

THE ROLE OF STATUS IN THE LAW OF OBLIGATIONS: COMMON CALLINGS, IMPLIED TERMS AND LESSONS FOR FIDUCIARY DUTIES

Paper presented at the University of Alberta, 18 July 2013 and DePaul University conference, Chicago, 19-20 July 2013

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Even in the case of a solicitor-client relationship, long accepted as a status based fiduciary relationship, the duty is not derived from status. As in all such cases, the duty is derived from what the solicitor undertakes, or is deemed to have undertaken, to do in the particular circumstances.¹

In some [exceptional] cases, it is simply not reasonable for a client to claim that it expected a law firm to owe it exclusive loyalty and to refrain from acting against it in unrelated matters ... [The Court will consider various factors] when determining whether there was a reasonable expectation that the law firm would not act against the client in unrelated matters.²

Summary and essential concepts

The focus of this conference is on fiduciaries. This paper addresses an important and difficult question at the heart of the law concerning fiduciaries. But the question is not confined to fiduciary law. It has repercussions throughout the law of obligations. The question is the role played by the status or office of a person in determining the obligation owed. One possible answer to this question forms part of a larger perspective which can reduce the tesserarian nature of fiduciary litigation.

The New South Wales Court of Appeal makes an important point in the quotation at the start of this paper. This point is that a fiduciary's duty is not derived from status. A similar point is made in the second quotation above was made on 5 July 2013 by the Supreme Court of Canada.³ But if fiduciary duty is not derived from status then this gives rise to a conundrum. Why do courts commonly speak of fiduciary *relationships*? Why do courts emphasise the duties that arise in relationships of a particular status? The answer which I will tentatively suggest is that status may play an important part of the background material by informing the duties which are undertaken by particular persons. In other words, where a duty arises because of a manifest, or objective, undertaking the status or office held by a person is an important circumstance in determining the scope of the duties which the officeholder reasonably undertook.

This paper makes one assumption which is justified only briefly here. The assumption is that the existence of an undertaking, objectively manifested, is a

^{*} Justice of the Supreme Court of Western Australia. My thanks to Daniella Spencer-Laitt for research assistance.

¹ *Beach Petroleum v Kennedy* (1999) 48 NSWLR 1, 188 (Spigelman CJ, and Sheller and Stein JJA). The only quibble which one might have with this quotation is that an objective undertaking does not involve a 'deeming' or any fiction. It is not a proxy for subjective thoughts.

² *Canadian National Railway Co v McKercher LLP* [2013] SCC 39 [37] (McLachlin CJ for the Court).

³ *Canadian National Railway Co v McKercher LLP* [2013] SCC 39.

precondition in equity for a fiduciary obligation to arise. I have made a more substantial argument concerning this precondition elsewhere.⁴ There are many authorities which emphasise the need for an undertaking.

Not every undertaking, nor even every undertaking said to be made by a person in a fiduciary relationship,⁵ is a *fiduciary* undertaking. The dominant position in authority is that before an undertaking can become a *fiduciary undertaking* the undertaking must include a pledge to act, or behave, in a particular *manner*. Sometimes this pledged manner of performance of the undertaking is described as a requirement that performance will be in the other party's best interests. Sometimes it is expressed as a requirement that the undertaking be performed 'loyally' to that other party. On other occasions it is expressed as a requirement that the duty be performed for the 'proper purposes' for which it was conferred. All of these formulations can be problematic. But the important point is that however the manner of acting or behaving is expressed, the manner of performance of an undertaking is not a freestanding duty.⁶ An 'obligation' to be 'loyal' invites the question: loyalty to do what? Loyalty can be infinitely variable as Horace illustrated, and Auden satirised: *dulce et decorum est pro patria mori*. In law, loyalty cannot be understood without knowing the performance in relation to which loyalty is required. The performance is the obligation undertaken. The manner in which the duty is performed is part of the undertaking but it is generally said to be that which attracts the epithet *fiduciary*.

There is a conundrum which arises from a focus upon construction of an undertaking to determine the content of a fiduciary duty. The conundrum is as follows: why do we speak of fiduciary *relationships*? If (i) the content of the fiduciary duty is determined by the objective undertaking and (ii) the distinctiveness, or fiduciary nature, of the undertaking is determined by the particular undertaking as to the manner in which the duty will be exercised, then why should it matter whether the undertaking is made as part of a particular relationship or not? In other words, what is the relevance of *status* or *relationships* in determining the content of objectively undertaken duties?

The answer to the conundrum may be that the role of a fiduciary relationship depends upon an understanding of the role of *status* in the law concerning voluntary undertakings. The essential point in this paper is to float the thesis that status performs the same role in relation to fiduciary duties that it performs generally in the law of obligations.

This paper is divided into three parts. First, I explain the nature of a fiduciary duty: how it arises and how the content of the duty is determined. This part is in the nature of a summary of more detailed arguments which I, and others,⁷ have made elsewhere.

⁴ J Edelman 'When do fiduciary duties arise?' (2010) 126 LQR 302.

⁵ P Finn *Fiduciary Obligations* (1977) 2; *Bristol and West Building Society v Mothew* [1998] Ch 1, 18 (Millett LJ); *Arklow Investments Limited v MacLean* [2000] 2 NZLR 1 (PC); *Chirnside v Fay* [2006] NZSC 68; [2007] 1 NZLR 433 [15] (Elias CJ).

⁶ *Pilmer v The Duke Group (in Liq)* (2001) 207 CLR 165, [70]-[71] (McHugh, Gummow, Hayne and Callinan JJ).

⁷ P Finn *Fiduciary Obligations* (1977).

Secondly, I turn to the role of status in the law of obligations generally. Two examples are given: the role of status in relation to implied terms and the role of status in relation to the law of common callings. In each case, it is strongly arguable that status operates as part of the context by which reasonable expectations are formed.

Thirdly, I return to fiduciary duties and explain how an understanding of the operation of status in the law of obligations can help us understand its role in determining the content of a fiduciary undertaking.

There is one significant exclusion from this paper. This paper is concerned only with fiduciary duties as they arise in equity. It does not deal with duties which a statute might describe as 'fiduciary' or the inter-relationship between fiduciary duties in equity and those under statute. Parliament can create new duties which in equity would not be considered 'fiduciary', and can attach the same remedial consequences upon those duties. Parliament might even attach the label 'fiduciary' to duties which had never previously been regarded as fiduciary. Or it can redefine and shape fiduciary duties and their remedial consequences. For instance, in *United States v Mitchell*,⁸ Marshall J, for the majority, spoke of the fiduciary duty 'established by the Act [*Indian General Allotment Act 1887*] and of the subsequent statutory and administrative developments which clarified and fleshed out that duty.'

Part I: The nature of a fiduciary duty

The word 'fiduciary' derives from the Latin *fiducia* meaning trust or confidence.⁹ The origins of a fiduciary duty depend upon the extent of the link between concepts that are thought to be necessary and the point at which it might be thought that one concept ceases being developed and a new concept is born. Some association might, nevertheless, be drawn between the modern conception of a fiduciary duty and the Roman law concept of *fiducia*. In Roman law, *fiducia* was a pactum. It was an 'appendage to a conveyance'.¹⁰ Its primary use was a direction to the holder of property concerning that person's obligations in relation to the property. The Roman concept of *fiducia cum amico*¹¹ which still exists in Civilian jurisdictions,¹² requires a person who receives assets of another to deal with them in good faith.

There are two important preliminary points which must be understood in order to comprehend the operation of fiduciary duties.

First, a fiduciary duty requires an undertaking. I have made this point elsewhere¹³ but the notion most famously derives from the academic¹⁴ and judicial¹⁵ work of Paul Finn. The core proposition of this Part of the paper is that the fiduciary undertaking is always manifested by the conduct of the fiduciary. In this sense the fiduciary

⁸ 445 U.S. 535 (100 S.Ct. 1349, 63 L.Ed.2d 607 (1980)).

⁹ J Morwood (ed) *Pocket Oxford Latin Dictionary* (2001 OUP Oxford) 56; *Oxford English Dictionary* (2nd edition 1989) definition 3: 'Of the nature of, proceeding from, or implying trust or reliance'.

¹⁰ W Buckland *A Textbook of Roman Law* (3rd edition 1966 CUP Cambridge) 431.

¹¹ Gaius 2.60.

¹² G Gretton 'Trusts without equity' (2000) 49 ICLQ 499 at 501.

¹³ J Edelman 'When do fiduciary duties arise' (2010) 126 LQR 302.

¹⁴ P Finn 'The Fiduciary Principle' in T Youdan (ed) *Equity, Fiduciaries and Trust* (1992) and *Grimaldi*

¹⁵ *Grimaldi v Chameleon Mining NL (No 2)* [2012] FCAFC 6; (2012) 200 FCR 296 [177].

undertaking is voluntary: it is not imposed by law independently of the fiduciary's manifest intentions. So, apart from statutory duties, and other duties imposed such as by the law of torts (eg the duty not to deceive), a person might be appointed as a guardian, as a director, as a trustee, or as a solicitor, and the undertaking upon appointment might provide clearly that he or she can perform duties in a manner which involves putting himself or herself in a position of conflict or that he or she might be permitted to use the position to make profit in a particular way, possibly at the expense of the principal. Equity does not prohibit such agreement, whether in a contractual context or in a trust deed or other settlement or undertaking. Indeed, in commercial trusts it is almost universal today for trustees to profit, via remuneration, from their positions.

The importance of the fiduciary undertaking is also not confined to fiduciary duties in equity. For instance, in the United Kingdom it has an important statutory role in the *Charities Act 2006 (UK)* which has, at the heart of its definition of charity in s1(1), the concept of an 'institution'. Section 78(5) defines an institution as including 'a trust or undertaking'. The *Charities Act 1960* also referred to undertakings in s46(1).

The second point is that the sub-division within undertakings, involving a class of undertaking as 'fiduciary', is a modern conception. As Sealy and Finn observed decades ago, the term 'fiduciary' only became common in the law reports of the mid-19th century.¹⁶ But although the concept of a 'fiduciary' undertaking is a recent one, the concept of an undertaking itself is extremely old. The undertaking, initially genuine and later also fictional, was central to the plea of *assumpsit* (he undertook). Prior to the emergence of a distinct law of contract, an undertaking did not require consideration from the plaintiff for a successful action based upon mis-performance of an undertaken responsibility.¹⁷

Today, an undertaking which is supported by consideration will usually be legally binding as a contract. Historically, however, consideration was not necessary for an undertaking to be a binding *assumpsit*. And even today a unilateral undertaking can be binding without consideration in various situations such as where the undertaking is in the form of a deed, or if it involves a letter of credit, or if it involves an undertaking to hold rights on trust.

The characterisation of an undertaking as 'fiduciary' might be seen as a general example of another situation in which courts will treat undertaken obligations as binding even if they are unilateral. But it may, nevertheless, be doubted whether there is any utility in a quest to identify a precise boundary between those undertakings which are fiduciary and those undertakings which are not. Making consequences depend upon whether a misleading label is attached to the undertaking is almost certain to cause confusion in the law. Nearly 40 years ago in the first page and core proposition of his great work on fiduciaries, Finn observed that the 'rules are everything. The description "fiduciary", nothing.'¹⁸ The label 'fiduciary' is also misleading due to its etymology in 'trust' and 'confidence'. It is well known that

¹⁶ L Sealy 'Fiduciary Relationships' [1962] CLJ 69; [1962] CLJ 119; P Finn *Fiduciary Obligations* (1977) 1.

¹⁷ D Ibbetson *A Historical Introduction to the Law of Obligations* (1999) 133 and *Powtuary v Walton* (1598) Ro Abr 1.10, *Action sur Case*, P5.

¹⁸ P Finn *Fiduciary Obligations* (1977) 1.

'fiduciary duties' can arise despite the absence of any relationship of trust or confidence. Even when a fiduciary duty is owed by a trustee, the duty does not arise because of the *fiducia* or 'trust' which is sometimes said to inhere in that relationship. There need be no relationship of trust or confidence between a trustee and a beneficiary; the beneficiary might not know of the trust and the beneficiary might not even be born.¹⁹

Nevertheless, on the state of the current law, it is often necessary to decide whether the label 'fiduciary' should be attached to a particular undertaking in order to determine whether various consequences should arise. On one view, the undertaking is 'fiduciary' if it incorporates a pledge that the duty will be performed in a particular way. Sometimes this manner of performance is described as being in the 'best interests' of the principal. In the United States, Scott made this point more than 60 years ago, saying that the fiduciary undertaking could be contractual or gratuitous, but the key point was that the nature of the undertaking involved undertaking to act in the interests of another person.²⁰ In Australia, in the leading Australian formulation of the fiduciary duty, Mason J explained that the 'critical' feature of fiduciary relationships was that the fiduciary 'undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense.'²¹ This statement has been quoted with approval in Australia on many occasions.²²

The same is true in Canada. Putting aside the reference to statute, in *Galambos v Perez*²³ the Supreme Court of Canada said of fiduciary duties in equity that '[i]t is fundamental to all ad hoc fiduciary duties that there be an undertaking by the fiduciary, which may be either express or implied, that the fiduciary will act in the best interests of the other party... In cases of per se fiduciary relationships this undertaking will be found in the nature of the category of relationship in issue.' The final, and important, sentence is considered in Part III of this paper. Again, in the Supreme Court of Canada in *Hodgkinson v Simms*,²⁴ La Forest, L'Heureux-Dubé and Gonthier JJ explained, quoting from Finn, that 'the "end point" in each situation is to ascertain whether "the one has the right to expect that the other will act in the former's interests (or, in some instances, in their joint interest) to the exclusion of his own several interests'. Most recently, two weeks ago the Supreme Court of Canada held that even in a *per se* fiduciary relationship such as that of lawyer-client there can be examples where a law firm might not owe exclusive loyalty to its client. Whether or not this proposition applies in other jurisdictions especially in the context of different statutes and regulations, the essential basis for the conclusion of the Supreme Court was whether there is a reasonable expectation by the client of such loyalty from the law firm.

Although it is not necessary for the purposes of this paper to quibble with the widely accepted formulation that a fiduciary duty requires that the undertaking be performed

¹⁹ *Swain v Law Society* [1982] 1 WLR 17, 48 (Fox LJ); J D Heydon and M J Leeming (eds) *Jacobs' Law of Trusts in Australia* (2006 7th edn) 4 [107].

²⁰ A Scott 'The Fiduciary Principle' (1949) 37 Calif Law Rev 539, 544.

²¹ *Hospital Products Ltd v United States Surgical Corporation* [1984] HCA 64; (1984) 156 CLR 41, 96-97.

²² In the High Court, for example, *Pilmer v Duke Group (In liq)* (2001) 207 CLR 165, [70]–[71] (McHugh, Gummow, Hayne and Callinan JJ); *John Alexander Tennis Club v White City Tennis Club* (2010) 241 CLR 1, [87] (French CJ, Gummow, Hayne, Heydon and Kiefel JJ).

²³ [2009] 3 SCR 247, 249.

²⁴ [1994] 3 SCR 377.

in the best interests of the principal, it suffices to say that there may be some difficulties with the expression of that proposition in those terms. It might be that a better approach, although still not without difficulty, could be that the essence of what makes an undertaking a 'fiduciary' undertaking is that the undertaking concerns the performance of a duty in a way which is consistent with the consideration of the interests of the principal (the positive aspect) and not in a way which is extraneous to the purposes of the duty (the negative aspect). There are three reasons why this more limited formulation might be preferred.

First, a trustee might undertake to hold assets on trust subject to a general power to distribute the assets to anyone in the world (including himself or herself). No decision has yet held a general power to be invalid. The existence of this power, if valid, must mean that there is no duty for the trustee to act in the best interests of the beneficiaries since a duty to act in a particular manner, with a power not to do so, is no duty at all.

Secondly, consider an example. Suppose a trustee holds a trust fund on a discretionary trust for 3 objects with an absolute discretion as to the amount, if any, which will be distributed to each. The trustee carefully considers the circumstances of the beneficiaries and distributes all of the trust funds to person B. Unknown to the trustee, person B has a chronic gambling habit and the distribution is soon gambled and lost. On the assumption that the distribution was not in the best interests of any of the objects, still less in the best interests of all of them, could it be said that the trustee is liable for failing to distribute the trust fund in the best interests of the objects of the trust? The answer may be 'no'. As the joint judgment in the High Court of Australia of McHugh, Gummow, Hayne and Callinan JJ explained in *Pilmer v Duke Group*,²⁵ 'there is not imposed upon fiduciaries a quasi-tortious duty to act solely in the best interests of their principals'. As the House of Lords and High Court of Australia have both emphasised, the description of the manner of exercise of fiduciary powers²⁶

clearly cannot be done by enumeration, since the variety of situations facing directors of different types of company in different situations cannot be anticipated. No more, in their Lordships' view, can this be done by the use of a phrase -- such as 'bona fide in the interest of the company as a whole,' or 'for some corporate purpose.' Such phrases, if they do anything more than restate the general principle applicable to fiduciary powers, at best serve, negatively, to exclude from the area of validity cases where the directors are acting sectionally, or partially i.e. improperly favouring one section of the shareholders against another.

A third reason which, on one view, might favour the more particular formulation or characterization of the manner of performance of an undertaking as fiduciary rather than a broad 'best interests' or 'loyalty' formulation is that the more particular formulation does not require a single undertaking to be 'filleted' into fiduciary and non-fiduciary components such as an undertaken duty of care.²⁷ Nor does it create a

²⁵ *Pilmer v The Duke Group (in Liq)* [2001] HCA 31; (2001) 207 CLR 165 [74]

²⁶ *Howard Smith Ltd v Ampol Ltd* [1974] AC 821, 835; *Whitehouse v Carlton Hotel Pty Ltd* [1987] HCA 11; (1987) 162 CLR 285 (Mason, Deane & Dawson JJ).

²⁷ See 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). See also *United States v White Mountain Apache Tribe* 537 US 465; 249 F 3d 1364 (2003).

distinction between fiduciary powers of care and (non)fiduciary duties of care.²⁸ Nor does it require that fiduciary duties are all proscriptive.²⁹ Each of these points is controversial and different countries, and different courts, have reached different conclusions.

The ultimate point about fiduciary duties was made by Fletcher Moulton LJ almost a century ago: '[t]here is no class of case in which one ought more carefully to bear in mind the facts of the case'.³⁰ In each case the undertaking and the manner of its performance is generally treated as a question of construction of the undertaking. Or, as the matter was put in the Supreme Court of Canada,³¹ and also in *Grimaldi v Chameleon Mining NL (No 2)*³² by the Full Court of the Federal Court, whether a reasonable person would be entitled to expect performance of the duty in that way:

A person will be in a fiduciary relationship with another when and insofar as that person has undertaken to perform such a function for, or has assumed such a responsibility to, another as would thereby reasonably entitle that other to expect that he or she will act in that other's interest to the exclusion of his or her own or a third party's interest.

Part II: The evolution of status in the law of obligations: two examples

Example 1: Common callings

The first example where status or office is sometimes thought to dictate the nature of obligations owed is in relation to 'common callings'. Holdsworth argued that the origin of liability upon a common calling was the notion that persons holding a particular status were regulated by law. Hence 'persons like innkeepers or common carriers, and perhaps persons like smiths or surgeons, were considered to be bound by their calling to show a certain degree of skill in their respective callings'.³³ The basis for the action, Holdsworth asserted, was 'at bottom public policy. It was for the interest of the community – then as now – that persons who professed a particular calling should show an adequate amount of care, skill and honesty in following their calling'.³⁴

Holdsworth's version of the history of the common callings is controversial. The late AWB Simpson argued that no particular categories of common calling ever existed. The adjective 'common' applied to hangmen, prostitutes, informers, serjeants, labourers, attorneys, innkeepers, carriers, and many others: it 'means no more than available to or for the public'.³⁵

In any event, the 'status' conception of the liability of a common calling gradually receded. In a later consideration of the evolution of special assumpsit, Holdsworth

²⁸ 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).

²⁹ See *Futter v Revenue & Customs* [2013] UKSC 26.

³⁰ *Re Coomber* [1911] 1 Ch 723 at 728-729.

³¹ *Canadian National Railway Co v McKercher LLP* [2013] SCC 39 [37].

³² [2012] FCAFC 6; (2012) 200 FCR 296 [177].

³³ W S Holdsworth, *A History of English Law Vol III* (Methuen & Co Ltd, 3rd ed, 1923) 385.

³⁴ W S Holdsworth, *A History of English Law Vol III* (Methuen & Co Ltd, 3rd ed, 1923) 385-6.

³⁵ A W B Simpson *A history of the common law of contract: the rise of the action of assumpsit* (1987) 230.

explained that by the 17th century the centrality of the undertaking had meant that the adoption of 'these forms of *assumpsit* in these cases tended to promote and emphasise a transition from status to contract'.³⁶ A general consensus emerged that it was not the particular status of an individual which gave rise to the duties of a common calling but the nature of the undertaking made by the individual.

In Sir Percy Winfield's famous history of negligence in torts,³⁷ he traced the different conceptions of the basis for rules concerning the common callings including that which was floated by Coke after the *Ipswich Tailor's Case*,³⁸ that the liability based upon a common calling, such as that of a common carrier, was based upon a general undertaking of safe delivery. By the time of Blackstone this undertaking conception had become central. Blackstone explained that this class of contracts 'arises upon this supposition that everyone who undertakes any office, employment, trust, or duty contracts with those who employ or entrust him, to perform it with integrity, diligence and skill'.³⁹

The modern conception is now firmly rooted in the notion of an undertaking. In the leading Australian case of *James v Commonwealth*,⁴⁰ Dixon J rejected the argument that the Commonwealth had induced common carriers to breach their duty to carry Mr James' fruit, finding that the carriers had not undertaken or assumed a common duty.⁴¹

The holding out or profession of the character of common carrier may be expressed, or it may be, and usually is, implied by a course of business or other conduct. It is in every case a question of fact whether the character of a common carrier has been assumed. In considering that question an important matter is whether the carrier holds himself out as ready without discrimination to carry the goods of all persons who may choose to employ him or send him goods to be carried. If, instead of inviting all persons without discrimination to use his ships or vehicles, he reserves the right of choosing among them, independently of the suitability of their goods for his means of transportation and without regard to the room or space he has available, then he is not a common carrier.

Although the common calling arises as a matter of an undertaking, one particular aspect of the *common* calling should however be emphasised. That aspect is that the undertaking is to the public *at large*. As Dixon J explained, a person is not required to make an undertaking to the public generally to perform a service, but if he or she does so then that duty can be breached if it is not performed in relation to an individual. For this reason, the duties arising from the common callings are sometimes described as 'public' duties and the possibility arose of proceeding for breach upon a criminal indictment.⁴² So 'if an inn-keeper ... hangs out a sign and opens his house for travellers, it is an implied engagement to entertain all persons who travel that way and upon this universal *assumpsit* an action on the case will lie against

³⁶ W.S Holdsworth, *A History of English Law Vol III* (Methuen & Co Ltd, 3rd ed, 1923) 448.

³⁷ P Winfield 'The History of negligence in torts' (1926) 42 LQR 184, 188-190.

³⁸ 11 Coke Rep 53a, 53b; 77 ER 1218, 1219.

³⁹ J Chitty (ed) *Blackstone's Commentaries of the Laws of England* (1826) Book III, Ch 9, p164.

⁴⁰ [1939] HCA 9; 62 CLR 339.

⁴¹ [1939] HCA 9; 62 CLR 339 at 367-369.

⁴² See discussion in *Stapley v Towing Masters Pty Ltd (trading as Dynamic Towing)* [2009] NSWCA 382 [92]; *Pozzi v Shipton* (1838) 1 Per & Dav 4, 12 per Patteson J (arguendo, although the passage does not appear in the report at [1838] EngR 205; 8 Ad & E 1106; 112 ER 1106); *Belfast Ropework Co v Bushell* at 212 per Bailhache J

him for damages'.⁴³ Similarly, a standard common law count in the case of a common carrier for the refusal to carry goods was as follows:⁴⁴

That the defendant was a common carrier of goods for hire ... and the plaintiff at a reasonable and proper time ... tendered to him ... at his place of business for the receipt of goods to be carried by him as such carrier to receive the same and carry them [for delivery] for hire to the defendant; and the plaintiff was then ready and willing and offered to pay to the defendant his reasonable hire ... and the defendant then had sufficient time, means and convenience to receive and carry and deliver the said goods as aforesaid, and could and ought to have done so; yet the defendant did not nor would receive and carry the said goods for the plaintiff.

Common callings still exist today. But an undertaking to the public to perform a service without discrimination is not common. Hence, the onus of proving that there has been no reservation of a right to discriminate is on the person who alleges that some particular carrier is a common carrier.⁴⁵ The question has become one of construction of an undertaking.

Although the question is one of construction of the undertaking, status is not wholly irrelevant. There are some instances where status leads to a reasonable expectation that the undertaking is one to act in a common calling. Barristers and taxi drivers are examples of this, although today the reasonable expectation is reinforced by ethical and regulatory duties of the barrister and taxi driver. Further, if a common calling is found, the status of the obligor might affect the nature of the particular rights and duties found to be as undertaken. An example is the common law lien which is imposed upon the recipient of a service provided by common calling. The 'common law lien' was differentiated by Lord Kenyon from liens which the common law recognised by usage or agreement. When the common calling obligations were thought to be based upon considerations of public policy the lien was rationalised as a corresponding benefit to the obligor. It was said that the common law lien arose 'where a party was obliged by law to receive goods ... in which case as the law imposed the [burden] it also gave him a power of retaining for his indemnity'.⁴⁶ But, as the basis of the common calling moved to a model concerned with undertakings, the basis for the common law lien became rooted in the *expectation* that the status of a person as a common obligor in that industry would generally carry a right to a lien. By the time of the *Bills of Lading Act 1855*, it became recognised that the 'receipt of the cargo by the indorsee of the bill of lading is evidence of an agreement to be bound by its terms, whatever they may be'.⁴⁷ As the House of Lords later explained, '[t]he inferred contract is not a fiction. It is a contract which the court concludes has come into existence because that is the proper finding of fact to make on the evidence in the case'.⁴⁸ The common law lien for freight or for general average arose as part of the contractual undertaking 'unless the bill of lading contained words waiving or negating the lien (as by stamping the bill of lading "freight prepaid")'.⁴⁹

⁴³ J Chitty (ed) *Blackstone's Commentaries of the Laws of England* (1826) Book III, Ch 9, p165.

⁴⁴ Bullen & Leake *Precedents of Pleadings* (3rd ed, 1868) 277.

⁴⁵ *Stapley v Towing Masters Pty Ltd (trading as Dynamic Towing)* [2009] NSWCA 382 [98] (Campbell JA).

⁴⁶ *Naylor v Mangles* (1794) 1 Esp 109, 109; 170 ER 295, 296.

⁴⁷ *Allen v Coltart* (1883) 11 QBD 782, 785, Cave J citing *Young v Moeller* (1855) 5 E&B 755.

⁴⁸ *Borealis Ab v Stargas Limited and Others and Bergesen DY A/S* [2001] UKHL 17; [2001] 2 All ER 193 [20] (Lord Hobhouse).

⁴⁹ *Borealis Ab v Stargas Limited and Others and Bergesen DY A/S* [2001] UKHL 17; [2001] 2 All ER 193 [20] (Lord Hobhouse).

Example 2: Implied terms

Another area in which it has been thought that a duty is imposed upon a person due to status or office is in circumstances where the term is implied by custom or usage in an industry in which a person holds office or status. Like the instance of a common calling, it was not historically clear upon what basis the obligation arising from custom or usage was imposed upon a person. The concept of a 'general custom' was described by reference to the operation of the common law itself: 'where 'a new case has to be decided, where analogy will not help as an authority or a guide, the lawyer must have recourse to what is called his discretion or common-sense, which is, in fact, customary reason'.⁵⁰ On this broad view of custom, all duties arising from custom would properly be seen as imposed as a matter of law rather than arising from construction of an undertaking.

But, there was a more limited use of custom as importing obligations. In *Hutton v Warren*⁵¹ Parke B spoke of the obligation from custom or usage being imported into a lease 'by implication'. The basis for the imposition of an obligation arising from custom was therefore implication of that obligation as a term of the undertaking. In the United States Supreme Court, in *Barnard v Kellogg*,⁵² Davis J said:

The proper office of a custom or usage in trade is to ascertain and explain the meaning and intention of the parties to a contract, whether written or in parol, which could not be done without the aid of this extrinsic evidence. It does not go beyond this, and is used as a mode of interpretation on the theory that the parties knew of its existence, and contracted with reference to it... But if it be inconsistent with the contract, or expressly or by necessary implication contradicts it, it cannot be received in evidence to affect it.

The role of status, or office, was as a background fact of an industry where there was broad acceptance of particular conduct from which to deduce the terms of that agreement. In *Browne on Usage and Custom* this more limited conception of duties that can arise by custom was explained in the following way:⁵³

Seeing that custom is only to be inferred from a large number of individual acts, it is evident that the only proof of the existence of a usage must be by the multiplication or aggregation of a great number of particular instances; but these instances must not be miscellaneous in character, but must have a principle of unity running through their variety, and that unity must shew a certain course of business and an established understanding respecting it.

One of the most famous examples of undertakings implied by custom was the law merchant. The law merchant custom varied. Sometimes it was local. Sometimes it was general. Sometimes law merchant custom was accepted without evidence. Sometimes evidence was required. In *Edie v East India Co*,⁵⁴ Wilmot J said that '[t]here may indeed be some questions depending upon customs amongst merchants, where if there is a doubt about custom it may be fit and proper to take the opinions of merchants thereupon; yet that is only where the law remains doubtful, and even then the custom must be proved by facts not by opinion only'.

⁵⁰ J H Browne *The Law of Usages and Customs* (1875) 79.

⁵¹ *Hutton v Warren* (1837) 1 M&W 466, 475; 150 ER 517, 521.

⁵² 77 US 383 (1869) [5].

⁵³ J H Browne *The Law of Usages and Customs* (1875) 79.

⁵⁴ 2 Burr 1228.

An example of an obligation, and corresponding right, which arose as a consequence of status was the lien at common law which arose as a matter of custom or usage in particular relationships involving a particular status. The source of this right was an implied undertaking. In *Brandao v Barnett*,⁵⁵ Lord Campbell explained that these liens arose as 'part of the law merchant' because 'when a general usage has been judicially ascertained and established it becomes a part of the law-merchant, which courts of justice are bound to know and recognize.' In Australia, Stephen J explained that 'it is by such a process that the general liens of solicitors, stockbrokers, factors and insurance brokers have been established.'⁵⁶

In the leading case in Australia, *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd*,⁵⁷ the High Court of Australia made the same point, describing the evolution of the concept of custom:

A person may be bound by a custom notwithstanding the fact that he had no knowledge of it. Historically the courts approached this question in a rather different way. It was said that, as a general rule, a person who was ignorant of the existence of a custom or usage was not bound by it. To this rule there was a qualification that a person would be presumed to know of the usage if it was of such notoriety that all persons dealing in that sphere could easily ascertain the nature and content of the custom. It would then be reasonable to impute that knowledge to a person, notwithstanding his ignorance of it.⁵⁸ In this way, the issue of notoriety ... came to be co-extensive with the question of imputed knowledge. The achievement of sufficient notoriety was both a necessary and sufficient condition for knowledge of a custom to be attributed to a person who was in fact unaware of it. The result is that in modern times nothing turns on the presence or absence of actual knowledge of the custom; that matter will stand or fall with the resolution of the issue of the degree of notoriety which the custom has achieved. The respondent's contention that industry practices unknown to the assured are incapable of forming the basis of an implied term of the contract cannot be sustained.

The same is true in Canada.⁵⁹

However, the acceptance that a term is *implied* into the undertaking is not necessarily the same thing as saying that the term arises as a matter of *construction* of the undertaking. In *Liverpool City Council v Irwin*,⁶⁰ Lord Wilberforce spoke of three different classes of implication of term. One class involved implication of terms by custom which was said to be founded upon 'what both parties know and would, if asked, unhesitatingly agree to be part of the bargain'. The second is where courts add a term to a contract without which the contract will not work. The third (which Lord Wilberforce doubted) was Lord Denning MR's view that terms could be implied if they were reasonable. The fourth was where the parties had not stated all the terms of the contract and the court needed to search for the terms by implication to complete the undertaking. On Lord Wilberforce's view, it is only the fourth of these categories which is expressly concerned with construction of the contract or undertaking.

⁵⁵ (1846) 12 Cl & F 787, 805; 8 ER 1622,1629. See also Lord Lyndhurst 810, 1631.

⁵⁶ *Majeau Carrying Co Pty Ltd v Coastal Rutile Ltd* [1973] HCA 22; (1973) 129 CLR 48.

⁵⁷ [1986] HCA 14; (1986) 160 CLR 226, 237-238.

⁵⁸ *Halsbury's Laws of England* 4th ed., vol 12, pars 467-468; *Jones v. Canavan* (1972) 2 NSWLR 236, 243.

⁵⁹ See, eg, *Georgia Construction Co. v. Pacific Great Eastern Railway* [1929] SCR 630; *Gainers Ltd and Local 319 United Packing House Workers of America* (1964) 47 WWR 544, 552 (Riley J).

⁶⁰ [1977] 1 AC 239, 253.

But if the other three classes of implication of term are not really concerned with a question of construction of the undertaking, then why do they arise? The view of Lord Denning MR, in the Court of Appeal in *Liverpool* was that the implication had nothing to do with the intention of the parties. Quoting from an extra-judicial speech of Lord Wright to the Holdsworth Club, Lord Denning argued that '[t]he truth is that the Court decides this question in accordance with what seems to be just and reasonable in its eyes... The Court is, in this sense, making a contract for the parties – though it is almost blasphemy to say so'.⁶¹ A non-religious lawyer might quibble with Lord Denning's use of the word 'almost'. The same view was expressed more recently by Kirby J in relation to implied terms in *Roxborough v Rothmans of Pall Mall Australia Ltd*.⁶² His Honour said that 'the time may be coming where the fiction is dispensed with completely and the courts acknowledge candidly that, in defined circumstances, the law to which they give effect permits, according to a desired policy, the imposition upon parties of terms and conditions for which they have omitted to provide expressly'. The ultimate purpose of this paper has been an attempt to reject this view.

The reason why this 'policy' approach to implied terms is incorrect was explained by the Privy Council in *AG of Belize v Belize Telecom Ltd*.⁶³ In that case, Lord Hoffmann, giving the advice of the Privy Council, considered the leading Privy Council decision in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings*,⁶⁴ on appeal from the Supreme Court of Victoria. In that case the Privy Council set out five criteria which 'must be 'satisfied' for the implication of a term'.⁶⁵ Those criteria were

- (i) must be reasonable and equitable;
- (ii) must be necessary to give business efficacy to the contract so that no term will be implied if the contract is effective without it;
- (iii) must be so obvious that 'it goes without saying';
- (iv) must be capable of clear expression; and
- (v) must not contradict any express terms of the contract.

Lord Hoffmann rejected the suggestion that the *BP Refinery* indicia must all be satisfied. Instead, his Lordship explained that the factors were merely indicia to be used in the assessment of the meaning which words bear to the reasonable addressee. This approach assimilates the process of implication of terms with the exercise of construction and interpretation. In relation to implication, Lord Hoffmann's approach asks whether such a provision would spell out in express words what the instrument,

⁶¹ *Liverpool v Irwin*, unreported Court of Appeal decision, 22 July 1975, page 9.

⁶² *Roxborough v Rothmans of Pall Mall Australia Ltd* [2001] HCA 68; (2001) 208 CLR 516, 575 [159].

⁶³ *AG of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 1 WLR 1988 [21] - [27] referred to without disapproval in *The Bell Group Ltd (in liq) v Westpac Banking Corporation [No 3]* [2012] WASCA 157 [342] (Lee AJA).

⁶⁴ *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266, 283 (Lord Simon and Lord Keith).

⁶⁵ *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266, 283 (Lord Simon and Lord Keith).

read against the relevant background, would reasonably be understood to mean.⁶⁶ Lord Hoffmann's approach has been approved in New Zealand,⁶⁷ and in England.⁶⁸

Lord Hoffmann's approach is also supported by the fact that courts often divide on the issue of whether they are involved in an exercise of 'implying' a term or 'construing' the terms of the contract by 'the drawing out of what is implied by the language of the contract itself'.⁶⁹ In Australia, the High Court of Australia has, on a number of occasions, divided in approach concerning whether the exercise in which it was engaged was one of interpretation or construction, or one of implication. For instance, in *Butt v Long*,⁷⁰ two judges in the High Court considered the issue to be one of interpretation⁷¹ whilst the Chief Justice considered the issue to be one of implication.⁷² In *Lewis Construction (Engineering) Pty Ltd v Southern Electric Authority of Queensland*,⁷³ three judges⁷⁴ considered the exercise as one of interpretation whilst two judges considered it as a question of implication.⁷⁵

Nevertheless, the step of conflating implication and construction has not yet been taken in Australia. In *Codelfa Construction Pty Ltd v State Rail Authority of NSW*,⁷⁶ the five requirements were described by Mason J (with whom Stephen and Wilson JJ agreed) as necessary conditions. Mason J (Stephen and Wilson JJ agreeing) also said that '[w]hen we say that the implication of a term raises an issue as to the meaning and effect of the contract we do not intend by that statement to convey that the court is embarking upon an orthodox exercise in the interpretation of the language of a contract, that is, assigning a meaning to a particular provision'.⁷⁷

There are signs that the approach in Australia may ultimately change. In relation to informal contracts it has been said that the five *BP Refinery* criteria are replaced with a single question: is it 'necessary for the reasonable or effective operation of a contract of that nature in the circumstances of the case'.⁷⁸ However, that expression of the test for implication was subject to a proviso: 'a term may be implied in a contract by established mercantile usage or professional practice or by a past course of dealing

⁶⁶ *AG of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 1 WLR 1988 [21].

⁶⁷ *Dysart Timbers Ltd v Nielsen* [2009] NZSC 43; [2009] 3 NZLR 160 [25] (Tipping and Wilson JJ) [62] (McGrath J).

⁶⁸ *Mediterranean Salvage & Towage Ltd v Seamar Trading and Commerce Inc ('The Reborn')* [2009] EWCA Civ 531.

⁶⁹ *Brambles Holdings Ltd v Bathurst City Council* [2001] NSWCA 61; (2001) 53 NSWLR 153, 165 [30] (Heydon JA); *Boreland v Docker* [2007] NSWCA 94 [110]-[111] (Beazley JA; Mason P and Ipp JA agreeing).

⁷⁰ *Butt v Long* [1953] HCA 76; (1953) 88 CLR 476.

⁷¹ *Butt v Long* [1953] HCA 76; (1953) 88 CLR 476, 489-490 (Webb J), 490-491 (Fullagar J).

⁷² *Butt v Long* [1953] HCA 76; (1953) 88 CLR 476, 487-489 (Dixon CJ).

⁷³ *Lewis Construction (Engineering) Pty Ltd v Southern Electric Authority of Queensland* (1976) 50 ALJR 769.

⁷⁴ *Lewis Construction (Engineering) Pty Ltd v Southern Electric Authority of Queensland* [(1976) 50 ALJR 769, 770-771 (Barwick CJ, dissenting), 773-775 (Gibbs J), 778 (Mason J)].

⁷⁵ *Lewis Construction (Engineering) Pty Ltd v Southern Electric Authority of Queensland* (1976) 50 ALJR 769, 777 (Stephen and Murphy JJ)

⁷⁶ *Codelfa Construction Pty Ltd v State Rail Authority of NSW* [1982] HCA 24; (1982) 149 CLR 337, 345.

⁷⁷ *Codelfa Construction Pty Ltd v State Rail Authority of NSW* [1982] HCA 24; (1982) 149 CLR 337, 347. See also *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* [1979] HCA 51; (1979) 144 CLR 596, 605 - 606 (Mason J).

⁷⁸ *Hawkins v Clayton* (1988) 164 CLR 539, 573 (Deane J); *Breen v Williams* (1996) 186 CLR 71, 90-91 (Dawson and Toohey JJ), 123-124 (Gummow J).

between the parties'.⁷⁹ The state of the law is therefore that different approaches may apply to identification of the terms of an undertaking by (i) express formal contract or deed; (ii) informal contract; or (iii) custom or usage. But the common feature is that each is found to be part of the undertaking based upon manifestations of the intention of the relevant party or parties.

Part III: Status and fiduciary undertakings

With this background of the role of status as a circumstance which informs the objective construction of an undertaking, we move to the meaning of the 'fiduciary relationship'. A question posed at the start of this paper is if the duty of a fiduciary is determined by the content of the manifest undertaking then what relevance is the fiduciary relationship?

The answer to that question must be that the relationship will often provide crucial context for the construction of the undertaking. For instance, in a case where the fiduciary duties are undertaken as part of a contract, the relationship will not be 'superimposed' upon those duties. Instead, it will inform their content. Often the relationship will be the reason why undertaken duties will become fiduciary. That is, the relationship will be the reason why a duty which is undertaken will be required to be performed in a manner which has regard to the interests of the principal, and is not extraneous to the purpose for which the duty was undertaken.

This notion was expressed in *Hodgkinson v Simms*⁸⁰ in the majority joint judgment of La Forest, L'Heureux-Dubé and Gonthier JJ. Speaking of the relationship of agency, and the status of a person as an agent, their Honours said that

...the legal incidents of many contractual agreements are such as to give rise to a fiduciary duty. The paradigm example of this class of contract is the agency agreement, in which the allocation of rights and responsibilities in the contract itself gives rise to fiduciary expectations.⁸¹ In other contractual relationships, however, the facts surrounding the relationship will give rise to a fiduciary inference where the legal incidents surrounding the relationship might not lead to such a conclusion ... However, as Professor Finn puts it, the 'end point' in each situation is to ascertain whether 'the one has the right to expect that the other will act in the former's interests (or, in some instances, in their joint interest) to the exclusion of his own several interests.'⁸²

One of the most famous passages in fiduciary law might be easily explained in this way. Various judgments in the High Court of Australia, the Privy Council,⁸³ the House of Lords,⁸⁴ and the Supreme Court of Canada,⁸⁵ have all endorsed and emphasised the importance of a crucial passage from Mason J in the High Court of Australia:⁸⁶

⁷⁹ *Hawkins v Clayton* (1988) 164 CLR 539, 573 (Deane J); *Breen v Williams* (1996) 186 CLR 71, 91 (Dawson and Toohey JJ).

⁸⁰ [1994] 3 SCR 377.

⁸¹ *Johnson v Birkett* (1910) 21 OLR 319; *McLeod v Sweezey* [1944] SCR 111; P.D Finn, "Contract and the Fiduciary Principle" (1989) 12 UNSWLJ 76.

⁸² P.D Finn, "Contract and the Fiduciary Principle" (1989) 12 UNSWLJ 76, 88.

⁸³ *Kelly v Cooper*, [1993] AC 205, 215.

⁸⁴ *Hilton v. Barker Booth & Eastwood* [2005] UKHL 8; [2005] 1 WLR 567 [30].

⁸⁵ *Strother v. 3464920 Canada Inc* [2007] 2 S.C.R. 177, 2007 SCC 24 [141] (McLachlin CJ, Bastarache, LeBel and Abella JJ agreeing).

⁸⁶ *Hospital Products Ltd. v. United States Surgical Corp.* (1984) 156 CLR 41, 97.

. . . the existence of a basic contractual relationship has in many situations provided a foundation for the erection of a fiduciary relationship. In these situations it is the contractual foundation which is all important because it is the contract that regulates the basic rights and liabilities of the parties. The fiduciary relationship, if it is to exist at all, must accommodate itself to the terms of the contract so that it is consistent with, and conforms to, them. The fiduciary relationship cannot be superimposed upon the contract in such a way as to alter the operation which the contract was intended to have according to its true construction.

The point being made by Mason J is that the fiduciary 'relationship' is a matter which informs the terms which arise under the contract. The relationship thus 'accommodates' itself to the contract and is not 'superimposed' upon the contract. Where, in light of the surrounding circumstance of the relationship of the parties, the particular 'fiduciary' duty is not expressed or implied in the contract then it cannot be imposed on the parties.⁸⁷

This explanation can clarify why status is not essential to the existence of a fiduciary duty. The classic English exposition of the fiduciary concept has been one of 'status'. The exemplar of a fiduciary is sometimes said to be a trustee.⁸⁸ Company directors were considered to be an obvious extension given the power they have to deal with company property.⁸⁹ But early in the development of fiduciary law it was clear that the notion of a fiduciary had extended so far beyond this analogy that this 'status' conception of a fiduciary could no longer have any real explanatory power. Fiduciary duties were recognized between parties despite the absence of any proprietary connection: lawyer to client,⁹⁰ doctor to patient,⁹¹ partner to partner,⁹² bailee to bailor,⁹³ stockbroker to client,⁹⁴ joint venturer to joint venturer,⁹⁵ parent to child,⁹⁶ the State to its Aboriginal people.⁹⁷ And they were recognized between persons who could not be categorized as falling within any category at all: in Canada this residuary category was described as *ad hoc* fiduciary relationships. As early as 1885, Field J said that 'the fiduciary relation, as it is called, does not depend upon any particular circumstances. It exists in almost every shape.'⁹⁸

⁸⁷ *ASIC v Citigroup Global Markets Australia Pty Ltd (No 4)*, (2007) 160 FCR 35, 77 [281] (Jacobson J) *Henderson v Merrett Syndicates Ltd* [1994] UKHL 5; [1995] 2 AC 145, 206 (Lord Browne-Wilkinson); *Canberra Residential Developments Pty Ltd v Brendas* [2010] FCAFC 125; (2010) 188 FCR 140 [36]; *Noranda Australia Ltd v Lachland Resources NL* (1988) 14 NSWLR 1 [17] (Bryson J). Cf the more tentative expression in *John Alexander Tennis Club v White City Tennis Club* [2010] HCA 19; (2010) 241 CLR 1 [87], French CJ, Gummow, Hayne, Heydon and Kiefel JJ that 'it will be very difficult to superimpose the suggested fiduciary obligation upon that limited contract'.

⁸⁸ P Birks 'The Content of Fiduciary Obligation' (2002) TLI 34.

⁸⁹ *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134.

⁹⁰ *Maguire v Makaronis* (1997) 188 CLR 449.

⁹¹ *Norberg v Wynrib* [1992] 2 SCR 226; *Breen v Williams* (1996) 186 CLR 71 (Gaudron, McHugh and Gummow JJ; Contra Brennan CJ, Dawson and Toohey JJ).

⁹² *Helmore v Smith* (1886) 35 Ch D 436 at 444.

⁹³ *Hallett's Estate; Knatchbull v Hallett* (1879) 13 Ch D 696 at 709.

⁹⁴ *Daly v Sydney Stock Exchange Ltd* (1986) 160 CLR 371.

⁹⁵ *United Dominions Corporation Ltd v Brian Pty Ltd* (1985) 157 CLR 1; *Chirnside v Fay* [2006] NZSC 58; [2007] PNLR 6.

⁹⁶ *M(K) v M(H)* [1992] 3 SCR 6; *Plowright v Lambert* (1885) 52 LT 646 at 652; *Clay v Clay* (2001) 202 CLR 410.

⁹⁷ *Guerin v R* [1984] 2 SCR 335.

⁹⁸ *Plowright v Lambert* (1885) 52 LT 646 at 652.

Conclusions

Writing in 16th century Elizabethan England, Shakespeare observed the importance of 'degree, priority and place, Insisture, course, proportion, season, form, Office, and custom, in all line of order'. But 'Take but degree away, untune that string, And, hark! what discord follows; each things meets In mere oppugnancy...'⁹⁹ In various areas of the law of obligations, including obligations arising from common callings and obligations arising from custom or usage, it was sometimes thought that the obligation was imposed on a person due to that person's status or office. That view is no longer held. Instead, status or office serves as a basis from which an implication can be drawn in an undertaking by the obligor. That implication is based upon the manifestations by, or objective conduct of, the obligor. The office or status held by the obligor will shape the understanding that a reasonable person will have of the conduct.

The same should be true of the role of status in relation to duties undertaken by fiduciaries. A dominant view of the law concerning fiduciary duties is that an undertaking will become a *fiduciary undertaking* when the undertaking involves an obligation to act or behave, and also to do so in a particular *manner*. The undertaking, and the manner in which the undertaking must be performed, may be influenced by the status or office of the person giving the undertaking. But, in every case, the ultimate question should be one of construction or implication.

This view is not universally held in relation to fiduciary duties, nor in relation to common callings nor terms implied by custom. There are still views that these terms are implied as a matter of policy, or judicial assessment of reasonableness, independently of the manifest intentions of the parties.

There is a grave danger which can arise unless we are vigilant with an understanding of status as only a factor in the process of construction or implication of terms of an undertaking. The danger arises because the same status can describe many different types of relationship. The 'archetypal' fiduciary,¹⁰⁰ the trustee, can be used as an example.

Historically, the nomenclature of trust was almost exclusively used to describe circumstances of declared trusts, that is trusts which were either expressly declared or impliedly declared. In *Cook v Fountain*,¹⁰¹ the Lord Chancellor, Lord Nottingham, giving the opinion of himself and two Chief Justices, said of declarations of trust:

[E]xpress trusts are declared either by word or writing; and these declarations appear either by direct and manifest proof, or violent and necessary presumption. These last are commonly called presumptive trusts; and that is, when the Court, upon consideration of all circumstances presumes there was a declaration, either by word or writing, though the plain and direct proof thereof be not extant.

In this period, 'almost all the lands in England were conveyed to Uses' to evade 'the hardships of the feudal tenures ... [and] to secure estates from forfeitures for high

⁹⁹ *Troilus & Cressida*, I, iii.

¹⁰⁰ *Maguire v Makaronis* [1997] HCA 23; (1997) 188 CLR 449, 473 quoting *Hospital Products Ltd v United States Surgical Corporation* [1984] HCA 64; (1984) 156 CLR 41 at 68 (Gibbs CJ).

¹⁰¹ (1676) 3 Swan 585, 591; (1676) 36 ER 984, 987,

treason'.¹⁰² Hence, it was unsurprising that there was a common recognition that particular duties would attach to this common undertaking of trustee. When lands were placed into the management of another person, there was a common, perhaps near-universal, expectation arising from the acceptance of the office. In *Ex parte Lacey*¹⁰³ Lord Eldon said that a 'trustee, who is entrusted to sell and manage for others, undertakes in the same moment, in which he becomes a trustee, not to manage for the benefit and advantage, of himself'.

The same is not true today. The office of trustee assumes many different forms and the nature of the trust can vary dramatically. There will be many express trusts where Lord Eldon's implication can be easily made. But this is far from universal. It is well recognized that some trustees do not owe fiduciary duties at all.¹⁰⁴ Other trustees, who might usually owe fiduciary duties, will not do so if the express or implied terms of the trust instrument deny those duties.¹⁰⁵ In every case, courts must be vigilant not to impose particular duties without examining carefully the terms of the undertaking. Although the status or office of a person as a trustee is an important and relevant matter in construing the scope of the undertaking and the duties which arise from it, it is only part of the enquiry concerning construction of the undertaking.

The same is true of a person in a position such as a financial adviser. In one recent Australian case it was suggested that financial advisers are one of the 'well recognized categories' of fiduciary agent.¹⁰⁶ But it was also emphasised that this was because the financial adviser had 'voluntarily assumed the well established obligations such a person owes to its clients That relationship attracted the above fiduciary obligations that, in the absence of contractual or other modifications, for over two centuries have overlaid contractual dealings between fiduciary agents in well recognised categories, such as financial advisers, stockbrokers, real estate agents and, of course, solicitors, and their clients.' The same point was made in *Commonwealth Bank of Australia v Smith*¹⁰⁷ where Davies, Sheppard and Gummow JJ said that where a bank gives a customer advice upon financial affairs, 'it may have created in the customer the expectation that nevertheless it will advise in the customer's interests as to the wisdom of a proposed investment.' As Jagot J recently explained a financial advisory firm will owe fiduciary duties when the firm moves beyond being a 'mere salesman'.¹⁰⁸

It may be that this understanding of the role of fiduciary relationships, and fiduciary duties, will ultimately prove the point made more than four decades ago by Finn that

¹⁰² W Cruise *An Essay on Uses* (1795) 30; see also T Plucknett and J Barton *St German's Doctor and Student* (1523; ed 1974) page 222, ch 22, 'Howe uses of lande began and by what law and the cause why so moche lande is put in use'; W Swadling 'Explaining Resulting Trusts' (2008) 124 LQR 72, 80.

¹⁰³ (1802) 6 Vesey Junior 625, 626-7, 31 ER 1228, 1228-9.

¹⁰⁴ *Giumelli v Giumelli* [1999] HCA 10; (1999) 196 CLR 101, 112 [5] (Gleeson CJ, McHugh, Gummow & Callinan JJ).

¹⁰⁵ *Sargeant v National Westminster Bank* (1990) 61 P&CR 518; *Hayim v Citibank NA* [1987] AC 730; *Citibank NA v QVT Financial LP* [2007] EWCA 11, 1 All ER (Comm) 475; *Elovalis v Elovalis* [2008] WASCA 141 [67] (Buss JA); *Re Beatty* [1990] 1 WLR 1503, 1506 (Hoffmann J); *Edge v Pensions Ombudsman* [2000] Ch 602, 621, 627-630 (Chadwick LJ for the Court of Appeal).

¹⁰⁶ *Wingecarribee Shire Council v Lehman Bros Australia Ltd (in liq)* [2012] FCA 1028 [733] (Rares J).

¹⁰⁷ [1991] FCA 375; (1991) 42 FCR 390, 391.

¹⁰⁸ *Bathurst Regional Council v Local Government Financial Services Pty Ltd (No 5)* [2012] FCA 1200 [2324].

the label 'fiduciary' is the unnecessary expression of a conclusion. Indeed, there are already areas where the law functions, and has long functioned, without the necessity of hanging consequences upon the label. An example is the duties of employees. Employees may owe fiduciary duties to their employers which are similar to the duty of good faith and fidelity. The employment relationship was recognised as one of the categories of relationship where fiduciary duties are owed in *Hospital Products Ltd v United States Surgical Corporation*.¹⁰⁹ But the same fiduciary analysis, with the same consequences, is employed in many cases by implication of terms without the need for the fiduciary epithet. Hence, in *Pearce v Foster*¹¹⁰ the English Court of Appeal held that an employee had breached an implied contractual duty because he 'had deliberately placed himself in that position which rendered his interest conflicting with his duty.'¹¹¹ The duty was implied because 'the relation of master and servant implies necessarily that the servant shall be in a position to perform his duty duly and faithfully'.¹¹² Again, in *Malik v Bank of Credit and Commerce International SA*¹¹³ the House of Lords accepted as properly made a concession that contracts of employment contained implied terms that 'the bank would not, without reasonable and proper cause, conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.'¹¹⁴ Lord Steyn observed that this implied term in law was probably just part of the very long established implied term in law 'to serve his employer loyally and not to act contrary to his employer's interests.'¹¹⁵

¹⁰⁹ [1984] HCA 64; (1984) 156 CLR 41, 68 (Gibbs CJ), 96 (Mason J), 141 (Dawson J).

¹¹⁰ (1886) 17 QBD 536. See also *Sterling Engineering Co Ltd v Patchett* [1955] AC 534.

¹¹¹ (1886) 17 QBD 536 at 541-542 (Lindley LJ).

¹¹² (1886) 17 QBD 536 at 539 (Lord Esher MR). See also at 543 'their position is highly fiduciary' (Lopes LJ).

¹¹³ [1998] AC 20.

¹¹⁴ [1998] AC 20 at 34-35 (Lord Nicholls). See also at 45 (Lord Steyn).

¹¹⁵ [1998] AC 20 at 46 (Lord Steyn).