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Reconceptualising fiduciary regulation in actual conflicts

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RECONCEPTUALISING FIDUCIARY REGULATION IN ACTUAL CONFLICTS

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This article reviews the fiduciary duty to avoid actual conflicts. It argues that the duty to avoid actual conflicts adds limited substantive value to fiduciary accountability. Its present form has also contributed to widespread misconception of what should be expected of an unfortunate fiduciary who finds themselves in such a position. In this respect, we propose that many of the modern scenarios involving actual conflicts of duties or conflicts of duties and interests are better analysed not in terms of conflict avoidance but in terms of conflict management. Our analysis paves the way for thoughtfully working out what the fiduciaries' duties are in cases of actual conflict.

CONTENTS

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I Introduction

It is well known that a fiduciary is under a duty to: (i) avoid conflicts between their interest and their duty; and (ii) avoid conflicts between duties owed to two or more different principals.[1] Both duties are regarded as capable of operating at two different levels. First, as a matter of practicality, a fiduciary is duty-bound to avoid both types of conflicts even if the conflicts are merely real or substantial *potentialities* (ie potential conflicts).[2] Although such a prophylactic duty is typically considered, as a matter of theory, to be the practical implication of difficulties in proving actual conflicts,[3] as a matter of practice, the duty to avoid potential conflicts is more often invoked precisely because of its significantly lower evidentiary burden. This aspect of fiduciary duty operates in a prophylactic fashion and was classically considered to be imposed by the law rather than voluntarily undertaken by fiduciaries.[4] As a result of the manner in which it operates (ie prophylactically), it was often considered that a principal's remedies were limited to rescission or an account of profits.[5] A compensatory award was considered inappropriate for 'breach' of the prophylactic duties.[6] So regarded, the 'duties' might possibly be better regarded as disabilities, though modern developments are arguably incompatible with such a view.[7] Secondly, again as a matter of practicality, a fiduciary is also duty-bound to avoid conflicts of duties and conflicts of duty and interest as an *actuality* (ie actual conflicts).[8]

[1] See, eg, *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165, 199 [78] (McHugh, Gummow, Hayne and Callinan JJ) ('*Pilmer*').

[2] See, eg, *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 103 (Mason J) ('*Hospital Products*'); *Chan v Zacharia* (1984) 154 CLR 178, 198 (Deane J) ('*Chan*'); *Boardman v Phipps* [1967] 2 AC 46, 124 (Lord Upjohn) ('*Boardman*').

[3] Matthew Conaglen, 'The Nature and Function of Fiduciary Loyalty' (2005) 121 (July) *Law Quarterly Review* 452, 468–9, quoting *Ex parte Lacey* (1802) 6 Ves Jr 625; 31 ER 1228, 1229 (Lord Eldon LC).

[4] See Lionel Smith, 'Fiduciary Relationships: Ensuring the Loyal Exercise of Judgement on Behalf of Another' (2014) 130 (October) *Law Quarterly Review* 608, 613. Cf James Edelman, 'When Do Fiduciary Duties Arise?' (2010) 126 (April) *Law Quarterly Review* 302, 302.

[5] See Conaglen, 'The Nature and Function of Fiduciary Loyalty' (n 3) 463.

[6] Lord Millett, 'Proprietary Restitution' in Simone Degeling and James Edelman (eds), *Equity in Commercial Law* (Lawbook, 2005) 309, 310; Sarah Worthington, 'Corporate Governance: Remedying and Ratifying Directors' Breaches' (2000) 116 (October) *Law Quarterly Review* 638, 664–5; Sarah Worthington, 'Fiduciaries: When Is Self-Denial Obligatory?' (1999) 58(3) *Cambridge Law Journal* 500, 507; John D McCamus, 'Prometheus Unbound: Fiduciary Obligation in the Supreme Court of Canada' (1997) 28(1) *Canadian Business Law Journal* 107, 133–4.

[7] *Farrington v Rowe McBride & Partners* [1985] 1 NZLR 83, 94 (McMullin J) (Court of Appeal of New Zealand) ('*Farrington*'). Cf Conaglen, 'The Nature and Function of Fiduciary Loyalty' (n 3) 462.

[8] See, eg, *Hospital Products* (n 2) 103 (Mason J).

This article examines the fiduciary duty to avoid *actual* conflicts, which has been relatively understudied for a number of reasons. Cases involving a breach of the duty to avoid actual conflicts are few and far between. Early detection of the existence of potential conflicts and litigation pursued on such basis forestalls the ripening of some conflicts. Where the duty to avoid potential conflicts has not been waived following informed consent, it suffices to plead and prove potential conflict to access equity's full remedial armoury so that proof of an actual conflict is superfluous. Furthermore, cases involving either potential or actual conflicts may also have been dealt with as concerning breaches of other duties. Most commonly, where it could be proved that the fiduciary has made unauthorised profits, such cases could be resolved more straightforwardly by simply invoking the no profit rule, obviating the need to show that there was a conflict or engage in a debate on the proper test to determine if a conflict had arisen.[9] In other cases, principals may have straightforwardly pleaded breach by the fiduciary of the primary duty actually undertaken (eg to exercise care in giving impartial advice),[10] instead of invoking the *actualised* aspect of the no conflict rule. Finally, in still other cases of actual conflicts, principals may have decided not to pursue litigation because there were neither profits for which an account could be sought, nor provable losses for which compensation could be obtained, nor tainted transactions to be rescinded.

Importantly, the scarce pool of case law and literature on actual conflicts coupled with a rich array of material on potential conflicts has tempted us to believe mistakenly that the fiduciary duty operates in the same way in the two contexts. This article seeks to pierce this superficial veil of (mis)understanding regarding the duty to avoid actual conflicts. In the main, it argues that the duty to avoid actual conflicts adds limited substantive value to fiduciary accountability. Its present form has also contributed to widespread misconception of what should be expected of an unfortunate fiduciary who finds themselves in such a position. In this respect, we propose that many of the modern scenarios involving *actual* conflicts of duties or conflicts of duties and interests are better

[9] See, eg, *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134, 145 (Lord Russell) ('*Regal (Hastings)*'), discussing *Keech v Sandford* (1726) Sel Cas T King 61; 25 ER 223 ('*Keech*').

[10] See, eg, *Nocton v Lord Ashburton* [1914] AC 932, 958 (Viscount Haldane LC) ('*Nocton*'). As Justice James Edelman explains in '*Nocton v Lord Ashburton* (1914)' in Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in Equity* (Hart Publishing, 2012) 473, 477, the House of Lords, particularly Viscount Haldane LC, who gave the leading decision, found against Nocton not because of some conflict of duty and interest but because he had committed a negligent misrepresentation in the context of a fiduciary relationship. Simply put, he had breached his voluntarily undertaken duty to give impartial advice. Cf Kelvin FK Low, 'Fiduciary Duties: The Case for Prescription' (2016) 30(1) *Trust Law International* 3, 14–15, elaborating on the compound fiduciary duty originally articulated by Peter Birks, 'The Content of Fiduciary Obligation' (2002) 16(1) *Trust Law International* 34, 44, 46–52.

analysed not in terms of conflict avoidance but in terms of conflict management. The clarification in language and concept is crucial as fiduciary law is a key component of commercial and corporate arrangements — areas in which certainty and forward planning are paramount.[11] Our analysis also paves the way for thoughtfully working out what the fiduciaries' duties are in cases of actual conflict.

The discussion comprises three main parts. Part II explains that the duty to avoid actual conflicts does not perform the same function as the duty to avoid potential conflicts, which performs the function of transforming otherwise permissible acts into impermissible acts to ensure the fiduciary's single-minded loyalty to their principal. Practically, the identification of a breach of the duty to avoid actual conflicts does not, as a matter of course, yield significantly more advantageous remedies for the principal than what they may receive in pursuit of the breach of the primary duty. Part III goes on to dispel the confusion and misconception perpetuated by the conventional narrative surrounding the duty to avoid actual conflicts by unpacking four core elements of the no conflict rule: (i) how do actual conflicts arise; (ii) the 'position of conflict' and 'pursuit of conflict' debate; (iii) resignation as a response to actual conflicts; and (iv) the role of informed consent. Building on the insights obtained from the preceding parts, the final part (Part IV) proposes that we should reconceptualise fiduciary regulation beyond the traditional narrative of conflict avoidance at all costs. A proscriptive rule cast in the language of the duty to avoid potential and actual conflicts misses the value of tolerating certain kinds of conflicts in the modern society. It also does not pay sufficient regard to the principal's right to self-determination.

II A Paucity of Substantive Content

It is trite law that the prophylactic fiduciary duties exist as subsidiary duties to promote the likelihood of compliance with a higher, primary duty, being the duty actually undertaken (eg to exercise care in giving impartial advice).[12] Whether this primary duty ought to be regarded as nominate–general or fiduciary–non-fiduciary,[13] the subsidiary role of the prophylactic fiduciary duties is

[11] See, eg, Justice Mark Leeming, 'The Role of Equity in 21st Century Commercial Disputes: Meeting the Needs of Any Sophisticated and Successful Legal System' (2019) 47(2) *Australian Bar Review* 137, 148–9.

[12] See, eg, Conaglen, 'The Nature and Function of Fiduciary Loyalty' (n 3) 453.

[13] See generally Low (n 10) 7–14; Robert Flannigan, 'The Adulteration of Fiduciary Doctrine in Corporate Law' (2006) 122 (July) *Law Quarterly Review* 449, 454–5; Conaglen, 'The Nature

clear, as is the manner of their operation. The implication of prophylactic fiduciary duties is necessary in fiduciary relationships because of the principal's reliance on the fiduciary's exercise of discretion that affects the former's interests.[14] In the absence of discretion, an obligor cannot possibly be a fiduciary. Fiduciary duties are thus never found in absolute duties to achieve specific outcomes such as the promise to pay a sum of money by a particular date.[15] This is not to say that the discretion cannot be limited,[16] or that other aspects of a fiduciary's duty may involve no discretion at all.

A *The Duty to Avoid Potential Conflicts Operates Differently from the Duty to Avoid Actual Conflicts*

Notably, discretion, especially the sort of wide discretion that fiduciaries wield, carries with it the temptation of abuse. Hence, the prophylactic fiduciary duties essentially transform a primary duty, voluntarily undertaken, to act in the best interests of another into one where the fiduciary must act in the sole interests of that other.[17] In other words, acts undertaken by a fiduciary which might be regarded as permitted by the primary duty (if viewed alone) might be prohibited by the prophylactic fiduciary duties. The classic case of the duty to avoid potential conflicts, *Boardman v Phipps*,[18] is illustrative of this transformation,

and Function of Fiduciary Loyalty' (n 3); Rebecca Lee, 'In Search of the Nature and Function of Fiduciary Loyalty: Some Observations on Conaglen's Analysis' (2007) 27(2) *Oxford Journal of Legal Studies* 327.

[14] Matthew Harding, 'Trust and Fiduciary Law' (2013) 33(1) *Oxford Journal of Legal Studies* 81, 86.

[15] As a result, it has controversially been suggested that bare trustees — whose only duty is to simply hold the property for the beneficiary — do not owe fiduciary duties: *Financial Management Inc v Planidin* [2006] ABCA 44, [19] (McFadyen, Picard and O'Brien JJA) ('*Financial Management Inc*'). See also Paul B Miller, 'The Fiduciary Relationship' in Andrew S Gold and Paul B Miller (eds), *Philosophical Foundations of Fiduciary Law* (Oxford University Press, 2014) 63, 77. But see Robert Flannigan, 'Bare Trustee — Fiduciary Obligation — Whether Bare Trustee Can Have Fiduciary Duty: *Financial Management Inc v Associated Financial Planners Ltd*' (2007) 26(2) *Estates, Trusts and Pensions Journal* 114, 114–15.

[16] See, eg, *Citibank NA v MBIA Assurance SA* [2007] 1 All ER (Comm) 475, 497 [81]–[82] (Arden LJ, Sir Andrew Clarke MR agreeing at 500 [100]) ('*Citibank NA*'), but note the criticism in Alexander Trukhtanov, 'The Irreducible Core of Trust Obligations' (2007) 123 (July) *Law Quarterly Review* 342, 343–6.

[17] John H Langbein, 'Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?' (2005) 114(5) *Yale Law Journal* 929, 931–2 ('Questioning the Trust Law Duty of Loyalty').

[18] *Boardman* (n 2).

even though it is a more complex case than commonly presented.[19] Boardman, as the solicitor of a family trust whose assets included a minority holding in a private company, considered that the trust beneficiaries' interests would be better served if the trust could acquire control of the company via a majority shareholding.[20] When the trustees declined to do so on account of the investment prohibitions in the trust instrument and the lack of funding,[21] Boardman and one of the beneficiaries of the trust, Tom Phipps, purchased the necessary shares themselves.[22] Their actions proved most beneficial to their 'principals', the trustees and the beneficiaries of the trust.[23] Crucially, in representing themselves as acting for the trust in their negotiations with the directors of the company regarding the purchase of the shares, Boardman and Phipps had effectively implicated themselves as agents *de son tort*.[24] Although there is, in the majority's opinions, another dimension to the case involving information as property,[25] this aspect of their reasoning has largely been condemned,[26] so that their reasoning on the basis of conflict of interest and duty as agents *de son tort* must be taken seriously.

Fiduciary duties were thus imposed on Boardman and Phipps by reason of their intermeddling as purported agents of the trust.[27] In the circumstances, it is difficult to see how their actions could be considered a breach of any primary duties imposed upon them as agents *de son tort*. The primary duties imposed through intermeddling could not be more substantial than the duties imposed on an agent appointed pursuant to the assent of the principal in the same circumstances. Given that the trustees were opposed to purchasing additional

[19] See the in-depth analysis of *Boardman* (n 2) in Michael Bryan, '*Boardman v Phipps* (1967)' in Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in Equity* (Hart Publishing, 2012) 581, which aptly reminds us that '*Boardman* is not a "single issue" case': at 581.

[20] *Boardman* (n 2) 71–3 (Viscount Dilhorne).

[21] Ibid 119 (Lord Upjohn). See also Bryan (n 19) 583–4.

[22] *Boardman* (n 2) 82 (Viscount Dilhorne). See also Bryan (n 19) 584.

[23] *Boardman* (n 2) 82–3 (Viscount Dilhorne). See also Bryan (n 19) 584.

[24] Although the majority of the House of Lords in *Boardman* (n 2) had used the language of agency, it is agency *de son tort* which provided the basis of the defendants' fiduciary accountability: see Bryan (n 19) 585–9, 592.

[25] *Boardman* (n 2) 102–3 (Lord Cohen), 109–11 (Lord Hodson), 115–17 (Lord Guest). Cf at 89–90 (Viscount Dilhorne), 127–8 (Lord Upjohn).

[26] Gareth Jones, 'Unjust Enrichment and the Fiduciary's Duty of Loyalty' (1968) 84 (October) *Law Quarterly Review* 472, 484–5. See also Bryan (n 19) 594–5. Cf Kevin Gray, 'Property in Thin Air' (1991) 50(2) *Cambridge Law Journal* 252.

[27] Bryan (n 19) 589. To be clear, Boardman and Phipps acted as true agents of the trust only in respect of representing the trust in the annual general meetings of the company: *Boardman* (n 2) 73, 79 (Viscount Dilhorne); and the (ultimately unsuccessful) attempt to get Phipps elected as a director: at 73.

shares in the company,[28] an agent appointed for the limited purpose of negotiating the purchase of shares with the directors of the company would have no actual duty to purchase the shares for the trust or advise on the purchase.[29] Further, there was no doubt that the intentions of Boardman and Phipps were honourable[30] (else the liberal remuneration awarded to them would be inexplicable)[31] and, as things turned out, their actions were immensely profitable for the trust as well. Yet, an application of the prophylactic fiduciary duties (in this case the possibility of a conflict of duty and interest[32] and/or the equally prophylactic duty to avoid unauthorised profits) convinced a majority of the House of Lords that Boardman's actions were not permitted absent the informed consent of his principals.[33]

The same transformation, however, cannot be readily applied in respect of the so-called fiduciary duty to avoid *actual* conflicts. Rather than adding content by circumscribing certain actions that may have been otherwise permitted, the so-called fiduciary duty to avoid *actual* conflicts appears to be nothing more than a semantic reconstruction of the primary duty undertaken by a fiduciary considered in a specific context. Consider *Stewart v Layton* ('*Stewart*'), in which a solicitor acted for both the vendor and the purchaser in a sale of property.[34] Ordinarily, this should have been prohibited by the prophylactic fiduciary duties as there was a *possibility* that his duties to both parties could conflict. But as both vendor and purchaser were aware of his so acting from the outset, both parties were regarded as authorising his acting in the face of a *potential* conflict of duties.[35] Over the course of the transaction, the solicitor came to be aware of

[28] *Boardman* (n 2) 73 (Viscount Dilhorne).

[29] Therefore, in view of the circumstances of the trust, Lord Upjohn, the dissenting judge, concluded that there was no real sensible possibility of a conflict of duty and interest: ibid 124, 130–3.

[30] Ibid 105 (Lord Hodson), 115 (Lord Guest), 123 (Lord Upjohn). See at 94 (Viscount Dilhorne).

[31] See ibid 104 (Lord Cohen), 112 (Lord Hodson).

[32] Lord Cohen and Lord Hodson were of the view that there was a possibility of Boardman being asked by the trustees to advise on the purchase of additional shares in the company (including making a court application to sanction the purchase): *Boardman* (n 2) 103 (Lord Cohen), 111 (Lord Hodson). Their Lordships thus held that there was a possibility of conflict between Boardman's duty to advise and his personal interest in acquiring the shares: at 104 (Lord Cohen), 112 (Lord Hodson).

[33] Ibid 104 (Lord Cohen), 109, 112 (Lord Hodson), 117 (Lord Guest). Contrary to popular misconception, the defence of informed consent failed not because one of the trustees was mentally unsound, but because the plaintiff co-beneficiary was also a 'principal' to the defendants' agency *de son tort* and insufficient disclosure had been made to him: see Bryan (n 19) 601–2.

[34] (1992) 111 ALR 687, 690 ('*Stewart*').

[35] See ibid 689–90 (Foster J).

information pertaining to the purchaser's ability to honour his financial obligations.[36] This led to the latent *potential* conflict of duties — permitted because waived — maturing into an *actual* conflict of duties. The solicitor owed a duty to the vendor to disclose the information relating to the purchaser's ability to honour his financial obligations.[37] However, he also simultaneously owed a duty to the purchaser to keep the same information confidential.[38] There is no doubt that the two duties conflicted, but does the recognition of their conflict add any content to the primary duties undertaken by the solicitor to both vendor and purchaser? It is suggested that it does not.

Whilst a fiduciary's primary duties (whether or not they are properly described as fiduciary) will often entail tremendous discretion and hence are not typically prescriptive in the sense of requiring specific actions to be undertaken at the outset, a course of events may develop that narrows the discretion to the point that only a singular course of action is permissible. This is precisely what happened in *Stewart*. The narrowing of discretion stemmed from the fiduciary's acquisition of the relevant information relating to the purchaser's precarious financial position.[39] When the solicitor first undertook to act for both parties, it was not at all obvious that the purchaser would face financial difficulties in this particular transaction or that the solicitor would come to know about it to the extent that he did. However, from the moment that he did, he became caught in a bind by the narrowing of options stemming from the acquisition of that information. From the perspective of his duty to the vendor, it was now difficult to conceive how keeping the information from the vendor could conceivably be in her best interests. From the perspective of his duty to the purchaser, it was likewise difficult to conceive how providing the information to the vendor could be in his best interests, to say nothing of a simple invocation of the duty of confidence. Nevertheless, the narrowing of options stemmed from the precise same primary duties undertaken by the solicitor at the outset, albeit considered with the benefit of hindsight. Neither required action departing from that mandated under his expressly undertaken primary duties. The invocation of a fiduciary duty to avoid *actual* conflict adds little substantive content to the primary duty originally undertaken. It is superfluous in practice.

[36] Ibid 691.

[37] Ibid 708.

[38] Ibid.

[39] See ibid 710.

This redundancy is implicit in the reasoning of Foster J in *Stewart* as well. He concluded that

> the [solicitor] was in breach of his fiduciary obligation to [his client] in failing to disclose to her his information as to [his other client's] particular and general financial problems at a point of time sufficiently early to enable an informed discussion to take place between them as to what steps should be taken in the event that [the latter] could not settle.[40]

Although Foster J suggested that this breach 'was rooted in the fact that [the solicitor] continued to act for both parties in a conveyancing transaction after a conflict of duties arose',[41] he did not identify any separate conflict of duties other than that involving the duty to disclose information to the vendor, which information the solicitor was obliged to keep in confidence vis-a-vis the purchaser.[42] It is not possible to demonstrate an *actual* conflict of duties without first identifying that the circumstances demand that a primary duty to one principal be performed in a particular manner which would entail breach of another primary duty owed to another principal. But once the aforesaid awkward state of affairs is established, then non-performance of the primary duty is undoubtedly a breach. It is not obvious what wisdom may be derived in either identifying a further breach of a duty to avoid *actual* conflicts or labelling non-performance as such a breach of duty to avoid *actual* conflicts.

Moreover, once we switch perspectives from one principal to the other, the absurdity of the duty to avoid *actual* conflicts is laid bare. In cases of conflicting engagements, it must logically follow that a fiduciary who is in breach of their duty to avoid *actual* conflicts to one principal must also be in breach of the same duty to their other principal since it is the fiduciary's duties to both principals that conflict. It is not logically possible for a fiduciary owing duties to principals A and B to be in a position of *actual* conflict with respect to Principal A but not Principal B. Coming back to *Stewart*, it is not obvious what conceivable claim the purchaser, whose confidence the solicitor kept, could have brought against him.[43] Yet, if Foster J is correct in concluding that the solicitor was in breach to

[40] Ibid 711.

[41] Ibid.

[42] Ibid 708.

[43] In theory, if the law wished to embellish the duty to avoid *actual* conflicts in order to give it the appearance of independent content, it is arguable that the purchaser could have sought a declaration that acting for both parties in the circumstances was a breach of this duty or sought an injunction on the same basis. But it is difficult to understand why this would be necessary, much less imagine why the purchaser would incur litigation costs to seek such remedies.

the vendor of his duty to avoid *actual* conflicts, then logically, he must also be in breach of the same duty to the purchaser.

B *Remedial Advantage of Claiming for Breach of the Fiduciary Duty to Avoid Actual Conflicts?*

Of course, one may argue that there is a *practical advantage* of identifying a further breach of a duty to avoid actual conflicts because it opens the door to equitable remedies which the claimant would not be entitled to if the breaches of the primary duties lay in contract or tort.[44] Although the division between fiduciary and non-fiduciary duties owed by fiduciaries is currently the orthodox position in England,[45] it has been criticised,[46] and the position is less clear in Australia.[47] The perceived remedial generosity for breaches of acknowledged fiduciary duties such as the duty to avoid *potential* conflicts over breaches of primary duties is also arguably illogical given the prophylactic function of the former, which operates akin to a conclusive presumption of breach of the latter in order to protect and promote it.[48] But it is surely perverse for presumed breaches to be serviced with more generous remedies than actually proven ones, especially in the context of actual conflicts, where breaches of primary duties are often intentional even if undesired by the fiduciary concerned. Moreover, even proceeding on the orthodoxy, we warn against a hasty assumption that the remedial advantage is available in all cases and/or that it is a significant one.

Most cases relying upon the duty to avoid *actual* conflicts do so in the context of duty–duty conflicts rather than duty–interest conflicts.[49] Let us consider the classical case involving a conflict of the duty to inform Principal A of all facts relevant to the transaction and the duty to maintain confidentiality owed

[44] See *Nocton* (n 10) 951–2 (Viscount Haldane LC).

[45] *Bristol and West Building Society v Mothew* [1998] Ch 1, 16 (Millett LJ) ('*Mothew*').

[46] Joshua Getzler, 'Duty of Care' in Peter Birks and Arianna Pretto (eds), *Breach of Trust* (Hart Publishing, 2002) 41, 71–2; Joshua Getzler, 'Am I My Beneficiary's Keeper? Fusion and Loss-Based Fiduciary Remedies' in Simone Degeling and James Edelman (eds), *Equity in Commercial Law* (Lawbook, 2005) 239, 263–5.

[47] Justice RP Meagher, Justice JD Heydon and MJ Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (Butterworths LexisNexis, 4th ed, 2002) 210–18 [5-295]–[5-330]; Justice JD Heydon, 'Are the Duties of Company Directors to Exercise Care and Skill Fiduciary?' in Simone Degeling and James Edelman (eds), *Equity in Commercial Law* (Lawbook, 2005) 185; Anthony Goldfinch, 'Trustee's Duty to Exercise Reasonable Care: Fiduciary Duty?' (2004) 78(10) *Australian Law Journal* 678.

[48] See Conaglen, 'The Nature and Function of Fiduciary Loyalty' (n 3) 468–71.

[49] See below Part III(A) for our discussion as to the reasons.

to Principal B.[50] In *Stewart*, for example, the vendor could not complain of the solicitor acting for the purchaser from the outset since informed consent to his acting for both parties in circumstances of a potential conflict of duties had been obtained prior to his doing so.[51] Once events have transpired leading to the narrowing of options in terms of how the solicitor must perform their duty vis-a-vis both principals, resulting in a position of *actual* conflict of duties, the solicitor is forced to choose which duty to perform and which to breach. In *Stewart*, the solicitor chose (whether consciously or otherwise) to keep the confidence of the purchaser,[52] thus ensuring that he breached his duty to the vendor (but not the purchaser).[53] In choosing to breach his primary duty to the vendor, the solicitor became liable to compensate the vendor for losses arising from his failure to properly discharge his primary duty to her. In choosing to frame the claim as a breach of fiduciary duty, the vendor was hoping to take advantage of the rule in *Brickenden v London Loan & Savings Co* ('*Brickenden*')[54] — which was contended to stand for dispensing with establishing causation between breach and loss in a claim for equitable compensation for non-disclosure of material facts — so as to persuade the Court to award her the full sum (with interest) that was paid pursuant to the transaction.[55] Justice Foster, however, held that the *Brickenden* rule merely relieves the court 'of the task of unravelling and exposing the strands of causation connecting breach with damage', but it does not require the court to be 'blind to the reality of the [case]'.[56] On the facts, the vendor would have entered into the transaction with the purchaser, but she could have taken a less disadvantageous course, and her loss was to be assessed on that basis.[57] Furthermore, in relation to the purchaser, if the solicitor had provided the vendor with the information relating to the financial status of the purchaser, proof of breach of confidence would suffice to make available the range of equitable remedies to the purchaser without the need to additionally plead a breach of duty to avoid *actual* conflicts.

[50] See, eg, *Hilton v Barker Booth & Eastwood* [2005] 1 WLR 567, 569 [4] (Lord Scott) ('*Hilton*'), quoting *Moody v Cox* [1917] 2 Ch 71, 91 (Scrutton LJ) ('*Moody*').

[51] See *Stewart* (n 34) 690 (Foster J).

[52] Ibid 709.

[53] Ibid 711.

[54] [1934] 3 DLR 465, 469 (Lord Thankerton) (Privy Council).

[55] *Stewart* (n 34) 712–13 (Foster J).

[56] Ibid 713–14.

[57] Ibid 714.

Indeed, Commonwealth jurisdictions have moved away from a stringent application of *Brickenden* rule.[58] In England and Wales, it has long been established that to succeed in a claim for equitable compensation for breach of fiduciary duty, a causal connection needs to be established between the loss and the breach.[59] Even in Australia, it is becoming increasingly clear that a causal link is required.[60] Accordingly, it is unclear how great an advantage is to be gained by the vendor framing a claim for equitable compensation for breach of the fiduciary duty to avoid actual conflicts, as opposed to damages for breach of the underlying duty. Moreover, the principal would not be entitled to claim the commission paid by the other principal to the conflicted fiduciary unless the fiduciary had acted dishonestly.[61] Nor could the principal from whom material information was withheld be entitled to ask for disclosure of the information.[62] If unauthorised profits had been earned by the conflicted fiduciary, the principal could have invoked the no profit rule to ask for an account of profits[63] or a constructive trust over the unauthorised gains.[64]

In Australia, some recent cases have acknowledged that the equitable accounting rules — falsification and surcharging — which are traditionally available for breach of trust are equally applicable to claims for equitable compensation for breach of fiduciary duty by custodial fiduciaries.[65] This suggests that

[58] See Matthew Conaglen, '*Brickenden*' in Simone Degeling and Jason NE Varuhas (eds), *Equitable Compensation and Disgorgement of Profit* (Hart Publishing, 2017) 111, 134–40.

[59] *Swindle v Harrison* [1997] 4 All ER 705, 717–18 (Evans LJ), 723–4, 727–8 (Hobhouse LJ), 733 (Mummery LJ). Cf *Auden McKenzie (Pharma Division) Ltd v Patel* [2020] BCC 316, 326–8 [57]–[64] (David Richards LJ, Newey LJ agreeing at 329 [71], Lewison LJ agreeing at 329 [72]) ('*Auden McKenzie*'). The issues were discussed in the context of an application for summary judgment: at 327 [59] (David Richards LJ).

[60] See, eg, *Short v Crawley [No 30]* [2007] NSWSC 1322, [419] (White J). Australian law differs from English law in that some recent Australian cases suggest that the equitable accounting rules are applicable in respect of breach of fiduciary duty by custodial fiduciaries: see *Agricultural Land Management Ltd v Jackson [No 2]* (2014) 48 WAR 1, 69 [363] (Edelman J) ('*Agricultural Land Management*'); *Hasler v Singtel Optus Pty Ltd* (2014) 87 NSWLR 609, 641–2 [152] (Leeming JA) ('*Hasler*'). Current English law appears less clear on this point, although there is suggestion that the same approach would apply in respect of a breach of fiduciary duty by a company director: see *Auden McKenzie* (n 59) 322 [32], 326–7 [56]–[59]. The case involved an appeal from a summary judgment that was allowed by the English Court of Appeal, which took the view that the defendant's defence was not 'unsustainable in law': at 328 [64].

[61] *Kelly v Cooper* [1993] AC 205, 216 (Lord Browne-Wilkinson for the Judicial Committee) ('*Kelly*'); *Keppel v Wheeler* [1927] 1 KB 577, 588 (Bankes LJ), 592 (Atkin LJ).

[62] *North & South Trust Co v Berkeley* [1971] 1 WLR 470, 485–6 (Donaldson J) ('*North & South Trust*').

[63] See, eg, *Regal (Hastings)* (n 9) 144–5 (Lord Russell).

[64] See, eg, *Chan* (n 2) 199 (Deane J).

[65] See, eg, *Agricultural Land Management* (n 60) 69 [363] (Edelman J); *Hasler* (n 60) 641–2 [152] (Leeming JA).

a claimant may obtain a greater remedial advantage under Australian law if they bring a claim for equitable compensation for breach of fiduciary duty, instead of a claim for damages for breach of a primary duty, assuming the latter is characterised as non-fiduciary. In *Agricultural Land Management Ltd v Jackson [No 2]* ('*Agricultural Land Management*'), the defendants, Jackson and Goff, were the directors of Agricultural Land Management Ltd ('Agricultural') as well as officers of Bunbury Centro, a company that sold a property to Agricultural for hotel development.[66] Apart from the purchase price, Agricultural made an additional payment to Bunbury Centro for a non-exclusive licence to use 'information and know how' in the possession of Bunbury Centro.[67] Jackson and Goff, aware of Agricultural's development plans, signed the contract on behalf of both parties to the transaction.[68] The development project turned out to be a failure, and the hotel was eventually sold to a third party at a great loss.[69] Agricultural sued the defendants, with the majority of their complaints being focused on the entry into the contract and the alleged overpayment for the property and the licence fee.[70] Justice Edelman found that the defendants were in breach of their fiduciary duties to avoid conflict of duties in causing Agricultural to enter into the contract with Bunbury Centro.[71] However, the evidence did not support Agricultural's claim of overpayment, that is to say, Agricultural could not show that they had suffered any financial loss by reason of the breach of duty.[72] As Edelman J astutely noted, '[p]erhaps in anticipation of this difficulty', Agricultural claimed for both substitutive and reparative equitable compensation,[73] the former being restorative in nature and not loss-based.

Nevertheless, as the essence of Agricultural's claim, however framed, was to recover the alleged overpayment, neither type of equitable compensation was awarded.[74] Further, in respect of the claim for reparative equitable compensation for financial loss it suffered for selling the property to a third party, Agricultural was unable to establish a causal link between the loss and the breach.[75] In respect of the claim for substitutive equitable compensation, Edelman J held that the purchase price was paid pursuant to a valid contract which Agricultural

[66] *Agricultural Land Management* (n 60) 9 [2]–[4] (Edelman J).

[67] Ibid 9 [3].

[68] Ibid 9 [4].

[69] Ibid 9 [5].

[70] Ibid 9 [7].

[71] Ibid 53 [275].

[72] Ibid 10 [10].

[73] Ibid 64 [333].

[74] Ibid 90 [481].

[75] Ibid 80 [419]–[420]. See also at 74–6 [390]–[399].

did not seek to rescind.[76] Agricultural could not, in the case, claim substitutive compensation by disallowing the disbursement (ie the payment of the purchase price) and at the same time, accepting the receipt of the property.[77] Clearly, mounting a claim for breach of the no conflict duty and seeking to recover substitutive equitable compensation afforded no relief to Agricultural. Had Agricultural been able to prove that it had overpaid for the property or the licence, it would have been able to claim against the directors for breach of their primary duties and claimed compensation in the amount of the overpayment.[78] Although the case was examined on the basis of a potential conflict of duties,[79] it is instructive on the limits of equitable remedies for conflicts more generally.

Our analysis above shows that the remedial advantage in bringing a claim for breach of fiduciary duty, instead of breach of the primary duty, is not available in all cases. Nor is the advantage as great as it may seem at first sight. Significantly, the fiduciary's breach of the duty to avoid actual conflicts yields no remedy for the principal who has suffered no breach of primary duty. In that context, the duty is entirely superfluous. Furthermore, a rationalisation of the assumption that fiduciary breaches yield more generous remedial prospects than breaches of the primary duties (assuming they are non-fiduciary) that they are widely acknowledged to support is overdue.

In Part III, we go on to unravel further dangers of maintaining a meretricious symmetry between the fiduciary duty to avoid actual conflicts and the prophylactic fiduciary duty to avoid potential conflicts. It will be shown that the duty to avoid actual conflicts, in its current form, not only adds little value to our understanding of the substantive duties owed by fiduciaries, but also entails a tendency to mislead and distract from the core narrative of fiduciary accountability.

III Unpacking Four Core Aspects of the No Conflict Rule

The confusion and distraction caused by the conceptualisation of the fiduciary duty to avoid *actual* conflicts become apparent when we examine four core aspects of the no conflict rule: (i) how do actual conflicts arise; (ii) the 'position of conflict' and 'pursuit of conflict' debate; (iii) the requirement to resign from one or both conflicting engagements; and (iv) the role of informed consent.

[76] Ibid 72 [377]–[379].

[77] Ibid 73 [381].

[78] Ibid 10 [10].

[79] We argue that *Agricultural Land Management* (n 60) can be analysed as a case of actual conflict: see below nn 111–114 and accompanying text.

A *How Do Actual Conflicts Arise?*

To fully appreciate the inadequacy of the prevailing account of the fiduciary duty to avoid actual conflicts, it is important to first understand how actual conflicts arise in practice. To do so, it is helpful to start with pinpointing what amounts to an actual conflict, in contradistinction to a potential conflict.[80] Justice Richardson's comments on when a solicitor might act for two clients in *Farrington v Rowe McBride & Partners* provide general guidance:

> A solicitor's loyalty to his client must be undivided. He cannot properly discharge his duties to one whose interests are in opposition to those of another client. If there is a conflict in his responsibilities to one or both he must ensure that he fully discloses the material facts to both clients and obtains their informed consent to his so acting … And there will be some circumstances in which it is impossible, notwithstanding such disclosure, for any solicitor to act fairly and adequately for both.
>
> But the acceptance of multiple engagements is not necessarily fatal. There may be an identity of interests or the separate clients may have unrelated interests. In some circumstances they may even be able and prepared to look after their own interests. Such cases seem straightforward so long as it is apparent that there is no actual conflict between duties owed in each relationship.[81]

A clear red flag for an actual conflict is where the interests of one principal are diametrically opposed to the interests of the other principal and the fiduciary owes duties to both which cannot be performed concurrently without injuring the interests of one.[82] The duty to avoid actual conflicts appears to be more frequently invoked in cases concerning conflict of duties, perhaps because it is much easier to spot a direct conflict of duties, as opposed to a direct conflict of

[80] This part of the discussion focuses on the concept of 'actual conflicts' at common law. The term may be defined differently and with greater precision, depending on the context, in statutes.

[81] *Farrington* (n 7) 90.

[82] See, eg, *Saab v Jones Day Reavis & Pogue* [2002] EWHC 2616 (Ch), a trial on a number of preliminary issues arising from a dispute concerning a solicitor acting for both parties to a transaction: at [32] (Peter Smith J). Justice Peter Smith held that an actual conflict of duties arose once the parties had disagreements over the terms of the contract: at [169].

duty and interest.[83] The fiduciary's personal interest may be remote or insignificant in the grand scheme of things, and the principal can always invoke the duty to avoid potential conflicts in such less-than-clear-cut cases.[84]

Returning then to the main inquiry on when actual conflicts arise, based on existing case law, there are two main situations in which a fiduciary may find

[83] For cases on actual conflict of duty and interest, see, eg, *Global Energy Horizons Corp v Gray* [2012] EWHC 3703 (Ch) ('*Global Energy Horizons Corp*'); *Sun Indalex Finance, LLC v United Steelworkers* [2013] 1 SCR 271 ('*Indalex*').

[84] Perhaps for this reason, in some cases the courts do not explicitly characterise the conflict as an actual conflict or a potential conflict: see, eg, *ABN AMRO Bank NV v Bathurst Regional Council* (2014) 224 FCR 1 ('*ABN AMRO*'). In this landmark decision, a rating agency was found liable to investors for assigning a flawed rating to a volatile structured financial product issued by ABN AMRO (the 'Rembrandt notes'): at 23–4 [12]–[13] (Jacobson, Gilmour and Gordon JJ). For a general discussion of the case, see Joshua Getzler and Alexandra Whelan, 'Common Law and the Constraint of Financial Markets: Credit Rating Agencies as a Test Case' in Kit Barker, Karen Fairweather and Ross Grantham (eds), *Private Law in the 21st Century* (Hart Publishing, 2017) 257, 270–2. The breach of fiduciary duty arose in respect of a financial intermediary who sold a substantial portion of the Rembrandt notes it had purchased to 13 municipal councils, to whom the former owed a fiduciary duty not to place itself in a position of conflict: *ABN AMRO* (n 84) 21 [2], 212 [1071] (Jacobson, Gilmour and Gordon JJ). The Full Court of the Federal Court of Australia found that the financial intermediary had breached the no conflict rule by failing to disclose the potential risks and ramifications it faced in continuingly holding on to the amount of Rembrandt notes it had, 'including [the] commercial imperative of addressing the impact of those notes on its balance sheet': at 213 [1076]. In other words, the fiduciary was in a position of conflict between duty and interest, as it stood to gain from the sale of the Rembrandt notes to the councils: at 213 [1077]. In the litigation, the financial intermediary accepted that a 'potential conflict of interest' arose in the circumstances, but the Full Court's reasoning did not explicitly characterise the conflict as an actual conflict or a potential conflict, nor depend on such a distinction being made.

themselves in a position of actual conflict.[85] First, as in *Stewart*,[86] the authorisation of a fiduciary to continue to act in spite of existing potential conflicts allows room and opportunity for the potential conflicts to mature into actual conflicts when circumstances change ('ripened actual conflict' scenario). In cases of authorised potential conflict of interest and duty, it may not be straightforward to identify when the fiduciary's personal interest has come into direct conflict with their duty to the principal, if the conflict maturation occurs by way of a series of events.[87]

Second, and more unusually, a fiduciary may act in a situation of inherent actual conflict from the outset ('inherent actual conflict' scenario). In *Re Colorado Products Pty Ltd (in prov liq)* ('*Re Colorado*'),[88] the defendant fiduciary

[85] A third situation, where a fiduciary is in a position of unauthorised actual conflict whose potentiality had not been previously authorised by its principal, is likely to occur more rarely. Such cases occur, for example, in situations where the potential conflict was, for some strategic reason, (successfully) concealed from the principal. Generally, one would expect fiduciaries in positions of potential conflict to seek informed consent from their principals in order to avoid liability for breach of fiduciary duty. In *Duke Group Ltd (in liq) v Pilmer* (1999) 73 SASR 64, a defendant, Somes, was a director of a company, Kia Ora, which was making a takeover bid for a company called Western United of which Somes was as a director and shareholder: at 199 [660] (Doyle CJ, Duggan and Bleby JJ). Somes knew that Kia Ora was 'supplied with a misleading opinion which overvalued Western United to a considerable degree': at 204 [671]. He was found to be in a conflict of duty and duty and a conflict of duty and interest: see at 118 [175], 204 [670]. Notably, he was appointed a director of Western United and of Kia Ora before the proposed takeover: see at 81 [27], 199 [660]. Accordingly, it may be said that he was in a position of potential conflict — by virtue of him holding cross-directorships — which matured into an actual conflict when Kia Ora decided to make a takeover bid for Western United. It was not clear if he had declared his conflict when the potential conflict first arose. On the facts, it was found that he had not disclosed his conflict of interest when he knew of the takeover plans and he proceeded to participate in the decision-making process: at 205 [672]. See generally Rosemary Teele Langford, 'Pursuit Revisited' (2020) 13(3) *Journal of Equity* 267, 284.

[86] See above nn 34–38 and accompanying text. The authorisation is usually obtained through the informed consent given by the principal, but it may also be granted by the constitution materials of a company, a statute or a court.

[87] See, eg, *Indalex* (n 83), a case concerning breach of fiduciary duty by the employer administrator of two employer-sponsored pension plans. The employer went into insolvency and had to pursue debtor-in-possession financing that resulted in the grant of a super priority to the lenders over all other creditors (including the pension beneficiary employees) to the extent of the borrowing limit: at 317–18 [86] (Cromwell J for McLachlin CJ, Rothstein and Cromwell JJ). Justice Deschamps and Cromwell J differed in their conclusions as to when an actual conflict of duty and interest arose: at 312–13 [72]–[73] (Deschamps J for Deschamps and Moldaver JJ), 353 [182] (Cromwell J for McLachlin CJ, Rothstein and Cromwell JJ). See also *Global Energy Horizons Corp* (n 83) [459] (Vos J). Pinpointing the exact time at which the actual conflict matured may be difficult.

[88] (2014) 101 ACSR 233 ('*Re Colorado*').

occupied various roles in different companies: she was the director of the importing Australian company known as Colorado,[89] the controller of the manufacturing company that supplied the goods to Colorado,[90] as well as the controller of the company that leased Colorado's business premises.[91] The plaintiffs were the shareholders of Colorado.[92] Justice Black dismissed most of the allegations relating to breach of the no conflict rule because the matters complained of 'were contemplated by the arrangements between the parties … or were not established'.[93] It was found on the facts that the conflicts were already in existence prior to the plaintiffs' acquisitions of their respective interests in Colorado and that the conflicts would persist after the acquisitions in light of the business structure put in place.[94] The corporate officers of the plaintiffs also knew of the defendant director's multiple roles in the various companies.[95] Further, Black J noted that Colorado's constitution explicitly

> preserves a director's ability to contract with Colorado, including as vendor of goods and services … and also permits the directors to vote in respect of such transactions … subject to a requirement for disclosure of the relevant interest.[96]

In extrajudicial reflection, Justice Black described the case as one involving circumstances 'where the parties had structured their business' such as to '[give] rise to inherent conflicts of interest'.[97] In the judgment (and extrajudicially) Black J also tentatively considered the possibility that the structure and background to the transaction had narrowed 'the scope of the [defendant director's] fiduciary duties to at least permit her roles with' the other two companies.[98] That is to say, the parties had given informed consent to the fiduciary's inconsistent duties and proceeded to enter into the relevant contracts on that understanding.

[89] Ibid 236 [6] (Black J).

[90] Ibid 296 [204].

[91] Ibid 235 [3].

[92] Ibid 235 [1].

[93] Ibid 356 [387].

[94] Ibid 349 [365].

[95] Ibid.

[96] Ibid 348 [362], discussing cl 9.1 of Colorado's constitution.

[97] Justice Ashley Black, 'Equitable and Statutory Regulation of Conflicts of Interests and Duty' (Speech, The University of New South Wales Law School, 10 May 2016) 8 <https://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2016%20Speeches/Black_20160510.pdf>, archived at <https://perma.cc/DU28-59SB>.

[98] *Re Colorado* (n 88) 349 [365]. See also Black (n 97) 8. Justice Black did not, however, go on to explore what the reduced content of the fiduciary's duties is.

It is important to distinguish between the two scenarios of actual conflict. In respect of the ripened actual conflict scenario, it is meaningless to speak in the language of a duty to avoid actual conflicts as the non-avoidance of the potential conflict is the very reason the conflict is allowed to mature into actuality. Moreover, the circumstances which lead to the ripening of the actual conflict are quite often, though not always, beyond the control of the fiduciary. Crucially, a key aspect of the fiduciary's duty of loyalty in such cases, we argue, is to timeously identify the maturing of an actual conflict and notify their principals of the change in circumstances. The language of conflict avoidance is thus unhelpful as it obscures from sight the full scope of fiduciary accountability.

In respect of the inherent actual conflict scenario, it would be meaningless to speak of the duty to avoid actual conflicts if the fiduciary has been authorised to occupy such a position, as in *Re Colorado*. All relevant parties embraced the situation of actual conflict.[99] The only scenario in which it might be useful to use the language of actual conflict avoidance is where the fiduciary is in a position of *unauthorised* inherent actual conflict. Such cases are unlikely to be common[100] and may often be addressed as cases concerning potential conflicts.

B *Position of Conflict versus Pursuit of Conflict?*

In Australian jurisprudence, there is presently an unresolved debate on what the proper understanding of the no conflict rule is: is the prohibition against putting oneself in a position of conflict or the pursuit of conflict?[101] In *Agricultural Land Management*, Edelman J noted the divergent approaches but favoured the more stringent 'position of conflict' approach.[102] He explained that judges who have affirmed the alternative view have 'done so in the context of considering the scope of the separate "profit rule" or the "equitable principle governing the liability to account"', and that no account of profits was ordered if no advantage was taken of a conflict to make a profit.[103]

[99] *Re Colorado* (n 88) 349 [365] (Black J).

[100] The principal is likely to object to the fiduciary's participation in the transaction in the first place, unless the principal has no knowledge of the conflict.

[101] See generally Black (n 97) 7–9. See especially Langford (n 85) for an erudite analysis on whether the concept of 'pursuit' may be helpful in specific contexts concerning conflicted company directors. Langford considered that 'pursuit' could refer to taking a 'positive action in the face of a conflict': at 272. Which supports our proposed analysis of 'pursuit of conflict' and 'position of conflict' in the cases of *Re Colorado* (n 88) and *Agricultural Land Management* (n 60).

[102] *Agricultural Land Management* (n 60) 51–2 [265]–[268].

[103] Ibid 52 [267], quoting *Hospital Products* (n 2) 103 (Mason J) and *Chan* (n 2) 198 (Deane J).

In *Re Colorado*, without any reference to *Agricultural Land Management*, and relying on Sir Frederick Jordan's observations in *Chapters on Equity in New South Wales*[104] and earlier Australian authorities,[105] Black J adopted the 'pursuit of conflict' approach.[106] As Langford and Ramsay observe, both Edelman J and Black J interpreted 'pursuit of conflict' to mean 'actually taking advantage of [the] conflict'[107] and an adoption of the 'pursuit' approach would result in there being 'no discernible difference between having a real sensible possibility of conflict and an actual conflict'.[108] Simply put, the consequence of adopting the 'pursuit' approach is that the 'real sensible possibility of conflict' test[109] is satisfied generally on proving that there is an actual conflict. The inclination towards a less stringent approach — the 'pursuit of conflict' approach — possibly indicates a softening of judicial attitude towards an unduly strict approach in the application of fiduciary principles.[110]

However, the divergent views of Edelman J and Black J are easily reconciled once we analyse how the conflicts arose in *Agricultural Land Management* and *Re Colorado*. In the former case, the directors acted for both the principal company (as the buyer) and the seller in the transaction.[111] There was no informed consent to the position of conflict.[112] Although the case was reasoned on the basis of a breach of the duty to avoid a potential conflict,[113] we argue that it could be properly analysed as a case of unauthorised inherent actual conflict of duties. As Edelman J described in his judgment, the directors 'were acting in a position of owing duties to parties with directly conflicting interests' because a

[104] *Re Colorado* (n 88) 344 [353], quoting Sir Frederick Jordan, *Chapters on Equity in New South Wales: Being a Revision of Portion of the Notes of Lectures Delivered in the Law School of the University of Sydney* (6th ed, 1947) 115.

[105] *Re Colorado* (n 88) 345 [354], quoting *Hospital Products* (n 2) 103 (Mason J); *Re Colorado* (n 88) 345 [355], quoting *Chan* (n 2) 198–9 (Deane J); *Re Colorado* (n 88) 345 [356], quoting *Warman International Ltd v Dwyer* (1995) 182 CLR 544, 557–8 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ); *Re Colorado* (n 88) 345–6 [357], quoting *Pilmer* (n 1) 199 [78] (McHugh, Gummow, Hayne and Callinan JJ).

[106] *Re Colorado* (n 88) 346 [360].

[107] Rosemary Teele Langford and Ian M Ramsay, 'Directors' Conflicts: Must a Conflict Be Pursued for There to Be a Breach of Duty?' (2015) 9(3) *Journal of Equity* 281, 287.

[108] Ibid 288.

[109] *Boardman* (n 2) 124 (Lord Upjohn) (dissenting).

[110] Lord Upjohn's 'real sensible possibility of conflict' test in *Boardman* (n 2), as opposed to the majority's mere possibility of conflict test at 103–4 (Lord Cohen), 111 (Lord Hodson), subsequently found favour with lower English courts: see, eg, *Bhullar v Bhullar* [2003] 2 BCLC 241, 248–9 [268]–[273] (Jonathan Parker LJ).

[111] *Agricultural Land Management* (n 60) 9 [4] (Edelman J).

[112] Ibid 76 [399].

[113] Ibid 51–3 [263]–[275].

buyer would want to obtain the lowest price possible but a seller would want to obtain the highest price possible.[114] The directors thus owed inconsistent duties to the parties to the transaction that directly conflicted. In any event, whether analysed as a case concerning a potential or actual conflict of duties, the pertinent point is that the directors could not place themselves in a position of conflict (potential or actual) unless they had the informed consent of their principals. By contrast, the dispute in *Re Colorado* arose from an authorised inherent actual conflict. As discussed above, the fiduciary's position of actual conflict was an inherent and accepted part of the business structure.[115] Accordingly, it seems logical that a breach of fiduciary duty would only occur if there had been a *pursuit* of the actual conflict in a manner that was not contemplated by the parties.

The debate, unpacked and closely scrutinised as it has been above, shows that the language of avoidance of actual conflicts breeds confusion and unnecessary contention. Further, our analysis also demonstrates that it is not meaningful to dissociate the understanding and application of the no conflict rule from the primary duty which performance it is to protect. The application of the no conflict rule 'must accommodate itself to the particulars of the underlying relationship which give rise to the duty so that it is consistent with and conforms to the scope and limits of that relationship'.[116] The particulars of the relationship determine what is permissible and what is not permissible. In a case of unauthorised inherent actual conflict, as in *Agricultural Land Management*, there is little point in analysing the matter as a breach of the fiduciary duty to avoid actual conflicts. The point, if any, of casting it as a matter of breach of fiduciary duty is to obviate the need to prove a breach of the primary duty. But the benefit of that analysis is minuscule given the need to prove the existence of two sets of duties that actually conflict or the existence of an actual conflict between the fiduciary's duty and their personal interest, which is a small step away from proving a breach of the primary duty.

As we have stressed above, in the case of authorised inherent actual conflict (eg *Re Colorado*), it is simply meaningless to speak of the duty to avoid an actual conflict. The preference for the language of 'pursuit of conflict' illustrates that. But even the 'pursuit of conflict' terminology does not change the fact that what is permissible and impermissible for the defendant director to undertake will depend on the particulars of the relationship. Justice Black said that the rule against conflict in the specific context of the case did not require the defendant

[114] Ibid 51 [264].

[115] See above nn 88–98 and accompanying text.

[116] *Howard v Federal Commissioner of Taxation* (2014) 253 CLR 83, 100 [34] (French CJ and Keane J).

director to subordinate the interests of the other company or of herself to those of Colorado in the ways as alleged by the plaintiffs.[117] She did not have to accept the demand to set off a debt which was said to be owed by her to Colorado against a debt which Colorado owed to the leasing company; or grant any extension of time to Colorado for payment to the manufacturing company; or not require Colorado's payment of invoices issued by the manufacturing company.[118] This is because these were neither terms of the contracts between the companies nor stipulations in Colorado's constitution.

C *Resignation: Conflict Avoidance versus Conflict Management*

We now move on to examine more closely what is required of a fiduciary who is confronted with an actual conflict in which they are not authorised to act. We argue that the language of conflict avoidance is similarly misleading in this context as courts, when looking at the matter in terms of the avoidance of conflict, simultaneously expect too much and too little of the fiduciary. For example, in *Bristol and West Building Society v Mothew* ('*Mothew*'), Millett LJ said that

> the fiduciary must take care not to find himself in a position where there is an *actual* conflict of duty so that he cannot fulfil his obligations to one principal without failing in his obligations to the other … *If he does, he may have no alternative but to cease to act for at least one and preferably both*. The fact that he cannot fulfil his obligations to one principal without being in breach of his obligations to the other will not absolve him from liability.[119]

Lord Justice Millett's recommendation, that resignation from one or preferably both engagements whose duties actually conflict would be a necessary course of action to avoid being in breach of the duty to avoid actual conflict, stems entirely from the redundant reconceptualisation of a fiduciary's primary duties as proscriptive duties. So conceptualised, resignation seems a plausible panacea. However, the removal of oneself from a position of actual conflict cannot possibly avoid an actual conflict that has arisen. Indeed, choosing to resign from one engagement — which may be appropriate in some circumstances — is to prefer one principal over the other. Choosing to resign from

[117] *Re Colorado* (n 88) 350–1 [369]–[370].

[118] Ibid.

[119] *Mothew* (n 45) 19 (emphasis added) (citations omitted). There are exceptions to the rule on resignation in a situation of actual conflict — for example, a trustee may continue to act in circumstances where they are not responsible for placing themselves in the position of actual conflict: see *Edge v Pensions Ombudsman* [1998] Ch 512, 538–41 (Sir Richard Scott V-C). Our analysis here is, however, focused on cases where the fiduciary is the author of their own dilemma.

both engagements may suggest an even-handed approach but it would result in the fiduciary not fulfilling the primary duties they owe to both principals.

As a matter of logic, abstinence from being in a position of potential conflict is the best means to avoid an actual conflict as it is the only means of ensuring that there is *no* opportunity for the ripening of existing potential conflicts. Yet, it is common and legally permissible — as in *Mothew* itself — for principals to authorise in advance or *ex post* the fiduciary being in a position of potential conflict.[120] The tolerance of potential conflicts that are sanctioned by the principal is an implicit acknowledgement of two facts. First, an inherent limitation of all human endeavours is the inability to foresee the future. There is no way to know if potential conflicts will ultimately ripen and at what cost to the interests of the principal, as well as whether the materialised (actual) conflicts could be resolved or adequately managed. Second, economic activities are underlined by a cost–benefit analysis which, to a great extent, is appropriate to be undertaken by the participants themselves. The toleration of potential conflicts, pursuant to authorisation, accommodates both the uncertainty of future events and respect for self-determination. Jurisdictions that permit the same solicitor to act for both the mortgagee and the mortgagor recognise that the risk of the duties actually conflicting must be balanced against the cost of using separate solicitors in a relatively routine transaction generally based on a standard form contract supplied by the lender.[121]

Resignation, in our view, is merely a form of managing actual conflicts.[122] But it is not the only form of adequate conflict management. It may be the most adequate form of response to a situation of actual conflict in some situations because it could effectively limit the extent of harm suffered by both principals.[123] For instance, the principals could, at the earliest opportunity, engage separate professionals to help them complete the transaction. However, a belated resignation at a point where the principals' interests have been prejudiced would not absolve the fiduciary from liability.[124]

[120] *Holyoake Industries (Vic) Pty Ltd v V-Flow Pty Ltd* (2011) 86 ACSR 393, 412 [92] (Tracey J).

[121] In such a straightforward scenario, they merely face a potential conflict: see *Mortgage Express Ltd v Bowerman & Partners* [1996] 2 All ER 836, 844–5 (Millett LJ).

[122] In *Indalex* (n 83), resignation was not a practicable solution because a replacement director would be faced with the same conflict: see at 355–6 [188], 357 [194] (Cromwell J for McLachlin CJ, Rothstein and Cromwell JJ). See also Paul B Miller, 'Multiple Loyalties and the Conflicted Fiduciary' (2014) 40(1) *Queen's Law Journal* 301, 321.

[123] Low (n 10) 21.

[124] See Miller, 'Multiple Loyalties and the Conflicted Fiduciary' (n 122) 330. Miller says that 'a conflicted fiduciary ought to prepare for resignation as soon as she believes that she *may* have to pursue an option adverse to the interests of her beneficiary' (emphasis added). If so, the

The conventional proscriptive language of the 'duty to avoid actual conflict' seems to suggest that all the conflicted fiduciary has to do is to resign so as to remove themselves from a position of conflict. It does not actively inspire one to ask two related and more important questions: first, should the conflicted fiduciary be required to do more than merely resign? And secondly, can the conflicted fiduciary continue to act in some circumstances? Australian cases on conflicted directors show that resignation is not necessarily the only or the most appropriate course of action to take in some situations. In *Fitzsimmons v The Queen* ('*Fitzsimmons*'), the defendant was a director of the company, Duke, and in anticipation of a transaction to be entered into between Duke and another company, Kia Ora, the defendant was appointed a director of Kia Ora.[125] The said transaction involved Kia Ora transferring funding to Duke for the purpose of Duke acquiring Kia Ora's shares.[126] Given his employment and directorship with Duke, the defendant must have known that Duke was in a desperate financial position, but he did not warn the other Kia Ora directors before the transaction was entered into.[127] At that point, the defendant was clearly in a position of actual conflict — there was a conflict between his duty to divulge material information to Kia Ora and his duty of confidentiality owed to Duke.[128] The defendant was charged, inter alia, under s 229(1)(b) of the *Companies (South Australia) Code* for failing to act honestly as a director for not disclosing Duke's true financial position to Kia Ora's board of directors.[129] It was through this charge that the Supreme Court of Western Australia considered the position of a conflicted director and what they would be required to do in such circumstances.[130] The Court did not explicitly decide on how the conflict could have been resolved,[131] but Owen J said that resignation 'may, in particular circumstances, be the only course open but it would not necessarily

conflict has not actualised, and resignation is to remove oneself from a position of a potential conflict that is likely to ripen imminently.

125 (1997) 23 ACSR 355, 356–7 (Owen J) ('*Fitzsimmons*').

126 Ibid 356.

127 Ibid 362 (Parker J, Murray J agreeing at 356).

128 Ibid 359 (Owen J), 362–3 (Parker J, Murray J agreeing at 356). Whilst the defendant director owed a duty of confidence to Duke in respect of the latter's true financial position, an action for breach of confidence cannot be realistically maintained against the defendant director for warning Kia Ora's board of directors that they/Kia Ora's shareholders were to be defrauded. In other words, there would be no conflict of duty and duty. This alternative view was, however, not considered in the case.

129 Ibid 357 (Owen J).

130 Ibid 357–9 (Owen J), 363–4 (Parker J, Murray J agreeing at 356).

131 Ibid 357–9 (Owen J), 364 (Parker J, Murray J agreeing at 356).

follow'.[132] Commenting on *Fitzsimmons*, Barrett has pointed out that 'the duty of confidentiality … would not have suddenly evaporated upon [the director's] resignation', and that a director who chose to resign would do no better than one who chose to stay in office silently, insofar as the protection of Kia Ora's interests was concerned.[133] Nor does resignation avoid the conflict of duty and interest in the sense that the fiduciary may now pursue profits for which they would otherwise have to account if they had remained in office.[134]

More generally, beyond the context of corporate governance, there are two plausible arguments that a fiduciary should be required to do more than merely resign in such circumstances. First, if the fiduciary owes fiduciary duties to two different parties, at least up to the point of resignation, they are to act in their interests. Then they must be expected to do more than resign timeously. They ought to disclose all material information, identify and explain the point of conflict, as well as advise that the principals seek independent advice and/or look for a competent replacement so that they may carry on from the point of the conflicted fiduciary's resignation on an informed basis.[135] Secondly, the same additional course of conduct could be expected of them on the basis that the act of resignation (if necessary) is merely a part of the conduct required to manage the conflict, so that resignation alone is insufficient. Indeed, the Privy Council in *Kelly v Cooper* ('*Kelly*') acknowledged that cessation to act might not be the only course of action open to the conflicted fiduciary.[136] The case concerned a firm of estate agents (the defendants) who acted for the owners of two adjacent properties, one of which was owned by the plaintiff.[137] A buyer was interested in both properties and he reached an agreement to buy the other adjacent property owned by one Mr Brant.[138] The plaintiff did not know that the defendant was acting for Brant.[139] The defendant did not inform the plaintiff of the buyer's agreement to purchase the other property as it owed a duty of confidentiality to Brant in respect of that information.[140] The plaintiff accepted the

[132] Ibid 358 (Owen J). Justice Owen commented that 'commercial life would become very difficult' if a director had to resign whenever a conflict of interest existed: at 357.

[133] RI Barrett, 'Resolution of Directors' Conflicts' (1997) 71(9) *Australian Law Journal* 677, 679.

[134] *Streeter v Western Areas Exploration Pty Ltd [No 2]* (2011) 278 ALR 291, 350–1 [370] (Murphy JA); *Ex parte James* (1803) 8 Ves Jr 337; 32 ER 385, 390–1 (Lord Eldon LC).

[135] See a similar suggestion in Miller, 'Multiple Loyalties and the Conflicted Fiduciary' (n 122) 319, 328–9.

[136] *Kelly* (n 61) 216 (Lord Browne-Wilkinson for the Judicial Committee).

[137] Ibid 210.

[138] Ibid 210–11.

[139] Ibid 211.

[140] Ibid 212.

buyer's offer for his own property in such circumstances.[141] The plaintiff later sued the defendant firm for putting itself in a position of conflict of duty and interest (to earn the commission).[142] The case can also be analysed as one involving conflicting duties — the defendant firm was under a duty to inform the plaintiff and at the same time, it owed a duty of confidentiality to Brant. The Privy Council considered the question as to whether the defendant firm, when it became aware of the buyer's interest in purchasing both properties, was under any obligation to 'resolve the difficulty or cease to act'.[143] They commented that '[t]he only possible resolution of the difficulty' would have been to obtain the consent of both property owners to reveal the buyer's interest in the two properties.[144] This course of conflict management, if pursued, might have enabled both property owners to succeed in obtaining higher offers from the buyer.

Of course, in disputes involving actual conflict of duties, it is more often the case that the disclosure of confidential information is injurious to the interests of the party to whom the duty of confidence is owed. As a matter of law, the principal from whom the confidential information is withheld is not entitled to demand disclosure.[145] They may however sue the conflicted fiduciary for compensation in respect of any losses that have been caused by the latter's inability to discharge their duties owed to the principal.[146] Consequently, it would be practically impossible for the conflicted fiduciary to make full and frank disclosure of the conflict and/or seek informed consent from all relevant parties involved on any proposed course of conflict management. However, even so, the conflicted fiduciary should at the very least disclose that they are in a position of conflict and resign for that very reason, instead of quietly resigning without disclosing the real reason behind their action.

On the second question as to whether a conflicted fiduciary may continue to act in some circumstances, Sales J in *F & C Alternative Investments (Holdings) Ltd v Barthelemy [No 2]* ('*F & C Alternative Investments (Holdings)*') said that Millett LJ's recommendation in *Mothew* for resignation in cases of actual conflict of duties is not an absolute rule for application in every case.[147] As he explained:

[141] Ibid 211. The Privy Council accepted that the plaintiff might have succeeded in obtaining a higher price had he known of this piece of information: at 213.

[142] Ibid 211–12.

[143] Ibid 216.

[144] Ibid.

[145] *North & South Trust* (n 62) 485–6 (Donaldson J).

[146] See ibid 486.

[147] [2012] Ch 613, 655 [228] (Sales J) ('*F & C Alternative Investments (Holdings)*'), discussing *Mothew* (n 45) 19.

> That statement is readily understandable in the context with which Millett LJ was dealing in that case, namely a solicitor acting for two clients. The solicitor/client relationship involves a particularly strong degree of confidence and trust, and the content of the fiduciary duties associated with it is well established and demanding. It is also relevant that there is a ready supply of alternative solicitors who are able to act and can readily be substituted if an actual conflict of interest is perceived to arise. But in my view, read on its own, Millett LJ's statement does not take full account of the wide and varied range of circumstances in which fiduciary obligations of different types and of greater or lesser force may arise.[148]

F & C Alternative Investments (Holdings) concerned a limited liability partnership, F & C Partners LLP ('LLP'), that consisted of the defendants and the claimant as its members.[149] It was intended by both sides that the claimant 'should have its "representatives" [appointed to] the board and other governance organs of the LLP to balance out the defendants' membership of those organs'.[150] It was also fully known and intended that neither the defendants nor the claimant's representatives should be disabled from acting merely by the occurrence of an actual conflict at times or when they had some regard to their own respective interests.[151] In view of the parties' intentions as to how the power was to be balanced within the LLP structure, Sales J said that there would be 'no ready set of alternative board members whose judgment of what the LLP should do would be uncontaminated by consideration of either self-interest or the interests of [the claimant]'.[152] As a result, the question was not whether the conflicted LLP board members should cease to act but to what extent they could take into account their respective self-interests in the management of the business relationship that was to run for a 'substantial period of time'.[153] Accordingly, one may argue that a conflicted fiduciary may continue to act where no ready substitute can be found: for example, where a replacement fiduciary would be placed in the same dilemma or where the original conflicted fiduciary has specialist knowledge/experience in relation to the transaction or the principal such that they are practically irreplaceable. Taken to its logical conclusion, even solicitor/client relations should not be exempt from such an analysis — as Sales J appears to deny. Most cases of *actual* conflicts arise in conveyancing (or other

148 *F & C Alternative Investments (Holdings)* (n 147) 655 [228] (Sales J).

149 Ibid 617 [1].

150 Ibid 659 [236].

151 Ibid.

152 Ibid.

153 Ibid 660 [237].

commercial) transactions,[154] in which fixed completion dates do not readily permit for the easy substitution of solicitors, however ready and capable the supply of the same may be.

Finally, it is worthwhile to note that Australian law requires a positive course of action (including heightened disclosure or preventing the principal company from entering into the harmful transaction) from conflicted directors beyond disclosure of the conflict and resignation where special factors are present.[155] These factors include: where the company is undertaking a new or unfamiliar venture; where the conflicted director is more knowledgeable and/or experienced in relation to the venture as compared with the other unconflicted directors; and where the director has power and influence over the board.[156] As Langford and Ramsay helpfully summarise, the overarching consideration as to whether extra steps may be required of the conflicted director is

> whether the company needs protection and whether the director concerned is in the best position to provide such protection or at least to warn the other directors of the need for such protection.[157]

It is hoped that once we free ourselves from the language of conflict avoidance, we can begin to think more concretely in terms of conflict response and management and what that would entail in each specific case. In the commercial/corporate context, this would translate into constructive negotiation between the parties, whether *ex ante* or *ex post*, on an agreed course of conflict management.

D *The Role of Informed Consent*

It is frequently said that a fiduciary will be absolved from liability if they have obtained the principal's fully informed consent 'to the existence of what otherwise would be a conflict'.[158] It is clear that informed consent can insulate the

[154] See Patrick Parkinson, 'Fiduciary Obligations' in Patrick Parkinson (ed), *The Principles of Equity* (Lawbook, 2nd ed, 2003) 339, 368 [1026].

[155] See, eg, *Fitzsimmons* (n 125) 358 (Owen J), 363–4 (Parker J, Murray J agreeing at 356). See also Rosemary Teele Langford and Ian M Ramsay, 'Conflicted Directors: What Is Required to Avoid a Breach of Duty?' (2014) 8(2) *Journal of Equity* 108 ('Conflicted Directors'); Langford (n 85) 279–81, 284.

[156] Langford and Ramsay, 'Conflicted Directors' (n 155) 124–5.

[157] Ibid 126.

[158] *Commonwealth Bank of Australia v Smith* (1991) 42 FCR 390, 393 (Davies, Sheppard and Gummow JJ). See also *Fullwood v Hurley* [1928] 1 KB 498, 502 (Scrutton LJ) ('*Fullwood*'); *Farrington* (n 7) 90 (Richardson J); *Ohm Pacific Sdn Bhd v Ng Hwee Cheng Doreen* [1994] 2 SLR(R) 633, 642–3 [20] (LP Thean JA for the Court) ('*Ohm Pacific*').

fiduciary from liability arising from their occupation of a position of potential conflict.[159] What is less frequently discussed or at least not discussed directly is the role and effect of informed consent in relation to actual conflicts. This inquiry is relevant to proving the practical redundancy and inadequacy of the duty to avoid actual conflicts. In respect of an actual conflict between duty and interest, informed consent can 'cure' the breach.[160] Some support may be provided by cases involving a fiduciary earning unauthorised profits.[161] Some support may be gleaned from the unauthorised profits cases because the invocation of the no profit rule obviates the need to prove the existence of a conflict, potential or actual. The liability to account is a 'pragmatic response to the likelihood of … conflict'.[162] In Millett J's words, '[s]ecrecy is the badge of fraud'.[163] But it is acknowledged that in such cases, there 'will *commonly* or *generally* be a conflict between duty and interest'.[164] On the basis of this qualification, we proceed with our analysis.

It has been often stressed that the key mechanism for profits to be earned is through obtaining the principal's informed consent.[165] In *Regal (Hastings) Ltd v Gulliver*, Lord Russell observed that the directors, who had made unauthorised profits in that case, 'could, had they wished, have protected themselves by a resolution (either antecedent or subsequent) of the Regal shareholders in general meeting'.[166] The 'self-dealing rule' and 'fair-dealing rule' applicable

[159] *Mothew* (n 45) 18 (Millett LJ).

[160] *Maguire v Makaronis* (1997) 188 CLR 449, 465–6 (Brennan CJ, Gaudron, McHugh and Gummow JJ).

[161] See *Queensland Mines Ltd v Hudson* (1978) 18 ALR 1, 9–10 (Lord Scarman for the Judicial Committee) (Privy Council).

[162] Conaglen, 'The Nature and Function of Fiduciary Loyalty' (n 3) 467.

[163] *Agip (Africa) Ltd v Jackson* [1990] 1 Ch 265, 294. The words were said in the context of examining money laundering.

[164] Conaglen, 'The Nature and Function of Fiduciary Loyalty' (n 3) 467 (emphasis in original). Conaglen says: 'In other words, in virtually all cases where a profit is made out of a fiduciary position, the fiduciary will have acted in a way that involves a conflict between his non-fiduciary duty and his personal interest.'

[165] See, eg, *Boardman* (n 2) 109 (Lord Hodson); Matthew Conaglen, 'The Extent of Fiduciary Accounting and the Importance of Authorisation Mechanisms' (2011) 70(3) *Cambridge Law Journal* 548. Cf *Murad v Al-Saraj* [2005] EWCA Civ 959, [82] (Arden LJ), [121] (Jonathan Parker LJ).

[166] *Regal (Hastings)* (n 9) 150.

to fiduciaries[167] — applications of the no conflict rule, on Conaglen's reappraisal[168] — also illustrate that informed consent can absolve a fiduciary of liability for acting in a situation of actual conflict.[169]

The pertinent question is this: what is the function performed by informed consent in the context of an actual conflict of duty and interest?[170] Does it operate as a defence to a breach of duty in the sense that the principal is estopped from pleading the breach or has waived the right to pursue the breach or does it enable the avoidance of an actual conflict? Where informed consent is sought *ex post*, it seems senseless to view informed consent as a means to *avoid* an actual conflict. The estoppel/waiver view is not untenable.[171] But we suggest that there is a third way of looking at informed consent in such circumstances: it is a substantive mechanism to obtain voluntary, intentional and informed authorisation of a particular state of affairs.[172] The sufficiency of disclosure is thus crucial for autonomous authorisation to occur. On our proposed view of informed consent, the law gives principals the freedom of choice to either affirm and allow a state of affairs to continue (with some adjustments) or to reject the state of affairs and sue the fiduciary for breach of duty. Based on the information, the principals may conclude that the transaction is beneficial to them or they may consider the transaction to be acceptable if certain safeguards or adjustments are put in place. The conflict is managed — and not avoided. What is avoided is the liability for breach.

We now turn to consider a conflict of duties.[173] The first and foremost question is whether informed consent removes liability for an actual conflict of duties. In respect of a solicitor considering the acceptance of dual engagements, Lord Cozens-Hardy MR said in *Moody v Cox*:

167 *Tito v Waddell [No 2]* [1977] 1 Ch 106, 241 (Megarry V-C).

168 Matthew Conaglen, 'A Re-Appraisal of the Fiduciary Self-Dealing and Fair-Dealing Rules' (2006) 65(2) *Cambridge Law Journal* 366, 367.

169 Ibid 372, 374.

170 See generally Joshua Getzler, 'Ascribing and Limiting Fiduciary Obligations: Understanding the Operation of Consent' in Andrew S Gold and Paul B Miller (eds), *Philosophical Foundations of Fiduciary Law* (Oxford University Press, 2014) 39, 55 ('Ascribing and Limiting Fiduciary Obligations'). Getzler says that 'the juristic effect of informed consent … is a point of central doctrinal and practical importance, yet the authorities are divided'.

171 Langbein, 'Questioning the Trust Law Duty of Loyalty' (n 17) 965, quoting *Lockhart v Reilly* (1856) 25 LJ Ch 697, 701 (Lord Cranworth LC).

172 It operates with retroactive effect in the case of informed consent obtained *ex post*.

173 To be sure, that one owes multiple loyalties does not mean that one is conflicted. As Richardson J explained in *Farrington* (n 7) 90: 'But the acceptance of multiple engagements is not necessarily fatal. There may be an identity of interests or the separate clients may have unrelated interests.'

> He ought before putting himself in that position to inform the client of his conflicting duties, and either obtain from that client an agreement that he should not perform his full duties of disclosure or say — which would be much better — 'I cannot accept this business'.[174]

Strictly speaking, the situation envisaged by Lord Cozens-Hardy MR is one of obtaining informed consent in respect of a conflict that has yet to materialise. By refusing to take on dual engagements, as Lord Cozens-Hardy MR would encourage, the solicitor avoids the maturation of an actual conflict by avoiding its precursor — a potential conflict. The alternative of seeking the client's agreement that the solicitor 'should not perform his full duties of disclosure' is to adjust the terms of the relationship so as to avoid the maturation of an actual conflict of duties. Now, recalling the case of *Re Colorado* discussed above,[175] by way of comparison, the business relationship in that case was structured in a way that the inherent actual conflict was authorised.[176] Justice Black queries, extrajudicially, if the scope of the director's duty had been narrowed as a consequence of the structural authorisation.[177] We suggest that it had. The modification of the duty is either a resolution of the actual conflict,[178] or a form of management of the inherent actual conflict.[179]

Where an actual conflict of duties arises without such structural authorisation, practically, it would be almost impossible for the fiduciary to obtain the principal's informed consent to authorise them to continue acting for both parties. An actual conflict would seriously undermine the fiduciary's ability to make full and frank disclosure of all material facts to the principal, as the fiduciary very often owes a duty of confidentiality to the other party. Usually, the proper question to ask is: how should the fiduciary respond to the actual conflict? Or, put another way, how can the conflict be managed?[180] In the unusual cases where the fiduciary succeeds in obtaining the principal's 'informed consent', the 'consent' may be characterised as a waiver of the right to pursue the breach that has occurred and authorisation of the fiduciary's position of actual

[174] *Moody* (n 50) 81.

[175] See above nn 88–98 and accompanying text.

[176] *Re Colorado* (n 88) 349 [365] (Black J).

[177] Black (n 97) 8.

[178] It may be that the fiduciary no longer owes fiduciary duties in respect of that part of the transaction and the actual conflict therefore ceases to exist.

[179] The duties are modified to the extent that the risk of actual harm is reduced or predictable such that it can be managed.

[180] See, eg, *Indalex* (n 83) 365–6 [215]–[217] (Cromwell J for McLachlin CJ, Rothstein and Cromwell JJ).

conflict, resulting in a narrowing of their duty going forward. In other words, 'informed consent' given in such a context results in renegotiated duties.

Given that authorisation must be rendered on an informed and voluntary basis,[181] we therefore cannot agree with the approach taken by the Privy Council in *Kelly* of endorsing implied consent to conflict derived from general knowledge of the context in which the fiduciary operates.[182] In that case, the Privy Council said:

> Thus, in the present case, the scope of the fiduciary duties owed by the defendants to the plaintiff (and in particular the alleged duty not to put themselves in a position where their duty and their interest conflicted) are to be defined by the terms of the contract of agency. … [S]ince the plaintiff was well aware that the defendants would be acting also for other vendors of comparable properties and in so doing would receive confidential information from those other vendors, the agency contract between the plaintiff and the defendants cannot have included either (a) a term requiring the defendants to disclose such confidential information to the plaintiff or (b) a term precluding the defendants acting for rival vendors or (c) a term precluding the defendants from seeking to earn commission on the sale of the property of a rival vendor.[183]

Although superficially attractive, such an approach demonstrates very little by way of principled reasoning. It could just as well be argued that the agency contract between the agent and the other principal must have impliedly excluded a duty of confidence to the extent that it detracted from the agent's duty to properly advise the plaintiffs. Lord Browne-Wilkinson offers no good reason why an implied term ought to prefer the duty of confidence to one or both principals over the duty to fully and properly advise them, and it is difficult to see how *Kelly* can stand in light of *Hilton v Barker Booth & Eastwood* ('*Hilton*').[184] In *Hilton*, a firm of solicitors acted for both the vendor and the purchaser in a property transaction in circumstances in which the firm knew that the purchaser was a bankrupt and had served a prison sentence for committing offences of dishonesty.[185] These facts concerning the purchaser were not known

[181] See, eg, *Rossetti Marketing Ltd v Diamond Sofa Co Ltd* [2013] 1 All ER (Comm) 308, 314 [22] (Lord Neuberger MR).

[182] Our position derives support from the Singapore Court of Appeal's decision in *Ohm Pacific* (n 158) 643–4 [22] (LP Thean JA for the Court).

[183] *Kelly* (n 61) 215 (Lord Browne-Wilkinson for the Judicial Committee).

[184] *Hilton* (n 50). See commentary in Joshua Getzler, 'Inconsistent Fiduciary Duties and Implied Consent' (2006) 122 (January) *Law Quarterly Review* 1; Getzler, 'Ascribing and Limiting Fiduciary Obligations' (n 170) 56–8.

[185] *Hilton* (n 50) 571–2 [11]–[16] (Lord Walker).

to the vendor, nor did the firm disclose the same to him.[186] The House of Lords rejected the firm's argument that there was an implied term in the contract of retainer with the vendor that the firm may be excluded from any general duty of disclosure in respect of information which they were obliged to keep confidential.[187] The House of Lords was firmly of the view that the firm could not get out of their position of dilemma, in which they found themselves as a result of their own fault,[188] by arguing that their duty to the vendor was curtailed.[189]

It follows that we find the decision of the Federal Court of Australia in *Australian Securities and Investments Commission v Citigroup Global Markets Australia Pty Ltd [No 4]* ('*Citigroup*'), which arguably extended *Kelly*, even more problematic.[190] Citigroup Global Markets Australia Pty Ltd ('Citigroup'), a subsidiary of the global banking giant Citigroup Inc, operated various businesses in Australia, including advisory services in connection with mergers and acquisitions (through its investment banking division) and proprietary trading in securities (through its equities division).[191] On 8 August 2005, Citigroup's investment banking division was engaged by Toll Holdings Ltd ('Toll'), as one of two investment banks, to provide financial advisory services in relation to a proposed takeover of another company, Patrick Corporation Ltd ('Patrick').[192] On 19 August 2005, a trader in Citigroup's equities division acquired a substantial number of Patrick shares, apparently in response to market movements in their share price, which in turn reflected market speculation about the likelihood of Patrick being the subject of a takeover bid.[193] Certainly, there was no suggestion that the trader had acquired insider information about Toll's proposed bid for Patrick and the two divisions of Citigroup had been kept on opposite sides of a Chinese wall — the investment banking division on the private side and the equity division on the public side.[194] Later that day, when employees on the private side of the wall became aware of the purchase, the trader (who was on the public side of the wall) was instructed not to purchase any more

186 Ibid 571–2 [14]–[15].

187 Ibid 570 [6] (Lord Scott), 577–8 [37]–[38] (Lord Walker, Lord Hoffmann agreeing at 569 [1], Lord Hope agreeing at 569 [2], Lord Brown agreeing at 581 [48]).

188 Ibid 570 [8] (Lord Scott), 577 [35] (Lord Walker, Lord Hoffmann agreeing at 569 [1], Lord Hope agreeing at 569 [2], Lord Scott agreeing at 569 [3], Lord Brown agreeing at 581 [48]).

189 Ibid 570 [6] (Lord Scott), 578 [37]–[38] (Lord Walker, Lord Hoffmann agreeing at 569 [1], Lord Hope agreeing at 569 [2], Lord Scott agreeing at 569 [3], Lord Brown agreeing at 581 [48]).

190 (2007) 160 FCR 35 ('*Citigroup*').

191 Ibid 42–3 [5]–[6] (Jacobson J).

192 Ibid 46 [34].

193 Ibid 46 [41], 98 [470]–[473] (Jacobson J).

194 Ibid 43 [8]–[9], [12].

shares in Patrick.[195] The trader then sold 192,352 Patrick shares he had purchased that day.[196] Toll's takeover bid for Patrick was announced on 22 August 2005.[197] The case against Citigroup was brought not by Toll but by the Australian Securities and Investments Commission ('ASIC') on the basis, inter alia, of s 912A(1)(aa) of the *Corporations Act 2001* (Cth) ('*Corporations Act*') concerning 'hav[ing] in place adequate arrangements for the management of conflicts of interest',[198] which in turn was premised upon a breach of fiduciary duty.[199] Justice Jacobson ruled against ASIC in respect of this claim on a number of different bases. First, he held that the mandate excluded a fiduciary relationship altogether.[200] Secondly, and most controversially, Jacobson J concluded that even if the relationship was fiduciary, informed consent to any conflicts alleged to have arisen had been given by Toll impliedly.[201] Finally, Jacobson J considered that no conflicts of duty and interest arose on the facts.[202]

With respect, Jacobson J's reasoning in relation to informed consent builds a bridge too far. First, as Jacobson J acknowledged,[203] the facts are even further removed from *Kelly*, so the strength of any implied term to the same effect would be much attenuated. Secondly, even if it is considered that the outcome of *Kelly* is desirable because of the necessity to ensure that services of agents are more freely available to others by using notoriety of particular practices to exclude certain conflicts of duties, it is difficult to see how that sort of reasoning

195 Ibid 43 [11]–[12].

196 Ibid 43 [12]–[13].

197 Ibid 65 [199].

198 Ibid 45 [25].

199 Ibid 45 [26].

200 Ibid 82–4 [322]–[339]. It is arguable that this aspect of *Citigroup* (n 190) may not survive closer scrutiny, given that it is arguable that the nature of an advisory relationship is inherently fiduciary: Andrew Tuch, 'Investment Banks as Fiduciaries: Implications for Conflicts of Interest' (2005) 29(2) *Melbourne University Law Review* 478. While some fiduciary duties, such as the prophylactic ones, can be excluded through informed consent, it is arguable that the recasting of the entire relationship as non-fiduciary would be repugnant to the bargain envisaged by the parties: cf *Armitage v Nurse* [1998] Ch 241, 253 (Millett LJ, Hutchison LJ agreeing at 264, Hirst LJ agreeing at 264). Taking the label in the mandate drafted by the defendant that the relationship is not fiduciary as definitive is probably inconsistent with *Street v Mountford* [1985] 1 AC 809 and *Agnew v Commissioners of Inland Revenue* [2001] 2 AC 710, which were not considered in *Citigroup* (n 190). See also Getzler, 'Ascribing and Limiting Fiduciary Obligations' (n 170) 53–4; Joshua Getzler, '*ASIC v Citigroup*: Bankers' Conflict of Interest and the Contractual Exclusion of Fiduciary Duties' (2007) 2(1) *Journal of Equity* 62.

201 *Citigroup* (n 190) 85–6 [349]–[361] (Jacobson J).

202 Ibid 87–93 [369]–[420].

203 Ibid 86 [359]–[360].

process could work when the conflict is one between the duty owed to the principal and the personal interest of the fiduciary. The fact that Citigroup operated a proprietary trading desk should not, without more, amount to informed consent, especially since it does not appear that Toll had been informed about the steps that Citigroup took to protect its confidence,[204] which was assumed to remain important.[205] The fact that sufficient safeguards had been taken[206] and the fact that the principal would have consented had it been fully informed[207] are irrelevant. The simple fact is that the principal had not been fully informed, and thus any implied consent could not be described as informed, much less fully informed.

This is not to say that the outcomes in *Kelly* or *Citigroup* are not attainable as a matter of conflict management — provided they are explicitly provided for with the informed consent of the relevant principal(s).[208] Where the law is concerned with conflicts of duties owed to two principals, it may be difficult to obtain informed consent once an actual conflict has materialised. But as *Re Colorado* demonstrates, it is possible to structurally authorise actual conflicts a priori. Given developments in *Hilton*,[209] it would be advisable for fiduciaries choosing to act in situations of *possible* conflicts of duties to provide in advance for conflict management by anticipating actual conflicts that are likely to mature and reaching agreement with both principals as to how they are expected to proceed in such an event.

Consider the classical *actual* conflict of acquiring information in confidence which must also be disclosed to the other principal. It is possible for both principals and the fiduciary to agree that in such an event, the fiduciary's duty to one particular principal would prevail over that to the other principal, though this is not likely to be palatable to many. It is more probable that both principals

[204] See ibid 68 [229], 86 [356]–[358].

[205] Ibid 68–9 [232]. Mr Chatfield, chief financial officer of Toll, was asked in cross-examination by Citigroup's lawyer: 'You knew that the proprietary trading desk could operate for the benefit of Citigroup as long as knowledge of Toll's confidential information didn't leak to the proprietary trading desk?': at 69 [232].

[206] Ibid 110–11 [579]–[585].

[207] Ibid 69 [232]. Chatfield agreed that 'if … Citigroup had told [him] that they had been engaged in proprietary trading up to that time, it wouldn't have made any difference to any of the decisions that [he] made'.

[208] Cf *Hurstanger Ltd v Wilson* [2007] 1 WLR 2351. In this case, a borrower signed a contract with a finance broker which provided that the latter was to be paid a commission by the lender in some circumstances: at 2355 [4] (Tuckey LJ). The Court of Appeal held that this did not amount to informed consent and that the broker was thus in breach of fiduciary duty: at 2365 [44]–[45] (Tuckey LJ, Jacob LJ agreeing at 2366 [54], Waller LJ agreeing at 2366 [55]).

[209] See above nn 184–189 and accompanying text.

could agree that the duty of confidence should always trump the duty to disclose,[210] regardless of which principal it operates in favour of (consistently with the result in *Kelly*).[211] Conversely, and equally plausibly, they could agree that the duty to disclose should always trump the duty of confidence. They could do so whilst permitting the fiduciary to continue acting for both principals (again consistently with *Kelly*), only one of them, or none (consistently with the advice of Millett LJ in *Mothew*).[212] Each course of conflict management will have its pros and cons. Requiring the fiduciary to resign from both engagements will either result in lost fees for the fiduciary and/or wasted costs for both principals. Allowing the fiduciary to continue to act for both principals will ensure that the principal whose duty has been subjugated will lose an opportunity to have their interests better served by an independent fiduciary.[213] It will, of course, never be possible to account for all possibilities but it certainly seems advisable as a matter of conflict management to provide for readily foreseeable actual conflicts.[214]

IV Reconceptualising Fiduciary Regulation in Actual Conflicts

The conventional formulation of the no conflict rule requires a fiduciary to avoid conflicts at all costs, unless they have obtained the informed consent of the principal.[215] We suggest that the proper perspective should be to view the no conflict duty in relation to authorisation mechanisms, the most notable of which is the concept of informed consent. This more balanced perspective will help us appreciate the importance of authorisation in mitigating the strictness of the primary duty, and that not all conflicts are necessarily harmful or fatal.

In fact, in modern commercial life, conflicts may be normal, intended and even helpful in the pursuit of mutual advantage. Under United States ('US') law, indenture trustees, corporate directors and partners in a general partnership

[210] See *Moody* (n 50) 81 (Lord Cozens-Hardy MR).

[211] See above nn 136–144 and accompanying text.

[212] See above n 119 and accompanying text.

[213] In some cases, owing to the niche expertise of the conflicted fiduciary, it may be impossible to find a replacement.

[214] See the facts of *Barnsley v Noble* [2017] Ch 191, 195–7 [2]–[13] (Sales LJ). In that case, a will contained a 'transactions clause' which modified the self-dealing rule such that an executor involved in a self-dealing transaction which satisfied the stipulated conditions would not be in breach of obligation: at 201 [28] (Sales LJ, Patten LJ agreeing at 205 [45], Sir Terence Etherton C agreeing at 205 [46]).

[215] See, eg, *Pilmer* (n 1) 199 [78] (McHugh, Gummow, Hayne and Callinan JJ).

are clear examples where conflicts are anticipated and normal.[216] Indeed, certain US laws permit conflicts of interests provided there is advance consent[217] or permit the elimination of the no conflicts obligation.[218] Further, not tolerating conflicts in the corporate context would prohibit many mutually beneficial transactions.[219] Langbein explains that, in some cases, the fiduciary may be better placed to provide a paid service to the principal which generates a conflict of duty and interest than a non-conflicted individual, citing the institutional trustees' provision of financial services for trust accounts as an example of a mutually beneficial transaction.[220]

The toleration of conflicts in commercial life can be observed in other common law jurisdictions. The English Court of Appeal decided in *Citibank NA v MBIA Assurance SA* that, in some instances, an agreement could permit conflicted duties and the reduction of the trustee's duty to consider the best interests of the beneficiaries.[221] The context of the case was, however, significant. The dispute arose from a debt-securitisation transaction.[222] The transaction documentation permitted the security trustee to disregard the interests of the noteholders when acting on the mandatory instructions of the note guarantor on how the trustee was to exercise its powers and discretions.[223] The Court of Appeal did not find such provision to be objectionable.[224] On one view, the outcome might be rationalised on the basis that the security trustee's exercise of discretion and powers when directed by the note guarantor was not subject to fiduciary duties. On another view, it might be said that the role of a security trustee is not the same as the role of a traditional trustee[225] — the paradigmatic

216 See Andrew S Gold, 'The Loyalties of Fiduciary Law' in Andrew S Gold and Paul B Miller (eds), *Philosophical Foundations of Fiduciary Law* (Oxford University Press, 2014) 176, 184. See also Langbein, 'Questioning the Trust Law Duty of Loyalty' (n 17) 959–60.

217 See, eg, *Delaware Revised Uniform Partnership Act*, 6 Del Code Ann § 15-103(f) (2019). See also Gold (n 216) 184.

218 See, eg, *Limited Liability Company Act*, 6 Del Code Ann §§ 18-1101(c)–(e) (2019). See also Gold (n 216) 184.

219 Langbein, 'Questioning the Trust Law Duty of Loyalty' (n 17) 959–60.

220 Ibid 968–9.

221 *Citibank NA* (n 16) 497 (Arden LJ, Sir Anthony Clarke MR agreeing at 500 [100]).

222 Ibid 478 [1] (Arden LJ).

223 Ibid 491 [54].

224 Ibid 497 [82] (Arden LJ, Sir Anthony Clarke MR agreeing at 500 [100]).

225 Man Yip, 'The Commercial Context in Trust Law' (2016) 80(5) *Conveyancer and Property Lawyer* 347, 356–8. Even within traditional trust law, a context in which the fiduciary principles are expected to operate with the greatest rigour, there are instances of toleration of conflicts. For example, trust law allows the trustee to act for both income and capital beneficiaries whose interests clearly diverge: see, eg, *Re Mulligan (Deceased)* [1998] 1 NZLR 481 (High Court of

context in which the strict no conflict rule was initially developed.[226] The fiduciary duties must be accommodated to the particulars of the relationship.

Under Australian law, s 961J of the *Corporations Act* imposes an obligation on a financial adviser of a retail client to 'give priority' to the interests of the retail client when giving advice in circumstances where it knows, or reasonably ought to know, that there is a conflict between the interests of its client and those of the provider, financial services licensee, authorised representative, or their associates. Justice Black has pointed out extrajudicially that the duty to 'give priority' contemplates the existence of different interests, and he considers this standard to be less demanding than the equitable duty to avoid conflicts of interest.[227]

The toleration of conflicts, whether potential or actual and whether authorised by the principal, statute or the court, generally indicates that conflicts in practice are not always harmful. This picture of reality directly challenges the orthodox view that conflict avoidance is the only way to safeguard or advance the interests of the beneficiaries. This is not merely a commercialist analysis, although the infiltration of equity into the commercial arena does challenge conventional wisdom that was developed in a different time and a different set of circumstances. The value of our reanalysis is that it accords greater respect to the principal's right to self-determination. They are regarded as well placed to decide for themselves if a transaction tainted by a conflict is worthwhile to pursue and, if it is to be pursued, what safeguards are to be introduced to protect their own interests.

V Conclusion

The duty to avoid actual conflicts arises as a perceivedly logical extension of the duty to avoid potential conflicts. However, our article has shown that the two duties do not operate in the same way, as is often assumed. The correct logical extension from the duty to avoid potential conflicts is that strict compliance would result in the avoidance of actual conflicts as there is no opportunity for existing potential conflicts to mature. The separate duty to avoid actual conflicts, as our article has pointed out, adds little substantive value to our understanding of fiduciary accountability. Crucially, we have argued that the conventional narrative surrounding conflict avoidance is dangerously misleading and

New Zealand). Section 29 of the *Trustee Act 2000* (UK) also authorises the trustee to receive remuneration.

226 See especially *Keech* (n 9) 223–4 (Lord King LC). See generally John H Langbein, 'The Contractarian Basis of the Law of Trusts' (1995) 105(3) *Yale Law Journal* 625, 640–3.

227 Black (n 97) 15.

inadequate, and poses a serious conceptual hindrance to formulating a workable regime of fiduciary regulation for modern society. Having reconceptualised the way in which fiduciary doctrine operates in the context of actual conflicts, a further related project of crucial doctrinal and practical significance, but which goes beyond the scope of this article, is working out the appropriate methods of conflict management.[228] It is hoped that our article has laid a strong foundation for this important work to be undertaken.

[228] It has been suggested that the way in which actual conflicts arise would be significant: see Miller, 'Multiple Loyalties and the Conflicted Fiduciary' (n 122) 327–30, discussing *Indalex* (n 83). Miller argues that where latent conflicts are authorised in the set-up of a transaction, the standard of loyalty that is expected of the fiduciary in conducting themselves in a situation of actual conflict would be that of demonstrable partiality.