Conceptions of the fiduciary in trust law

*Tobias Barkley**

Statutory reform of trust law in New Zealand is taking the groundbreaking step of defining the express trust relationship. Part of the definition is that trusts are fiduciary relationships. As interpretation of the statute will take into account common law principles, this reform provides an opportunity to reflect on what fiduciary means in trust law. The article identifies five distinct conceptions of the fiduciary in trust cases. While all five are concerned with restraint on the trustees' discretion, different trustees can be restrained by different standards of behaviour. The identified fiduciary conceptions range from the classical fiduciary, who must solely and exclusively act for the benefit of others, to the honest fiduciary, who is free to honestly benefit him- or herself. The range of meaning in the common law will complicate interpretation of 'fiduciary' in the New Zealand legislation.

The New Zealand Parliament will soon pass a Trusts Bill.[1] The Bill has broad political support and is the product of 10 years' work by the New Zealand Law Commission and Ministry of Justice.[2] When passed it will represent the most comprehensive statutory incorporation of domestic trust law in the Anglosphere.[3] The purpose of the Bill is to restate and reform the law of express trusts by setting out the core principles, improving default administrative rules and dispute mechanisms, and making trust law more accessible to lay people who use trusts.[4] Much of the Bill is an attempt to express common law principles clearly without changing them, while other provisions engage in minor or major reform.[5] This development is significant for the wider world of trusts because it raises interesting questions about the current state of the common law of trusts.

The starting point for these questions is the definition of the characteristics of an express trust in clause 13 of the Bill. The New Zealand Law Commission's chosen approach was to adopt a definition of express trusts that would govern access to the Act, rather than to conclusively determine the

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1 Trusts Bill 2017 (290—3) (NZ) (Trusts Bill). After this article was completed, the Bill passed its third reading on 24 July 2019.

2 New Zealand, *Parliamentary Debates*, 9 May 2019 (Trusts Bill — Second Reading).

3 The core Anglosphere: see Srdjan Vucetic, *The Anglosphere: A Genealogy of a Racialized Identity in International Relations* (Stanford University Press 2011). It does not include the offshore jurisdictions where trust law is focused on foreign rather than domestic trusts. New Zealand also has a foreign trust industry, but it lost some significance after the Shewan report: see John Shewan, *Government Inquiry into Foreign Trust Disclosure Rules* (Inquiry Report, June 2016).

4 Trusts Bill, cl 3.

5 Law Commission (NZ), *Review of the Law of Trusts: A Trusts Act for New Zealand* (Law Com Report No 130, 2013) paras 3.19–3.22, 3.66 (NZ Law Com Report No 130).

validity or enforceability of a transaction.[6] The Commission accepted that there might be good reasons to find a relationship was a valid trust in equity even if it did not fall within the statutory definition, although such cases were predicted to be rare.[7] In response to submissions, which were concerned that codification would stultify the flexibility of the common law, the Law Commission chose not to create a code but expressed the hope that the definition be read against the history of flexibility and principle in the common law.[8] This approach means that the Bill's definition reflects the ambiguity of the trust concept inherent in the cases.

The definition of an express trust is found in clause 13 of the Trusts Bill:

> The characteristics of an express trust are as follows:
>
> (a) it is a fiduciary relationship in which a trustee holds or deals with trust property for the benefit of the beneficiaries or for a permitted purpose; and
> (b) the trustee is accountable for the way the trustee carries out the duties imposed on the trustee by law.

While this definition is more concise than that proposed by the Law Commission, it fulfills the same purpose of being broad and inclusive.[9] The Commission was concerned to ensure that the wide variety of trusts used in New Zealand should be covered by the Bill.[10] Further definition of what an 'express trust' means is found in clauses 14–15.[11] Clause 14 provides that a sole trustee cannot be the sole beneficiary. Clause 15 provides that an express trust is created either by statute, or by a settlor indicating an intention to create a trust, identifying the beneficiaries or purpose, identifying the trust property, and complying with any formalities. In addition, 'beneficiary' is defined broadly to include any person who may receive a benefit under the trust.[12] Also relevant to the trust definition are clauses 20–36A that set out trustees' mandatory and default duties.

An initial observation is that the intended flexibility of the definition only works in one direction. The Bill expressly provides a mechanism by which the courts can apply the Bill to relationships that are outside the statutory definition.[13] This expressly anticipates future expansion of the common law trust. However, it does not provide any similar mechanism to narrow the

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6 ibid paras 3.11–3.12.
7 ibid, para 3.27; Trusts Bill, cl 5(2)(b).
8 NZ Law Com Report No 130 (n 5) paras 3.7–3.8; Trusts Bill, cls 5(5), 7(1).
9 Wordier definitions were included in the Law Commission (NZ) report and the Ministry of Justice's exposure draft bill: see NZ Law Com Report No 130 (n 5) 91; Ministry of Justice (NZ), 'Draft Trusts Bill' (10 November 2016) <https://consultations.justice.govt.nz/policy/trusts-bill-exposure-draft> accessed 5 July 2019. No explanation for this redrafting is found in the Explanatory Note or the Ministry of Justice's consultation document: see Explanatory Notes to the Trusts Bill 2017 (290—2) (NZ), 5; Ministry of Justice (NZ), *A new Trusts Act for New Zealand: Exposure draft of the Trusts Bill* (November 2016) 7 <https://consultations.justice.govt.nz/policy/trusts-bill-exposure-draft> accessed 5 July 2019. The changes do not appear to suggest any material difference in the respective objectives of Parliament and the Law Commission in defining the characteristics of a fixed trust.
10 NZ Law Com Report No 130 (n 5) 92.
11 Trusts Bill, cl 12.
12 ibid cl 9.
13 ibid cl 5(2)(b).

application of the Bill. That is, the Bill does not expressly anticipate that the courts might find a broad definition of trusts to be detrimental. However, one means by which the courts might narrow the application of the Act is through the trust relationship's definition as fiduciary.

The inclusion of 'fiduciary relationship' in the definition of an express trust will be the focus of this article. 'Fiduciary' is not further defined in the Bill and its meaning was not explained by the Law Commission when it was added to the proposed draft.[14] Its position as part of a gatekeeper definition that determines the application of a statute provides a welcome opportunity to reflect on the relationship between trust law and the fiduciary concept. Trusts were of course the archetypal fiduciary relationship, from which the rest of fiduciary law developed;[15] however, this history must not be allowed to obscure the complicated relationship between trust and fiduciary concepts. For example, some scholars have argued that some express trustees are not fiduciaries.[16] A statute that necessarily contradicts that argument invites the question of what is meant by 'fiduciary'.[17]

This article argues that 'fiduciary' in clause 13 presents a difficult issue of statutory interpretation. It will be taken as a foundational assumption that if 'fiduciary' is to mean anything, then it must mean duties or disabilities that restrain trustees' behaviour in the exercise of their discretions.[18] However, neither Parliament nor the Law Commission explained what type of restraint might be meant.[19] This means that the statute must be interpreted in light of the meanings that the common law has ascribed to 'fiduciary' in the trust context.[20] The object of this article is not to argue for a preferred interpretation of clause 13. Instead, it is to demonstrate that the common law has ascribed multiple distinct meanings to 'fiduciary' in the express trust context, which will seriously complicate interpretation of the statute.

The core issue in the interaction between trust and fiduciary concepts is the tension between the classical concept of a fiduciary and the practical reality of trusteeship. A fiduciary relationship typically elicits other-regarding normative concepts such as loyalty,[21] self-denial,[22] altruism,[23] selflessness,[24] opposition

14 NZ Law Com Report No 130 (n 5) para 4.9.

15 See, eg, PD Finn, 'The Fiduciary Principle' in TG Youdan (ed), *Equity, Fiduciaries and Trusts* (Carswell 1989) 1, 34.

16 See, eg, Robert Flannigan, 'The Boundaries of Fiduciary Accountability' [2004] NZL Rev 215, 225–26; JE Penner, 'Distinguishing fiduciary, trust and accounting relationships' (2014) 8 J Eq 202, 219–21.

17 The only other mention of fiduciary in the Trusts Bill is in cl 6 that provides an overview of the scheme and effect of the Bill. Clause 6(6) provides: 'As a fiduciary, each trustee owes duties and is accountable for how the trust property is managed and distributed'.

18 The theory that fiduciary duties control discretion is a dominant theme in the literature. See, eg, Lionel Smith, 'Fiduciary Relationships: Ensuring the Loyal Exercise of Judgement on Behalf of Another' (2014) 130 LQR 608, 610; Penner, 'Distinguishing fiduciary, trust and accounting relationships' (n 16) 204.

19 See text to nn 170ff.

20 On the relevance of common law principles in statutory interpretation in New Zealand, see *Re Greenpeace of New Zealand Inc* [2014] NZSC 105 [16]–[17], [56] (Elias CJ, McGrath and Glazebrook JJ) (*Re Greenpeace*).

21 John H Langbein, 'Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?' (2005) 114 Yale LJ 929.

22 Sarah Worthington, 'Fiduciaries: When Is Self-Denial Obligatory?' (1999) 58 CLJ 500.

to self-interest,[25] and deliberative exclusivity.[26] This is reflected in the Trusts Bill definition, which provides that the trustee must act either for the benefit of the beneficiaries or for a purpose permitted at law.[27] It is also reflected in well-worn statements of trustees' duties such as Millett LJ in *Armitage v Nurse*: 'The duty of the trustees to perform the trusts honestly and in good faith *for the benefit of* the beneficiaries is the minimum necessary to give substance to the trusts, but in my opinion it is sufficient.'[28] Nevertheless, neither the common law nor the Trusts Bill precludes trustees from benefiting from the property. Trustees may be beneficiaries,[29] have other beneficial rights, or may be authorised to exercise powers to benefit themselves.[30] These 'stakeholder trustees', to adopt Evan Criddle's terminology,[31] raise a central question about the fiduciary concept: in what way must a fiduciary be other-regarding and not self-regarding? Could a trustee's right or power to act in her own interests, whether in the exercise of management or distributive discretions,[32] be inconsistent with clause 13's definition of a trustee?

This article will consider a series of distinct conceptions of a fiduciary relationship that give different answers to this question of self-interest. They include: the classical fiduciary, who must solely and exclusively act in the other's interests; the best interests fiduciary, who must intensely act in the other's interests; the fair fiduciary, who must fairly balance the other's interests against their own; the purposive fiduciary, who must exclusively pursue a purpose; and the honest fiduciary, who must not act dishonestly. In the conclusion we will return to the Trusts Bill and set out the scope of the interpretation problem.

Fiduciary law and theory is notoriously complex, which means that some assumptions must be adopted. First, the primary subject of engagement is trust law cases. Other sources, such as other fiduciary cases and fiduciary theory, are used to explain and interpret the trust cases. The goal of the article is not to present a theory of fiduciaries generally, but to use theoretical insights to understand the case law that will be relevant to interpreting the New Zealand

23 Peter Birks, 'The Content of Fiduciary Obligation' (2000) 34 Is LR 3.

24 Lionel D Smith, 'Can We Be Obliged to Be Selfless?' in Andrew S Gold and Paul B Miller (eds), *Philosophical Foundations of Fiduciary Law* (OUP 2014).

25 Austin W Scott, 'The Fiduciary Principle' (1949) 37 CLR 539, 540; Deborah A DeMott, 'Beyond Metaphor: An Analysis of Fiduciary Obligation' (1988) 5 Duke LJ 879, 900; JK Maxton, 'Contract and Fiduciary Obligation' (1997) 11 JCL 222, 226; Paul B Miller, 'Justifying Fiduciary Duties' (2013) 58 McGill LJ 969, 972; Lusina Ho, 'Good Faith and the Fiduciary Duty in English Law' (2010) 4 J Eq 29, 36; Jill Murray, 'Conceptualizing the Employer as Fiduciary: Mission Impossible?' in Alan Bogg and others (eds), *The Autonomy of Labour Law* (Hart Publishing 2015) 337, 337.

26 Penner, 'Distinguishing fiduciary, trust and accounting relationships' (n 16) 207.

27 Trusts Bill, cl 25.

28 [1997] EWCA Civ 1279, [1998] Ch 241, 253–54 (emphasis added).

29 Unlike the Law Commission's proposed draft, the Trusts Bill does not explicitly state that a trustee can be a beneficiary, but it is implicit from cl 14, which states a sole trustee cannot be the sole beneficiary.

30 Clause 29 provides a duty to not exercise powers for the trustee's own benefit, but this is a default duty that can be excluded or modified by the trust terms (cl 26A).

31 Evan J Criddle, 'Stakeholder Fiduciaries' in Paul B Miller and Matthew Harding (eds), *Fiduciaries and Trust: Ethics, Politics, Economics, and Law* (CUP 2019) (forthcoming).

32 The language of management and distributive discretions is preferred to administrative and dispositive. This fits the Trusts Bill where, eg, cl 27 refers to discretions to distribute.

Trusts Bill. Second, the relevant case law is not limited to New Zealand. It has been observed that there is a broad consistency in approaches to trust law between Anglosphere jurisdictions,[33] thus the Australian, English and Canadian cases are relevant to understanding the common law of New Zealand. Third, there is a significant body of trust law cases that consider the fiduciary character of non-trustees such as protectors or those holding powers to appoint and remove trustees.[34] While these cases are not directly relevant to clause 13 they do inform the common law conceptions of a fiduciary in the trust context. Fourth, there is a view that there are two distinct parts of fiduciary law: fiduciary relationships of loyalty and judicial review restraints on fiduciary powers.[35] In trust law, these parts cannot be treated in isolation. A fiduciary relationship of loyalty imposes restraints on the fiduciary's many discretions. These restraints are not necessarily different from the restraints that are imposed on particular fiduciary powers through judicial review, although any differences would suggest different conceptions of fiduciary restraint. For the purposes of understanding the meaning of 'fiduciary' in clause 13 the restraints imposed on all trustee discretions will need to be considered. With these caveats in mind the following sections consider the common law conceptions of the fiduciary in trust law.

I The classical fiduciary: Exclusively other-regarding

The archetype of a fiduciary is someone who is obliged to act solely and exclusively in the interests of another. The fiduciary is obliged to act solely in the beneficiaries' interests and must completely put to one side their own pecuniary[36] interests and the interests of anyone else.[37] It is this type of fiduciary standard that was invoked in Wilson J's concurring judgment in *Guerin v The Queen*:

> There is no magic to the creation of a trust. A trust arises, as I understand it, whenever a person is compelled in equity to hold property over which he has control for the benefit of others (the beneficiaries) in such a way that the benefit of the property accrues not to the trustee, but to the beneficiaries.[38]

It is comprehensively set out in Paul Finn's description of the trust:

> Two features typify the trust in its purest form. The one is that the trustee, though having 'custody' of the trust property, has no right to the beneficial enjoyment of that property or its product. The other is that the rights, powers and duties given to the trustee exist, for the most part, not for his own benefit, but to further the purpose of the relationship — the promotion of the beneficiary's interests.[39]

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33 *Breakspear v Ackland* [2008] EWHC 220 (Ch), [2009] Ch 32 [32].
34 See, eg, *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2017] EWHC 2426 (Ch).
35 *Grimaldi v Chameleon Mining NL (No 2)* [2012] FCAFC 6, (2012) 200 FCR 296 [174].
36 Non-pecuniary interests have rarely been considered relevant to fiduciary rules. An exception is *Newgate Stud Co v Penfold* [2004] EWHC 2993 (Ch) [231], [240]–[242].
37 JD Heydon, MJ Leeming and PG Turner, *Meagher, Gummow & Lehane's Equity: Doctrines and Remedies* (5th edn, LexisNexis Butterworths 2015) 143–44.
38 [1984] 2 SCR 335 (SC) 355 (Ritchie, McIntyre and Wilson JJ concurring); see also 387 (Dickson, Beetz, Chouinard and Lamer JJ).
39 Finn, 'The Fiduciary Principle' (n 15) 34 (citations omitted).

This conception of a fiduciary is given effect by the traditional default rules that trustees must act gratuitously,[40] must not profit from their position,[41] and must avoid conflicts.[42]

The classical conception of a fiduciary is firmly established in the case law on ad hoc fiduciary relationships.[43] For example, in New Zealand Richardson J stated:

> The fiduciary duty arises where one party to the relationship (A) is reasonably entitled to expect of the other (B) that B will act in the interests of A, not in the interests of B or a third party and not merely having regard to A's interests. Under the fiduciary standard the fiduciary must act solely and selflessly in the interests of the beneficiary.[44]

In the ad hoc relationship context, the principle of selflessness is more than a mere description of the result of imposing a fiduciary relationship.[45] It is the foundational principle for determining whether a particular relationship has a fiduciary character.

In Australia, a leading case is *Hospital Products Ltd v United States Surgical Corp*, where the majority found that there was no fiduciary relationship because the claimed fiduciary was not required to have regard to the principal's interests to the exclusion of his own.[46] For example, Gibbs CJ found there was no fiduciary relationship because 'in my opinion HPI did not undertake, whether by representation or contractual provision, to act *solely* in the interests of USSC and not in its own interests.'[47] Numerous Australian High Court cases have affirmed this principle[48] and it is regularly applied in the lower courts. For example, Perram J refused to accept that the Commonwealth Government could be a fiduciary in relation to foreign policy because it was impossible to accept the Commonwealth could be 'bound to disregard its own interests'.[49] The New South Wales Court of Appeal held that a complex commercial contract could not coexist with a fiduciary relationship

40 *Robinson v Pett* (1734) 3 P Wms 249, 251; 24 ER 1049, 1049; *Wickham v King* (1879) 1 QLJ (Supp) 13, 14–15 (Lilley CJ).

41 *Keech v Sandford* (1726) Cas temp King 61, 25 ER 223.

42 *Re Pauling's Settlement Trusts* [1964] Ch 303 (CA) 339.

43 'Ad hoc' fiduciary relationships are those that are determined to have a fiduciary character because of their individual characteristics and not presumed to be fiduciary like the 'per se' categories, which typically include trusts. See *Pilmer v Duke Group Ltd (in liq)* [2001] HCA 31, (2001) 207 CLR 165 [121]–[123]; *Chirnside v Fay* [2006] NZSC 68, [2007] 1 NZLR 433 [73]–[75]; *Galambos v Perez* 2009 SCC 48, [2009] 3 SCR 247 [48]; *Vanguard Financial Planners Pty Ltd v Ale* [2018] NSWSC 314, (2018) 354 ALR 711 [52]; *Al-Dowaisan v Al-Salam* [2019] EWHC 301 (Ch) [75].

44 *DHL International (NZ) Ltd v Richmond Ltd* [1993] 3 NZLR 10 (CA) 23 (*DHL*).

45 Contrast Lionel D Smith, 'Fiduciary Relationships — Arising in Commercial Contexts — Investment Advisors: *Hodgkinson v Simms*' (1995) 74 Can Bar Rev 714, 721.

46 (1984) 156 CLR 41 (HC) 72 (Gibbs CJ), 122–23 (Deane J), 145–46 (Dawson J) (*Hospital Products*).

47 ibid 72 (emphasis added).

48 *Chan v Zacharia* (1984) 154 CLR 178 (HC) 198–99 (Deane J); *United Dominions Corp Ltd v Brian Pty Ltd* (1985) 157 CLR 1 (HC) 13 (Mason, Brennan and Deane JJ) (*United Dominions*); *Breen v Williams* (1996) 186 CLR 71 (HC) 113 (Gaudron and McHugh JJ); *Pilmer* (n 43) [78]; *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd* [2006] HCA 55, (2006) 229 CLR 557 [15] (Gummow ACJ); *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* [2010] HCA 19, (2010) 241 CLR 1 [90].

49 *Habib v Commonwealth (No 2)* [2009] FCA 228, (2009) 175 FCR 350 [53].

because of the 'reality that each party's role is a selfish role, not one of self-denial and subordination of personal interest'.[50]

The Canadian Supreme Court has used even clearer language. In *Alberta v Elder Advocates of Alberta Society*, McLachlin CJ stated that a person claiming a fiduciary relationship 'must be able to point to a forsaking by the alleged fiduciary of the interests of all others in favour of those of the beneficiary, in relation to the specific legal interest at stake'.[51] In *Hodgkinson v Simms*, the critical question determining the fiduciary status of a financial adviser was, 'evidence of a mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party'.[52] Courts in the United Kingdom have expressed the same principle.[53]

There are strong normative arguments in favour of the strict conception of fiduciaries as selfless.[54] For example, *Bray v Ford* emphasises the reality that fiduciaries are in a position where it can be tempting to benefit oneself to the detriment of others.[55] Functional accounts of fiduciary law emphasise that the strict fiduciary duties operate to contain these temptations. Some accounts go further than temptation and emphasise that even well-meaning fiduciaries cannot truly know whether their decision has been influenced by the incentives to which they are subject; therefore, it is necessary to remove any incentives that could improperly influence them.[56] However, the classical fiduciary conception so strongly expressed in the ad hoc cases are a poor fit with many trust cases.

Practical reality means that the normative clarity of exclusively acting in the interests of the other must give way to practical considerations. Stakeholder fiduciaries mean other-regarding duties exist in tension with the fiduciary's self-interest, which does not need to be denied.[57] This tension can be seen in

50 *Streetscape Projects (Australia) Pty Ltd v City of Sydney* [2013] NSWCA 2, (2013) 85 NSWLR 196 [121]. See also *News Ltd v Australian Rugby Football League Ltd* (1996) 64 FCR 410 (FC) 551; *Francis v South Sydney District Rugby League Football Club Ltd* [2002] FCA 1306 [269]; *Dresna Pty Ltd v Linknarf Management Services Pty Ltd (in liq)* [2006] FCAFC 193, (2006) 156 FCR 474 [53]; *Gibson Motorsport Merchandise Pty Ltd v Forbes* [2006] FCAFC 44, (2006) 149 FCR 569 [107].

51 2011 SCC 24, [2011] 2 SCR 261 [31]; see also [44], [49].

52 [1994] 3 SCR 377 (SC) 409–10 (La Forest, L'Heureux-Dubé and Gonthier JJ); see also 461 (Sopinka and McLachlin JJ in dissent). See also *Lac Minerals Ltd v International Corona Resources Ltd* [1989] 2 SCR 574 (SC) 597–98 (Sopinka J); *Galambos* (n 43) [64], [69].

53 *Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd* [1991] 2 All ER 597 (Ch) 604–05 (Sir Nicolas Browne-Wilkinson V-C); *Bolkiah v KPMG* [1999] 2 AC 222 (HL) 237 (Lord Millett); *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 (HL) 206 (Lord Browne-Wilkinson); *Nottingham University v Fishel* [2000] ICR 1462 (QB).

54 See Worthington (n 22) 504–07; Tamar Frankel, 'Watering Down Fiduciary Duties' in Andrew S Gold and Paul B Miller (eds), *Philosophical Foundations of Fiduciary Law* (OUP 2014) 242.

55 [1896] AC 44 (HL) 51–52.

56 See Lionel Smith, 'Deterrence, prophylaxis and punishment in fiduciary obligations' (2013) 7 J Eq 87, 97–98; JE Penner, 'Is Loyalty a Virtue, and Even If It Is, Does It Really Help Explain Fiduciary Liability?' in Andrew S Gold and Paul B Miller (eds), *Philosophical Foundations of Fiduciary Law* (OUP 2014) 159, 168–69; Remus Valsan, 'Fiduciary Duties, Conflict of Interest, and Proper Exercise of Judgment' (2016) 62 McGill LJ 1.

57 An example is horizontal fiduciary relationships where parties with joint interests act as mutual fiduciaries for each other, like in the *United Dominions* case (n 48). The most

statements of the fiduciary principle that negate themselves. In *Bray v Ford*, Lord Herschell stated: 'It is an inflexible rule of a Court of Equity that a person in a fiduciary position, such as the respondent's, is not, *unless otherwise expressly provided*, entitled to make a profit'.[58] The question is how to manage the tension between the 'inflexible' rule and the open exception.

A Scope: Confining the other-regarding role

The established mechanism to manage the tension between a fiduciary's exclusively other-regarding role and their liberty to act in their own interests is the concept of scope. The fiduciary's exclusively other-regarding role is confined to a defined scope of operation, so outside that scope they are free to act self-interestedly and in the interests of third parties. However, scope cannot successfully characterise all stakeholder trustees as classical fiduciaries.

The best analysis of scope has been by Justice Leeming writing extrajudicially. His consideration of scope is firmly within the classical fiduciary conception. Early in his article he states that any consideration of the fiduciary's own interests will be a breach unless it falls outside the scope of the fiduciary obligation.[59] Leeming then identifies three aspects of scope, 'the time during which fiduciary obligations arise, the subject matter over which fiduciary obligations extend, and the way in which the content of those fiduciary obligations may be limited'.[60] The first two can neatly coexist with the classical concept of fiduciary, provided that subject matter is understood as something that is one step removed from the fiduciary relationship itself.[61] That is, the subject matter is an area of conduct to which the fiduciary relationship applies, but which is distinct from the conduct required by that fiduciary relationship.[62] For example, in *Hospital Products*, the majority accepted that there might be a fiduciary relationship over distinct subject matter — the manufacturer's goodwill interest in its products — even if the rest of the relationship was not characterised as fiduciary,[63] although they concluded there was not on the facts.[64] Subject matter and time allow the fiduciary role to be clearly demarcated. However, Justice Leeming's third category does not neatly coexist with the classical concept of fiduciary, because it defines the nature of the fiduciary duties themselves, rather than defining the external area of conduct to which the duties apply.

Any limitation of the content of the fiduciary duties against conflict and profit, in relation to the same subject matter and same timeframe, undermines

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stringent duties that this relationship could bear would be to act exclusively in the partners' mutual interests and not in their individual interests: see Finn, 'The Fiduciary Principle' (n 15) 27, 39–40; *News Ltd* (n 50) 540; *Chirnside* (n 43) [15] (Elias CJ), [74] (Blanchard and Tipping JJ). This is not acting exclusively in the other's interests.

58 *Bray* (n 55) 51 (emphasis added).

59 Mark Leeming, 'The scope of fiduciary obligations: How contract informs, but does not determine, the scope of fiduciary obligations' (2009) 3 J Eq 181, 186.

60 ibid 182.

61 cf Matthew Conaglen, *Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary Duties* (Hart Publishing 2010).

62 See the examples in Leeming (n 59) 11–12.

63 *Hospital Products* (n 46) 70–71 (Gibbs CJ), 144 (Dawson J).

64 ibid 73–74 (Gibbs CJ), 122–23 (Deane J), 145–46 (Dawson J).

the exclusivity of regard shown for others. Any allowance that fiduciaries might consider their own interests means that they are not solely acting in others' interests. Leeming considers cases where the standard fiduciary duties are modified, but does not consider the question of how fiduciaries remain subject to self-interest prohibitions following that modification.[65] He also recognises that there is a limit on the extent to which fiduciary duties can be excluded or modified, if a fiduciary relationship is to survive.[66] For trusts, he identifies that limit as the duty to perform the trusts honestly and in good faith for the benefit of the beneficiaries, as in *Armitage*.[67] However, Leeming does not explain how a stakeholder trustee who is obliged to honestly perform a trust that authorises that trustee's self-benefit fits with the concept of fiduciary he set out at the start of the article.

The problem with Leeming's third aspect of scope can be identified through an analysis of trustees' rights to remuneration, recoupment and exoneration.[68] If trustees have rights to pay themselves remuneration from the trust assets for work they do or the expenses they properly incur, then they no longer have a duty to exclusively use and apply the assets for the benefit of the beneficiaries. Nevertheless, there will still be a classical fiduciary relationship to the extent that the trustees' rights are limited. Thus, the scope of this relationship has a residual quality; it exists to the extent that the trustees do not have beneficial rights.

The problem with relying on a classical fiduciary relationship with a residual scope is that, while in some cases the relationship will necessarily arise, in other cases it might not. For example, some rights to remuneration strictly contain the trustees' interest. Under the Victorian statutory power, remuneration cannot be granted at more than 5 per cent.[69] Where the trustee's interest is strictly contained then the residual fiduciary relationship will necessarily arise. However, rights to remuneration might not be strictly contained and rights to indemnity usually are not. Thus, in these cases, the trustees' beneficial rights could potentially extend to the entire trust fund.[70] Where this occurs the residual fiduciary relationship will never arise.

The difference between a necessary and a possible residual fiduciary relationship is critical when determining whether the overall relationship is fiduciary. The mere *possibility* that a classical fiduciary relationship might arise in the future is insufficient to conclude that someone is a fiduciary in the present. This is because the principles or standards that will govern whether the residual fiduciary relationship ever arises are not standards of exclusive regard for the beneficiaries. Instead, they are the standards by which the trustees' rights are limited. For example, the right to remuneration must be reasonable,[71] and the rights to indemnity must be for properly incurred trust

65 Leeming (n 59) 12–13, 17.
66 ibid 20.
67 *Armitage* (n 28) 253–54.
68 Recoupment and exoneration form the trustees' two rights to indemnity: see *Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth* [2019] HCA 20 [29]–[30] (Kiefel CJ, Keane and Edelman JJ) (*Carter Holt Harvey*).
69 Trustee Act 1958 (Vic), s 77.
70 This frequently occurs with trading trusts as in *Carter Holt Harvey* (n 68).
71 The beneficiaries have a right to have the court review trustees' remuneration claims. See

expenses.[72] That is, the trustee who holds a right to indemnity does not decide how to distribute the trust assets solely with regard to the interests of the beneficiaries; she also must consider whether it is proper for her to take the assets to satisfy her own liabilities. Thus, for as long as she is entitled to consider this factor, her fiduciary status cannot be explained by the classical conception of sole and exclusive regard for others.

A similar analysis applies to any understanding of scope that distinguishes between individual powers. A trustee may have a range of powers, some fiduciary in the classical sense and others not.[73] For example, while a trustee authorised to exercise a power of sale in his or her own favour[74] is not a classical fiduciary with respect to that power, he or she may nevertheless be a classical fiduciary with respect to other powers. Thus, it could be said that the scope of the fiduciary relationship encompasses his or her fiduciary powers, but not the power of sale. The problem with relying on this understanding of scope is that, if a trustee has one non-fiduciary power that could potentially extend to the entire subject matter, then any fiduciary restraints on other powers are moot. The question is whether the trustee is a classical fiduciary in relation to the subject matter: is the trustee obliged to deal with the assets to the exclusive benefit of others? An illustrative case is *Lomas v RAB Market Cycles (Master) Fund Ltd*, where all cash received by the trustee as income or from the sale of shares was to be held by the trustee free of any trust duty.[75] That is, the power of sale could be exercised to benefit the trustee and had the potential to extinguish the trust. This meant the trustee's relationship overall could not be characterised as classically fiduciary because the trustee was not obliged to exclusively deal with the trust assets for the benefit of the beneficiaries. The fact that the trustee was not authorised to exercise other powers for its own benefit is irrelevant.[76] After all, clause 13 of the Trusts Bill is concerned with the fiduciary character of the trust relationship not of individual trust powers.

In conclusion, the idea of scope can reconcile the classical idea of an exclusively other-regarding role with certain types of fiduciary self-interest. However, Leeming's third aspect of scope, which allows the modification of the fiduciary duties, means that any classical fiduciary relationship takes on a

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Arthur Underhill, *The Law Relating to Trusts and Trustees* (7th edn, Butterworth 1912) 313; *Sacks v Gridiger* (1990) 22 NSWLR 502 (SC) 514.

72 *Carter Holt Harvey* (n 68) [24] (Kiefel CJ, Keane and Edelman JJ).

73 See Paul Finn, 'Fiduciary Reflections' (2014) 88 ALJ 127, 135.

74 See, eg, *Sargeant v National Westminster Bank plc* (1990) 61 P & Cr 518 (CA).

75 [2009] EWHC 2545 (Ch) [11]–[13].

76 Where the overall relationship in relation to the subject matter is not fiduciary, by whatever measure, then there will be a further question about whether any of the trustee powers should be construed as fiduciary. As recognised in *Blenkinsop v Herbert* [2017] WASCA 87, (2017) 51 WAR 264 [99] instruments are often silent on whether the donee of a power must exercise it with regard to others. In these cases the power's fiduciary status can only be inferred. There is an argument that where the overall relationship is not fiduciary then there is no basis to infer that particular powers are fiduciary. An example would be where a settlor held a power to revoke the trust and a power to appoint trustees. The power to revoke is unlikely to be fiduciary because it necessarily would be reserved for the personal benefit of the settlor. Therefore, any argument that the power to appoint trustees was fiduciary would have to explain why the settlor was obliged to act in the interests of the beneficiaries and not himself when appointing trustees, when at any time he could revoke the entire trust.

residual character. This requires that we ask whether that residual fiduciary relationship will arise necessarily or only potentially. Where the residual relationship is merely potential then the trustee cannot be characterised as a classical fiduciary prior to that potential being realised because their behaviour is not restrained by exclusively other-regarding duties.

B The logical conclusion to the classical fiduciary conception

The High Court of Australia has demonstrated the logical conclusion of a commitment to the classical fiduciary in relation to stakeholder trustees. In *Chief Comr of Stamp Duties (NSW) v Buckle*[77] and *CPT Custodian Pty Ltd v Comr of State Revenue*,[78] the High Court considered trusts where the trustees had rights to indemnity from the trust fund. The Court in *Buckle* stated:

> To the extent that the assets held by the trustee are subject to their application to reimburse or exonerate the trustee, they are not 'trust assets' or 'trust property' in the sense that they are held solely upon trusts imposing fiduciary duties which bind the trustee in favour of the beneficiaries.[79]

The word 'solely' shows that the Court was using the classical fiduciary concept. The rather radical suggestion is that no true trust fund existed while the trustees had rights to the trust assets.[80] The Court's brief analysis shows the logical conclusion to reasoning from the classical concept of fiduciary. If a stakeholder trustee is not a classical fiduciary, but trusts are truly classical fiduciary relationships, then there is no true trust while there is a stakeholder trustee.

While this reasoning satisfactorily reconciles the trustee's position with the classical fiduciary, it raises difficult questions. How should we characterise the relationship before the trust fund comes into existence? Is it a relationship that may become a trust, a trust without a trust fund, or some lesser type of trust without the fiduciary duties of the sort the High Court describes? What duties and rights characterise this relationship? Moreover, what are the consequences of finding that the assets are not trust assets? Are they assets held 'in trust for another person' for the purposes of the section 116(2)(a) of the Bankruptcy Ac 1966 (Cth)? The strict adherence to the classical fiduciary conception indicated by the High Court would be conceptually coherent but raises serious difficulties for the practical life of trusts.

II The best interests fiduciary: Intensely other-regarding

Our second conception of a fiduciary is someone who must act in the best interests of the beneficiaries. It is found in cases like *Carmine v Ritchie*:

> a power to remove a trustee and replace him with a new trustee is almost always considered to be a fiduciary power to be exercised in the best interests of the

77 [1998] HCA 4, (1998) 192 CLR 226 (*Buckle*).
78 [2005] HCA 53, (2005) 224 CLR 98 (*CPT*).
79 *Buckle* (n 77) [48] (citations omitted).
80 ibid; *CPT* (n 78) [51].

> beneficiaries. This is because the subject matter of the power is the office of the trustee which lies at the core of the trust and carries fundamental and onerous obligations to act in the best interests of the beneficiaries as a whole.[81]

The best interests principle has been incorporated into Australian statutes.[82] It frequently arises when protectors' powers or powers to remove trustees are characterised as fiduciary.[83]

The best interests fiduciary differs from the classical fiduciary in that the fiduciary restraint does not focus on avoiding improper incentives, but directly incorporates the goal of meeting the interests of the beneficiaries. Geraint Thomas has argued that this principle, despite its change in focus, could mean nothing more than the classical conception of acting for the benefit of the beneficiaries, or a summary of the duties that apply to the exercise of fiduciary discretions.[84] Indeed, it could be a useful term for an enhanced conception of fiduciary restraint that includes the exclusively other-regarding classical fiduciary and grounds of judicial review that further restrain the trustees' discretion.[85] However, if the best interests conception does not include the classical, then prima facie it allows fiduciaries to benefit themselves and others if that is also best for the beneficiaries. Indeed, best interests is vague enough that it could allow significant self-interested behaviour by a trustee. As Tamar Frankel argues, such a fiduciary can say: 'What is *best* for *you* can be *best* for *me as well*. What is best for *me* can be also best for *you as well*.'[86]

The allowance for some self-interest means that the best interests fiduciary is a better fit for stakeholder trustees who share a fixed beneficial interest in the trust assets so must manage the assets for themselves and others. Management powers can usually be exercised in the best interests of all beneficiaries,[87] because the trustees' and beneficiaries' interests are aligned to the extent that they all benefit from the fund being well managed.[88] This conception means that there is no need to engage in the problematic task of defining the scope of an exclusively other-regarding role.

However, the best interests account does not provide an answer where the trustee's and beneficiary's interests are in conflict. For example, in *Re Mulligan (decd)*, one of the trustees was a life beneficiary whose interest in how the fund was invested conflicted with the residuary beneficiaries.[89] Considering what is in the best interests of the beneficiaries as a whole would not assist this trustee because management choices that benefit the residuary beneficiaries would harm her own interests and vice versa. For the same reason, the best interests conception does not easily fit distributive discretions

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81 [2012] NZHC 1514 [66].
82 See, eg, Trustee Act 1925 (NSW), s 14B(2); Trustee Act 1958 (Vic), s 7(2).
83 See *Berger v Lysteron Pty Ltd* [2012] VSC 95 [84]; *Harre v Clark* [2014] NZHC 2533 [24]–[25]; *New Zealand Maori Council v Foulkes* [2015] NZCA 552, [2016] 2 NZLR 337 [22]–[26]; *Mercanti v Mercanti* [2016] WASCA 206, (2016) 50 WAR 495 [320]–[321], [327] (Buss P), [398] (Newnes and Murphy JJA).
84 Geraint W Thomas, 'The duty of trustees to act in the "best interests" of their beneficiaries' (2008) 2 J Eq 177.
85 Cf *Grimaldi* (n 35) [174].
86 Frankel (n 54) 250.
87 See *Armitage* (n 28) 251.
88 *Cowan v Scargill* [1985] Ch 270 (Ch) 287–88.
89 [1998] 1 NZLR 481 (HC) (*Re Mulligan*).

where trustees are also beneficiaries. The interests of the objects of a distributive discretion are not aligned but mutually exclusive.[90] Any exercise of powers in favour of the trustee reduces the assets available to the other beneficiaries and so will often not be in their best interests.

An example of the difficulty in reconciling a best interests approach and stakeholder trustees is *Re Cottee; Estate of Smith*.[91] Two trustees sought the court's approval for an advancement of capital to benefit three contingent beneficiaries aged between 9 and 20, who were the children of one trustee. The trustees wanted to pay $175 000 to the beneficiaries' parents so they could repay expenses incurred in adding a second storey to their home. The advance was to be a secured interest-free loan repayable by the parents when each child left home. The loan amount attributed to each beneficiary would reduce every week that they stayed, by $200 per week for the 20-year-old and $100 per week for the 9-year-old.[92] Hallen J accepted that the beneficiaries would indirectly benefit from the advancement by having the use of their own rooms while they lived at home,[93] although the building was already complete when the decision to advance was made. However, their trustee parent would also benefit from the increase in value of their home, from having the benefit of an interest-free loan, and from having their children pay for board.[94] Hallen J referred to the best interests idea[95] and, although he did not clearly decide the decision on that basis,[96] this case could be seen as one where the best interests of the beneficiaries were aligned with the interests of the family as a whole. Alternatively, it could be seen as a case where a trustee prioritised her own interests over the beneficiaries.

III The fair fiduciary: Balancing regard for the other and the self

The third conception of fiduciary we can find in the case law is the idea that fiduciaries must adopt a fair balance between their interests and the interests of the other beneficiaries. Like the best interests fiduciary, the fair fiduciary can be added to the classical fiduciary, but we are interested in it as an alternative to the classical conception. The extent to which the fair fiduciary can act in their own interests is restrained by objective standards. Thomas has summarised this conception while describing the duties of a donee of a power of appointment who is also nominated as an object, 'in so far as it is reasonably possible in the circumstances, he must balance the claims and interests of all objects (or classes of objects) against each other, including his

90 *Gartside v Inland Revenue Comrs* [1968] AC 553 (HL) 605–06 (Lord Reid).
91 [2013] NSWSC 47.
92 ibid [58].
93 ibid [53].
94 ibid [20], [54].
95 ibid [35].
96 ibid [44]–[49]. Hallen J also referred extensively to authorities on judicial review of trustee discretionary powers. The beneficiaries were interviewed by a solicitor, but only one was old enough to consent to any breach of fiduciary duty, if in fact she did.

own'.[97] Criddle describes the role of stakeholder fiduciaries as one where they balance their interests against the other beneficiaries' interests in a fair and even-handed manner.[98]

In this article 'fairness' is understood as a restraint on the exercise of discretion that requires the exercise to be justified according to some objective criteria. As Lord Wilberforce famously said of a discretionary object:

> when it is said that he has a right to have the trustees exercise their discretion 'fairly' or 'reasonably' or 'properly' that indicates clearly enough that some objective consideration (not stated explicitly in declaring the discretionary trust, but latent in it) must be applied by the trustees and that the right is more than a mere spes.[99]

Fairness is commonly associated with the duty of impartiality that requires trustees to exercise management discretions fairly with regard to different beneficiaries.[100] However, fairness as a fiduciary standard can be found where trustees are required to be fair in balancing their own interests against others in relation to both the exercise of management discretions and distributive discretions.

Fairness can be found in cases where the classical conception has been excluded and must be substituted with another standard. This can occur where a trustee is authorised to exercise management discretions while conflicted. As we saw above, where trustees have rights to remuneration the exercise of those rights to benefit the trustee must be justifiable.[101] The balance the trustee must find between self-interest and the beneficiaries' interests is determined by what expenses a trustee may reasonably charge. The same substitution of a fairness standard for the exclusively other-regarding standard applies where trustees are authorised to exercise a power of sale in their own favour. For example, in *Sargeant v National Westminster Bank plc*, trustees were authorised to purchase trust land for their personal use.[102] This authorisation excluded the classical conception of fiduciary by excluding the conflicts rule insofar as it related to the sale of assets. However, Nourse LJ held the trustees still owed fiduciary obligations to the other beneficiaries as they were obliged to pay the best price for the land.[103] An obligation to pay the best price is best interpreted as an obligation to pay the highest price that might reasonably have been obtained through a sale to a non-trustee. It is analogous to the best or proper price that must be obtained by a mortgagee who is obliged to have regard to the mortgagor's interests.[104] A further example is where a trustee has an interest in how the trust fund is invested that conflicts with the other beneficiaries, like in *Re Mulligan*.[105] The trustee in such a position has a duty

97 Geraint Thomas, *Thomas on Powers* (2nd edn, OUP 2012) para 12.26 (citations omitted).
98 Criddle (n 31).
99 *Gartside* (n 90) 617–18.
100 See *Northwest Capital Management v Westate Capital Ltd* [2012] WASC 121, (2012) 264 FLR 424 [295].
101 See text to n 71.
102 *Sargeant* (n 74).
103 ibid 523.
104 See *Vasiliou v Westpac Banking Corp* [2007] VSCA 113, (2007) 19 VR 229.
105 *Re Mulligan* (n 89).

to act fairly with respect to their own interests and the interests of the other beneficiaries.[106]

The fair fiduciary is also applied to life tenants who are granted powers over settled land,[107] as raised by Thomas.[108] These powers largely concern management of the land but can have distributive effects, for example, where capital, rather than income, is used to maintain the land.[109] The Settled Land Acts impose a statutory duty on the life tenant to 'have regard to the interests of all parties entitled'.[110] This obliges the life tenants to act justly towards the remaindermen and to protect their interests.[111] The question of justice is determined objectively, not by the life tenant's honesty.[112] Life tenants are accepted as fiduciaries, although their authority to have regard to their own interests was said by Vaisey J to qualify that status.[113]

More contentiously, the fair fiduciary concept can also be found in cases on distributive discretions. It is contentious because the traditional position is that in *Gisborne v Gisborne*, where the House of Lords held that trustees were not required to act wisely in exercising discretions, at least where the trust instrument excluded any such duty.[114] This principle continues to find support.[115] However, fairness and reasonableness principles are encroaching on the traditional position. First, they have been applied to discretions in the public and superannuation trust contexts,[116] albeit often in the shadow of statute.[117] For example, in *Edge v Pensions Ombudsman*, pension trustees held powers to distribute a pension surplus fund in favour of current and former employees and some of the trustees were themselves employees.[118] The Court of Appeal accepted that an exercise of power that benefited the trustees alongside other employees was valid so long as it was exercised fairly and

106 ibid 501–02; *Nestle v National Westminster Bank plc* [1993] 1 WLR 1260 (CA) 1270 (Dillon LJ), 1279 (Staughton LJ).

107 See, eg, Settled Land Act 1958 (Vic), pt II.

108 Thomas, *Thomas on Powers* (n 97) para 12.26.

109 See *Re Boston's Will Trusts; Inglis v Boston* [1956] Ch 395 (Ch) (*Re Boston's*).

110 Settled Land Act 1882 (UK), s 53; Settled Land Act 1925 (UK), s 107; Settled Land Act 1958 (Vic), s 107.

111 *Re Richardson; Richardson v Richardson* [1900] 2 Ch 778 (Ch) 791–92; *Re Hunt's Settled Estates; Bulteel v Lawdesharne* [1905] 2 Ch 418 (Ch) 424–25; *Re Gladwin's Trusts* [1919] 1 Ch 232 (Ch) 239.

112 *Hampden v Earl of Buckinghamshire* [1893] 2 Ch 531 (CA) 544.

113 *Re Boston's* (n 109) 405.

114 (1877) 2 App Cas 300 (HL) 307.

115 *Smith v Cock* (1911) 12 CLR 30 (PC) 38; *Re Gulbenkian's Settlements; Whishaw v Stephens* [1970] AC 508 (HL) 518 (Lord Reid); *Karger v Paul* [1984] VR 161 (SC) 164; *Attorney-General (Cth) v Breckler* [1999] HCA 28, (1999) 197 CLR 83 [7], quoting *Wilkinson v Clerical Administrative and Related Employees Superannuation Pty Ltd* (1998) 79 FCR 469 (FC) 480; *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405 (CA) 428–29 (Mahoney JA).

116 *Scott v National Trust for Places of Historic Interest or Natural Beauty* [1998] 2 All ER 705 (Ch) 718; *Maciejewski v Telstra Super Pty Ltd* (1998) 44 NSWLR 601 (SC) 605–06; *Edell v Sitzer* (2001) 55 OR (3d) 198 (O SC) [159]; *Finch v Telstra Super Pty Ltd* [2010] HCA 36, (2010) 242 CLR 254 [33]; *Ievers v Superannuation Complaints Tribunal* [2016] FCA 936, (2016) 160 ALD 96 [70]–[71].

117 See Superannuation Industry (Supervision) Act 1993 (Cth), ss 10, 52; Superannuation (Resolution of Complaints) Act 1993 (Cth), s 14A; Corporations Act 2001 (Cth), s 1053(1); *Ievers* (n 116) [70]–[71].

118 [2000] Ch 602 (CA).

equitably and in light of the reasonable expectations of the beneficiaries.[119] Second, the courts are increasingly able to review the reasons for trustee decisions through the duties to take relevant matters into account. The leading edge is the duty of adequate deliberation in *Pitt v Holt*.[120] This duty goes beyond a cursory assessment of whether a relevant matter was known by the trustee and includes whether it was given proper (read: reasonable) consideration.[121] The courts may be more willing to impose standards of fairness where trustees are also discretionary objects.[122]

It must be noted that a duty to be fair or reasonable is typically rejected as insufficient for an ad hoc fiduciary relationship. In *Hospital Products* the majority rejected Mason J's argument that a contractual duty on the distributor to act in the interests of the manufacturer to a reasonable degree was sufficient for a fiduciary relationship.[123] The exception that proves this rule is the special relationship between indigenous peoples and the Crown. Courts in Canada and New Zealand have accepted this as a special type of fiduciary relationship where the Crown is obliged to act fairly and in good faith.[124] Usually,[125] this relationship is not characterised by the classical fiduciary standard,[126] and is instead categorised as sui generis and distinct from private fiduciary relationships.[127] In Australia, the High Court has accepted that standards of good faith and fairness apply to the Crown in its dealings with Indigenous Australians, but have not categorised these as fiduciary.[128]

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119 ibid 626–27. cf *Supple v Lowson* (1773) Amb 729, 27 ER 471; *National Trustees, Executors and Agency Co of Australia Ltd v Boyd* (1926) 39 CLR 72 (HC) 81; *Sargeant* (n 74) 523; *Walker v Stones* [2001] QB 902 (CA) 939–41; *Spencer v Spencer* [2013] NZCA 449, [2014] 2 NZLR 190 [131]; *Alexander v Perpetual Trustees WA Ltd* [2001] NSWCA 240 [65]–[69].

120 [2013] UKSC 26, [2013] 2 AC 108 [60]. See also *Finch* (n 116) [48] (trustee placed too much weight on an irrelevant consideration); *Abacus Trust Co (Isle of Man) v Barr* [2003] EWHC 114 (Ch), [2003] Ch 409 [27] (failure to take adequate steps to obtain relevant information).

121 *Pitt* (n 120) [60].

122 cf *Warburton v Warburton* (1700) 2 Vern 420, 23 ER 869; *Richardson v Chapman* (1760) 7 Bro Parl Cas 318, 3 ER 206; *Supple* (n 119); *Blair v Vallely* [2000] WTLR 615 (HC); Joseph Gold, 'The Classification of Some Powers of Appointment' (1942) 40 Mich L Rev 337, 341.

123 *Hospital Products* (n 46) 99 (Mason J), 73 (Gibbs CJ), 145–46 (Dawson J), 122–23 (Deane J). See also *DHL* (n 44) 23.

124 *Wewaykum Indian Band v Canada* 2002 SCC 79, [2002] 4 SCR 245 [86], [94]–[97] (Binnie J) (*Wewaykum*); *Paki v Attorney-General (No 2)* [2014] NZSC 118, [2015] 1 NZLR 67 [150]–[155] (Elias CJ), [192] (McGrath J), [271] (William Young J). See also *Mabo v Queensland (No 2)* (1992) 175 CLR 1 (HC) 203 (Toohey J).

125 Eg, in cases where the Crown is responsible for holding land for the benefit of the indigenous people, which is analogous to a private law fiduciary relationship. See *Guerin* (n 38) 387 (Dickson J), 355 (Wilson J); *Paki* (n 124) [273] (Wilson Young J).

126 *Wewaykum* (n 124) [96] (Binnie J); *Alberta* (n 51) [44] (McLachlin CJ); *Paki* (n 124) [155] (Elias CJ).

127 *Alberta* (n 51) [40]–[44] (McLachlin CJ); *Paki* (n 124) [155] (Elias CJ), [186] (McGrath J), [283] (William Young J).

128 *Griffiths v Minister for Lands, Planning and Environment* [2008] HCA 20, (2008) 235 CLR 232 [142] (Kirby J). The latest High Court case of *Northern Territory v Griffiths (decd)* [2019] HCA 7, [2019] 364 ALR 208 [126] did not consider the question whether a fiduciary relationship bound the Crown, because the issue at hand involved the extinguishment of native title, which was governed by a statute that left no room for a fiduciary relationship.

IV The purposive fiduciary

The fourth conception of a fiduciary breaks completely with the idea that a fiduciary must act in the interests of the beneficiaries. Instead, it replaces a duty of loyalty to the beneficiaries with a duty of loyalty to the purpose of the trust or power. Of course, as above, the purposive fiduciary can be added to the classical fiduciary, but we are interested in it as an independent concept.

The clearest expression of the purposive fiduciary is in charitable trusts. Charitable trustees have duties to use the trust assets honestly to forward the charitable purpose and not divert them towards any other purpose.[129] Charitable trustees are ordinarily subject to the same strict duties against conflict and profit that create the classical conception of the fiduciary.[130] In addition, the common law definition of charitable limits the extent to which self-interest can be authorised and the rules against conflict and profit excluded. Charitable purposes must not be for private benefit,[131] therefore, any attempt to authorise a charitable trustee to personally benefit beyond reasonable compensation for services would be non-charitable.[132] In Australia, the fiduciary role of most[133] charitable trustees is further regulated by the Australian Charities and Not-for-profits Commission that regularly investigates charities that act for a private benefit.[134]

The purposive conception of a fiduciary can be found in private trust cases as well as charitable. Of course, there are the residual categories of 'anomalous' purpose trusts.[135] More significant, however, are cases that apply a purposive analysis to broad discretionary trusts, of which the paradigm example is *Re Beatty (decd)*.[136] A testatrix granted her trustees powers of appointment over a legacy that could be exercised in favour of anyone in the world, including the trustees themselves. Hoffmann J concluded these were fiduciary powers because the trustees were 'to act in accordance with what they honestly consider to have been the purpose for which Mrs Beatty created

129 See *Andrews v M'Guffog* (1886) 11 App Cas 313 (HL) 329 (Lord Herschell).

130 *Halsbury's Laws of Australia*, 75 Charities, para 75-890 (at 30 October 2018).

131 *Re Resch's Will Trusts; Le Cras v Perpetual Trustee Co Ltd* [1969] 1 AC 514 (PC) 540–41.

132 cf *Comr of Inland Revenue v Carey's (Petone and Miramar) Ltd* [1963] NZLR 450 (CA) 455–56.

133 The Commission has jurisdiction under the Australian Charities and Not-for-profits Commission Act 2012 (Cth) to register charitable trusts with the Commonwealth to, inter alia, obtain tax benefits. However, the Commonwealth does not have constitutional power to directly regulate the law of trusts.

134 Australian Charities and Not-for-profits Commission, *Charity Compliance Report 2018: Maintaining, protecting and enhancing public trust and confidence in Australia's charity sector* (2019) 28–31 <www.acnc.gov.au/tools/reports/compliance-report> accessed 5 July 2019.

135 See *Re Astor's Settlement Trusts; Astor v Scholfield* [1952] Ch 534 (Ch) 542; *Re Endacott (decd); Corpe v Endacott* [1960] Ch 232 (CA) 245–46 (Lord Evershed MR).

136 [1990] 3 All ER 844 (Ch) (*Re Beatty*). Most of Hoffmann J's judgment concerned the rule against delegation of discretion in wills. This aspect of the case has been rejected in Australia where the rule against delegation of will-making power remains: see *Gregory v Hudson* (1997) 41 NSWLR 573 (SC) 576, 585; (1998) 45 NSWLR 300 (CA) 305, 308, 312. However, Hoffmann J's broader findings at the start of the judgment, which are of interest to us, have not been rejected in Australia: see *Blenkinsop* (n 76) [117]; *Elovalis v Elovalis* [2008] WASCA 141 [67]–[68].

the powers'.[137] Surprisingly, Hoffmann J described them as hybrid powers of appointment[138] rather than the more usual description of a general power of appointment that can be exercised in favour of anyone in the world.[139] Justice Edelman has commented extrajudicially that there could not have been an obligation of loyalty to the objects of the power in *Re Beatty*.[140] This leaves us with a decision that the trustees' general powers of appointment were constrained by a fiduciary concept of acting for a non-charitable purpose.

Lionel Smith has arrived at a similar conclusion in explaining the decision in *Mettoy Pension Trustees Ltd v Evans*.[141] An employer held a power to appoint assets to employees but was also entitled to those same assets if it chose to not exercise the power. Smith explains:

> The best way of making sense of the provision, in the context of the deed as a whole, was that the power was not held by the employer as a pecuniary asset with which it could do what it pleased, but rather was granted and held in a managerial capacity. This conclusion brings with it *a version of the requirement of loyalty*, as it applies to dispositive discretions: such powers are not required to be exercised in what the holder considers to be the best interests of any particular person or persons; rather, they are required to be exercised in what the holder considers to be the best manner of fulfilling the purpose for which the power was granted.[142]

This would allow the employer to benefit itself legitimately and completely if that was within the purposes of the power.

The conception of a fiduciary as a person obliged to apply assets for a non-charitable purpose should be approached with caution. The problem is that purpose is an endlessly malleable concept. It would allow settlors to gain the advantages of a trust whenever it was desired. Indeed, when faced with the general question of non-charitable purpose trusts the courts have not accepted them.[143] This objection applies with equal force to distributive discretions that take the form of a very broad power of appointment, like those in *Re Beatty*.[144] Such discretions may satisfy the beneficiary principle, but if their fiduciary character is dependent on the purposive fiduciary concept then they are essentially non-charitable purpose trusts.

V The honest fiduciary: Honest regard for self

The final conception of a fiduciary is the idea that fiduciaries must simply act honestly and in good faith. Like purpose, honesty demands nothing in the way of other-regarding behaviour from trustees. For example, in *National*

137 *Re Beatty* (n 136) 846.

138 A hybrid power is used to refer to a power that is exercisable in favour of all the world apart from specific exceptions. It is not a special power that is exercisable in favour of a specific group, but it is also not a general power that is exercisable in favour of all: see Thomas, *Thomas on Powers* (n 97) para 1.18.

139 ibid para 1.16.

140 James Edelman, 'The importance of the fiduciary undertaking' (2013) 7 J Eq 128, 139.

141 [1991] 2 All ER 513.

142 Smith, 'Fiduciary Relationships: Ensuring the Loyal Exercise of Judgement on Behalf of Another' (n 18) 617 (emphasis added).

143 See *Bowman v Secular Society Ltd* [1917] AC 406 (HL) 441; *Legal Services Board v Gillespie-Jones* [2013] HCA 35, (2013) 249 CLR 493 [112].

144 *Re Beatty* (n 136).

Nominees Ltd v Agora Asset Management Pty Ltd (No 2) Davies J concluded, quite straightforwardly, that a trustee that charged a 5 per cent exit fee was not dishonest because it was entitled to charge the fee under the terms of the trust. An honest trustee could charge an unreasonable fee that did not represent the trustee's costs caused by the exit.[145]

The classic statement of trustees' duties quoted at the start of this article was from Millett LJ in *Armitage*: 'The duty of the trustees to perform the trusts honestly and in good faith for the benefit of the beneficiaries is the minimum necessary to give substance to the trusts, but in my opinion it is sufficient.'[146] The idea that honesty and good faith by themselves are fiduciary is controversial as we will see below. Nevertheless, in two key cases this conception of the fiduciary has been used to decide a trust exists.

First, in *Citibank NA v MBIA Assurance SA*, Citibank NA was trustee of a securitisation trust over Channel Tunnel debt, where investors in various notes were the beneficiaries. The unusual feature was that the trust instruments gave a guarantor, the defendant, power to direct the trustee how to exercise almost all its powers. The defendant was given this power to protect its interests as guarantor to some (but not all) beneficiaries.[147] A less privileged class of noteholders claimed that the defendant's powers were so extensive that they were repugnant to the trust.[148] This argument was rejected by the Court of Appeal where Arden LJ held that the fact the trustee had no control over the trust assets was not incompatible with a trust because the trustee was not licensed to act fraudulently and retained a real discretion to exercise.[149] However, the trustee had no real capability to act in the interests of the beneficiaries otherwise than with the consent of the defendant guarantor.[150] On this conception of the fiduciary, a bare duty to remain honest was sufficient to gain all the proprietary advantages of a trust.[151]

Second, there is the New Zealand Court of Appeal decision in *Clayton v Clayton*.[152] A settlor declared himself sole trustee with a discretionary power to distribute the assets to himself as one of a class of discretionary objects. The instrument authorised the trustee to act in his own interests and without considering the interests of all other beneficiaries.[153] The Court decided that the trustee's wide powers did not eliminate his fiduciary duties to act honestly and in good faith.[154] This conception of a fiduciary was sufficient to conclude a trust existed.[155] On appeal the Supreme Court expressed some doubt on this

145 [2011] VSC 425 [33].
146 *Armitage* (n 28) 253–54 (emphasis added).
147 [2007] EWCA Civ 11, [2007] 1 All ER (Comm) 475 [3].
148 It was not clear whether the noteholders were arguing that the trust was invalid or that the terms should be read down to be consistent with the essential core of a trust: see ibid [48].
149 *Citibank NA* (n 147) [82].
150 ibid [17]–[18]. Contrast Helen Dervan, 'Reviewing the Citibank Securitisation Case: Did It Really Challenge the Integrity of Equity?' (2016) 27 JBFLP 279.
151 See Alexander Trukhtanov, 'The Irreducible Core of Trust Obligations' (2007) 123 LQR 342, 346.
152 [2015] NZCA 30, [2015] 3 NZLR 293 (*Clayton*).
153 ibid [45], [53].
154 ibid [51]–[52].
155 ibid [53]–[56].

point,[156] but could not agree so left it open.[157]

The conception of a fiduciary as merely honest is controversial. Academics have pointed out that honesty is a necessary foundation for every legal relationship.[158] Essentially, honesty does not impose any additional restraint on a person's behaviour because the general law does not condone fraud.[159] Moreover, there are serious arguments in the literature that there was no trust in *Clayton* because an intention to create a structure where the 'trustee' can freely and honestly benefit himself is not an intention to create a trust.[160]

The literature on *Clayton* is supported by the Court of Appeal of the Cook Islands in *Webb v Webb*,[161] decided by former and current New Zealand judges.[162] The case concerned a trust deed similar to that in *Clayton* where the settlor was nominated as sole trustee with power to distribute trust assets to a class of discretionary beneficiaries that included himself.[163] The Court decided that the settlor had failed to create a valid trust and, therefore, retained absolute ownership of trust assets at the relevant times.[164] The Court's reasoning was that the settlor had no intention to irrevocably relinquish his beneficial interest in the assets because the deed provided no impediment to the settlor recovering the entire trust fund.[165] Particularly, the Court found that the deed's exclusion clause removed the fiduciary duties that the trustee would otherwise owe to the beneficiaries.[166] Thus, the Court went further than the New Zealand Supreme Court in *Clayton* and decided that a fiduciary restriction on self-benefit was essential for the creation of a trust. A duty to honestly comply with the terms of a deed that authorised significant self-interest was simply not a trust duty.[167]

Moreover, the honest fiduciary is not consistent with the cases on protectors

156 See *Clayton v Clayton* [2016] NZSC 29, [2016] 1 NZLR 551 [64], [124].

157 ibid [124]–[127].

158 *Ford and Lee: The Law of Trusts*, para 9.270 (at 25 June 2018); JE Penner, 'Exemptions' in Peter Birks and Arianna Pretto (eds), *Breach of Trust* (Hart Publishing 2002) 241, 250.

159 cf *Lazarus Estates Ltd v Beasley* [1956] 1 QB 702 (CA) 712 (Denning LJ).

160 See Jessica Palmer and Nicola Peart, 'Clayton v Clayton: a step too far?' (2015) 8 NZFLJ 114, 118; Tobias Barkley, '*Clayton v Clayton*: The Court of Appeal on the concepts of property and trusts' [2015] NZLJ 164; Mark Bennett, 'Competing views on illusory trusts: The *Clayton v Clayton* litigation in its wider context' (2017) 11 J Eq 48; Lusina Ho, '"Breaking Bad"' in Richard C Nolan, Kelvin F K Low and Tang Hang Wu (eds), *Trusts and Modern Wealth Management* (CUP 2018) 34, 42–47. Contrast Jeremy Bell-Connell, '*Clayton v Clayton*: Nipping the "illusory trust" in the bud' [2015] NZLJ 261.

161 [2017] CKCA 4.

162 See 'Cook Islands judges honoured in New Zealand' *Cook Islands News* (Rarotonga, 18 January 2018) <www.cookislandsnews.com/item/67333-cook-islands-judges-honoured-in-new-zealand> accessed 5 July 2019.

163 *Webb* (n 161) (schedule annexed to judgment).

164 ibid [67].

165 ibid [53]–[65].

166 ibid [56], [58], [61].

167 It must be noted that while *Webb* (n 161) is a clear rejection of the honest fiduciary, it is ambiguous in relation to the other fiduciary conceptions. This is because the only duties clearly excluded by the exclusion clause were the rules against profit and conflict (see cl 14 of the deed in the schedule to the judgment). The Court did not consider whether fairness or proper purpose duties were owed by the trustee. This means that the conclusion that no fiduciary duties prevented the trustee from benefiting himself could be interpreted as a conclusion that no fairness or proper purpose duties were owed, or that they do not qualify as fiduciary duties.

and powers to remove beneficiaries. For example, in *Blenkinsop v Herbert* the court held that

> Generally speaking, where, on a proper construction, the donee of the power is entitled to exercise the power for their own advantage or benefit and without regard to the interests of others, the exercise of the power is personal, and not attended by any fiduciary duty.[168]

Indeed, in these cases the fiduciary question is decided by whether the protector or appointer is authorised to act in her own interest or is obliged to act in the interests of the other beneficiaries in some way. Mere honesty while acting within the terms of the power is not considered fiduciary in this context.[169]

VI Conclusion: The statutory interpretation problem

The range of restraints on trustee discretion that have been considered fiduciary in the case law present a difficult statutory interpretation problem for the courts. 'Fiduciary' in clause 13 of the Trusts Bill has the position of a gatekeeper, but neither Parliament nor the Law Commission has offered any guidance about its meaning. The only explanation of fiduciary relationships offered by the Law Commission was in the first introductory issues paper where the explanation did not go beyond a brief summation of the classical conception.[170] It did not consider the complications that arise when the classical conception is encroached upon by the exclusion of the fiduciary duties.[171] Moreover, 'fiduciary' was not included in the Law Commission's proposed definition of a trust until the final report, where it was added in response to submissions.[172] This means the courts will need to consider the common law conceptions when interpreting clause 13.[173]

The classical fiduciary conception is likely to be used for rhetorical effect in explanations of clause 13, although it is unlikely to be determinative in difficult cases. The Trusts Bill draws on the rhetorical spirit of the classical conception by suggesting that trustees must act with exclusive regard to the beneficiaries while failing to acknowledge that a trustee may also be a beneficiary or may be authorised to benefit herself.[174] The rhetoric of the classical conception was also present in the debates during passage of the Bill. During the second reading, the importance of trust law was identified as the 'the ability to hold property for the benefit of somebody else'.[175] However, the substance of the Bill belies its classical tone. Stakeholder trustees are allowed

168 *Blenkinsop* (n 76) [97] (citations omitted).

169 *Re Burton; Wily v Burton* (1994) 126 ALR 557 (FC) 560; *Berger* (n 83) [84]; *Carmine* (n 81) [70]; *Blenkinsop* (n 76) [99].

170 Law Commission (NZ), *Review of Trust Law in New Zealand: Introductory Issues Paper* (Law Com IP No 19, November 2010) paras 3.32–3.35.

171 See Law Commission (NZ), *The Duties, Office and Powers of a Trustee: Review of the Law of Trusts: Fourth Issues Paper* (Law Com IP No 26, June 2011) paras 1.14, 1.16–1.21.

172 NZ Law Com Report No 130 (n 5) para 4.9; cf Law Commission (NZ), *Review of the Law of Trusts: Preferred Approach* (Law Com IP No 31, 2012) 29–30.

173 See *Re Greenpeace* (n 20) [16]–[17], [56] (Elias CJ, McGrath and Glazebrook JJ).

174 Trusts Bill, cl 13.

175 New Zealand, *Parliamentary Debates*, 9 May 2019 (Trusts Bill — Second Reading, Ginny Andersen, Paul Eagle).

by the Bill because the duties that give effect to the classical fiduciary are categorised as default duties that can be excluded by the express or implied terms of the trust.[176] Thus, while the classical meaning of fiduciary might be applied to clause 13 when stakeholder trustees are not an issue, it is less likely to be applied when they are.

The excludability of the classical fiduciary concept in the Trusts Bill leaves space for the courts to apply the best interests and fair conceptions of fiduciaries. Either of these meanings could be applied to clause 13, which would restrain the extent to which the duties against profit and conflict could be excluded. However, it must be noted that the fair fiduciary conception in particular would face an additional hurdle in clause 33, which imposes a default duty to 'not be unfairly partial'. This duty, on its face, applies to the exercise of distributive discretions because it can be contrasted to the duty of care in clause 27 that expressly does not apply to distributive discretions. The fact that the clause 33 duty can be excluded works against the fair fiduciary being part of the trust definition. However, a distinction could be made between trustees acting impartially between different groups of beneficiaries and the trustees acting impartially between themselves and the beneficiaries; the courts might find the latter is mandated by clause 13.

The Trusts Bill also leaves space for the purposive and honest conceptions of fiduciaries. However, as concluded above, these are more problematic common law principles because they completely depart from the idea that fiduciary relationships require other-regarding restraints on discretion. As we have seen, a purpose can be a purpose that benefits the trustee as much or more than anyone else and honest trustees may honestly benefit themselves if that was the purpose of the trust. Indeed, the restraints of honesty and acting for a proper purpose are imposed on discretionary powers at large, whether found in public law, contract or equity.[177] Nevertheless, the courts might interpret fiduciary in clause 13 as demanding nothing more than those ordinary common law restraints.

In conclusion, the New Zealand Trusts Bill leaves considerable space for further development of the common law. This has been demonstrated by showing how just one word — fiduciary — attracts at least five distinct conceptions of a trustee's role. The ambiguity in the Bill is not ideal; however, is not created by the legislation. The Bill accurately reflects the contemporary uncertainty in the common law about the relationship between trust and fiduciary concepts. The growth of discretionary trusts, stakeholder trustees and third-party powers has reduced the coherence of the trust as an institution. The result is a vast difference between the rhetorical heights of the classical fiduciary, who is exclusively other-regarding, to the honest fiduciary, who is

176 Trusts Bill, cls 29, 32, 34–5.

177 On proper purpose see *Braganza v BP Shipping Ltd* [2015] UKSC 17, [2015] 4 All ER 639 [21] (Lady Hale DP) (discretionary powers in contract); ***R v Secretary of State for Foreign and Commonwealth Affairs, ex p World Development Movement Ltd*** [1995] 1 All ER 611 (QB) (purpose in public administrative law); *State Bank of New South Wales Ltd v Chia* [2000] NSWSC 552, (2000) 50 NSWLR 587 [873] (mortgagees' power of sale); *Blenkinsop* (n 76) [69]. But see *Eclairs Group Ltd v JKX Oil and Gas plc* [2015] UKSC 71, [2016] 3 All ER 641 [39] (Lord Sumption). See generally Jessica Hudson, 'Propriety, Loyalty and Power' (International Fiduciary Law Workshop, University of Hong Kong, December 2018).

free to honestly benefit herself. This is a concern in all jurisdictions, not only those experimenting with groundbreaking legislation.