FIDUCIARY DUTIES OF SHAREHOLDERS AND DIRECTORS

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Fiduciary Duties of Shareholders and Directors

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The fiduciary accountability of corporate actors has departed from the conventional general jurisprudence in a number of respects. Much of the divergence is the product of conceptual confusion, and does not represent an advance on the conventional position. The difficulty is that some judges have misconceived the function of the fiduciary jurisdiction. It is not designed to supervise how shareholders treat each other, or how directors manage the affairs of the corporation. Rather, it operates as a general civil liability to discipline self-interested conduct in limited access arrangements. That conventional function now requires either reaffirmation, or explicit reformation, before an orderly jurisprudence will be possible.

Conventional fiduciary accountability

We separate different human arrangements into nominate categories (agency, trust, partnership, etc.). We do this to achieve information transmission economies. Legislatures and courts, relying on their understanding of social policy, then formulate idiosyncratic sets of rules to govern these nominate categories. The original perception or intuition of physical difference becomes institutionalised first as taxonomic convenience and then legal difference. Thereafter, for the purpose of assigning default obligations without revisiting social policy, individual physical arrangements are simply (though not necessarily easily) fitted into the appropriate nominate category of regulation. Arrangements that come within the definition of agency, for example, are subjected to the applicable rules of agency law. It is the same for arrangements that satisfy the definition of a trust,...

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2 See R. Flannigan, "The Limits of Status Assertion" (1999) 21 Advocates’ Quarterly 397. It is important to understand the analytical limitations of this communal and judicial economising. The categorical differentiation of legal obligation is a substitute or proxy analysis for the more precise assignment of legal obligation based on the particularised correlation of policy and actual structure.
3 The identification of the correct category is often disputed in the courts. Consider, for example, the legion of cases where courts must determine whether an arrangement is a partnership or a debtor/creditor relation, or whether an arrangement is an employment or independent contractor relation.
guardianship, employment, partnership or other nominate characterisation. All of these nominate arrangements are also regulated by a number of overlapping general liability regimes. The main forms of general regulation are criminal, contract, tort and fiduciary responsibility. The legal obligations of shareholders and directors conform to this pattern of regulation. The nominate category is corporate law. The corporate law rules define the legal character of corporation, shareholder and director. The rules address capacity, authority, securities (issue, transfer, redemption, dividends, etc), governance, meetings, records, disclosure, exit, solvency and numerous other matters. Corporations, shareholders and directors are simultaneously generally subject to liability for their criminal, contractual, tortious and fiduciary breaches. We are concerned here with the last of these general forms of liability.

The proper application of fiduciary responsibility is crucially dependent on understanding the distinction between nominate regulation and fiduciary regulation. Nominate regulation is idiosyncratic, it varies from category to category. Fiduciary regulation, in contrast, is generic. It applies the same rules in the same way across categories. Fiduciary accountability is designed to control the opportunism of those trusted with a defined or limited access to the assets of others. The concern is that actors will exploit their limited access to serve their own interests. Extracting personal benefit, though it has many mechanisms, is a singular mischief. Consequently, because the mischief is generic, the regulation is generic. Some nominate relations are invariably limited access arrangements (trustee/beneficiary). Others, in their standard form, are not (lessee/lessor, vendor/purchaser). Where a nominate relation does involve limited access, the fiduciary jurisdiction applies as a parallel or concurrent regulation that supports the performance of the nominate function. Consider the nominate categories of agent/principal, trustee/beneficiary, solicitor/client and guardian/ward. Each category is governed by a unique set of nominate rules. The rule sets differ because the specific functions differ or because comparable functions are implemented or organised in different ways. Each of these relations is also a limited access arrangement. There is a possibility the limited access will be exploited for personal

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4 Only potentially novel physical arrangements raise fresh regulation issues. It was thought by some, for example, that joint ventures were unique arrangements that required a separate set of rules. The courts concluded, however, that joint ventures could not be distinguished from partnerships and were not excused from the attendant common law default regulation.

5 Within this broad nominate category are several specific relationships. They include corporation/director, corporation/shareholder, shareholder/shareholder, shareholder/director and the associated third party relations. Only the first relationship carries a status obligation. The others are open access arrangements. The principal/agent and employer/employee relationships, also commonly found in the corporate context, are independent general status categories.

6 Flannigan, n.t above. See also the treatment of the distinction in R. Flannigan, "Fiduciary Control of Political Corruption" (2002) 26 Advocates’ Quarterly 252 at 253-258.

7 Specific rules may be common to a number of categories, but the set of rules for each category will be distinctive.
Fiduciary Duties of Shareholders and Directors

advantage. The mischief is the same for each category. Agents, trustees, solicitors and guardians may all succumb to the self-regarding impulse. That generic mischief necessarily requires a generic regulation. Accordingly, we regulate the idiosyncrasy of nominate functions with idiosyncratic rule sets, and we regulate the singular mischief of opportunism by applying generic rules of fiduciary accountability across categories.  

A number of observations attend this analysis. One is that idiosyncrasy is largely confined to the nominate dimension of a relation. Contrary to one popular view, fiduciary content is not driven by the idiosyncrasy of nominate functions. A second observation is that fiduciary accountability represents a relatively narrow form of social regulation. It is concerned exclusively with controlling opportunism on the part of those with limited access. It is not concerned with defining substantive performance standards for nominate functions. Nor is it concerned with lack of care, bad judgment, unjust enrichment, power differentials, general market exploitation or the substantive merits of decisions. Judges, we will see, do not always appreciate the nature, or implications, of the distinction between the nominate and fiduciary dimensions. That is a concern because, *inter alia*, while a strict discipline is appropriate to regulate opportunism in limited access arrangements, it has traditionally not been thought appropriate for the general regulation of nominate functions.

The conventional status accountability of shareholders and directors is relatively straightforward. To understand the conventional position, it is first necessary to describe the fiduciary liability assignments associated with the joint stock company; the precursor of the modern registration corporation. Because the joint stock company was a partnership, the stockholders were status fiduciaries to each other. The active or managing partners were also fiduciaries (a practical, but not conceptual, redundancy) as a result of their status as appointed agents. These fiduciary obligations changed significantly when joint stock companies assumed corporate status. The first general incorporation statutes in England were designed to confer corporate personality on joint stock companies upon registration of their constitutional documents with the state. Although incorporation was achieved with minimal formality, it fundamentally altered the legal positions of the parties. The primary consequence of incorporation was the insertion or identification of a new legal person (the corporation) as the principal or owner of the business. The former stockholders were no longer principals in relation to the

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8 It may be helpful to restate the essential distinction in summary form. Limited access functions are governed by both (1) nominate regulation and (2) fiduciary regulation. Nominate regulation is idiosyncratic. Fiduciary regulation is generic. Nominate regulation is concerned primarily with the performance of the nominate function. Fiduciary regulation is concerned exclusively with the self-interested exploitation of the function.


10 This may be understood in either of two traditional ways. Partners were deemed to be agents of one another and therefore attracted the associated fiduciary accountability. Alternatively, partners were fiduciaries because they were joint principals in a business undertaking. Both conceptions are premised on limited access.
business. Their partner status was replaced by a "shareholder" status created and defined by statute. Two significant effects flowed from this replacement of principals. One effect was the transfer of the contractual and vicarious liability of the former partners to the new corporate entity (producing limited liability for shareholders). Another effect, of present interest, was the erasure of the status fiduciary obligations the shareholders had previously owed to each other as partners. Their status fiduciary obligations evaporated at the moment of their conversion from joint principals to statutory investors of equity capital in the business of the corporation. As for the managing partners who became directors of the new entity, their fiduciary responsibility continued. The effect of incorporation was only to change the identity of the person to whom they owed their fiduciary duties. Instead of acting as agents for partners, they now served as agents for the corporation.

The change in the fiduciary accountability of shareholders, in moving from the joint stock company to the corporation, is properly understood in terms of a change in access. Partners in joint stock companies granted each other only limited access to partnership assets. Unless otherwise agreed, the assets were to be utilised exclusively for the collective purposes of the partners, not their individual private purposes. That standard expectation came to be formally recognised in the default fiduciary responsibility assigned to partners. Incorporation radically changed the nature of the grant of access, and therefore the fiduciary consequences. Whereas partners granted limited access to each other, shareholders granted open access to the corporation. Their share subscriptions were conveyed to the corporation for the purposes of the corporation. The corporation became the owner of the contributed capital, with no formal requirement to act in the interests of shareholders as such. The corporation was entitled to exploit the capital for its own benefit. That was the fundamental consequence of incorporation. What had been a grant of limited access in the partnership context became a grant of open access in the corporate context. Accordingly, as a matter of status, while partners owe fiduciary obligations to each other, shareholders do not. In the case of directors, as noted above, their fiduciary character was not cancelled. The identity of their principal changed, but they still had the limited access of agents, and remained status fiduciaries. Their limited access was now to the assets of the corporation. They no longer owed fiduciary obligations to shareholders on a status basis because they did not have access to shareholder assets.

An access analysis also explains why creditors are not, as a matter of status, owed fiduciary duties either by the corporations they deal with or the directors of those corporations. Voluntary creditors supply capital (including labour capital) for the purposes of the corporation. Corporations typically do not, unless in partnership, undertake to employ supplied capital for the benefit of the suppliers. Rather, they purchase or rent capital to exploit for their own purposes. Their access to that capital is open. Capital suppliers expect corporations to

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consume capital in the self-interested pursuit of profit. Suppliers (like shareholders) essentially contract for a portion of the resulting production, not for production in their personal service. If they insisted on production in their own service, they would be principals in the business and liable themselves for the obligations of the business. On the same analysis, directors have no status fiduciary responsibility to creditors while the corporation is a going concern. We will consider later whether this changes when a corporation approaches insolvency.

The focus to this point has been on status-based fiduciary obligations. Without more, that would be a seriously incomplete analysis. Conventional fiduciary responsibility is not confined to status relations. Fiduciary accountability arises wherever an arrangement between parties involves an element or measure of limited access. The traditional reliance on status-based analysis in the corporate context tends to mask or discount this exposure to general fact-based responsibility. The abstract test for fiduciary accountability is whether an actor has access to the assets of another for a defined or limited purpose. That test produces fiduciary responsibility on the basis of the actual character, not the nominate status, of particular relations. Thus, a corporation may potentially be a fiduciary to some or all of its shareholders, directors, creditors or others (such as employees, customers). Similarly, where they have the relevant access, shareholders may owe fiduciary duties to the corporation, its directors, its creditors or other third parties. And directors may owe fiduciary obligations to some or all of the shareholders or creditors of the corporation, or other third parties. In each case, it is not the status of the actor that attracts fiduciary responsibility. Rather, it is the fact that one actor has trusted the other with limited access. While as a practical matter these obligations may come into existence only infrequently, they are the orthodox consequences of the general operation of the fiduciary jurisdiction. We will see, however, that judges have had some difficulty in properly identifying fact-based obligations.

Because they are the primary fiduciary actors in the corporate context, it is useful here to further examine the position of directors. It is important first to observe that directors are subject to layers of nominate regulation. As agents, they are subject to the general law of agency. They are also subject to the more specific layer of corporate law rules that apply to directors. Directors may also be subject to further layers of specific sectoral or topical statutory regulation, for example, in the areas of financial services or environmental management. This layering of regulation also exists for the fiduciary dimension of the director function. The limited access of directors attracts conventional general fiduciary regulation, "corporate law" fiduciary regulation and, occasionally, sectoral or topical fiduciary regulation. These additional layers of regulation largely restate or refine conventional fiduciary principles. In certain respects, however, the additional layers substantively modify the content of the conventional regulation. To the extent that is so, the fiduciary position of directors is distinguishable from the

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12 e.g. the nature and consequences of their authority. See Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd [1964] 2 Q.B. 480, CA.
Robert Flannigan

posmon of other fiduciaries, and therefore represents idiosyncratic fiduciary regulation. Such treatment is unwarranted unless considerations peculiar to the director function justify a specialised fiduciary regulation. The question is whether the opportunism of directors is different in kind from the opportunism of other trusted actors? It is not. As a general proposition, opportunism is a constant or generic mischief and, consequently, does not produce categories of fiduciary accountability. Nevertheless, with its modifications, corporate law implicitly asserts or claims inconstancy or difference. The claim is unjustified.

Consider the statutory regulation of insider trading in Canada (not dissimilar to that in other jurisdictions). Numerous conditions must be satisfied for statutory liability and, consequently, it is difficult to establish the offence. Under general fiduciary principles, fiduciaries who are conflicted or who benefit from their office (for example, from confidential information) are required without more to disgorge their profit. No satisfactory explanation has been forthcoming for treating directors more leniently on this aspect of their fiduciary responsibility. Insider trading represents a serious opportunism concern for corporations. Directors in a position to trade corporate securities on inside information have a classic conflict of interest. They are to make decisions in the best interest of the corporation, but they have an incentive to realise trading gains by making decisions that will spike (up or down) the market prices of the corporation’s securities. Obviously decisions affected by that kind of incentive can be harmful to the corporation. The only excuse for insider trading should be, as is the case for fiduciaries generally, the informed consent of the corporation. There should be no relief from fiduciary liability through the device of a blinkered and deficient statutory provision.

Insider trading is the main instance of the statutory modification of conventional principle. There are other statutory modifications, but they are relatively modest. Of greater analytical interest is the modification [confusion] of the conventional position by the judiciary, a process that it is also occurring without credible justification. We will review the case law shortly. Here it is only necessary to raise briefly the question of justification. Idiosyncratic fiduciary regulation in the corporate context may be thought to be justified by considerations or conditions unique to the director function. Such considerations might suggest either relaxation/retraction or extension of the regulation. One argument for relaxation might be that the application of conventional fiduciary responsibility

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13 Canada Business Corporations Act, s.131(4). Query whether the statutory regulation was intended to replace the fiduciary regulation of insider trading.
14 It has been argued that insider profits are permissible as implicit compensation and are a necessary instrument for aligning the interests of directors with the interests of shareholders. The flaws in those arguments are obvious.
15 Insider trading is regarded by many as unfair to all those who trade with the insider. If there is a wrong to third party traders in the absence of a limited access arrangement, it is not a “fiduciary” wrong.
16 As one example, most corporate statutes deal with interested contracts.
to "commercial" actors is inappropriate. Another might be that conventional fiduciary accountability would make it difficult to recruit able directors. Another might be that the decisions of directors would be unduly conservative and less productive. These same arguments are regularly advanced to justify reduced tort liability for directors. They are not credible arguments in either context. 18 As for extending fiduciary regulation beyond its conventional scope, no arguments have been advanced. Litigants and judges typically do not even appreciate that an extension is involved. They do not understand the specific narrow function of fiduciary accountability. They wrongly assume that function is to regulate in a general way how directors exercise their discretion or otherwise carry out their task of managing the affairs of the corporation. 19 The singular function of the jurisdiction is instead to discipline self-interested or conflicted action on the part of trusted actors. Once that is appreciated, it becomes clear that the extensions invariably push fiduciary regulation into the nominate dimension without apparent justification.

Before proceeding to examine the jurisprudence of fiduciary relations in the corporate context, a number of general observations are in order. The first is that judges often describe a particular power as a "fiduciary power". That is an unhelpful habit. It represents a failure to recognize that fiduciary responsibility is a separate form of parallel general regulation designed to support limited access nominate functions. The basic nominate function of directors is to manage or direct the business of the corporation. Fiduciary accountability attaches to every aspect of that function. Each power (more broadly, each aspect of limited access) is capable of being turned to personal ends. Thus, in that respect, every power

18 See Flannigan, n.11 above, at 310-321.
19 One particular manifestation of that failure is relatively common. Judges and legislators have framed the fiduciary obligation of directors as a duty to act in "the best interest of the corporation". That phrase, unfortunately, is capable of conveying two very distinct ideas. One interpretation is that directors are required to pursue the good of the corporation given its capital constraints and its lawful advantages/disadvantages in its competitive environment. That interpretation corresponds with the nominate duty all agents owe to their principals. The other interpretation is that directors are to act in the corporate interest in the sense that they are not to act in their own personal interest. That corresponds with the generic fiduciary duty imposed on all fiduciaries. The two interpretations are conventionally associated with very different legal consequences for directors. The nominate duty to act in the corporate interest is primarily bracketing regulation, as opposed to direct substantive regulation. The exercise of power and discretion, if within set parameters, can not be directly challenged on the merits. Directors are protected by the business judgment rule. They are not protected, however, if they exceed their authority or act for an improper purpose. In contrast, under the second interpretation, regulation is direct, substantive and strict. If, in the course of pursuing the best interest of the corporation, directors are conflicted, or secure a personal benefit, they are accountable. Given these two interpretations, the confusion that predictably arose was that performance of the nominate function, the first interpretation, was wrongly conflated with the fiduciary regulation of the second interpretation. In other words, the substantive merit of the exercise of various powers by directors has been treated as a question of fiduciary responsibility. That plainly confuses the nominate and fiduciary dimensions.
Robert Flannigan

exercised by a director *qua* director is a fiduciary power. Labelling only certain powers as fiduciary suggests that other powers directors exercise in the conduct of the business are not subject to fiduciary regulation. That is a confusion. The proper analytical dichotomy is between limited and open access. To the extent directors have limited access (their entire "director" function), they are fiduciaries, and every exercise of their power, where it is potentially self-interested, is subject to fiduciary regulation.

The second observation is that there is a difference between fiduciary *accountability* and fiduciary *liability*. The former is determined by limited access (indicating the potential for opportunism), the latter by benefit or conflict (proxies for demonstrated opportunism). Every limited access arrangement is susceptible to the mischief of self-interested action. Accordingly, every actor with limited access is subject to fiduciary *accountability*. That does not by itself, however, produce fiduciary *liability*. Fiduciaries who perform their undertaking without the fact or prospect of self-interest will incur no liability. Fiduciaries may of course act in other ways relative to their limited access that are impeachable or provocative. They may exceed their authority. They may act negligently. They may pursue an objective that does not have the support of their beneficiaries. These actions are not fiduciary breaches *per se*. A fiduciary breach occurs only where the actions of those with limited access (*i.e.* fiduciaries) are compromised by self-interest, or a conflict of interest. The fiduciary jurisdiction is concerned exclusively with that one kind of mischief. Other kinds of mischief that might be facilitated by limited access will be unregulated, or regulated by other legal regimes. Fiduciaries will incur nominate, contractual, tortious, criminal or fiduciary *liability* (exclusively or concurrently) depending on the way they exploit their limited access.

A third observation has to do with the tendency of some judges to describe directors as trustees, or as having trustee or trust-like obligations. It is clear that directors are not, as such, formal trustees subject to trust law (nominate) regulation. Judges have employed the "trustee" terminology because they intuitively understood that the nominate function of directors must be protected against the opportunism of those same directors by the application of generic fiduciary accountability. The analogy to trustees was their rudimentary means of expressing the legal conclusion that directors have parallel nominate and fiduciary duties.20 The director/trustee duality reflected the innate analytical independence of the nominate and fiduciary dimensions.

The fourth observation is that courts will not allow the corporate veil to block their control of the fiduciary mischief. It is not uncommon for fiduciaries to attempt to colour or conceal their opportunistic actions through the facility of a corporate structure. The courts, however, have been prepared to pierce the veil where it has been employed in efforts to sanitise what would otherwise be a fiduciary breach. Piercing in such circumstances is uncontroversial, and courts

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20 See *Re Duekwari pte* (No.2) [1998] 2 B.C.L.C. 315, CA; *Bairstow v Queens Moot Houses Ltd* [2001] 2 B.C.L.C. 531, CA.
will make that move without elaborate, or even any, explanation.\textsuperscript{21} It is regarded as within the fraud exception to the impenetrability of the corporate veil. Given the historic reaction of the judiciary to the self-interested conduct of trusted actors, the irrelevance of the veil in this context is unremarkable.

**Duties of shareholders**

Shareholders do not, as a matter of status, owe fiduciary obligations to each other or to their corporations.\textsuperscript{22} As discussed earlier, the interposition of the corporate entity between the shareholders and the business had fundamental consequences. The corporation now carried on the business as a principal. For shareholders, that produced their limited liability, but also negated the mutual fiduciary obligations they would otherwise have if they had carried on the business together without incorporating.\textsuperscript{23} In both respects, shareholders became more remote from each other (limited collective liability to third parties, no mutual fiduciary obligations). The resulting fiduciary position is explicable in terms of the access involved. A purchase of shares is an exchange of open access. The consideration shareholders pay for their shares is conveyed to the corporation for its unfettered use in a defined undertaking. The subscribed capital becomes the property of the corporation and, consequently, without more, the access of the corporation to that capital is unlimited. The corporation, for its part, conveys income and capital entitlements, and an array of other negotiated and statutory rights, to shareholders to be used by them as they see fit. Accordingly, because both the corporation and the shareholder normally exchange assets on an open access basis, neither owes a status fiduciary duty to the other. On that same basis, shareholders have no fiduciary duties to each other, either directly or through the medium of the corporation. All of this is self-evident with respect to distributions of income or capital. It is also clear, on a proper analysis, with respect to the rights and powers attached to shares.\textsuperscript{24} When considering the power to alter corporate rules, Justice Dixon explained that: "The power of alteration is not fiduciary. The shareholders are not trustees for one another, and, unlike directors, they occupy no fiduciary position and are under no fiduciary duties. They vote in respect of their shares, which are property, and the right to vote is attached to the share itself as an


\textsuperscript{23} The introduction of a new principal involved a number of trade-offs. The separate entity status of the corporation produced transactional convenience and limited liability for shareholders. The cost of those advantages included the loss of direct fiduciary accountability and the loss of the direct right to take action for an injury to the collectivity. Shareholders also submitted to a much increased level of state regulation designed to offset the effects of the legal consequences of fictional personality.

\textsuperscript{24} Pender v Lushington (1877) 6 Ch. 70.
incident of property to be enjoyed and exercised for the owner’s personal advantage.” Shareholders expect that other shareholders will exercise their voting rights in their own self-interest. All shareholders take the risk that they may be adversely affected by an exercise of voting rights. It is equally clear that shareholders, in their shareholder capacity, do not have status fiduciary duties in other respects. Unlike partners, they are not prevented from competing with the corporation, or in taking opportunities that could have been pursued by the corporation. Shareholders may also sell their own assets to the corporation, or purchase corporate assets for themselves, without the transaction being voidable.

The lack of a foundation for the fiduciary regulation of shareholder powers on a status basis does not mean that shareholder action is unfettered. It means only that such regulation that is applied will usually be of the nominate kind, and occasionally of the fact-based fiduciary kind. It is plain enough that shareholders will often be in a position to oppress each other. Their ability to do so, however, will only infrequently be traceable to limited access opportunism. Instead, in most instances, it is attributable to dominant voting power. Significant voting positions, whether individual or in alliance with others, permit the diversion of value to the dominant voting block. That, it will be appreciated, is not an opportunistic exploitation of assets that had been entrusted to shareholders on a limited access basis. It is not a fiduciary breach. Rather, the controlling shareholders are taking what is within their immediate economic power to appropriate. Nevertheless, because the action of dominant shareholders may in some circumstances amount to an unacceptable abuse of economic power, judges have imposed limits on the freedom of shareholders to exercise their power. A commonly cited statement of that limitation is found in the judgment of Lindley M.R. in Allen v Gold Reefs of West Africa, Limited. He asserted that each shareholder power "must, like all other powers, be exercised subject to those general principles of law and equity which are applicable to all powers conferred on majorities and enabling them to bind minorities. It must be exercised, not only in the manner required by law, but also bona fide for the benefit of the company as a whole, and it must not be exceeded. These conditions are always implied, and are seldom, if ever, expressed." It may be suggested that this proposition is hardly (as the tenor suggests) self-evident or, more importantly, functionally comprehensible. The Master of the Rolls cited no authority for his view, and even

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25 Peters' American Delicacy Co Ltd v Heath (1939) 61 e.L.R. 457 at 504, HC.
26 Shareholders, for example, may be liable for trading securities on inside information. That liability may arise from a situational limited access to the information.
2. [1900] 1 Ch. 656.
2. ibid. at 671.

286

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conceded that authority might not exist ("seldom, if ever, expressed"). Subsequently, recognising the apparent novelty, there has been considerable judicial debate over how his words should be understood. That debate, however, is of no particular relevance to the present analysis. Whatever the limitation on shareholder voting power might be, it is not a fiduciary limitation. It is enough to understand that the limitation constitutes nominate (corporate law) regulation of shareholder relations. It must not be confused, as it sometimes is today, with status fiduciary regulation.

Some jurisdictions have reformed the nominate regulation of corporate affairs with the introduction of general oppression remedies. Whether the common law regulation was considered uncertain or deficient, it has now been displaced in those jurisdictions by a comprehensive statutory intervention. The boundaries of this "oppression" regulation remain uncertain, but there is no doubt the provisions impose a greater constraint on shareholder (and director) action than the nominate regulation they supplanted. Significantly, the oppression provisions appear to accommodate or subsume conventional fiduciary breaches within their scope. That diminishes fiduciary responsibility in the sense that fiduciary breaches are recharacterised as merely one kind of "oppression". The effect of that remains to be seen. Possibly the fiduciary case law will be absorbed or left behind by the oppression jurisprudence. Alternatively, because of its strict character, and its operation as a general regime of legal obligation (like tort law), fiduciary responsibility will remain viable as an independent cause of action where the complaint is that a de facto limited access arrangement between shareholders was compromised by self-interest.

Duties of directors to the corporation

Directors have a fiduciary obligation to the corporation, formally recognised as a status obligation (either as director or agent), to execute their duties without
pursuing their own interests. Here too there has been a failure to respect or appreciate the boundary between the nominate and fiduciary dimensions of the office. There is again a tendency to characterise nominate (corporate law) duties as fiduciary duties. There are two clear manifestations of this in the cases. The first is the duty of directors to act in the best interest of the corporation. That duty is often identified as the main fiduciary duty of directors. It is not. The duty to act in the best interest of the corporation is the main nominate duty of directors. It is the agency duty all agents owe to their principals. The duty is assumed by agents as an express or implied term of their agency contract, or as a positive default rule of agency law. Confusion arises because some judges do not understand the parallel, but independent, operation of the fiduciary liability regime. They wrongly conflate nominate and fiduciary regulation. The proper view is that nominate regulation is augmented or supported by the parallel application of fiduciary responsibility. The potential for opportunism inherent in the limited access function of directors requires this concurrent fiduciary control. The best interest rule has a wider ambit than the fiduciary proscription. Serving one’s own interest is but one way in which directors might fail to act in the best interest of the corporation. The best interest rule also requires directors to evaluate the merits of alternative actions. Fiduciary responsibility is not directly concerned with the relative merits of decisions. It is concerned only with whether a decision is compromised by a conflict or the prospect of a personal benefit. The application of the best interest rule is also qualified by the business judgment rule. It is for the directors alone, not the court, to determine what constitutes the best interest of the corporation. Conventional fiduciary accountability, in comparison, is not qualified by the business judgment rule. Judges are prepared, and competent, to check self-interested management. Accordingly, it is confusing to

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33 York and North-Midland Railway Co v Hudson (1845) 16 Beav. 845, 51 E.R. 866; Aberdeen Rail Co v Blaikie Brothers (1854) [1843-60] All E.R. Rep. 249, HL; Parker v McKenna (1874) L.R. 10 Ch.App. 96, CA; Cavendish Bentinck v Fenn (1877) 12 A.e. 652, HL; Transvaal Lands Co v New Belgium (Transvaal) Land and Development Co [1914] 2 Ch. 488, CA. Directors who are employees of the corporation (e.g. president, manager) will have a status fiduciary in that capacity as well. The employment relation typically involves limited access, and therefore may be (and is) regarded as a status fiduciary relation. Some judges essentially recognise the fiduciary obligation, but for some unclear reason cast it as a distinct (albeit redundant) duty of fidelity. See CMS Dolphin Ltd v Simonet [2001] 2 B.e.L.e. 704, Ch. Note that for fiduciary questions, notwithstanding the popular contrary view, there is no legitimate substantive distinction between junior and senior employees.

34 The nominate common law duties of directors included duties to act in the best interest of the corporation, to not exceed their authority, to not fetter their discretion and not delegate their functions. Those duties have been modified by corporate legislation in various respects. Many other nominate duties are found in the statutes.

35 See Regentrest pic (in liquidation) v Cohen [2001] 2 B.e.L.C. 80, Ch. Many commentators also make this error, usually simply as an assumption. See also n.19 above.

36 Australian Metropolitan Life Assurance Co Ltd v Ure (1923) 33 e.L.R. 199, HC; Harlowe’s Nominee Pty Ltd v Woodside (Lakes Entrance) Oil Co (1968) 121 e.L.R. 483, He.
Fiduciary Duties of Shareholders and Directors

characterise the best interest rule as a component or aspect of fiduciary regulation.

Judges have also conflated nominate and fiduciary regulation when applying the proper purpose rule. Judges regularly describe the rule as a fiduciary rule. The rule, however, is properly characterised as a construct of corporate law regulation. Exercising a power in order to secure a personal benefit is but one of a number of possible improper purposes. In *Howard Smith Ltd v Ampol Petroleum Ltd*, Lord Wilberforce stated that: "Self-interest is only one, though no doubt the commonest, instance of improper motive: and, before one can say that a fiduciary power has been exercised for the purpose for which it has been conferred, a wider investigation may have to be made". That the proper purpose rule should be characterised as nominate regulation, rather than fiduciary regulation, is in no sense a radical proposition. Although the rule is treated as a free-standing rule, consider how it differs, if at all, from the basic nominate rule that directors (agents) must not exceed their authority. It may be that the rule has enjoyed a separate application because it is a judicially imposed default limitation on negotiated and statutory authority. Even so, the rule would still appear to fit within the concept of exceeding one's authority.

The best interest and proper purpose rules may appear to be fiduciary in character because conceptually each is more than wide enough to accommodate regulation of the opportunism mischief. It is that conceptual breadth, however, that has produced confusion. The difficulty is that the two concepts accommodate regulation of matters that have nothing to do with the pursuit of self-interest. Thus, when judges uncritically label the two rules as fiduciary rules, they necessarily assign fiduciary responsibility to actions that offend the rules but which are not self-regarding or conflicted actions. That is then the source of an unwarranted expansion of fiduciary accountability. The best interest rule and the proper purpose rule, it should be observed, are associated with an analysis that is very different from a standard fiduciary analysis. The two rules may produce contradictory conclusions because it is possible to find that directors exercised their power for a proper purpose but not in the best interest of the corporation, and vice versa. That has produced a debate in the courts as to which rule is

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39 Consider *Grimes v Harrison* (1859) 26 Beav. 435, 53 E.R. 966; *Fraser v Whalley* (1864) 2 H. & M. 10,71 E.R. 361; *Re Lee, Behrens and Co Ltd* [1932] 2 Ch. 46; *Australian Growth Resources Corp Pty Ltd v van Reesema* (1988), 6 A.C.L.C. 529 at 537, SASC ("A transaction entered into for an improper purpose is invalid because it is beyond the scope of the powers of the directors ... ").
40 To the extent the rules are employed to address the opportunism mischief, they obviously perform the function of controlling opportunism. The difficulty is that, relative to conventional fiduciary discipline, they represent a different and weaker form of regulation.
dominant in given circumstances.\textsuperscript{42} There is also considerable analytical compromise involved where there are both proper and improper motives, and they are prioritised.\textsuperscript{43} Further, there is uncertainty over the correct interpretation of the idea of the "best interest of the corporation".\textsuperscript{44} All of this complication, contradiction and ambiguity is foreign to conventional fiduciary accountability, which applies a clear and strict proscription on self-interest. As it is, because the judges have failed to recognise the boundary between nominate and fiduciary regulation, they have unwittingly expanded fiduciary responsibility, and simultaneously implicitly approved an analysis that has little resemblance to the conventional analysis. The preferred approach would be to consider as separate questions whether the actions of the directors were a nominate breach (of the best interest, proper purpose or other nominate rule), and/or a fiduciary breach, and/or some other kind of breach. In the case of a self-interested transaction, the actions of the directors would be a fiduciary breach, but not necessarily a breach of any nominate rule. The utility of the analysis is that it treats every claim of director opportunism independently (but not exclusively) as an issue of fiduciary responsibility, and all other claims according to their nature. Judges must recognise that fiduciary accountability is a general form of default civil liability that is concerned with a specific mischief that arises in diverse limited access arrangements. The best interest and proper purpose rules may include that same mischief within their scope, but it is a confusion to conclude that the rules are inherently fiduciary in nature.

Some of the cases on improper purposes may also appear to imply a relaxation of the conventional strict application of fiduciary responsibility.\textsuperscript{45} Once an actor is characterised as a fiduciary, the conventional assignment of liability depends only on proving either a conflict or a benefit. It is necessary, however, to make good on that proof. In the takeover bid cases, the issue is whether the directors are conflicted, or secure a benefit, because the defeat of the bid will allow them to retain their positions.\textsuperscript{46} Often this reduces to a question of benefit, rather than


\textsuperscript{43} The main compromise is the judicial acceptance of an incidental or secondary motive to realise a special (versus general) benefit. Apart from other considerations, it is obviously relatively easy for knowledgeable opportunistic directors (or their advisers) to arrange their actions (and therefore the evidence) \textit{ex ante} and \textit{ex post} to establish a permissible primary motive to shield a “secondary” motive of personal benefit. Consider generally Hirsche v Sims [1894] A.C. 654; Seligman v Prince & Co [1895] 2 Ch. 617, CA; Mills v Mills (1938) 60 e.L.R. 150, HC.

\textsuperscript{44} Mills v Mills (1938) 60 e.L.R. 150, HC; Whitehouse v Carlton Hotel Propriety Ltd (1987) 162 e.L.R. 285, He. See the cases at n.42 above.

\textsuperscript{45} A similar inappropriate relaxation may occur in the application of the best interest rule to self-interested conduct. Determining whether directors acted (or intended to act) in the best interest of the corporation implies for some an examination of ostensible mitigating considerations that would not be permitted in a conventional fiduciary analysis.

\textsuperscript{46} See 347883 Alberta Ltd v Producers Pipelines Inc (1991) 80 D.L.R. (4th) 359, Sask. CA. It is an improper purpose, but not necessarily a self-interested purpose, for directors to use their power to affect control of the corporation. Directors are to manage the business, not
conflict, because the general management powers of directors may imply consent to the existence of the conflict. As a question of benefit, however, there is a difficulty. There must be evidence of the benefit. That presents a problem because, unlike many fiduciary breach cases, there is no discrete monetary payment or comparable ascertainable benefit. The alleged benefit is the continuation of incumbency. The courts reacted to this difficulty by substituting motive for demonstrated benefit. The issue of benefit became, through the application of the proper purpose doctrine, an issue of motive. The judges looked for evidence that the motive of the directors was to retain their office. That analytical substitution went essentially unchallenged by commentators, even though motive is irrelevant to the conventional ascription of fiduciary liability. Conceding the fact [if not the necessity] of that substitution, however, does not justify a general relaxation of the fiduciary standard in the corporate context. Certainly there is no such suggestion on the part of judges. Strict application is a defining characteristic of fiduciary accountability and, arguably, its refutation would require explicit justification. No credible justification, it would appear, exists. The accepted rationales for a strict operation apply with full force in the corporate context. The practical need for the conventional strict discipline, recent experience suggests, is evident.

There are other respects in which courts have permitted the duties of directors to depart from the conventional fiduciary position. One frequently discussed departure involves competing duties. The ostensible departure is found in a thin strand of authority supporting the view that directors may serve on the boards of competing corporations. A number of observations are relevant to the issue. The first is that this apparent divergence is virtually universally identified as a weakness or anomaly in the fiduciary regulation of the director function. The second observation is that, as a practical matter, it is of little consequence. If it matters, corporations will not knowingly appoint directors of competing corporations to their boards. Those that do, and who thereby expressly or implicitly consent to the existence of the conflict, will have their reasons. Competing corporations, for example, might utilise common directors to stay informed of


*See, e.g. Peso Silver Mines Ltd (NPL) v Cropper* (1966) 58 D.L.R. (2d) 1, where the Supreme Court of Canada chose not to strictly apply fiduciary responsibility. Contrast *Peso*, which is considered anomalous, with *Regal (Hastings) Ltd v Gulliver* [1962] 1 All E.R. 378, HL. There are other decisions in every jurisdiction that are inconsistent with established principles in one respect or another.


*See the judgment of Sedley L.J. in In Plus Group Ltd v Pyke* [2002] 2 B.C.L.C. 201, CA. Because fiduciary accountability is not fiduciary liability, it is conceivable that careful directors might never breach their duty to either corporation.

291
Robert Flannigan

each others’ actions so as to maintain their tacit price-fixing agreement. In such cases, while there might be a competition offence involved, the mutual consent to the existence of the conflict will vitiate any fiduciary liability for directors. Other corporations will tolerate the conflict because they believe they gain from the expertise or industry connections of the directors. Common directors are also used to exercise a unified control over formally independent corporations within a group. 51 Thus, on this issue, the apparent divergence is either misconceived (and should be corrected) or practically illusory (because there is consent) and, in any event, does not amount to a significant conceptual challenge to the general application of conventional accountability in the corporate context.

The recent decision in Extrasure Travel Insurances Ltd v Scattergood illustrates the confusion that currently troubles the assessment of the fiduciary liability of directors. 52 The case involved a monetary transfer between corporations in a corporate group. The paying corporation sought equitable compensation from two of its directors on the ground that the payment was in breach of their fiduciary obligations. On the facts, arguably, this was a straightforward instance of a conflict of competing duties on the part of persons who were formal or de facto directors of all of the involved corporations. 53 The directors damaged one subsidiary in an attempt to rescue another. They exploited their limited access to the assets of the paying corporation to secure a benefit for the subsidiary they chose to prefer. Alternatively, in the case of Mr Scattergood, who was indirectly beneficially interested in all of the corporations, this was simply a conflict of interest and duty. The court, however, took a different approach. 54 Justice Crow asserted that: “It is trite law that a director owes to his company a fiduciary duty to exercise his powers (i) in what he (not the court) honestly believes to be the company’s best interests, and (ii) for the proper purposes for which those powers have been conferred on him (emphasis added)”. 55 He then went on to examine the facts to determine whether the directors believed the transfer was in the best interest of the corporation or was for a proper purpose.

51 Common directors must obtain proper consent for their self-interested proposals. See Baillie v Oriental Telephone and Electric Co Ltd [1915] Ch. 503.
52 [2003] 1 B.C.L.C. 598, Ch.
53 One of the directors, Mr Scattergood, was found by the court to be a de facto director of the parent corporation to whom the transfer was made. If necessary for the decision, Scattergood was likely also a de facto director of the subsidiary corporation that ultimately received the payment, he being the majority shareholder of the parent and having attended the board meetings of the subsidiary. The other defendant was formally appointed as a director of all the corporations.
54 Justice Crow did properly distinguish the duty of loyalty from other general duties, particularly the duty of care (at 618): “Fiduciary duties are not less onerous than the common law duty of care: they are of a different quality. Fiduciary duties are concerned with concepts of honesty and loyalty, not with competence. In my view, the law draws a clear distinction between fiduciary duties and other duties that may be owed by a person in a fiduciary position. A fiduciary may also owe tortious and contractual duties to the cestui que trust: but that does not mean that those duties are fiduciary duties.” Justice Crow did not explicitly make the additional distinction between nominate and fiduciary duties.
55 ibid. at 618.

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Fiduciary Duties of Shareholders and Directors

It should be evident at this point that Justice Crow’s statement of "trite law" recharacterises nominate regulation as fiduciary regulation. The "best interest" and "proper purpose" rules are nominate rules, and are correctly applied separately from a fiduciary analysis. That separate analysis may ultimately produce concurrent liability (i.e. nominate and fiduciary), but it will properly avoid the implication that every action against corporate interest or for an improper purpose is a fiduciary breach. The case itself nicely illustrates the need for analytical separation. Justice Crow clearly was under the impression that fiduciary responsibility extended beyond the mischief of the self-interested exploitation of limited access. He expressly refused to find that the directors acted dishonesty in the sense that they "had any corrupt motive of personal gain". He nevertheless found them liable for a fiduciary breach. If, however, there was no self-interested or conflicted action, the conventional analysis would be that there were nominate breaches of the best interest and proper purpose rules, but no fiduciary breach. As it was, the facts indicated that the two directors were conflicted. Accordingly, upon separately applying the nominate and fiduciary analyses, the directors should have been found liable for concurrent breaches of their nominate duties (to act in the best interest of the corporation and for a proper purpose) and their fiduciary duty to act without a conflict of interest or duty. The result of the case would be the same, but the analysis would avoid the conflation of nominate and fiduciary responsibility.

Duties of directors to shareholders

The conventional principle is that directors do not have status fiduciary obligations to shareholders. That is consistent with the nature of the arrangement between a shareholder and a corporation. Shareholders grant open access to the corporation. Their subscriptions are conveyed to the corporation for its purposes. The corporation thereafter makes its assets (acquired both from shareholders and creditors) available to its directors on a limited access basis. There is no such limited access arrangement between the shareholders and the directors. The directors, as agents of the corporation, have the same open access as their corporate principal relative to the shareholders. Consequently, directors have a

56 ibid. at 636.
57 ibid. at 635. Justice Crow asserted that "since Extrasure was a subsidiary of Inbro Holdings, Mr. Scattergood's own interests as a shareholder in Inbro Holdings were not in conflict with his duties to Extrasure".
58 Confusion of the nominate and fiduciary dimensions may occur almost naturally or casually because of the parallel application of the two forms of regulation. On the other hand, once understood, application of the distinction is instinctive.
general fiduciary obligation to the corporation, but not to the shareholders, either collectively or individually. That, however, does not exhaust the possibilities.

Having concluded that directors do not have a *general* status fiduciary obligation to shareholders, it may be observed that some judges are of the view that directors have certain *discrete* duties to shareholders that are fiduciary in nature. Most of the discussion has been about a supposed positive fiduciary duty of disclosure to shareholders (alternatively described as a duty to inform or to advise). Directors are required to fully inform, or avoid misleading, shareholders when their action or approval is required. It should be obvious, however, that the disclosure obligations of directors (whether arising by statute or the common law) represent nominate regulation. Disclosure content will typically relate to material considerations affecting the management and direction of the business. No issue of director self-interest will necessarily be engaged. Though partial or misleading disclosure may be the means by which fiduciaries implement or conceal self-interested action, that does not make the duty to disclose a fiduciary duty. Rather, self-interested action in a limited access arrangement will independently attract fiduciary liability. In every case, the fiduciary breach is the opportunistic action itself, not the incomplete or misleading disclosure associated with it. Arguing that non-disclosure is the wrong is often merely an attempt to overcome the absence of self-interested conduct that would legitimately produce a fiduciary claim on a conventional analysis.

While there are no accepted status duties, it is generally recognised that an obligation may arise on the facts. That will depend on the existence of an actual arrangement of limited access between the director and shareholder. The exposure of directors to a fact-based fiduciary liability is the same exposure we all have, whether or not we are status fiduciaries. It is neither peculiar nor unprincipled. It is only the ordinary consequence of the direct application of a general civil liability, much like the application of tort liability for losses we negligently inflict on our “neighbours.” Recognising that, it is worth reiterating that fiduciary accountability and fiduciary liability are different matters. Fiduciary status (i.e. accountability) depends on whether the access of a particular actor is limited in some respect. Fiduciary liability thereafter depends on whether there is a possibility the commitment of the fiduciary may have been compromised by self-interest. For status fiduciaries, the first issue requires only proof of nominate status (as opposed to proof of fiduciary status). Fact-based accountability, on the other hand, depends entirely on demonstrating an actual limited access arrangement.

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Fiduciary Duties of Shareholders and Directors

The decision of the New Zealand Court of Appeal in *Coleman v Myers* is regarded as a seminal case on the fact-based fiduciary accountability of directors.\(^6\) Unfortunately, the fiduciary analysis is wrong.\(^6\) The complaint of the shareholders was that the directors had failed to disclose (through non-disclosure and active misrepresentation) their financing plans for acquiring all of the shares of the corporation. The court concluded that failure was a breach of a fiduciary obligation that arose on the facts. The court initially distinguished *Percival v Wright*, which the directors offered as authority for the proposition that directors do not have fiduciary obligations to shareholders. Justice Cooke correctly observed that *Percival v Wright* "would merely exclude any automatic fiduciary duty, leaving open the possibility of such a duty falling on a director in particular circumstances."\(^6\) There is no status fiduciary obligation because, as has been explained, the relation between director and shareholder is normally not one of limited access. In certain circumstances, however, a limited access arrangement may exist. As Justice Cooke recognised, that is an independent question.

Justice Woodhouse stated that though it "may not be possible to lay down any general test", there are nevertheless some factors that will usually have an influence. They include, I think, dependence upon information and advice, the existence of a relationship of confidence, the significance of some particular transaction for the parties and, of course, the extent of any positive action taken by or on behalf of the director or directors to promote it."\(^6\) Justice Woodhouse also identified asymmetric knowledge and experience as a factor. This list of factors, as is often the case with multiple factor tests, offers little guidance. Such tests suggest uncertainty over the purpose of legal intervention. Alternatively, they may suggest a conscious preference for indeterminate tests [which tend to enhance judicial power] over other tests that more sharply distill the essence of the wrong but coincidentally increase the exposure of adjudicators to challenges of their analyses and conclusions. For his part, Justice Woodhouse did not develop or clarify the relevance of the various factors. The first factor, it should be apparent, is not by itself an indicator of fiduciary status. Dependence, without an entitlement to depend, is irrelevant. It is necessary to conclude that actors have fiduciary obligations before injury resulting from dependence on their (self-serving) information or advice is actionable as a fiduciary breach. The second factor similarly begs the question. When does a relationship of confidence (i.e. a fiduciary relationship) exist? The third and fourth factors, as well as asymmetric knowledge and experience, are of no relevance. The issue is whether there is potential for the opportunism mischief (i.e. whether there is limited access). Neither the significance or promotion of a transaction, or asymmetric knowledge, are helpful in answering that question. They are in fact likely to misdirect the

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\(^6\) See the earlier decisions in *Gadsden v Bennetto* (1913) 3 W.W.R. 1109, Man. CA and *Allen v Hyatt* (1914) 30 T.L.R. 444, P.C.

\(^6\) The alternative grounds, which the Court of Appeal accepted, were fraudulent misrepresentation and breach of the duty of care.

\(^6\) n.61 above at 330.

\(^4\) *ibid.* at 325.
Robert Flannigan

analysis. As it was, none of the factors were shown to be significant in the circumstances. The directors did conceal information, but the question remained whether they were under a duty as fiduciaries to disclose to the shareholders.

Justice Cooke offered a somewhat different list of factors: "Broadly, the facts giving rise to the duty are the family character of this company; the positions of father and son in the company and the family; their high degree of inside knowledge; and the way in which they went about the takeover and the persuasion of shareholders".65 Again, none of these factors are self-evidently relevant to establishing a fiduciary obligation between directors and shareholders. They may suggest opportunity and mechanism, or they may represent considerations of "fairness", but they do not address in any clear way the critical initial question whether the relation between a director and a shareholder is in any respect a limited access arrangement.

There was no fiduciary obligation owed to the shareholders in this case because the directors simply did not have limited access to shareholder assets. The directors could indirectly affect shareholder assets (i.e. share value), but their access to the corporate assets (i.e. the inside information) was not a limited access relative to the shareholders (as opposed to the corporation). The understood basis of a subscription exchange between a corporation and its prospective shareholders is mutual open access. There was nothing to suggest that default understanding had been altered by any special arrangements or understandings between the parties.

The principle the Court of Appeal purported to apply (fact-based liability) is unquestionably valid. It had been established much earlier in the general fiduciary jurisprudence. Subsequently, it has been recognised in several cases dealing specifically with director’s obligations to shareholders.66 There seems to be real difficulty, however, with the practical application of the principle. As in the recent general jurisprudence (which is infrequently cited), there is uncertainty over what factors are analytically relevant. Coleman v Myers is just one example of a flawed analysis.

A second problematic analysis is found in the decision of the New South Wales Court of Appeal in Brunninghausen v Glavanics.67 The case involved a sale of shares between two brothers-in-law. The plaintiff argued that the defendant, as a director, breached a fact-based fiduciary obligation in failing to disclose contemporaneous negotiations for the sale of the company. The court accepted that argument notwithstanding the absence of any limited access arrangement. Justice Handley set the stage by observing that: "If the defendant had a fiduciary duty to the plaintiff he could not contract to purchase his shares that day without

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65 ibid. at 330.
67 (1999) 46 N.S.W.L.R. 538, CA.
Fiduciary Duties of Shareholders and Directors

disclosing the existence of the other negotiations".68 It was his view that the plaintiff could succeed only if the principle in Percival v Wright was not applicable: "The question is whether the principle applies in a case, such as the present, where the transaction did not concern the company, but only another shareholder".69 He stated that the duties of the directors to the corporation prevented "recognition of concurrent and identical duties to its shareholders covering the same matter... [but that] should not preclude the recognition of a fiduciary duty to shareholders in relation to dealings in their shares where this would not compete with any duty owed to the company".70 Here Justice Handley appears to misconceive the operation of fact-based accountability. It is not restricted to finding fiduciary duties only where conflicts would not be created with the existing status duties of directors. If directors enter into limited access arrangements with others, they are fiduciaries to those others, whether or not they conflict with existing duties.

Justice Handley then insisted that the courts have "recognised the existence of some fiduciary duties owed by directors to shareholders".71 As he understood it, recognised duties included the duty to treat shareholders equally and the duty to disclose material facts. The power to make calls on unpaid capital and the power to issue shares were also said to be matters of fiduciary regulation. It appears that Justice Handley, at this point in his analysis, shifted away from a search for fact-based obligation to an assertion of the existence of discrete status obligations. As noted in the discussion of the duty of disclosure, there are difficulties with that view. The authorities Justice Handley cites do not expressly address the point. Fiduciary characterisation is either assumed or is absent. The main authority is now essentially his own judgment, and that authority was installed elliptically. He asserted the fiduciary character of the duties without ever explaining why the director/shareholder relation should be recognised, in specific respects, as a status fiduciary category. More generally, it is evident that Justice Handley did not appreciate the distinction between nominate and fiduciary regulation. None of the duties he described are inherently fiduciary. They are all nominate duties. At the same time, however, they are all supported by the coincident application of fiduciary discipline. When directors make judgments about shareholder treatment, calls, issuing shares or disclosure, they will be liable for a fiduciary breach where their actions are conflicted or produce a personal benefit. Any other kind of action on their part in the course of exercising those duties or powers will be regulated by other forms of legal discipline (corporate law, negligence law, etc.).

Justice Handley then returned to a consideration of whether on the facts the defendant owed a fiduciary duty to the plaintiff. He identified several factors as relevant. As the de facto controlling director, the defendant "occupied a position

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8 ibid. at 546.
9 ibid. at 549.
70 ibid. at 549-550. Query whether the defendant was in breach of his fiduciary duty to the corporation to not benefit from confidential information.
71 ibid. at 550.

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of advantage in relation to the plaintiff", who was therefore "at the mercy of" and "vulnerable to abuse by" the defendant. 72 Justice Handley also observed that the transaction involved a "gross disparity in price" and a "quick profit", and would "destroy family harmony forever". 73 He concluded that the defendant was entitled to expect "that he would not be cheated by non-disclosure of negotiations". 74 The difficulty with this analysis is that none of these considerations are helpful in determining whether one actor has undertaken to act in the interests of another and thereby obtained only a limited access. Price disparity and a quick profit are plainly irrelevant, as is family harmony. The other considerations beg the question. In virtually every relation or transaction one party is in a "position of advantage" and, to that extent, the other party is at their mercy or vulnerable to abuse. As well, all parties will have their "expectations". 75 The question is still why their relationship or their expectations ought to attract fiduciary regulation (as opposed to any other kind of regulation, if any). As it was, nothing in the facts indicated that there was a limited access arrangement between the parties. The defendant did not undertake a separate obligation to act for the personal (versus derivative) interests of the plaintiff. This was an ordinary sale transaction where, as is often the case, one party has superior information. The defendant exploited his information in the sense that he kept it to himself. That is generally permissible conduct vis-à-vis a purchaser, unless special circumstances indicate otherwise. In this case, there were no circumstances that justified fiduciary liability to the plaintiff.

In a case that preceded Brunninghausen, the English Court of Appeal offered obiter comments on the matter. In Stein v Blake, the court confirmed that the misappropriation of corporate assets by a director was only a derivative loss to another shareholder, and therefore not actionable. 76 Justice Millett, however, went on to state that the shareholder would have had an action if the director had subsequently purchased his shares at the diminished value: "If, following the misappropriation and its concealment, the first defendant had purchased the plaintiff's shares at a value which reflected the reduced value of the old companies' assets, then he would have committed a separate breach of fiduciary duty ... Directors owe fiduciary duties to their company to preserve and defend its assets and to the shareholders to advise them properly so that they are not induced or compelled to part with their shares at an undervalue." 77 These comments clearly reference the decision in Coleman v Myers and are subject to the same objection that there is no basis for a fiduciary duty in the absence of a limited access arrangement. There is certainly no sound conceptual basis for the view that directors have a status fiduciary duty to shareholders from whom they purchase shares.

72 ibid. at 558.
73 ibid. at 559.
74 ibid.
75 As to reasonable or legitimate expectations, see Flannigan, n.1 above.
76 [1998] 1 B.C.L.C. 573, CA.
77 ibid. at 579.
Fiduciary Duties of Shareholders and Directors

There is one other case worth mentioning. In Peskin v Anderson, the English Court of Appeal rejected a claim of fact-based liability.8 Again the claim was that the directors were under a positive duty to disclose. Retired members of an incorporated club argued that they would not have retired had they been informed of the directors’ future intentions to sell assets and distribute the proceeds. Justice Mummery recognised that, while directors generally do not have fiduciary responsibilities to shareholders, special circumstances could give rise to fiduciary duties: "Those duties are, in general, attracted by and attached to a person who undertakes, or who, depending on all the circumstances, is treated as having assumed, responsibility to act on behalf of, or for the benefit of, another person. That other person may have entrusted or, depending on all the circumstances, may be treated as having entrusted, the care of his property, affairs, transactions or interests to him."79 While parts of Justice Mummery’s analysis are rather broadly drawn, this is a fair reproduction of the traditional articulation of the general test for fiduciary accountability.

The shareholders advanced three arguments for a disclosure obligation. The first, that disclosure was required when directors intended to commit ultra vires acts, was properly summarily rejected. The second argument was that special circumstances gave rise to a duty to disclose. The ostensible special circumstances were essentially that the directors had information they knew would be relevant to retirement decisions of the members. Justice Mummery concluded that the pleaded circumstances were not sufficient to "found a claim for the existence and breach of a fiduciary duty to disclose to the claimants the proposals and plans for demutalization".80 He observed that: "There was nothing special in the factual relationship... In particular there were no relevant dealings, negotiations, communications or other contact directly between the directors and the members..."81 The conclusion, in other words, was that no arrangement of limited access had been created between the directors and shareholders. Justice Simon Brown supported that conclusion by noting that directors are "under no general duty to inform shareholders of developments or proposals which may increase the value of their shareholding".82

The third line of argument raised the opportunism mischief directly, but also failed. The directors, it was said, were in a conflict position because they would receive personal benefits, and because disclosure would likely discourage retirements and thereby reduce the proportionate benefit the directors might realise in their capacity as shareholders. It was also argued that the directors had exploited their inside information by fast-tracking new memberships for their associates, who would then share in the distribution. These were viable fiduciary arguments. Unlike the first two arguments, the claims were explicitly concerned with the self-interested exercise of managerial power. As Justice Mummery pointed out,

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79 ibid. at 379.
80 ibid.; at 384.
81 ibid.
82 ibid. at 388.

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however, this line of argument only amounted to another attempt to establish "circumstances which justified an exception to the general rule that the directors' fiduciary duties are owed only to the company". As was the case for the second argument, the facts pleaded did not disclose special circumstances, and the alleged breaches were therefore a matter for the corporation alone to pursue. All of this was the equivalent of a conventional analysis with one obvious qualification. Justice Mummery's judgment was a response to a claim of a fiduciary duty of disclosure. His analysis, however, need not have focused on disclosure. The conventional view would be that the alleged benefits or conflicts were themselves actionable as fiduciary breaches. The claim that it is a fiduciary breach to not disclose an actual or potential fiduciary breach represents a confusion about the relevance of disclosure. Disclosure goes to the independent question of whether the relevant party approved or consented to the conflict or benefit. The issue is whether consent was obtained with full disclosure of the impugned actions or proposals. It is only in that sense that disclosure touches the issue of fiduciary liability. Otherwise, disclosure is a matter of nominate regulation.

Duties of directors to creditors

The conventional view is that directors do not have fiduciary obligations to creditors. In the past several years, however, a number of judges have declared that directors have, or should have, fiduciary duties to creditors where the corporation approaches insolvency (i.e. prior to the formal application of the insolvency regime). For a time, it seemed that the case law was on its way to developing an "insolvency" exception to the traditional position. Such a development, however, is now very much in doubt. Recent decisions have properly rejected the idea of a status obligation. There is a recognition that prudent directors may, and do in practice, "have regard to" the interests of creditors, but that regard is rightly identified as an aspect of the nominate duty to act in the best interest of the corporation.

8 ibid. at 385.
Fiduciary Duties of Shareholders and Directors

There are a variety of concerns with the extension of fiduciary duties to creditors. None of those concerns needs be catalogued here. It is enough to explain why the proposition fails at an abstract level. If the argument is that the duty to creditors is status-based, it is impossible to sustain. The arrangement between a corporation and its voluntary creditors is invariably one of open access, rather than limited access, and that obviates status fiduciary responsibility. Circumstances of near insolvency do not alter the position. The opportunism mischief is not dependent on, or sensitive to, relative solvency. The corporation is vulnerable to director opportunism whatever its economic condition. Similarly, the creditors are in precisely the same position with respect to director opportunism whether the corporation is or is not close to insolvency. Accordingly, because their positions are unchanged, there is no basis for an alteration of the conventional regulation. It is for the corporation to pursue the directors. The conceptual error that drives the claim for a duty to creditors is that fiduciary accountability is generally concerned with balancing the interests of corporate stakeholders. That balancing, however, is the function of corporate law, or for distressed corporations, insolvency law.

There remains the possibility that the parties may have established a basis for a fact-based obligation. Even in that event, the probability of liability is likely still small. Most of the self-interested actions that creditors would want to challenge would be breaches of the duty directors owe to the corporation. It would be for the corporation to take action to collect damages or unauthorised profits. If that were a credible view in the circumstances, it seems doubtful as a practical matter that a court would be receptive to finding an identical liability to creditors. In other circumstances, the difficulty would be that creditors were complaining about business judgments, rather than opportunistic conduct per se. That raises the prospect that any duty extended to creditors would pass over the boundary between nominate and fiduciary regulation. In the result, while it is an available argument, there will not often be a satisfactory basis for a fact-based liability. None of this, it should be understood, means that courts are never entitled to fix directors with duties to creditors, should that be considered appropriate in the insolvency context. It means only that, in the absence of limited access, such duties are not "fiduciary" duties.

Conclusion

There is much that is amiss with the fiduciary regulation of corporate relations. The apparent departures from the conventional position are largely the result of failures to comprehend the function of fiduciary accountability. That function is not to review the merits of business judgments, referee shareholder relations or revise bargains. The narrow conventional function is to control the self-regarding impulses of those who undertake to serve our purposes. In the corporate context,
as a matter of status, only directors are regarded as giving that undertaking, and it is given only to the corporation. All other shareholder and director relations are assumed to involve open access, and are therefore not status fiduciary relations. That, however, has not prevented some judges from arguing that directors have certain discrete status obligations to shareholders and creditors. Those are not sound views. On the other hand, it is always possible that a fiduciary obligation may arise on the facts. The general abstract test for fiduciary accountability is whether an arrangement is one of limited access. Liability will follow if limited access is exploited in the relevant (self-interested) way. The courts, unfortunately, have confused the analysis by introducing factors or considerations that are irrelevant, tautological or otherwise misleading. The effect overall is that fiduciary responsibility in the corporate context is moving away from its conventional foundation in the undisputed public policy of controlling opportunism in limited access arrangements. It seems that it is being redirected, *sub silentio*, to the broader task of generally adjusting business and investor relations in order to produce "fair" outcomes. To the extent that redirection progresses, the corporate fiduciary jurisprudence will further distinguish itself, without good reason, from the general fiduciary jurisprudence.