such as parent/child, guardian/ward or solicitor/client.³⁸ The early authorities conflated fiduciary duties with undue influence and breach of confidence.³⁹ In modern law, these two doctrines are generally not considered to be doctrines of fiduciary law.⁴⁰

The Lord Chancellor’s speech (Lord Atkinson concurring)

As I have mentioned, Viscount Haldane’s decision was the leading decision. Lord Atkinson concurred entirely. Lord Dunedin agreed and added only a few additional remarks mainly relating to jurisdiction of the courts of equity.⁴¹ Lord Shaw also agreed before adding his own remarks.⁴²

An immediate obstacle to imposing liability upon Nocton was the decision in *Derry v Peek*.⁴³ In *Derry v Peek*, the House of Lords had resolved a long-running controversy concerning the liability of a defendant for losses caused by the defendant’s misstatements. The House of Lords had held that a defendant was not liable for negligent misstatements; the duty was simply to make only statements which the representor ‘honestly believe[d]... to be a true and fair representation of the facts.’ Since this duty had not been infringed, the decision of the Court of Appeal was overturned and the defendant was not held liable.⁴⁴ Following *Derry v Peek*, the rules

³⁷ (1834) 2 My & Keen 655 at 665; 39 ER 1095 at 1099.

³⁸ J Smith *A Treatise on the Principles of Equity* (1856, Sweet and Maxwell, London) at 669, 682-683; J Smith *A Manual of Equity Jurisprudence as Administered in England* (1855, Stevens and Norton, London) 63-66; J Griffith (ed) *Snell’s Principles of Equity* (2nd edition, 1872, Stevens and Haynes, London) at 388-389. *Snell’s Equity* maintained this view immediately prior to *Nocton v Lord Ashburton*: A Brown (ed) *Snell’s Principles of Equity* (16th edition, 1912, Stevens and Haynes, London) at 421.

³⁹ See discussion in P Finn *Fiduciary Obligations* (1977) at 78. Doubted by W M Gummow in a review [1978] 2 UNSWL 408 at 410.

⁴⁰ Independence of duties of confidence from fiduciary duties: *Arklow Investments Ltd v Maclean* [2000] 1 WLR 594 at 600; *Indata Equipment Supplies Ltd v ACL Ltd* [1998] FSR 248 at 262; R Meagher, J D Heydon, M Leeming *Meagher, Gummow and Lehane’s Equity, Doctrines & Remedies* (4th edition, 2002) at 41-035; J McGhee (ed) *Snell’s Equity* (32nd edition, 2010) at 7-065; Independence of undue influence from breach of fiduciary duty: also R Meagher, J D Heydon, M Leeming *Meagher, Gummow and Lehane’s Equity, Doctrines & Remedies* (4th edition, 2002) at 15-100; J McGhee (ed) *Snell’s Equity* (32nd edition, 2010) at 7-070. For a general discussion of the independence of these two duties M Conaglen *Fiduciary Loyalty* (2010) at 236-244.

⁴¹ *Nocton v Lord Ashburton* [1914] AC 932 at 965.

⁴² *Nocton v Lord Ashburton* [1914] AC 932 at 965.

⁴³ (1889) 14 App Cas 337.

⁴⁴ *Derry v Peek* (1889) 14 App Cas 337 at 376 (Lord Herschell).

as to what was fraudulent at common law and in equity became uniform. In the absence of fraud, neither equity nor common law allowed an action for losses suffered by a misrepresentation even if the misrepresentation were made without reasonable grounds.⁴⁵

A month before the decision in *Nocton v Lord Ashburton*, Viscount Haldane then told Frederick Pollock that in order to minimise the consequences of *Derry v Peek*, ‘the Lords are going to hold that it does not apply to the situation created by a positive fiduciary duty such as a solicitor’s, in other words, go as near as they dare to saying it was wrong, as all in Lincoln’s Inn thought at the time.’⁴⁶

In the leading speech, Viscount Haldane was true to his word.

Although it might have been possible to impose liability based on some wholly separate duty, such as Nocton’s duty not to put himself in a position of conflicting duty (to Lord Ashburton) and self-interest, this was not the basis for Viscount Haldane’s decision. Viscount Haldane distinguished *Derry v Peek* only on the basis that the negligence in *Nocton v Lord Ashburton* had occurred in the context of a fiduciary relationship. Viscount Haldane’s decision developed his own *obiter dicta* a year earlier in the Scottish case of *Dick v Alston*.⁴⁷ In that case, Mrs Dick lent her fortune to her husband’s firm, in which a solicitor, Mr Alston, was personally interested (as a creditor). Mr Alston acted for her in a number of transactions, including ones related to her loan, but he failed to advise her against making the loan. When the firm became insolvent Mrs Dick sued Mr Alston. Mrs Dick’s claim was dismissed because Mr Alston was not engaged to act for her in relation to that transaction. However, in the course of dismissing the appeal to the House of Lords and absolving Mr Alston from liability, Viscount Haldane LC explained that it was “well settled” that there were three ways in which a solicitor might be held liable for a transaction of his client. These were as follows: (1) “a claim for negligence—that is to say, for damage arising from a breach of duty to give proper advice or to exercise proper skill”;⁴⁸ (2) where the solicitor has obtained a benefit from the transaction then the solicitor cannot keep the benefit unless the client has obtained independent advice;⁴⁹ (3) where a solicitor has entered a bargain with the client and the client seeks rescission of the contract.⁵⁰

In *Nocton v Lord Ashburton*,⁵¹ Viscount Haldane again referred to these three routes. However, describing the first (negligence⁵²), he suggested that a claim in equity

⁴⁵ *Low v Bouverie* [1891] 3 Ch 82; *Elkington & Co v Hurter* [1892] 2 Ch 452; *Gilchester Properties Ltd v Comm* [1948] 1 All ER 493.

⁴⁶ M Howe (ed) *Holmes-Pollock Letters* (1961 Harv Univ Press Camb) 215 (20 May 1914; *Nocton* was decided on 19 June 1914).

⁴⁷ *Dick v Alston* [1913] SC (HL) 57.

⁴⁸ *Dick v Alston* [1913] SC (HL) 57 at 57-58. the Lord Chancellor explained that this lack of care was readily found where the solicitor had a conflict of interest and duty.

⁴⁹ *Dick v Alston* [1913] SC (HL) 57 at 58. Referring to the undue influence case of *Rhodes v Bate* (1865) LR 1 Ch 252.

⁵⁰ *Bank of Montreal v Stuart* [1911] AC 120.

⁵¹ *Nocton v Lord Ashburton* [1914] AC 932 at 956.

⁵² Arising in the context of a contractual relationship.

which merely asserted negligence, although once permissible,⁵³ was later demurrable for want of equity. However, Viscount Haldane considered the presence of a fiduciary relationship between Nocton and Lord Ashburton, and the personal benefit derived by Nocton sufficient for “*jurisdiction to scrutinize his action*”.⁵⁴ Having brought Nocton within the jurisdiction of equity, Lord Ashburton was able to succeed on the basis that Nocton had made a “*misrepresentation in breach of fiduciary duty*”.⁵⁵ It did not matter that the action brought was one which also could have been brought for negligence at common law (based upon the contractual undertaking) because once the court of equity had assumed jurisdiction the action could be brought: it “*was really an action based on the exclusive jurisdiction of a Court of Equity over a defendant in a fiduciary position in respect of matters which at law would also have given a right to damages for negligence*”.⁵⁶ In ordering Nocton to pay compensation, Viscount Haldane explained that he would be ‘*sorry to be thought to lend countenance to the idea that recent decisions have been intended to stereotype the cases in which people can be held to have assumed such a special duty*’ to take care in making representations.⁵⁷ He remarked that the ‘*special duty*’ which gave rise to Nocton’s liability might arise from ‘*an implied contract at law*’⁵⁸ or a ‘*fiduciary obligation in equity*’.⁵⁹

Although Lord Ashburton’s claim relating to the release of his security succeeded, his claim relating to Nocton’s inducement of him to enter into the 1904 mortgage failed. Both were instances of negligence in the context of their relationship, and both were actionable as a breach of contractual duties of care and skill as well as breach of fiduciary duty in equity. However, as Viscount Haldane explained, the claim based upon Nocton’s earlier carelessness was barred by the *Statute of Limitations* (common law) and acquiescence (in equity).⁶⁰

Lord Dunedin’s speech

Lord Dunedin agreed with the Lord Chancellor. However, he delivered a short additional speech which focussed upon the jurisdiction of the courts of equity. Lord Dunedin immediately sidelined *Derry v Peek* by suggesting that, at common law,

⁵³ Although Viscount Haldane cited no examples, see *Floyd v Nangle* (1747) 3 Atk 567; 26 ER 1127; *Dixon v Wilkinson* (1859) 4 De G & J 508 at 523; 45 ER 198 at 203, discussed in J D Heydon ‘Are the Duties of Company Directors to Exercise Care and Skill Fiduciary?’ in S Degeling and J Edelman (eds), *Equity in Commercial Law* (Lawbook Co, Sydney 2005) 185 at 200 fn 82.

⁵⁴ *Nocton v Lord Ashburton* [1914] AC 932 at 956.

⁵⁵ *Nocton v Lord Ashburton* [1914] AC 932 at 958.

⁵⁶ *Nocton v Lord Ashburton* [1914] AC 932 at 957.

⁵⁷ [1914] AC 932 at 948.

⁵⁸ By ‘implied contract’, Viscount Haldane must have meant a genuine contract implied between the parties which included an undertaking to take care and skill. However Viscount Haldane did not distinguish between such genuine contracts, implied by conduct, and cases which would today be regarded as part of a category of unjust enrichment. In *Sinclair v Brougham* [1914] AC 398 at 415-416, four months before his decision in *Nocton*, Viscount Haldane had referred to obligations to make restitution as arising *quasi ex contractu* and involving a fiction of attributed promise.

⁵⁹ [1914] AC 932 at 955.

⁶⁰ *Nocton v Lord Ashburton* [1914] AC 932 at 958. This point had been conceded in argument: [1914] AC 932 at 960 (Lord Dunedin).

there would have been an action for negligence in this case. He treated *Derry v Peek* as requiring only proof of *mens rea* in an action where fraud was alleged.⁶¹ Viscount Haldane had considered that *Nocton v Lord Ashburton* had only been pleaded as a case of fraud, and it was too late to amend to plead negligence at common law.⁶² Lord Dunedin said that he would have been prepared to read the statement of claim more broadly, as alleging negligence at common law, in breach of the contractual undertaking to take reasonable care.⁶³ Nevertheless, he also agreed with the other solution, namely that courts of equity used ‘fraud’ in a much broader sense, to encompass any wrongful breach of duty.⁶⁴ However, like Viscount Haldane, Lord Dunedin considered that a claim for mere negligence might have been met with a demurrer for want of equity.⁶⁵ But such a rule did not apply to persons in a fiduciary relationship. In such cases, the “*fiduciary position imposes on him the duty of making a full and not a misleading disclosure of facts known to him when advising his client.*”⁶⁶ The misrepresentation by a fiduciary to his principal was a breach of duty in equity.⁶⁷

Lord Shaw’s speech

Although Lord Shaw of Dunfermline agreed generally with Viscount Haldane, he was less circumspect in relation to *Derry v Peek*. Lord Shaw did not express concern with the jurisdiction of equity to deal with the issue of liability for a negligent breach of duty. His Lordship considered that although the claim was pleaded as fraud, all the facts relevant to a claim for negligence were also alleged.⁶⁸ Lord Shaw did not bother to insist on a fiduciary relationship before the misrepresentation could become actionable in equity. Instead, he relied directly on *Burrowes v Lock*, and the line of authority from equity which had generally been considered to have been overruled in *Derry v Peek*. Lord Shaw relied heavily on the fact that in one of the speeches in *Derry v Peek*⁶⁹ Lord Hershell had not expressly overruled the equity cases in that line of authority but had merely mentioned the line of authority “*for the purpose of putting it aside*”. Lord Shaw therefore concluded that *Derry v Peek* was authority only for the proposition that liability for a negligent misrepresentation would be denied *only if there was no duty to take care*.⁷⁰

Lord Shaw relied upon argument made by Sir Roundell Palmer (later Lord Selborne LC) in *Peek v Gurney*⁷¹ that “*there was such a proximate relation between himself and the person making the representation as to bring them virtually into the position of parties contracting with each other*”.⁷² In other words, the circumstances between

⁶¹ *Nocton v Lord Ashburton* [1914] AC 932 at 963.

⁶² *Nocton v Lord Ashburton* [1914] AC 932 at 963.

⁶³ *Nocton v Lord Ashburton* [1914] AC 932 at 965.

⁶⁴ *Nocton v Lord Ashburton* [1914] AC 932 at 963.

⁶⁵ *Nocton v Lord Ashburton* [1914] AC 932 at 963.

⁶⁶ *Nocton v Lord Ashburton* [1914] AC 932 at 965.

⁶⁷ *Nocton v Lord Ashburton* [1914] AC 932 at 965.

⁶⁸ *Nocton v Lord Ashburton* [1914] AC 932 at 968.

⁶⁹ *Derry v Peek* (1889) 14 App Cas 337 at 360.

⁷⁰ *Nocton v Lord Ashburton* [1914] AC 932 at 971.

⁷¹ (1873) LR 6 HL 377.

⁷² [1914] AC 932 at 971-972.

the parties were such that Nocton had impliedly undertaken to take care. Lord Shaw said:⁷³

“It is admitted in the present case that misrepresentations were made; that they were material; that they were the cause of loss; that they were made by a solicitor to his client in a situation in which the client was entitled to rely, and did rely, upon the information received. I accordingly think that that situation is plainly open for the application of the principle of liability to which I have referred, namely, liability for the consequences of a failure of duty in circumstances in which it was a matter equivalent to contract between the parties that the duty should be fulfilled.”

Lord Shaw asserted that liability in *Nocton* arose simply because ‘it was a matter equivalent to contract’.⁷⁴ This echoed earlier words of Lord Blackburn in a Scottish appeal in *Brownlie v Campbell*,⁷⁵ where Lord Blackburn said of the equity cases such as *Burrowes v Lock*, that ‘if they do not absolutely amount to contract, come uncommonly near it.’ Lord Shaw was, of course, a Scottish law lord having been appointed to the House of Lords in 1909 from his position as Lord Advocate of Scotland. His background was not immaterial: in Scotland, contracts could be enforced in the absence of consideration.

On Lord Shaw’s approach there was not much left of the reasoning, or even the result, in *Derry v Peek*. Applied directly to that case the result was indefensible: the promoters had made misrepresentations; they were material; they were the cause of loss; and they were made in a situation in which the claimant was entitled to rely, and did rely, upon the information received.

Lord Parmoor’s speech

The speech by Lord Parmoor was the least reasoned and the most dismissive of *Derry v Peek*. Lord Parmoor stated that the question before their Lordships was simply whether the pleadings had sufficiently asserted negligence⁷⁶ and, if so, whether a person could be liable for negligence in the absence of *mens rea*.⁷⁷ In a single paragraph he concluded that negligence had been sufficiently raised because no new evidence was needed to establish the case, and that fraud was not required. In reasoning which was hardly perspicacious he brushed aside *Derry v Peek* asserting that all that the House of Lords had concluded in that case was that an action for deceit required proof of deceit: “*that case decides that in an action founded on deceit, and in which deceit is a necessary factor, actual dishonesty, involving mens rea, must be proved. The case in my opinion has no bearing whatever on actions founded on a breach of duty in which dishonesty is not a necessary factor.*”⁷⁸ If Lord Shaw had left only a shell of reasoning in *Derry v Peek*, Lord Parmoor had obliterated all but the trail.

⁷³ [1914] AC 932 at 972.

⁷⁴ *Nocton v Lord Ashburton* [1914] AC 932 at 972.

⁷⁵ (1880) LR 5 App Cas 925 at 953

⁷⁶ *Nocton v Lord Ashburton* [1914] AC 932 at 977.

⁷⁷ *Nocton v Lord Ashburton* [1914] AC 932 at 976.

⁷⁸ *Nocton v Lord Ashburton* [1914] AC 932 at 978.

Viscount Haldane's and Lord Dunedin's treatment of fiduciary duty

The fiduciary duty of care in their speeches

As we have seen, Viscount Haldane and Lord Dunedin were concerned that a general claim for negligence against a solicitor would have been demurrable in equity, without some additional fact. It is true that in 1875 the Vice Chancellor had allowed a demurrer in relation to a claim for negligence by a solicitor in failing to check for defects in a title being offered as security.⁷⁹ But, this did not apply to all negligence claims in equity. Negligence by a trustee was generally actionable and in relation to negligent misstatements, equity courts had long rejected claims that there was no jurisdiction merely because an action might also have been brought at common law.⁸⁰

Viscount Haldane and Lord Dunedin could easily have based the jurisdiction in equity upon the long line of pre-Judicature cases concerning misrepresentations in equity. One might speculate that the reason that this route was not taken was because it might have run headlong into the objection that the House of Lords would be contradicting directly its own decision in *Derry v Peek*; and unlike Lords Shaw and Parmoor, Viscount Haldane and Lord Dunedin were too circumspect to take such a direct route. For this reason, they chose to distinguish *Derry v Peek* on the basis that the negligence was committed by a fiduciary in relation to his principal. There is some support for this speculation the course of oral argument. When Jenkins KC rose to respond, he was immediately told by Viscount Haldane that the Lords were unlikely to disagree with Neville J's rejection of fraud by Nocton. So Jenkins KC immediately focussed his fire on negligence: "*the judgment of the Court of Appeal can be supported on the footing of negligence*".⁸¹ Jenkins KC then explained that such a dereliction of duty by a fiduciary had commonly been described in equity as 'fraud'. At this point he was immediately stopped by the court. Viscount Haldane was satisfied.

Viscount Haldane reiterated his point very shortly after *Nocton v Lord Ashburton* in *Robinson v National Bank of Scotland Ltd.*⁸² In that case, the claimant sought damages from a bank which he alleged had made misrepresentations concerning the creditworthiness of a principal debtor which induced the claimant to enter into a contract of suretyship. The representations were honestly made by the defendant bank to another bank which conveyed them to the claimant. The House of Lords held that in the absence of dishonesty no action could be brought against the defendant bank. However, Viscount Haldane (with whom Lord Kinnear and Lord Atkinson agreed) emphasised that a duty to be careful might arise in other circumstances:⁸³

"I think the case of Derry v Peek in this House has finally settled in Scotland, as well as in England and Ireland, the conclusion that in a case like this no

⁷⁹ *British Mutual Investment Company v Cobbold* (1875) LR 19 Eq 627.

⁸⁰ Above at n.

⁸¹ *Nocton v Lord Ashburton* [1914] AC 932 at 943.

⁸² [1916] SC (HL) 154.

⁸³ [1916] SC (HL) 154 at 157.

duty to be careful is established. There is the general duty of common honesty, and that duty of course applies to the circumstances of this case as it applies to all other circumstances. But when a mere inquiry is made by one banker of another, who stands in no special relation to him, then, in the absence of special circumstances from which a contract to be careful can be inferred, I think there is no duty excepting the duty of common honesty to which I have referred.

*In saying that I wish emphatically to repeat what I said in advising this House in the case of *Nocton v Lord Ashburton*, that it is a great mistake to suppose that, because the principle in *Derry v Peek* (1889) 14 App Cas 337 clearly covers all cases of the class to which I have referred therefore the freedom of action of the courts in recognising special duties arising out of other kinds of relationship which they find established by the evidence is in any way affected. I think, as I said in *Nocton's* case, that an exaggerated view was taken by a good many people of the scope of the decision in *Derry v Peek*. The whole of the doctrine as to fiduciary relationships, as to the duty of care arising from implied as well as expressed contracts, as to the duty of care arising from other special relationships which the courts may find to exist in particular cases, still remains, and I shall be sorry if any word fell from me which suggests that the courts are in any way hampered in recognising that the duty of care may be established when such cases really occur." (Emphasis added).*

The Aftermath of *Nocton v Lord Ashburton*

Negligent misrepresentation without a fiduciary relationship

Nocton v Lord Ashburton was a watershed case in the history of equity. But it was initially seen only as creating a limited sphere of actionability for loss caused by non-fraudulent misstatements within a fiduciary relationship. Leading equity texts either did not even mention *Nocton*,⁸⁴ or simply considered it an exception to *Derry v Peek* in cases of a recognised relationship: "*this does not prevent the possibility of an equitable remedy based on the relation of the parties.*"⁸⁵ In other words, *Nocton v Lord Ashburton*, understood in context, was simply a decision that *Derry v Peek*

⁸⁴ The eighth edition of Sir Arthur Underhill's *The Law Relating to Trusts and Trustees* (8th edition, 1926) makes no mention of *Nocton*. Nor does the ninth (1939), tenth (1950), eleventh (1959), twelfth (1970), or thirteenth (1979). The first mention is in the fourteen edition (1987) at 733 where the editor (Professor Hayton, as he then was, editor since the thirteenth edition) discusses the case only for the proposition that equity did not make awards of damages although it awarded compensation.

⁸⁵ D Browne (ed) *Ashburner's Principles of Equity* (2nd edition, 1933, Butterworth and Co, London) at 289 (this quote was apparently inserted at a late stage into the page proofs). This was also the treatment of *Nocton* by *Snell's Equity*, even after the decision in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* which appeared to pass unnoticed in the 26th edition: see R Megarry and P Baker *Snell's Equity* (26th edition, 1966, Sweet and Maxwell, London) at 613 "*an action may lie against a solicitor for loss sustained by his client through a misrepresentation made to his client in breach of this duty [of due care and skill] without fraudulent intent.*"

meant negligent misrepresentations were not *generally* actionable. Such a proposition was entirely unremarkable in an era when a majority of the Court of Appeal in *Heaven v Pender*⁸⁶ had, in 1881, held that there was no *general* duty of care at common law.⁸⁷

As we have seen, for a long time it was thought that *Derry v Peek* settled the state of knowledge required for an action for misrepresentation.⁸⁸ In *Candler v Crane, Christmas & Co*,⁸⁹ a majority of the Court of Appeal refused a claim based on negligent misrepresentation on the basis that negligent misrepresentations were only actionable if they were made in the context of a contractual or fiduciary relationship between the claimant and defendant. In a powerful dissent, Lord Denning MR relied upon *Nocton v Lord Ashburton* for having exposed that “*all that is to be deduced from (though not decided by) Derry v. Peek is that in the particular circumstances of that case there was no duty to be careful.*”⁹⁰ Lord Denning contrasted those who were “*timorous souls...fearful of allowing a new cause of action*” with “*bold spirits who were ready to allow it if justice so required.*”⁹¹ The reader of the law reports is left in no doubt as to which camp Lord Denning considered himself to belong and, in contrast, the camp to which he considered the majority to belong.

After the rejection of *Heaven v Pender*, in 1932 by *Donoghue v Stevenson*, the path was clear for *Derry v Peek* to be confined as Lord Denning MR had envisaged, and as Lords Shaw and Parmoor had presaged in *Nocton v Lord Ashburton*. In 1964, the House of Lords unanimously adopted this broad view of liability for negligent misstatement in the absence of contractual or fiduciary relationships. The House of Lords drew heavily upon *Nocton v Lord Ashburton* and suggested that *Derry v Peek* did not exclude forms of liability for wrongful misrepresentations apart from those occurring in contractual and fiduciary relationships. The obiter dicta in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*⁹² established that, where a duty to take care existed, a merely negligent wrongful misrepresentation was actionable.

Conclusions

With the recognition by the common law that negligent misrepresentations were actionable even in the absence of a fiduciary duty then it was perhaps inevitable that courts would question the reasoning in *Nocton* that carelessness by a person in a fiduciary position was a breach of fiduciary duty. As I explained at the start of this paper, this is precisely what was said in some Canadian decisions in the 1980's, followed in the decision of the Full Court of the Western Australian Supreme Court in

⁸⁶ (1882) LR 11 QBD 503.

⁸⁷ Rejecting Sir Baliol Brett MR's minority view (at 509) that a duty of care arose “*whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct*”.

⁸⁸ *Heskell v Continental Express Limited* [1950] 1 All ER 1033 at 1042.

⁸⁹ [1951] 2 KB 164.

⁹⁰ [1951] 2 KB 164 at 177.

⁹¹ [1951] 2 KB 164 at 178.

⁹² *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465.

*Permanent Building Society (in liq) v Wheeler*⁹³ and other subsequent cases. But some questions have since been raised about this view. This paper has not sought to resolve those questions. It has only sought to put them in a historical context by focus upon the case which first addressed this issue and which first recognised that a director's duty of skill and care is a fiduciary duty: *Nocton v Lord Ashburton*.

So what happened to each of the players in *Nocton v Lord Ashburton*? The aftermath of the case revealed a litany of gambles. Every one of them failed.

The Kensington property investment was not the first transaction between Nocton and his client, Lord Ashburton. Prior to the Kensington transaction, in 1894, Nocton had borrowed heavily to purchase the Langham Estate in Essex from Lord Ashburton's family. As a result of losing the litigation with Lord Ashburton, an interim receiver was appointed over Nocton's lands in the county of Essex, including Langham Manor, to recover the judgment debt.⁹⁴ Nocton's gambles with Lord Ashburton had spectacularly failed.

The Economic Life Assurance Society which had lent the money to Lord Ashburton for the Kensington investment in 1904 grew rapidly over the next century. It was acquired by Alliance Assurance in 1912. After several mergers, by 1996 it was Royal Insurance and Sun Alliance. In the 1990s, following complaints about its treatment of discretionary bonuses contrary to the reasonable expectations of policy holders, a rival insurance company, Equitable Life, decided to litigate the issue. It defended a test case and sought a declaration that it had acted lawfully. It funded the claim of the test claimant, Alan Hyman. It did not insure against losing the litigation. On 20 July 2000, the House of Lords held that Equitable Life had acted unlawfully. Equitable Life collapsed.⁹⁵ Royal Insurance and Sun Alliance made provision for losses from similar treatment of £1.2 billion. In August 2002, Royal Insurance and Sun Alliance's life assurance business was closed with the loss of 1,200 jobs.

Lord Ashburton's grandson, Alexander, the sixth Baron Ashburton, followed in the family business and became a managing director of Barings Bank. At the time of Alexander's death, the rogue trader, Nick Leeson began a series of gambles which destroyed the Barings Bank four years later.

And the property in Church Street, Kensington in which Lord Ashburton invested was eventually developed as a commercial premises. Located opposite it is the gambling store, Ladbrokes.

⁹³ (1994) 11 WAR 187, 237.

⁹⁴ See the discussion in the writ of *elegit* proceedings which followed the decision of Neville J: *Lord Ashburton v Nocton* [1915] 1 Ch 274 at 275.

⁹⁵ An enquiry found that it was the author of its own misfortune by payments to policyholders which had left it "under-funded to the extent of £4½ billion in the summer of 2001": Penrose Report, Chapter 19, para [82]. The figure of £4.5 billion was the expectation which Equitable Life had created for policyholders rather than any actual entitlement.