

THE END OF FIDUCIARY ACCOUNTABILITY

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Some judges and writers have been moving our regulation of opportunism off its conceptual rails. Numerous departures from convention presently are nesting in the jurisprudence and the literature. None of the departures are justified, and all should be purged. They choke the coherent expression of principle. If not dispatched, they may invite or license the collapse of our prudent strict supervision of the mischief that vitally undermines synergy and community.

I INTRODUCTION

In several previous articles I have examined various aspects of the law and literature on fiduciary accountability. Here I bring that work together in one relatively compact statement of principle and controversy in order to demonstrate that we appear to be at or near a tipping point where the conventional regulation may be replaced by an incoherent array of unjustified assertions and suppositions. I begin by summarising the function and content of the conventional regulation. I explain that it seeks to strictly constrain the opportunism that may compromise limited access undertakings.¹ I then turn to the obfuscation produced by the multiple departures that ostensibly either contract or expand the conventional design in disparate ways. The law, it appears, is working itself impure.² Each of the departures represents a challenge to conventional principle, and collectively they may signal the *collapse* of the conventional position. I will briefly describe each departure, and point the reader to my prior work where I show the departure to *be a departure*, and to be an *unjustified* departure.³ Finally, I explain further why the departures ought to be

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¹ See the discussion of limited access at R Flannigan, 'The Core Nature of Fiduciary Accountability' [2009] *New Zealand Law Review* 375, 376–85 ('Core Nature').

² There is no pure state of the law. There is in the immediate context only a notorious mischief and a conventional response. To the extent the law moves away from that recognised mischief and response without credible justification, it works itself impure. My work demonstrates that the law is not necessarily geared to work itself pure. The status quo position will always be continuously contested simply because it is the status quo. Variation will occur, sometimes justifiably, sometimes not.

³ It will become apparent that the incorporation by reference of my prior work into this compact statement essentially produces a book-length treatment of the need for clarification of the law.

discarded. My objective is to confirm the singular function or *end* of the accountability, and dismiss the other ends that addle the law. That conceptual pruning or definition is required if we are to avoid the negligent *end*, whole or partial, of the conventional accountability. My hope is that judges will affirm conventional principle, or specify precisely what other norms or policies inform the accountability, and what different test(s) that ought to produce. The whole of the analysis is applicable to every jurisdiction that initially recognised the English law of fiduciary accountability.

II THE OPPORTUNISM MISCHIEF

Fiduciary accountability seeks to address the risk that the performance of an undertaking of service will be compromised by production opportunism.⁴ That is not controversial.⁵ The seeming disorder that presently confounds the jurisprudence is due to wayward assertions and suppositions about the function, test for, and content of, the accountability. I will address the disorder at a later point. My initial task is to explain the animating mischief and its conventional regulation.

Self-regard is not a social mischief *per se*. It is required for success or survival in all kinds of environments. It has been bred into sentient life from the beginning of time. Self-regard, even aggressive self-regard, often is virtue. Today it is

⁴ Production opportunism is to be distinguished from exchange opportunism. See R Flannigan, 'The Economics of Fiduciary Accountability' (2007) 32 *Delaware Journal of Corporate Law* 393, 394–6 ('Economics of Fiduciary Accountability').

⁵ Opportunism regulation is a manifestation of or complement to the general social/legal norm of risk regulation. Those who project risk are accountable for any resulting adverse consequences. That regulation is required to prevent insulated risk-taking from elevating the level of risk in a community. The norm informs much of the law including, for example, the law of contract, tort and business organisation. On the operation of the risk regulation norm in the vicarious liability context, see R Flannigan, 'Enterprise Control: The Servant–Independent Contractor Distinction' (1987) 37 *University of Toronto Law Journal* 25, 26–36. In the present context, the risk regulation norm is applicable in two respects. Fiduciary accountability is required to protect beneficiaries from fiduciaries projecting risk through or in the form of opportunism. Fiduciary accountability is also required to protect third parties who potentially may be affected. The detriment of compromised performance, in addition to being felt by the beneficiary, may be transmitted through the beneficiary (or the assets) to third parties who are intended to benefit from the performance or who incidentally feel the effects. Consider separately that general forms of default regulation are public goods. They define our terms of interaction in default of revision, and thereby provide social structure. They are most valuable to us when they are intellectually accessible because they are uncomplicated manifestations of our social norms and social capital. Lawyers and judges capture undue increments of the value of a public good to the extent unnecessary complexity and uncertainty leads to its use or navigation requiring incremental advice, litigation and judicial resolution.

celebrated in market economies as desirable competition, and is generally accepted everywhere to some degree in every manner of social game (every human interaction).⁶ That said, the immediately relevant feature of self-regard is that it may be projected through an undertaking to serve others distinctly or jointly.⁷ That is, it often is in one's self-interest to pursue the interest of another. There are many such arrangements.⁸ Actors choose to act for or on behalf of others because they anticipate benefits of various kinds (eg fees, salaries, a share of profit, gratitude, the satisfaction of a moral or spiritual duty). We thus subscribe to both serving self and serving self through serving others. Both may advance synergy and community.

An undertaking of service normally leads to an actor gaining access to the value of the assets of others.⁹ That access may be acquired in different ways. Commonly access is acquired through a grant of authority. Trustees, agents and guardians, for example, may be given authority to enter into contracts (eg purchases, leases) or create or utilise assets (eg equipment, information). Access may also be acquired through authorised or incidental proximity. Agents or employees may in the course of performance be placed in a position where the value of assets simply is *available* to them, even though their use of the assets is not authorised. Access may also be acquired through the influence that may come with some undertakings of service.

The access that actors acquire through authority, proximity, influence or other means may be exploited for their personal gain.¹⁰ That predation possibility creates the risk that the service will be compromised. Performance (or the performance environment) will be shaped, at some unclear cost to beneficiaries and others, to produce exploitable circumstances. To be opportunistic is to find a way to exploit the value of the assets of others. To an opportunist, access is currency. Consider an authority granted to an agent to find and contract with a supplier for a particular component required for the assembly of a widget. That

⁶ Even charitable/nonprofit activity is self-interested. See R Flannigan, 'Tort Immunity for Nonprofit Volunteers' (2005) 84 *Canadian Bar Review* 1, 4–7.

⁷ R Flannigan, 'The Boundaries of Fiduciary Accountability' (2004) 83 *Canadian Bar Review* 35, 36–54 ('Boundaries of Fiduciary Accountability').

⁸ Consider the variety of occupations discussed in R Flannigan, 'Fiduciary Mechanics' (2008) 14 *Canadian Labour & Employment Law Journal* 25 ('Fiduciary Mechanics').

⁹ Often the access is to the assets managed, developed or consumed to perform the function. But other assets are exposed to exploitation in the course of performance. For example, an employee tasked by an employer to perform a service for a third party often gains access to the value of assets of the third party. Benefitting from that access may be a breach to both the employer and the third party. See R Flannigan, 'Fiduciary Accessories' (2019) 38 *University of Queensland Law Journal* 41 ('Fiduciary Accessories').

¹⁰ See Flannigan, 'Core Nature' (n 1) 378–88. The actual means by which an actor acquires access does not imply a particularised kind of exploitation or regulation. The fact that the access is for a limited purpose, however obtained, alone raises the risk of compromised performance and alone justifies a generic regulation.

authority is a value-generating asset in two respects. First, it is a link or key to other assets. In the example, the other asset is the money that will be paid to the supplier that is selected by the agent. Thus an agent who selects a personally affiliated firm to supply the component, without disclosing the conflict, will have silently profited from the authority by arranging a contract that may not be the best for the principal. Secondly, the authority by itself is capable of generating exploitable value. The agent may in return for a fee or a kickback reveal to a potential supplier the terms on which the principal authorised the agent to contract. The supplier may ultimately choose to not proceed to bid, or the bid may not succeed for some reason, but the agent will have extracted value from the authority alone.

One form of authority deserves special mention because it is thought in some quarters to be exclusively definitive of fiduciary accountability. That authority is to exercise a discretion of some kind. Discretion, it should be evident, is not congruent with the risk of compromised performance. A solicitor may only be authorised to acquire information from third parties to produce a report respecting potential liability. A trustee or agent may only be authorised to execute transactions that are fully specified. An employee may only be authorised to transport a specified load of goods to a specified destination by a specified mode of transport. No discretion is granted to these actors, but the access to asset value they obtain through their authority may still be exploited. An authority to exercise a discretion is just one means (one kind of authority) that gives access to the value of the assets that are the object of, or incidentally proximate to, the discretion.

No exploitation of a limited access is benign. Consider two examples that might be thought to be unobjectionable. Receiving an undisclosed fee from a third party for performing some aspect of a service function might be regarded as unobjectionable if the function ostensibly was properly performed and the payment did not come out of the assets intended to benefit the beneficiary. Using confidential information to make trades on a public stock market might also appear to be unobjectionable because the information is not conveyed to competitors or others, the information seemingly does not lose its confidential character, and the gain comes through an external neutral institution. In both examples, however, there remains a risk that the service may be compromised by personal interest. The prospect of a fee or trading gains may consciously or subconsciously incent actors to take (or not take) actions in the course of performing their other-regarding function, including shaping the actions of co-workers or related processes, that will have the effect of distorting performance (eg shaping decisions to create exploitable share price spikes up or down). That is, the self-interest originally subordinated to others may reassert itself inconsistently with the undertaking to serve. It is not a new or different self-interest. It is the same self-interest that motivated the undertaking to serve, but which now potentially is corrosive of that service. A self-interest that defects from a voluntary undertaking of service becomes objectionable opportunism.

It is practically impossible in most cases to know whether an undertaking of service was actually compromised by opportunistic impulse. The extraction or diversion of value that is made possible through the access acquired may effectively be concealed or coloured.¹¹ It is the nature of an undertaking of service that, once engaged, it *de facto* enables or facilitates the unauthorised appropriation of value. The ceding of access to another for a limited purpose inherently creates the risk that the access will be turned to other purposes.

III THE CONVENTIONAL ACCOUNTABILITY

The courts have always understood that opportunism is latent in all relations of service. They also understood the difficulty in detecting and proving the actual operation of the opportunistic impulse. They therefore designed the strict regulation that we now identify as fiduciary accountability.¹² They concluded that those who undertake to serve others must not allow selective advantage to possibly compromise their function. Actors were made *accountable* because their undertaking of service led to an access that could be exploited.¹³ That accountability then became *liability* where the risk of compromised performance was indicated by the presence of an unauthorised conflict or benefit. Both the accountability and the liability normally had a default operation. Either could be varied by the appropriate parties in whatever way and to whatever extent might

¹¹ See R Flannigan, 'The Strict Character of Fiduciary Liability' [2006] *New Zealand Law Review* 209, 210–14 ('Strict Character'). To the extent that conflicts and benefits are unappreciated, undetectable, or unquantifiable, fiduciary accountability underperforms (or is incapable of performing) its assigned function. Consider ethnic, class, racial, ideological, gender and religious conflicts of interest and duty, or duty and duty. Consider remote, psychic and fraternity benefits. Consider further that sophisticated and intuitive opportunists know how to operate below or through most thresholds of detection.

¹² See R Flannigan, 'The Limits of Status Assertion' (1999) 21 *Advocates' Quarterly* 397, 398–404. As I will note at a later point, the term 'fiduciary' today is used as a generic descriptor for anyone who undertakes to act in the interest of another. That usage may lead one mistakenly to conclude that the 'fiduciary' duty of a fiduciary is to act in the interest of the other. The only conventional fiduciary duty is to avoid compromising an other-regarding function with unauthorised conflicts or benefits. Because of the potential for confusion, it might be preferable to find a different descriptor to identify generically those who serve others. We might, for example, resurrect and repurpose the moribund term 'servant'. Trustees, agents, employees, directors and all other fiduciaries would then generally be characterised as 'servants' in the new sense (those who undertake to serve others) and they would have a more precisely delimited *fiduciary* duty to not exploit the access that comes with their service.

¹³ Flannigan, 'Boundaries of Fiduciary Accountability' (n 7) 37–8; Flannigan, 'Fiduciary Accessories' (n 9) 43–8.

be thought desirable.¹⁴ And no service was privileged as being intrinsically valuable. Context was irrelevant if an access was assumed for a limited purpose. Every undertaking of service was equally entitled to not be compromised by opportunism.

A strong jurisprudence clearly elucidates that conventional position. The more familiar English cases include, in chronological order, *Keech v Sandford*,¹⁵ *Ex parte Lacey*,¹⁶ *Ex parte James*,¹⁷ *Ex parte Bennett*,¹⁸ *Aberdeen Railway Co v Blaikie Brothers*,¹⁹ *Parker v McKenna*,²⁰ *Bray v Ford*,²¹ and *Regal (Hastings) Ltd v Gulliver*.²² One could fully comprehend the nature of the regulation by digesting those cases alone. There are thousands of other decisions across all common law jurisdictions that confirm conventional principle.²³

From the beginning the accountability developed as an independent general jurisdiction. It did not develop merely by way of analogy to the trust, though the judges initially employed the language of trust and confidence. It was initially applied contemporaneously to several nominate relations.²⁴ In addition to trustees, it was applied to, for example, agents, employees, partners and attorneys.²⁵ Over time, through both simple repetition and recognition that the

¹⁴ Though usually it is not prudent to agree to an exclusion of conventional fiduciary accountability, there are instances where parties might reasonably choose to do so. See Flannigan, 'Core Nature' (n 1) 388–98. See also R Flannigan, 'Collateral Contracting Implicitly May Vary Fiduciary Accountability' (2010) 126 *Law Quarterly Review* 496. Consider also that as the coherence or certainty of a default legal accountability deteriorates, it may become prudent to exclude its application entirely and replace it with a customised negotiated regulation.

¹⁵ (1726) Sel Cas T King 61; 25 ER 223.

¹⁶ (1802) 6 Ves Jun 625, 627; 31 ER 1228.

¹⁷ (1803) 8 Ves Jun 337; 32 ER 385.

¹⁸ (1805) 10 Ves Jun 381; 32 ER 893.

¹⁹ (1854) 23 LT 315 (HL).

²⁰ (1874) LR 10 Ch App 96 (CA).

²¹ [1896] AC 44 (HL).

²² [1942] 1 All ER 378 (HL).

²³ It is convenient here to also identify some of the cases that instituted distortion or enabled subsequent distortion. See, eg, *North-West Transportation Co v Beatty* (1887) 12 AC 589 (HL); *Robb v Green* [1895] 2 QB 315 (CA); *Re Smith and Fawcett Ltd* [1942] 1 Ch 304 (CA); *Canadian Aero Service Ltd v O'Malley* [1974] SCR 592; *National Westminster Bank plc v Morgan* [1985] AC 686 (HL); *Nottingham University v Fishel* [2001] RPC 22 (QB).

²⁴ A 'nominate' status is a named status. For example, the agency relation creates the nominate status of agent, the employment relation the nominate status of employee, and so on. There is an idiomatic nominate regulation associated with each nominate status (eg agency law, employment law). See R Flannigan, 'Fiduciary Control of Political Corruption' (2002) 26 *Advocates' Quarterly* 252, 253–8 ('Fiduciary Control of Political Corruption'). Consider also that there are *general* nominate categories of regulation (eg contract law, tort law, criminal law) that, like fiduciary accountability, apply a generic content generally.

²⁵ See the cases listed at R Flannigan, 'Access or Expectation: The Test for Fiduciary Accountability' (2010) 89 *Canadian Bar Review* 1, 5 n 18 ('Access or Expectation'). The rationale and generality of

opportunism mischief was latent across the full scope of the undertaking, the accountability of those classes of actors (and others) became a status accountability. Proving the status of an actor (proving a formal or de facto undertaking to serve as a trustee, agent, etc) was enough to engage the accountability. The accountability, however, was not confined to the status classes. It was clear that anyone who undertook to act for another in some respect, thereby creating (in the early terminology of the courts) a relation of 'trust and confidence', was accountable.²⁶ Both the status and fact-based accountability rested on the same conceptual foundation. The only difference was that, instead of the usually easier burden of proving an actual nominate *status* (where the undertaking of service is express or implicit in the nominate definition of each particular status), fact-based accountability required proof of an actual limited access undertaking.

Not every undertaking attracts the accountability.²⁷ The discipline is imposed only for limited access undertakings. Access obviously is required. In the

the accountability was concisely described by counsel in *York Buildings Co v Mackenzie* (1795) 8 Bro PC 42, 63–4; 3 ER 432, 446 (HL): 'The ground on which the disability or disqualification rests, is no other than that principle which dictates that a person cannot be both judge and party. No man can serve two masters. He that is entrusted with the interest of others, cannot be allowed to make the business an object of interest to himself; because from the frailty of nature, one who has the power, will be too readily seized with the inclination to use the opportunity for serving his own interest at the expence [sic] of those for whom he is entrusted ... The danger of temptation, from the facility and advantages for doing wrong, which a particular situation affords, does, out of the mere necessity of the case, work a disqualification; nothing less than incapacity being able to shut the door against temptation where the danger is imminent, and the security against discovery great, as it must be where the difficulty of prevention or remedy is inherent to the very situation which creates the danger. The wise policy of the law has therefore put the sting of a disability into the temptation as a defensive weapon against the strength of the danger which lies in the situation ... He is a trustee (in technical style) who is vested with property in trust for others; but every man has a trust, to whom a business is committed by another, or the charge and care of any concern is confided or delegated by commission. He that is employed by one either to sell or to buy land for him, is in that instance his trustee, and has a trust reposed in him.' See also *Greenlaw v King* (1841) 5 Jur 18, 19 ('[the rule is] one of universal application, affecting all persons who come within its principle'). See additionally the definitive review of the English jurisprudence by Chancellor Kent in the American case of *Davoue v Fanning* (1816) 2 Johns Ch 252.

²⁶ Possibly the best illustration of a proper fact-based analysis is the decision of the English Court of Appeal in *Tufton v Sporni* [1952] 2 TLR 516. See R Flannigan, 'Presumed Undue Influence: The False Partition from Fiduciary Accountability' (2015) 34 *University of Queensland Law Journal* 171, 197–8 ('Presumed Undue Influence').

²⁷ It should also be appreciated that some undertakings create only partial fiduciary accountability. I periodically use the example of the bank-depositor relation. The bank has an open access to the deposited funds, but only a limited access to depositor information. The bank will also be accountable as a fiduciary when it undertakes to advise depositors about investment options. That is, there may be a number of dimensions to a relation or function, some of which involve an open access, some of which involve a limited access. Another example would be a lender providing funds

absence of some kind of access to the value of the assets of others (including through one's own assets), there is nothing on which the opportunistic impulse can operate. Access by itself, however, is not sufficient. It must be limited by an other-regarding purpose. The access must have been acquired or assumed as part of, or in the course of, service (or purported or deemed service) on behalf of another. It is the limited access quality of an undertaking that directly identifies unauthorised self-regard as objectionable. Looking to self, however engineered, immediately compromises an other-regarding function. That limited access understanding of the onset of fiduciary accountability is explicit in numerous cases,²⁸ and otherwise implicit in every conventional authority.

for a specified purpose. If the funds are not used for the specified purpose, they are held for the lender. The lender is the intended beneficiary of the borrower's limited access undertaking, the lender believing the limitation reduces the risk associated with the loan. The borrower is given open access to the funds within the specified purpose, but only a limited access outside the purpose. It would be a fiduciary breach, for example, for the borrower to take a bribe to redirect part of the funds to an unauthorised project. Recognise also that the nature of some undertakings cannot be determined until a variegated nominate category is reduced to its component arrangements. An example is a bailment undertaking. The nature of the access that a bailee acquires depends on the kind of bailment undertaken. A custodial bailment is a limited access undertaking, while a bailment for hire is an open access undertaking. See *Coggs v Bernard* (1703) 2 Ld Raym 909, 92 ER 107. Consider further that some writers doubt that an undertaking of service is necessary for fiduciary accountability. See Matthew Harding, 'Fiduciary Undertakings', in Paul Miller and Andrew Gold (eds), *Contract, Status and Fiduciary Law* (Oxford University Press, 2016) ch 3, 73–5. Harding bases his doubt on the parent–child relation. He asserts (at 73) that is a 'situation in which fiduciary norms are imposed absent an undertaking'. In fact there is an undertaking. There is a general social consensus that parents are to act in the best interest of their children. Most every community has implemented that consensus through legislative or judicial fiat. That is, the community has associated parent status with an undertaking of service. Accordingly, when an actor voluntarily chooses to become (or voluntarily risks becoming) a parent, that actor voluntarily undertakes to act in the best interest of the child. That nominate undertaking simultaneously activates the proscription on unauthorised conflicts or benefits. It is irrelevant that the actor did not willingly or knowingly become a parent. It is no different from other status relations. For example, actors who voluntarily assume the status of a trustee, agent or employee (even if they did not subjectively do so willingly or knowingly) thereby voluntarily assume the default fiduciary accountability that the community has tied to that status. Further, it is not proper to say (as Harding does at 75) that, because parents are already subject to norms such as the duty to maintain the child, an undertaking of service by a parent is 'superfluous in ascertaining whether parents are fiduciaries'. It should be appreciated that any state-defined parental duty to act in the best interest of a child actually confirms (rather than negates) the application of fiduciary accountability (the duty to not allow interest to compromise nominate function).

²⁸ See, eg, *Rothschild v Brookman* (1831) 5 Bligh NS 165, 190; 5 ER 273, 282 ('But the law which your lordships are to administer is a law of jealousy: it will not allow any man to be trusted with power, that will give him an opportunity of taking advantage of his employer'); *Carter v Palmer* (1842) 8 Cl & Finn 657, 705; 8 ER 256, 277 ('As agent, he necessarily became acquainted with all the circumstances connected with these securities, and most particularly with the means which existed of providing for payment of them'); *Robertson v Norris* (1858) 1 Giff 421, 424–5; 65 ER 983, 984 ('The legitimate purpose [of a mortgage power of sale] being to secure repayment of his

Two early cases are instructive. In *Whichcote v Lawrence* Loughborough LC described the ‘principle of clear reasoning’ as follows:

[H]e who undertakes to act for another in any matter, shall not in the same matter act for himself. Therefore a trustee to sell shall not gain any advantage by being himself the person to buy. He is not acting with that want of interest, that total absence of temptation, that duty imposed upon him, that he shall gain no profit. The consequence is beyond doubt, that, in whatever shape that profit redounds to him, whether by management, which is the common case, or by superior good fortune, it is not fit, that benefit shall remain to him. It ought to be communicated to those, whose interests being put under his care afforded him the means of gaining that advantage.²⁹

mortgage money, if he uses the power for another purpose — from any ill motive to effect other purposes of his own, or to serve the purposes of other individuals — the Court considers that to be a fraud in the exercise of the power, because it is using the power for purposes foreign to that for which it was intended’); *Shallcross v Oldham* (1862) 2 J & H 609, 616; 70 ER 1202, 1205 (‘where a chattel is entrusted to an agent to be used for the owner’s benefit, all of the profits which the agent may make by using that chattel belong to the owner’); *Merryweather v Moore* [1892] 2 Ch 518, 524 (‘[Was there an abuse of the] confidence arising out of the mere fact of employment, the confidence being shortly this, that the servant shall not use, except for the purposes of service, the opportunities which that service gives him of gaining information?’); *Lamb v Evans* [1893] 1 Ch 218, 230 (CA) (‘these materials were not to be used otherwise than for the purposes of the employment in the course of which they were obtained’) and 235 (‘to allow you to use any of those materials for your own purposes would be allowing you to use them for a purpose for which they were not compiled’); *Reid and Sigrist Ltd v Moss and Mechanism Ltd* (1932) 49 RPC 461, 480 (‘a servant cannot use to the detriment of his master information of a confidential or secret nature entrusted to the servant or learnt by him in the course of his employment’); *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2011] EWCA Civ 347, [34] (‘Similarly, a person entrusted with another person’s money for a specific purpose has fiduciary duties to the other person in respect of the use to which those monies are put’); 581257 *Alberta Ltd v Aujla*, 2013 ABCA 16, [45] (‘where an employee is entrusted with the keys to the till and tasked with handling funds belonging to his or her employer, then that employee ought properly to be regarded as standing in a fiduciary relationship with his or her employer with respect to the handling of those funds’). See also the review of early judgments and texts at Flannigan, ‘Access or Expectation’ (n 25) 6–8.

²⁹ (1798) 3 Ves Jun 740, 750; 30 ER 1248, 1253. While the decision was conventional, Lord Loughborough (who became Lord Rosslyn) was criticised for suggesting that fiduciary accountability required proof of ‘advantage’. See the review in *Davoue v Fanning* (1816) 2 Johns Ch 252, 260. That controversy, however, does not detract from the significance assignable to the judgment. Moreover, it is possible to understand the ostensible suggestion in a conventional way. While persons claiming fiduciary breach need not prove actual harm or unfairness, they must prove either a benefit or the possibility of a conflict. A benefit plainly is an ‘advantage’. A conflict is as well. To act while conflicted is to permit a personal consideration (the conflict) to potentially (consciously or subconsciously) affect one’s function. It is in that sense that it may be said that a claimant must prove ‘advantage’ (ie the presence of an unauthorised conflict or benefit). A collateral observation is that earlier, in *York Buildings Co v Mackenzie* (1795) 3 Paton 378, 398 (HL), Lord Loughborough rightly said that: ‘A person who is an agent for another, undertakes a duty in which there is confidence reposed’, but he then went on to say inexplicably that: ‘The bargain must be perfectly fair and equal, at the best price’. That suggestion of a fairness criterion was not repeated in his later judgments, including *Whichcote*. See Flannigan, ‘Presumed Undue Influence’

Loughborough LC made it clear that it was the undertaking that triggered the accountability.³⁰ The limited access acquired was the means ('interests being put under his care afforded him the means of gaining that advantage') that produced the risk (the 'temptation') that the function might be compromised.³¹

The second decision is that of Lord Eldon in *Ex parte Lacey*, involving a purchase by an assignee in bankruptcy of property of the estate.³² Several aspects of the conventional regulation are illustrated. The first is that an actor who undertakes to serve another thereby assumes a parallel duty to forgo unauthorised personal advantage. According to Lord Eldon: 'A trustee, who is entrusted to sell and manage for others, undertakes in the same moment, in which he becomes a trustee, not to manage for the benefit and advantage of himself.'³³ It was thus again made clear that it was the undertaking to serve that initiated the parallel accountability. There was no suggestion of a requirement that an actor undertaking to serve must actually be trusted in some subjective sense (an intellectual or relational attachment or submission).³⁴ The imposition

(n 26) 176 n 35. See also the apparently unreported 15 March 1794 decision of Lord Loughborough referred to and affirmed in *Henchman v East India Co* (1797) 8 Bro 85, 102; 3 ER 459, 470.

³⁰ See also *Massey v Davies* (1794) 2 Ves Jun 317; 30 ER 651, where Arden MR (at 320–1; 653) asked if 'a man undertakes to buy for me', could he be trusted to be the seller? And see *Bath v Standard Land Co Ltd* [1911] 1 Ch 618 (CA), where Buckley LJ (at 643) recognised that 'the confidence induced by undertaking any service for another is a sufficient legal consideration to create a duty in the performance of it'. See also (without assessing the case generally) *Vivendi SA v Richards* [2013] EWHC 3006 (Ch), where Newey J reviewed more recent statements of the need for an undertaking. On the significance of an undertaking, see further Flannigan, 'Core Nature' (n 1) 378–385; R Flannigan, 'Fact-Based Fiduciary Accountability in Canada' (2010) 36 *Advocates' Quarterly* 431, 439–46 ('Fact-Based Fiduciary Accountability in Canada'); Flannigan, 'Fiduciary Accessories' (n 9) 43–8.

³¹ Statements that the mischief is compromised performance are common and uncontroverted. See, eg, *Ex parte Bennett* (1805) 10 Ves Jun 381, 394; 32 ER 893, 897 (a trustee cannot purchase because 'human infirmity will in very few instances permit a man to exert against himself that providence, which a vendor ought to exert, in order to sell to the best advantage'); *Bentley v Craven* (1853) 18 Beav 75, 76–7; 52 ER 29, 30 ('an agent will not be allowed to place himself in a situation which, under ordinary circumstances, would tempt a man to do that which is not best for his principal, and it is the plain duty of every agent to do the best he can for his principal'); *Bray v Ford* [1896] AC 44, 51–2 (HL) ('human nature being what it is, there is a danger of the person holding a fiduciary position being swayed by interest rather than duty, and thus prejudicing those whom he was bound to protect').

³² (1802) 6 Ves Jun 625; 31 ER 1228.

³³ *Ibid* 626.

³⁴ The language of 'reposing trust' appears in earlier cases, but in some of them it seems that the relevant 'trust' is rightly understood to be the trust arranged *by the law*. In *Bishop of Winchester v Knight* (1717) 1 P Wms 406; 24 ER 447, the Lord Chancellor said (at 407; 448) that the extraction of asset value was a breach 'of the trust which the law reposes in the tenant'. In *Welles v Middleton* (1784) 1 Cox 112; 29 ER 1086, the Lord Chancellor referred to the actual reposing of trust a number

of the legal accountability prompted by the undertaking essentially *made* the relation one of 'trust' or 'trust and confidence' in the sense that the beneficiary was entitled (by law) to 'trust' that the performance of the undertaking would not be compromised by the self-regard of the fiduciary.³⁵

A second aspect illustrated by the judgment is that the undertaking party acquires an access that may be exploited, which exploitation often will be difficult to detect. Lord Eldon observed that 'the Law supposes him to have acquired all the knowledge a trustee may acquire [the access]; which may be very useful to him; but the communication of which to the *Cestuy que trust* the Court can never be sure he has made'.³⁶ Lord Eldon elaborated as follows:

It is founded upon this; that though you may see in a particular case, that he has not made advantage, it is utterly impossible to examine upon satisfactory evidence in the power of the Court, by which I mean, in the power of the parties, in ninety-nine cases out of a hundred, whether he has made advantage, or not. Suppose, a trustee buys any estate; and by the knowledge acquired in that character discovers a valuable coal-mine under it; and locking that up in his own breast enters into a contract with *Cestuy que trust*: if he chooses to deny it, how can the Court try that against that denial? The probability is, that a trustee, who has once conceived such a purpose, will never disclose it: and the *Cestuy que trust* will be effectually defrauded.³⁷

Importantly, the mischief described in Lord Eldon's example arose from the access acquired (to information), and not from the presence or exercise of discretion on the part of the trustee.³⁸ Beyond that, it is clear that the detection concern was of organic significance in the formulation of the strict character of the regulation.³⁹

of times before then (at 125; 1092) describing the guardianship relation in another case as one where the guardian has 'the confidence that relation derives [sic] to him'.

³⁵ On the irrelevance of subjective trust, see R Flannigan, 'Fiduciary Obligation in the Supreme Court' (1990) 54 *Saskatchewan Law Review* 45, 48 ('Fiduciary Obligation in the Supreme Court'); Flannigan, 'Strict Character' (n 11); Flannigan, 'Fiduciary Accessories' (n 9) 43–8.

³⁶ *Ex parte Lacey* (1802) 6 Ves Jun 625, 626–7; 31 ER 1228, 1228.

³⁷ *Ibid* 627; 1229. Lord Eldon borrowed (and repurposed) his mine example from Lord Thurlow in *Fox v Mackreth* (1791) 2 Cox 320; 30 ER 148.

³⁸ In a later discussion of *Fox v Mackreth*, Lord Eldon noted ((1802) 6 Ves Jun 625, 627; 31 ER 1228, 1229) that upon assuming trustee status the defendant 'had acquired a knowledge of the value of the estate'. The route to exploitation (as illustrated again and again by numerous other cases) was through the access acquired, not any discretion possessed.

³⁹ The detection concern appears consistently in the jurisprudence. Other early cases include *Campbell v Walker* (1800) 5 Ves Jun 678; 31 ER 801; *Lister v Lister* (1802) 6 Ves Jun 631; 31 ER 1231; *Ex parte James* (1803) 8 Ves Jun 338; 32 ER 385; *Ex parte Bennett* (1805) 10 Ves Jun 381; 32 ER 893; *Greenlaw v King* (1840) 3 Beav 49; 49 ER 19; *affd* (1841) 5 Jur 18. See Flannigan, 'Strict Character' (n 11).

A third aspect is that information often is the asset that is exploited.⁴⁰ Information may be conveyed (or exposed) to a fiduciary as part of enabling performance. The information may concern other assets, intentions, opportunities or the exploitable circumstances of third parties. Additionally, as Lord Eldon's example indicates, it may be acquired independently by a fiduciary, possibly in the course of performance, accidentally or through active collateral investigation. In every case the access to the information is acquired as a consequence of the limited access undertaking, and therefore on conventional principle must not be exploited. Information is just another asset, the value of which may be diverted by an opportunistic fiduciary. Recognise as well that fiduciaries may use their own information (their externally acquired knowledge of the context or circumstances of parties or transactions) to exploit the access to asset value associated with their undertaking. They might, for example, strategically distribute information to suggest that the beneficiary ought to pursue a course of action that effectively will increase the benefit the fiduciary will extract from the access the fiduciary has to assets intended to benefit the beneficiary.

Another feature of the accountability that appears in the judgment is that a personal conflict or benefit is permissible if the informed consent of the appropriate party is obtained. In the case itself the consent issue did not arise, but Lord Eldon discussed how personal advantage may be permitted if the fiduciary character of a relation is first dissolved by the termination of the relation. The decision also indicates that it is no excuse that an advantage was fair, fortuitous

⁴⁰ There are other foundational cases where the fiduciary breach is the exploitation of information. See, eg, *Ex parte Bennett* (1805) 10 Ves Jun 381; 32 ER 893; *Boardman v Phipps* [1967] 2 AC 46 (HL). That negates the supposition that there is a breach of confidence doctrine that developed uniquely. Recognise separately that today the opportunistic exploitation of information is pervasive. Online undertakings of service, for example, often are designed deceptively to extract tradeable information. An undertaking to conduct a personality assessment (a 'free' personality test) may actually be a means to extract from the general population delicate information about individual circumstances. The information is formally sought (by the test provider), and implicitly delivered (by the test user), for a limited purpose, but is then exploited for a different (self-serving) purpose without consent (the user of the service having no knowledge of the remote secret benefit). Consider also an online calendar service. The information entered into a calendar may be highly valuable to third parties, who are willing to pay (or bribe) the provider (or provider employees) to disclose it. Clearly there is a role for fiduciary accountability (the same role as elsewhere) in the regulation of online interactions.

or of small value,⁴¹ that the fiduciary acted morally or honestly,⁴² or that the value of an advantage was set by an ostensibly neutral process (eg an auction).⁴³

It is useful here to amplify the first point taken from *Ex parte Lacey*. Fiduciary accountability is a parallel general regulation that applies once an actor undertakes to serve. An undertaking to serve may be proved directly (a fact-based analysis) or by proving the nominate character of an arrangement (a status-based analysis). There are numerous nominate (named) relations for which the law (the community) has developed an idiocratic set of rules.⁴⁴ Arrangements that satisfy the applicable tests for what constitutes, for example, a trust, agency, employment or partnership each attract a distinct array of legal rules (ie trust law, agency law, employment law, partnership law). Fiduciary accountability is not concerned with whether those idiocratic nominate rules are breached. Rather, in its parallel application, it is concerned with whether the nominate function might be compromised by opportunistic impulse. Fiduciary accountability is not itself an idiocratic element of each particular nominate class. Its content is not defined by the idiosyncrasy of the nominate character. It is a general regulation (like contract and tort law) that applies generic rules across all limited access relations. That often is not understood. It is common for judges and writers to conflate nominate and fiduciary accountability.

The most frequent conflation is to directly equate the content of fiduciary accountability with the undertaking of service. That undertaking often is described as an undertaking to act in the interest or best interest of the beneficiary. Whether negotiated, or implied by the assumption of a status, the physical undertaking to serve becomes a legal duty to pursue best interest. But that is not the *fiduciary* duty. The undertaking of service merely activates or

⁴¹ As to the 'small value' argument, see *Forbes v Ross* (1788) 2 Cox 113, 116; 30 ER 52, 54 ('there is no more sacred rule of a Court of Equity than that a trustee cannot so execute a trust as to have the least benefit from it himself') and 117; 54 ('a trustee cannot bargain with himself so as to derive through the medium of the contract any degree of forbearance or advantage whatever to himself'); *Docker v Somes* (1834) 2 My & K 655, 664; 39 ER 1095, 1098 ('yet for every farthing of profit he may make he shall be accountable to the trust estate'); *Kemp v Rose* (1858) 1 Giff 258, 266; 65 ER 910, 913 ('the smallest speck or circumstance which might unfairly bias his judgment'); *Turnbull v Garden* (1869) 38 LJ (Ch) 331, 334 ('What appears in this case shews the danger of allowing even the smallest departure from the rule that a person who is dealing with another man's money ought to give the truest account of what he has done, and ought not to receive anything in the nature of a present or allowance without the full knowledge of the principal that he is so acting').

⁴² The courts have also said that the accountability does not necessarily impute moral failure. See *Ex parte Bennett* (1805) 10 Ves Jun 381, 393; 32 ER 893, 897; *Greenlaw v King* (1841) 5 Jur 18; *Boardman v Phipps* [1967] 2 AC 46 (HL).

⁴³ On the concern with an auction, see *Ex parte James* (1803) 8 Ves Jun 338; 32 ER 385.

⁴⁴ Flannigan, 'Boundaries of Fiduciary Accountability' (n 7) 40–2; R Flannigan, 'Fiduciary Duties of Shareholders and Directors' [2004] *Journal of Business Law* 277, 278–9 ('Fiduciary Duties of Shareholders and Directors').

initiates the fiduciary duty.⁴⁵ The content of that duty of 'loyalty' (as it is often described) so triggered is to forgo unauthorised conflicts or benefits, the discrete objective being to avoid compromised function. The proscription on unauthorised conflicts or benefits, it must be understood, is just one way in which the law requires a fiduciary to act in the best interest of a beneficiary. Fiduciaries are also required to act in the best interest of their beneficiaries by, for example, not exceeding their authority and not performing their functions negligently. Like the duty of loyalty, the duty to be authorised and the duty of care have an independent general and generic operation. Breaches of those three general duties (of authorisation, care and loyalty) constitute the great bulk of the failures to act in the best interest of a beneficiary. Accordingly, once those independent forms of accountability are addressed by a judge, there is little left to be addressed in an analysis of the duty to act in the best interest of the beneficiary.⁴⁶ Even then the claim of failed duty will be met by the assertion of the deference or 'business judgement rule' that courts will not interfere with actions simply because they do not regard them as the best option in the circumstances. In the absence of a recognised wrong, judges will defer to the person who was authorised to take the action. Ultimately there will be little prospect of success for a claim where there is no excess of authority, no negligence and no detectable risk of opportunism (because no detected conflict or benefit).

The above summary illuminates the rationality and simplicity of fiduciary accountability.⁴⁷ The objective is to check performance compromised by opportunism. Its application proceeds in two stages. The first stage is to determine *accountability*. Was the access of the actor limited by an undertaking of service? That is determined by the nominate status of certain actors, or pursuant to a fact-based analysis. The second stage is to determine *liability*. Was there an unauthorised conflict or benefit? Both questions may be asked at any time in order to guide the conduct of the actor. It is part of both stages of the analysis to determine whether there was informed consent. That is the whole of the analysis. There is no other analytical step (unless consent is treated as a separate question).

⁴⁵ R Flannigan, 'Compound Fiduciary Duty' (2017) 23 *Trusts & Trustees* 794, 803–4 ('Compound Fiduciary Duty').

⁴⁶ R Flannigan, 'Judicial Disqualification of Solicitors with Client Conflicts' (2014) 130 *Law Quarterly Review* 498, 498–501 ('Judicial Disqualification of Solicitors with Client Conflicts'). It is conventional doctrine that it is not a defence to a claim of fiduciary breach to prove that one acted in the best interest of one's beneficiary. Accordingly, the duty of loyalty cannot be equated with the 'best interest' duty.

⁴⁷ Note the assertion of Harding (n 27) 71–2 n 4, that '[a] sound general theory of fiduciary law is likely to be neither elegant nor simple'. That awkward assertion is senseless per se, and Harding did not explain himself. My analyses indicate that the source of the current trouble with the case law is deficient research and/or exposition (not overly simple conventional policy). Contrast the Harding view with the aspiration of Lord Neuberger in *FHR European Ventures LLP v Mankarious* [2014] UKSC 45, [35]: 'Clarity and simplicity are highly desirable qualities in the law.'

The design of that regulation was tailored precisely to deal with the prospect of opportunism. Its content was not fashioned to deal with other mischiefs. It does not, except incidentally, regulate authorisation, care, judgement or fairness.

The presentation of that simplicity has been shredding in multiple ways in multiple contexts for some time. Assertions and suppositions have ostensibly both contracted and expanded the conventional jurisdiction. The numerous departures from convention, most emerging quietly in the twentieth century, have seriously clouded the law. The effect is to diminish the efficacy of the regulation. It is not applied where it ought to apply and it is applied where it ought not to apply. Consider the various departures.

Before that, however, two observations are in order. First, the large number of asserted or supposed departures that I am about to describe might suggest to some that we, in our respective communities, are not actually committed to the regulation of opportunism in the conventional way. That sort of rationalisation in the present context amounts to little more than an unsupported effort to entrench the continuing failure of judges and writers to fully investigate the development of each of the departures. The deteriorating state of the jurisprudence (the incoherence creep) cannot plausibly be grounded in a public discomfort with the strict regulation of production opportunism. On any measure of social consensus, the public is rightly concerned with opportunistic defections from undertakings of service. The lack of commitment, if that is what it is, lies elsewhere. The reality is that there has been a collective (though disconnected or unlinked) negligence on the part of those who participate in the legal process. In many cases the departures are attributable to an initial misunderstanding, or misconceived articulation, of principle or precedent. In blunt terms, the main causes of the departures that are shredding the clarity of the regulation are the failures on the part of some judges and writers to (1) do their homework, or (2) articulate concepts carefully. The blame is mutual and serial. A departure initially occurs because a judge or writer misreads the jurisprudence (because of inadequate investigation), or reads it correctly but uses pregnant or imprecise terms to describe it (which terms accommodate alien functions). That departure is then absorbed into the jurisprudence by judges and writers who subsequently uncritically accept the new departure as dogma because they do not themselves do the research that would enable them to recognise the departure *as a departure*, or the terminology as *imprecise* (usually expansive). Most of the departures do not come with an acknowledgment of structural novelty. The challenge to the coherence of conventional principle is not recognised. The judges or writers involved typically have assumed that they were stating, or working from, accepted principle. There were few instances where judges or writers conceded that they were implementing or proposing a change in the law or a new way to

understand the law.⁴⁸ That is important, obviously, because an improper starting point often produces an improper conclusion.

The second observation is that some of the departures I will describe may be partly attributable to the way in which the 'fiduciary' descriptor is used. The term commonly is used as a class descriptor. That is, persons who undertake to act in the interest of others in different ways commonly are aggregated together and identified in an abstract way as 'fiduciaries'. While actors are individually identified by their nominate status (eg as trustees, agents, employees, partners), they are aggregated as a class under the 'fiduciary' designation. That has both positive and negative effects. The positive effects or uses include the availability of the abstraction to speak about common fiduciary issues and to use the abstraction to frame analyses of fact-based fiduciary accountability (where there is no initial recognised nominate status). The main negative effect, as I described above, is that the usage produces a misconception in the minds of some. Because fiduciaries are described as those who undertake to act in the interest of others in some respect, it often is wrongly assumed that the content of the fiduciary *duty* is to act in the best interest of those others. A best interest undertaking simply is the trigger for fiduciary accountability. It initiates the accountability because there is latent in such undertakings the risk that actors will exploit their other-regarding access. The *content* of the duty is then defined by that mischief. The mischief may have operated wherever there are unauthorised conflicts or benefits connected or related to the function involved. Comprehending that, the courts sculpted the content of the accountability to be a strict proscription on unauthorised conflicts or benefits. There is still a distinct duty to act in the best interest of the beneficiary, but that duty must not be construed overly broadly to include or

⁴⁸ Perhaps the best example of a writer openly acknowledging that he was proposing a new way to understand the law is Paul Finn. His 1977 monograph was explicitly normative. See PD Finn, *Fiduciary Obligations* (Law Book Company, 1977). That said, Finn's thesis that there are numerous fiduciary duties (some of which actually are nominate duties per se), and that there are different duties in different contexts, cannot be accepted. The conventional authorities as a whole establish that the various perceived duties (other than the nominate duties) are but manifestations of the singular proscription on performance compromised by opportunism. The authorities also establish that the regulation is general and generic, and that it is not contextually sensitive because opportunism is not contextually sensitive. Finn later launched a more specific, and again openly normative, departure in claiming that the foundation for fiduciary accountability was reasonable expectation. See PD Finn, 'The Fiduciary Principle', in TG Youdan (ed), *Equity, Fiduciaries and Trusts* (Carswell, 1989) ch 1. That notion did not appear in the preceding fiduciary case law, but subsequently was adopted as animating principle by some courts. More recently the notion has faded, as it became clear that it does not itself do any analytical work. See Flannigan, 'Access or Expectation' (n 25) 22–7.

contemplate (or suppress the differentiation of) mischiefs that are governed by independent general forms of regulation (eg authority regulation, negligence regulation, loyalty regulation).

IV THE CONTRACTION OF THE ACCOUNTABILITY

Some assertions or suppositions diminish the conventional accountability. I described one such departure earlier. The assertion is that the exclusive function of the jurisdiction is to regulate the exercise of discretion and that, accordingly, the presence of discretion is the test for the application of the accountability. That would radically narrow the circumstances where unauthorised conflicts or benefits would be actionable as *fiduciary* breaches. That cannot be accepted if the objective is to regulate opportunism, and in fact the idea is not supported by the conventional jurisprudence.⁴⁹ The opportunism mischief is congruent with the limited access one has, not merely the discretion held, and consequently that limited access must (and does) attract fiduciary accountability.

A second departure, also noted earlier, is the assertion that in order for fiduciary accountability to arise the ostensible fiduciary must *actually* be trusted in a familiar or subjective sense. That clearly is not the conventional position.⁵⁰ Prior to the wide adoption of ‘fiduciary’ terminology later in the nineteenth century, judges used the terms ‘trust’ and ‘confidence’, often together as ‘trust and confidence’, to describe the accountability.⁵¹ However it was clear from the outset that those terms were intended to describe the nature of the relation that was produced by the limited access undertaking. That is, *because of the undertaking*, the relation was one of trust or confidence, and consequently the beneficiary was *entitled* to ‘trust’ or expect that the access of the fiduciary would not be exploited for unauthorised advantage. That understanding was disturbed

⁴⁹ See Flannigan, ‘Core Nature’ (n 1) 408–10; Flannigan, ‘Fact-Based Fiduciary Accountability in Canada’ (n 30) 446–53. See also the rejection of a discretion *requirement* in the American case law. Consider *Conkey v Bond* (1861) 34 Barb 276. And see *Trice v Comstock* (1903) 121 F 620, 626 (‘Nor was discretion or authority to sell these [lands] requisite to disable this agent from buying and holding them adversely to his principals. Every agency creates a fiduciary relation, and every agent, however limited his authority, is disabled from using any information or advantage he acquires through his agency, either to acquire property or to do any other act which defeats or hinders the efforts of his principals to accomplish the purpose for which the agency was established’).

⁵⁰ See the discussion in the text accompanying nn 34–5 above.

⁵¹ R Flannigan, ‘The [Fiduciary] Duty of Fidelity’ (2008) 124 *Law Quarterly Review* 274, 274–5 (‘[Fiduciary] Duty of Fidelity’); Flannigan, ‘Access or Expectation’ (n 25) 3–6. An incidental observation is that the continuing use of the ‘trust and confidence’ terminology in the fiduciary context may become increasingly problematic as the recently crafted distinct duty of ‘trust and confidence’ in employment law continues to develop.

only relatively recently in the 1998 judgment of Lord Millett in *Bristol and West Building Society v Mothew*, when he made the oft-cited statement that: 'A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence.'⁵² His words may be read to say that fiduciary accountability applies only to undertakings that produce relations of actual subjective trust and confidence. It is not clear, however, that he intended that interpretation.⁵³ It should be appreciated, in any event, that restricting fiduciary accountability to relations of actual trust and confidence would seriously complicate, and render uncertain and unpredictable, the application of the conventional regulation.

A third departure essentially would eliminate entirely the concept of a distinct *fiduciary* regulation. The assertion is that a fiduciary relation is simply a contractual one characterised by unusually high costs of specification and monitoring.⁵⁴ The argument has no substance. As I have explained elsewhere, it is defective in several respects.⁵⁵ It is enough to say here that the nature of a 'contract' matters. Some contracts create limited access arrangements; others do not.⁵⁶ The distinction is fundamental, and the regulation of the two types of contracts properly differs.

Fiduciary accountability would also contract (or possibly expand) without definitive guidance if the 'fairness' of an action or a consideration were to become the test. While the outcomes associated with fiduciary functions may always potentially be challenged on the basis of independent fairness standards (eg unconscionability, oppression),⁵⁷ they may only be challenged on a *fiduciary* basis

⁵² [1996] 4 All ER 698, 711.

⁵³ See R Flannigan, 'The Court of Appeal Recasts Fiduciary Accountability' (2019) 25 *Trusts & Trustees* 737, 740 ('Court of Appeal Recasts Fiduciary Accountability').

⁵⁴ Flannigan, 'Economics of Fiduciary Accountability' (n 4).

⁵⁵ Ibid 419–25.

⁵⁶ Beyond direct diversions, the issue at the margin is who is entitled to benefit from the capacity of assets to produce residual value (where there is no immediately apparent loss to the beneficiary). In an 'ordinary' contract, as long as the contract is performed, either party normally is free to be conflicted or to extract personal gain from the access they acquire to the assets of others. That is not the case where a limited access relation is created (whether by contract or otherwise). The beneficiary alone is entitled because otherwise fiduciaries will compromise their functions by attempting to shape actions and transactions to generate opportunities to extract residual value.

⁵⁷ Fairness per se has no actual analytical cut in any context. It is only descriptive of an outcome determined by other considerations. See Flannigan, 'Presumed Undue Influence' (n 26) 184–97. Consider that one writer has argued that the difference between the 'fairness rule' found in Delaware corporate law and the conventional English no-conflict rule is not as real or as important 'in practice' as some may assume. See Andrew Tuch, 'Reassessing Self-Dealing: Between No Conflict and Fairness' (2019) 88 *Fordham Law Review* 939. That argument is not compelling. See Flannigan, 'Strict Character' (n 11). Tuch asserts that we must focus on the exceptions to the loyalty standard in each case. His 'exceptions', however, mostly wash out as being just expressions of the

when the presence of an unauthorised conflict or benefit indicates that there is a risk that performance was compromised by opportunism. The highest courts, it should be noted, have consistently emphatically denied that fairness matters in a fiduciary analysis.⁵⁸ Still, however, the notion continues to appear, and to that extent the conventional regulation is distorted.

Another instance of narrowed application operates for politicians (and, possibly, political parties). On any conception of the accountability, political representatives individually are fiduciaries to their community.⁵⁹ They are not free to profit selectively from their undertaking to serve their community. That is recognised explicitly at the municipal level in most jurisdictions. Fiduciary accountability per se, however, appears to be largely ignored or suppressed for higher levels of government (state/province, national, federal). Although there is historical support for the accountability,⁶⁰ reference to 'fiduciary' principles is uncommon today in many jurisdictions. The reason for that seems to be less about mistakes by judges (other than the mistake of not including politicians on their lists of standard status fiduciaries), and more about the absence of a clear modern line of authority on which litigators can support claims. The reason for that absence of authority, in turn, is likely that a civil action on behalf of the community would be complicated (expensive) and that any success achieved (any value recovered) would accrue to the community as a political unit, rather than to the individuals pursuing the action. Other factors may include unwarranted suppositions on the part of judges that they would wrongly be interfering in political matters (the exercise of political discretion), or that the accountability

consent option. The one remaining difference he describes is that in Delaware there is a fairness defence (which allows self-dealing if it is fair). That is a critical difference. Delaware gives formal room to corporate fiduciaries to gain by covertly manipulating appearances to suggest 'fairness'. The conventional position, in contrast, permits gain only through informed consent. Tuch does not confront the detection concern that animates the conventional proscription. He also seems to think that claims that the conventional position is 'strict' overlook the widespread use of the consent option. It should be understood, however, that the proscription on unauthorised conflicts and benefits is a *default* strictness, and the fact that actors exercise the consent option, as they are entitled to, does not diminish the substantive difference between the two standards.

⁵⁸ Eg, *Aberdeen Railway Co v Blaikie Brothers* (1854) 23 LT 315 (HL) *Regal (Hastings) Ltd v Gulliver* [1942] 1 All ER 378, 391 (HL).

⁵⁹ R Flannigan, 'Fiduciary Accountability for Public Service Opportunism' [2018] *Public Law* 241 ('Fiduciary Accountability for Public Service Opportunism'). The form of government does not matter. The mischief is as corrosive of democracy as it is of, for example, communism.

⁶⁰ Flannigan, 'Fiduciary Control of Political Corruption' (n 24).

has been completely or adequately displaced by ‘ethics’ regulation.⁶¹ This particular departure embarrasses both law and politics.⁶²

Two other departures are found in the suppositions that the doctrines of breach of confidence⁶³ and presumed undue influence⁶⁴ are distinct from fiduciary accountability. Those suppositions are expressed without any plausible justification. The two doctrines in fact originally branched silently from the conventional trunk accountability. They gained ground as ostensibly independent doctrines because judges and writers did not do the research that would have indicated that they were unjustified departures. The effect of their seeming dissociation from the trunk accountability predictably has led to distortion, particularly in the case of presumed undue influence, that I and others have noted.⁶⁵

There is another departure in the denial of some judges that employment is a status fiduciary category. The assertion usually is that junior or non-key employees are not fiduciaries. I have demonstrated that there is no basis whatsoever for that assertion.⁶⁶ The space one occupies in a hierarchy is not linked to the probability of opportunism. The distinction only generates legal fees for time wasted by litigators in trying to elevate or diminish the nominate function of a given employee. Proper research establishes that the confusion in the employment context is attributable in large part to past imprecise language. Though contemplating the conventional accountability, one English Court of Appeal judge in *Robb v Green* described it as a duty of ‘fidelity’.⁶⁷ That linguistic

⁶¹ Ibid. Fiduciary accountability does not address the merits of political matters. It is entirely appropriate, on the other hand, for courts to regulate the opportunism of political representatives. See *ibid* 262–3; R Flannigan, ‘Contesting Public Service Fiduciary Accountability’ (2016) 36 *University of Queensland Law Journal* 7, 24 n 80.

⁶² The failure of the judicial branch of government to apply fiduciary accountability to senior politicians (municipal politicians being regarded as mere managers) risks its legitimacy and its claim to independence. There is no evident reason in this context to deny the even application of the law to a generic mischief. See Flannigan, ‘Fiduciary Accountability for Public Service Opportunism’ (n 59).

⁶³ Flannigan, ‘[Fiduciary] Duty of Fidelity’ (n 51) 281–5.

⁶⁴ Flannigan, ‘Presumed Undue Influence’ (n 26).

⁶⁵ See R Bigwood, ‘From *Morgan* to *Etridge*: Tracing the (Dis)Integration of Undue Influence in the United Kingdom’, in JW Neyers, R Bronaugh and SGA Pitel (eds), *Exploring Contract Law* (Hart Publishing, 2009) ch 9; M Haughey, ‘The Fiduciary Explanation for Presumed Undue Influence’ (2012) 50 *Alberta Law Review* 129; R Bigwood, ‘The Undue Influence of “Non-Australian” Undue Influence Law on Australian Undue Influence Law: Farewell *Johnson v Buttress*?’ (2018–19) 35 *Journal of Contract Law* 56 (pt 1), 187 (pt 2); R Bigwood, ‘Undue Influence as Constructive Fraud’ (2019) 13 *Journal of Equity* 144.

⁶⁶ R Flannigan, ‘Employee Fiduciary Accountability’ [2015] *Journal of Business Law* 189 (‘Employee Fiduciary Accountability’).

⁶⁷ [1895] 2 QB 315, 320 (CA).

departure subsequently was taken to mean that employees had a duty of *fidelity* instead of a *fiduciary* duty. As I have explained, it was a semantic departure that opened the gate to an unjustified substantive departure.⁶⁸ I would add that I have written a number of articles on the position of employees,⁶⁹ including responses to critics,⁷⁰ because the denial of accountability has become deeply embedded in some jurisdictions and, perhaps more importantly, because it is in a sense a fulcrum issue that is widely intelligible.⁷¹ On the one hand, if employees are not fiduciaries, the conventional position cannot (as with other departures) be regarded as descriptively coherent. On the other hand, if employees understand that they are fiduciaries, and why they are fiduciaries, they will understand why their supervisors, financial agents, political representatives and others are fiduciaries, and they will be more alert to when those actors may be exploiting their limited access. And with many more actors having reason to properly comprehend the accountability, deterrence ought to be enhanced.

Agency is another class of relation that some deny fully attracts fiduciary accountability. It is said that agents who are not actually trusted, or who have no discretion or advisory function, and only execute completely defined transactions, are not accountable. The supposition has traction only because of a lack of comprehension or research in a number of decisions and texts.⁷² The lack of a sound foundation for the supposition is particularly evident in the case of stock brokers where, in some jurisdictions, it has had its strongest adoption.⁷³

It is also supposed in some quarters that bare trustees are not fiduciaries. The arguments are that bare trustees lack discretion or that often their status is imposed rather than being voluntarily assumed. Again, I have explained that there is no sound basis for that supposition.⁷⁴

⁶⁸ Flannigan, '[Fiduciary] Duty of Fidelity' (n 51).

⁶⁹ See also R Flannigan, 'The Fiduciary Accountability of Ordinary Employees' (2007) 13 *Canadian Labour & Employment Law Journal* 283; Flannigan, 'Fiduciary Mechanics' (n 8); R Flannigan, 'The Fiduciary Duty of Departing Employees' (2008) 14 *Canadian Labour & Employment Law Journal* 355; R Flannigan, 'The Employee Status of Directors' (2014) 25 *King's Law Journal* 370.

⁷⁰ See R Flannigan, 'Constructing an Employee Duty of Fidelity' (2016) 37 *Business Law Review* 50 ('Constructing an Employee Duty of Fidelity'); R Flannigan, 'Employee: Fiduciary' (2016) 19 *Canadian Labour & Employment Law Journal* 509.

⁷¹ The issue is generally intelligible because the conventional accountability is relatively simple. I must add that the unavoidable length of several of my articles is not a contrary indicator. The length is due to the need to track and counter the distortions that have been introduced through misinformed analysis.

⁷² R Flannigan, 'Fiduciary Agency Denied' (forthcoming in the *Journal of Business Law*).

⁷³ Particularly in Canada. See R Flannigan, 'Stock Broker Mutation' (forthcoming in the *Canadian Business Law Journal*) ('Stock Broker Mutation'). See also Flannigan, 'Court of Appeal Recasts Fiduciary Accountability' (n 53) 740-41.

⁷⁴ R Flannigan, 'Resolving the Status of the Bare Trust' (2019) 83 *Conveyancer* 207.

Solicitors are another class of actor that have had their accountability ostensibly diminished. On the question of the judicial power to disqualify solicitors who are conflicted, there has been a shift in focus from opportunism to negligence. As I have observed, that pares the regulation of opportunism.⁷⁵

A narrowed accountability also is the result of the denial of its full application to assistants who are employed by fiduciaries to perform aspects of the fiduciary function. It is said that while those assistants may be accountable as fiduciaries to the fiduciaries that employ them, they have no fiduciary accountability directly to the beneficiaries of the fiduciary function. Their accountability is thought to be determined only by the lesser standard of knowing/dishonest assistance. The authorities differ, but recent cases support the denial. The denial, however, is not justified. Assistants who undertake to serve their employers simultaneously undertake to serve the beneficiaries, and therefore have only a limited access to the value of the associated assets.⁷⁶

A narrowed application is also contemplated by assertions that fiduciary accountability does not apply to commercial or arm's-length relations. Although the assertions have no substance, they continue to resurface occasionally in modern judgments.⁷⁷

Weakened requirements for the disclosure that is necessary to produce valid consent to a conflict or benefit also narrow the operation of the accountability. I have discussed how courts have departed from convention by allowing indirect or incomplete disclosure.⁷⁸

The last instance of narrowed application I will describe is found in the corporate context. It commonly is asserted that shareholders are not accountable as status fiduciaries. That, as I have explained at length, is conceptual error.⁷⁹

⁷⁵ Flannigan, 'Judicial Disqualification of Solicitors with Client Conflicts' (n 46).

⁷⁶ Flannigan, 'Fiduciary Accessories' (n 9). In the United States the direct accountability of assistants was recognised in *Gardner v Ogden* (1860) 22 NY 327.

⁷⁷ Eg, *Fujitsu Services Limited v IBM United Kingdom Limited* [2014] EWHC 752. See R Flannigan, 'Commercial Fiduciary Obligation' (1998) 36 *Alberta Law Review* 905.

⁷⁸ Flannigan, 'Fiduciary Obligation in the Supreme Court' (n 35); Flannigan, 'Court of Appeal Recasts Fiduciary Accountability' (n 53).

⁷⁹ R Flannigan, 'Shareholder Fiduciary Accountability' [2014] *Journal of Business Law* 1 ('Shareholder Fiduciary Accountability'). Consider separately that it is another contraction of the accountability in the corporate context to suppose that shadow directors are not fully subject to fiduciary accountability. An actor who exercises de facto control over a board of directors is a person who has undertaken an other-regarding function (governing the operations and affairs of the corporation) that carries with it fiduciary accountability. It is wrong to think that it matters that, while shadow directors have actual dominance, they do not have formal or direct legal powers. Fiduciary accountability depends only on the de facto assumption of a limited access (here, to corporate assets). Further, apart from other means of arranging deference (eg relational levers, bribery), shadow directors often acquire their de facto power to control through legal powers. Shadow directors, either alone or as part of a combination, may for example acquire a sufficient

Corporations must express their will through bodies tasked with the will definition function. The two bodies usually assigned that function are the board of directors and the shareholders in general meeting. It thus is widely understood that directors are accountable as fiduciaries to their corporation. However it is not well understood that *shareholders* also owe a fiduciary duty to their corporations when they exercise the will definition authority assigned to them. Shareholders are not entitled to benefit selectively from their authority. They may only benefit reflectively in the sense that they benefit when the corporation benefits.

V THE EXPANSION OF THE ACCOUNTABILITY

I now turn to the departures from conventional principle that broaden the accountability. I begin by returning immediately to corporate law. In many American states, and occasionally elsewhere, it is asserted that directors owe their fiduciary duty to the corporation *and* its shareholders. The assertion of a duty of directors to shareholders, it should be evident, is at odds with the separate entity status of the corporation. The corporation is a person with its own agenda. That agenda will rarely correspond with all of the various agendas of multiple shareholders. If directors were to have default dual duties, there would be an inherent conflict of duty and duty. Entity status dictates that directors are hired *by the corporation* to serve *the corporation*. They are not hired to serve the shareholders directly. Shareholders are just one of the stakeholder classes that corporations negotiate with in order to advance the objectives *of the corporation*.⁸⁰

number of votes (often well below 50 per cent) to elect and remove directors. The formally appointed directors understand that reality and are quick to identify, and defer to, shareholders who reach that dominance position. In short, though they do not have formal legal authority to manage, significant shareholders do have legal power (their voting power) that gives them de facto control over the formal legal powers of the board. It is also wrong to suppose that the fiduciary accountability of shadow directors is determined by (restricted to) the scope of instructions actually given. That misconceives the status and the accountability. See that conceptual error in *Standish v Royal Bank of Scotland plc* [2019] EWHC 3116 (Ch). The instructions per se (unless they are instructions to selectively benefit the shadow director) actually are irrelevant to the scope of the accountability because they are merely a manifestation of the assumption of control. A shadow director is a person who controls the board, even though actual intervention may be required only occasionally on specific matters. That controller status *initiates* the accountability, but the accountability itself extends to the full expanse of the access to asset value that is associated with the whole of the other-regarding function (and not merely to the scope of the specific instructions). Any unauthorised conflict or benefit that is linked to the function assumed constitutes a breach. Thus, for example, taking a corporate opportunity or competing with the corporation, would potentially compromise the governance function, and so are proscribed.

⁸⁰ R Flannigan, 'The Political Imposture of Passive Capital' (2009) 9 *Journal of Corporate Law Studies* 139, 157–63.

The shareholders, in other words, do not have default primacy. There is only default *corporation* primacy. It is of course possible for a corporation to agree that its directors will directly act in the best interest of its shareholders, but short of that there is no principled basis for a duty to the shareholders directly. The shareholders, it should be added, are not thereby exposed to the unconstrained opportunism of directors. The shareholders are protected indirectly by the fiduciary duty that the directors owe to the corporation. The shareholders benefit *reflectively* from that duty, just as they properly benefit reflectively from corporate gain.

The assertion that directors owe a fiduciary duty to creditors, other than where it is fact-based, is equally inconsistent with the entity status of the corporation.⁸¹ It is doubly mistaken to say that the duty of directors to the *shareholders* of the corporation shifts to the *creditors* of the corporation as the corporation approaches insolvency. There is no status fiduciary duty to either class of stakeholder because there is no limited access undertaking to them with respect to their supplying the corporation. In the ordinary course, both shareholders and creditors deliver funds, materials or credit to the corporation on an open access basis. The assertion of a fiduciary duty to creditors seems in most cases to involve the mistaken conflation of nominate and fiduciary accountability. Properly understood, the interests of creditors are to be considered, but that occurs normally (including *before* insolvency approaches) in the ordinary course of determining the best interest of the corporation at a particular time. The ongoing relative balancing of all stakeholder interests is simply part of how directors do (or should) determine corporate best interest. In the absence of any indication of compromised performance (ie an unauthorised conflict or benefit), there is no issue of fiduciary accountability. Recognise as well that a corporation is particularly vulnerable as it approaches insolvency and plainly requires the uncompromised loyalty of its directors during that time. Directors often have incentives to cut deals with creditors that personally benefit themselves. If the fiduciary duty has shifted to the creditors, the corporation has no *fiduciary* recourse for what otherwise would be fiduciary breaches to it.

The corporate law of many American states has expanded 'fiduciary' accountability in another way. American courts assert that directors have a 'fiduciary' duty of *care* in addition to their duty of loyalty.⁸² There is no basis for that general assertion, and the courts of other common law countries do not

⁸¹ Flannigan, 'Fiduciary Duties of Shareholders and Directors' (n 44) 300–1.

⁸² Flannigan, 'Economics of Fiduciary Accountability' (n 4) 398–9.

accept it.⁸³ Negligence is a mischief that differs substantively from the mischief of opportunism. Breaches may overlap (eg shirking may be both negligent and an unauthorised consumption of leisure) but that is because the impugned action independently offends both standards.⁸⁴

I have noted the impact of imprecise language above. Other illustrations of that impact appear in the corporate law context. Judges have referred to the powers granted to directors (and other fiduciaries) as ‘fiduciary powers’. That habit wrongly implies that every breach of the power would be a fiduciary breach.⁸⁵ That would produce another expansion of the accountability into issues of authority, care and the merits of actions. Expansions also occur when judges assert that fiduciary accountability is about restraining ‘improper’, ‘unfair’ or ‘capricious’ action. Much action that can be described in those terms will not constitute a fiduciary breach.⁸⁶ The conventional accountability only restrains action that is improper, unfair or capricious where those terms reflect unauthorised conflicts or benefits.

Other expansions of fiduciary accountability are also conveniently illustrated by their appearance in the corporate law context. As I noted earlier, judges and

⁸³ *Bristol and West Building Society v Mothew* [1998] Ch 1 (CA); *Breen v Williams* (1996) 186 CLR 71 (HCA). Recently the Supreme Court of Canada inexplicitly reversed itself on this point. It did so without justification, or even discussion, apparently not comprehending that it was departing from its own long-standing position. See R Flannigan, ‘A Fiduciary Duty of Care for Canada’ (2018) 134 *Law Quarterly Review* 368 (‘Fiduciary Duty of Care for Canada’). An incidental general observation about the Supreme Court of Canada is that its fiduciary jurisprudence has descended into radical incoherence over the past four decades. The court appears to have discarded conventional authority and to now contemplate possibly three distinct forms of the accountability (a general accountability, a governmental accountability, and a separate governmental accountability for aboriginal relations).

⁸⁴ In my early work I made statements about the negligence mischief that could be read too broadly. See Flannigan, ‘Fiduciary Obligation in the Supreme Court’ (n 35) 51 (‘Fiduciary responsibility would also conceptually apply to negligent behavior. Negligence is just another way in which one diverts value’). As I later clarified, fiduciary accountability applies to negligence that is opportunism (‘shirking’). See Flannigan, ‘Boundaries of Fiduciary Accountability’ (n 7) 38 n 6; Flannigan, ‘Economics of Fiduciary Accountability’ (n 4) 397–9. Consider also that sometimes negligence terminology is used to express the concern with opportunism. See *Coggs v Bernard* (1703) 2 Ld Raym 909, 918, 92 ER 107, 112 (‘for else these carriers [of goods] might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, ... and yet doing it in such a clandestine manner, as would not be possible to be discovered’) and 119, 113 (‘For when he intrusts the bailee upon his undertaking to be careful, he has put a fraud upon the plaintiff by being negligent, his pretence of care being the persuasion that induced the plaintiff to trust him’); *Whichcote v Lawrence* (1798) 3 Ves Jun 740, 752; 30 ER 1248, 1254 (‘where a trustee has a prospect of advantage to himself, it is a great temptation to him to be negligent; acting in a manner, that does not quite fix an imputation upon him’).

⁸⁵ R Flannigan, ‘The Adulteration of Fiduciary Doctrine in Corporate Law’ (2006) 122 *Law Quarterly Review* 449, 456–7 (‘Adulteration of Fiduciary Doctrine’).

⁸⁶ *Ibid* 454ff.

writers often wrongfully equate the substantive content of fiduciary accountability with the triggering undertaking of service. That appears to be the most common mistake they make in their articulation of the nature of the accountability. It happens frequently in the corporate context,⁸⁷ but also in other contexts.⁸⁸ A physical undertaking of service is elevated by the law, whether by contract, trust or some other legal device, into its own *duty* to provide that service, invariably on a 'best interest' basis. The undertaking also simultaneously activates the parallel application of fiduciary accountability. The undertaking to serve, however, does not itself precisely identify the content of that parallel fiduciary accountability. Once again, it is a confusion to regard the duty to act in the best interest of the beneficiary as *the* fiduciary duty.⁸⁹ For example, on a conventional analysis, directors do not commit a fiduciary breach merely because some of the shareholders (or some other party) might (even rightly) conclude that an action of the directors was not actually in the best interest of the corporation. That is a dispute over the merits of an exercise of judgement. The only fiduciary question would be whether the performance of the undertaken function potentially has been compromised by opportunism. The test is whether there is an unauthorised conflict or benefit. Obviously then, if the best interest duty is to be treated as *the* fiduciary duty, the accountability has been radically expanded.

There are other examples of judges wrongly characterising individual or multiple nominate duties as fiduciary duties. Another common conflation is to treat affirmative duties to disclose information as fiduciary duties. Where such duties exist (for example, in trust law), they are matters of nominate performance. For fiduciary accountability, the disclosure of an unauthorised conflict or benefit is not a *duty*. Rather, it is an *option* that is available to fiduciaries to validate conflicts or benefits.⁹⁰ The fiduciary breach is not the failure to disclose the conflict or benefit. The breach is the performance of the fiduciary function while compromised by the conflict or benefit. It thus is an unwarranted departure to extend fiduciary accountability to a failure simply to erect the one defence to a future claim of fiduciary breach.

Expansion also occurs when judges or writers create new duties that they characterise as fiduciary duties. One example is the assertion of a duty that fiduciaries must confess their breaches. As I have explained, that takes fiduciary

⁸⁷ Flannigan, 'Fiduciary Duties of Shareholders and Directors' (n 44) 283 n 19, 288–9.

⁸⁸ Consider Flannigan, 'Compound Fiduciary Duty' (n 45).

⁸⁹ See also Flannigan, 'Adulteration of Fiduciary Doctrine' (n 85) 453–4; R Flannigan, 'Fiduciary Accountability Transformed' (2009) 35 *Advocates' Quarterly* 334 ('Fiduciary Accountability Transformed').

⁹⁰ Flannigan, 'Presumed Undue Influence' (n 26) 172–3.

accountability too far.⁹¹ Another example is a proposed compound duty that fuses best interest, care and loyalty without credible justification.⁹²

A reasonable (or legitimate) expectation test, were it to have enduring traction, would also expand (and/or narrow) the accountability. Unlike the conventional accountability, it focuses on the expectation of the beneficiary, rather than the undertaking of the ostensible fiduciary. On its face, it begs the question. What expectations are actionable? What makes an expectation reasonable? Beyond that it should be evident that a reasonable expectation test is not linked, as a limited access undertaking is, to the risk of opportunism. Further, reasonable expectation is easily wrongly deployed to challenge the merits of an otherwise proper course of action. It could be construed as a fairness or oppression standard, offering no guidance per se as to what will constitute a breach. The notion had high support at one time,⁹³ but now is receding as a

⁹¹ R Flannigan, 'Director Duties: A Fiduciary Duty to Confess?' (2005) 26 *Business Law Review* 258.

⁹² Flannigan, 'Compound Fiduciary Duty' (n 45). See also Flannigan, 'Constructing an Employee Duty of Fidelity' (n 70). Charles Mitchell argues that additionally there are duties of honesty and good faith. See Charles Mitchell, 'Good Faith, Self-Denial and Mandatory Trustee Duties' (2018) 32 *Trust Law International* 92. The former duty, he asserts (at 95), is a duty 'imposed by general law on everyone in society to behave honestly towards other people'. That is invention. There is no such general duty distinct from the various specific legal rules and doctrines that are directly or indirectly concerned with honesty. As for the duty of good faith, Mitchell describes it (at 96) as 'a sincere and serious commitment to the purposes for which her powers have been given', and (at 102) as a duty 'to exercise powers rationally and transparently, and not to exercise them capriciously or perversely'. He purports to distinguish his duty of good faith from his duty of 'self-denial' partly on the basis of the existence of cases 'where a defendant has been permitted to act in a self-serving way but is nevertheless bound by a duty of good faith' (at 96). He insists that there are five groups of such cases. Those various groups, however, all have a conventional explanation. Some are just cases where a fiduciary breach is described as a breach of good faith. Others are cases of consent to a conflict or profit. Still others involve the application of the best interest duty and the deference principle. His first group of cases, for example, address a mortgagee power of sale. That nominate power is regulated by fiduciary accountability because it was acquired by the mortgagee on a limited access basis. The access to the mortgaged asset is an open access (to satisfy the debt), but the access to the power and to the residual value is other-regarding. See Flannigan, 'Access or Expectation' (n 25) 11–14. Consider also Mitchell's third group, which concerns 'powers vested in the trustees of trusts for multiple beneficiaries including the trustees themselves' (at 97). There is consent to their personal interest, and it is the very function of the trustees in his example to discriminate between beneficiaries. There is only a fiduciary breach if the discrimination function is compromised by an unauthorised conflict or benefit. In the end, none of the groups of cases he identified require a distinct duty of good faith.

⁹³ Notably from the Supreme Court of Canada in *Hodgkinson v Simms* (1994) 3 SCR 377. That court has also employed the reasonable expectation notion in attempts to define 'oppression'. See R Flannigan, 'Defining Corporate Law Oppression' (2018) 61 *Canadian Business Law Journal* 141.

definitive test. It is a departure that appears to be failing through the weight of its own vacuity.⁹⁴

Consider also the expansion that occurs where it is thought that the accountability is solely concerned with regulating the exercise of discretion. The mistake regularly made is that regulating discretion is about regulating the *merits* of an exercise of discretion. Properly understood, the assumption of a discretion activates the accountability (because it is a limited access undertaking), but that accountability is only designed to protect against the exercise of the discretion being compromised by opportunistic impulse. The merits of the exercise of a discretion per se are not for courts to review.⁹⁵

Another expansion of the accountability has been produced by equating it with the fraud on a power and improper purpose doctrines. As I have explained, those two doctrines formally regulate *authority*, not opportunism per se.⁹⁶ That said, the two doctrines coincidentally apply to fiduciary breaches because such breaches concurrently are a breach of authority. The two doctrines, however, are not congruent with fiduciary accountability. There will be breaches of authority that are not fiduciary breaches. Accordingly, the equation of the three doctrines leads to an expansion of fiduciary accountability.

My last illustration of expansion is the application of the accountability in the aboriginal context. Some courts have described nominate duties of the state to aboriginal communities as ‘fiduciary’ duties. There is no conventional basis for that.⁹⁷ The fiduciary duty of the state is exactly the same as the duty of every other fiduciary. The state must not exploit for its separate benefit its access to assets intended to benefit aboriginal communities. It is the same duty that applies *within* aboriginal communities, where tribal officials and employees are accountable to their communities when they divert community resources to themselves or their associates. As it is, there has been a recent move in some jurisdictions away from the ‘fiduciary’ characterisation to an ‘honour of the Crown’ notion. Still, some courts continue to assert a seemingly open-ended ‘fiduciary’ jurisdiction that indeterminately expands the conventional accountability.⁹⁸

⁹⁴ Flannigan, ‘Boundaries of Fiduciary Accountability’ (n 7) 73–74; Flannigan, ‘Access or Expectation’ (n 25).

⁹⁵ Flannigan, ‘Fact-Based Fiduciary Accountability in Canada’ (n 30) 451–3; Flannigan, ‘Judicial Disqualification of Solicitors with Client Conflicts’ (n 46) 498–501.

⁹⁶ R Flannigan, ‘Fraud on a Power, Improper Purpose and Fiduciary Accountability’ (2019) 62 *Canadian Business Law Journal* 133 (pt 1), 249 (pt 2).

⁹⁷ Flannigan, ‘Boundaries of Fiduciary Accountability’ (n 7) 61–7.

⁹⁸ See R Flannigan, ‘A Revised Canadian Test for Fact-Based Fiduciary Accountability’ (2011) 127 *Law Quarterly Review* 505; Flannigan, ‘Fiduciary Duty of Care for Canada’ (n 83).

VI AN AVOIDABLE COLLAPSE

On one view the above departures (both contractions and expansions) collectively signal the onset of the collapse of the conventional accountability. Another view might be that these departures together (despite their collective lack of conceptual integration) just represent the law working itself pure, informally inching (sometimes leaping) towards a state of regulation that more precisely reflects our true communal expectations. My view is that it we are nesciently moving towards a multi-point collapse that cannot be justified as subliminal visceral reform. That movement ought to be reversed by precise judicial statements that affirm conventional principle and discard every one of the identified departures. There are several reasons that add to or amplify the specific reasons I have enumerated in my prior work on each specific departure.

The first reason is that the conventional accountability, though dissembled or masked by misconceived assertion and supposition, remains untouched. It has never been credibly challenged. While norms may decay, this one has not. The classic cases endure. Everyone agrees that, whatever other functions (or content) might be asserted or proposed, the one established function is that fiduciary accountability regulates the risk that opportunism might compromise performance. The immediate problem is that the numerous departures shade or sideline that function, leaving it vulnerable to negligent or intentional displacement by misinformed or venturesome judges or writers who mistake (or exploit) departures for principle. As the departures become, through action or inaction, firmly embedded in the jurisprudence, conventional principle will give way. But that need not happen. The departures could today properly be jettisoned to restore the clarity of the purpose and application of the conventional regulation.

The second reason to affirm conventional principle, introduced earlier, is that a significant part of the modern confusion is attributable to a flawed literature. A rather large number of the writers who today purport to describe the law have not done the necessary homework, and simply are misinformed because they have relied on judges or other writers who originally misconceived or misdescribed the substance of the jurisprudence. They typically do not themselves investigate the conventional logic, even if they sense that there is contradiction or inconsistency. Most importantly, with some exceptions, they do not address the opportunism mischief, or comprehend how it drives and constrains design. And there is little independent historical analysis of the development of the jurisprudence. Thus we see writers wrongly declaring, for example, that actual 'trust' is required, that discretion is the sole or definitive test for the accountability, that fairness matters, or that employees are not status

fiduciaries.⁹⁹ It certainly is understandable that mistakes initially may be made (and made more frequently as the disorder grows). The trouble is that writers rarely concede after the fact that they were mistaken or misled, and so the distorting assertions accumulate. I have myself made mistakes in my past expositions of the law, in some cases because like others I relied on popular or seemingly accepted propositions of law. The difference is that, having recognised the errors, I have publicly corrected them in subsequent articles.¹⁰⁰ Other writers have not done that. There are a variety of possible reasons. First, their public work is a *sunk* intellectual investment. Being sunk, denial or silence often are tactical responses to documented mistake. Writers are not open to conceding that they wrongly subscribed to misconceptions or failed to recognise that their inventions were opposed to established conventional principle. And the greater the magnitude of their mistake(s), the greater the incentive to cling to their positions and ignore (rather than confront) critical commentary. Secondly, they might believe that conceding mistakes may undermine their work or reputation generally. They apparently fail to appreciate that their uncorrected misconceptions will produce that result. Thirdly, the disorder they contributed to itself gives them cover in that it provides a basis for declining to recognise mistakes. They might point to others making the same mistake and claim that their view is the (or an) accepted view. Or they might insist that the law is in a

⁹⁹ The authors of general textbooks and casebooks on nominate subjects (eg trust law, corporate law) are perhaps the worst offenders. Many books are crammed with misinformed suppositions about the accountability. A Canadian example is the business organisation casebook by Robert Yalden et al, *Business Organizations: Practice, Theory and Emerging Challenges* (Emond, 2nd ed, 2018) ch 13. Corporate law, it is worth emphasising, is an area of the law that has contributed significantly to the distortion of conventional principle. See Flannigan, 'Adulteration of Fiduciary Doctrine' (n 85); Flannigan, 'Shareholder Fiduciary Accountability' (n 79).

¹⁰⁰ Possibly my most significant error (which I shared with everyone) was to adopt the proposition that shareholders do not have a fiduciary duty to their corporation. See Flannigan, 'Fiduciary Duties of Shareholders and Directors' (n 44) 285–6. A subsequent full article was required to correct that proposition and my error. See R Flannigan, 'Shareholder Fiduciary Accountability' (n 79), particularly at 2 n 3. For other corrections, see Flannigan, 'Boundaries of Fiduciary Accountability' (n 7) 40 n 8; Flannigan, 'Employee Fiduciary Accountability' (n 66) 203 n 97; Flannigan, 'Contesting Public Service Fiduciary Accountability' (n 61) 11 n 25; Flannigan, 'Fiduciary Accessories' (n 9) 41 n 3. Consider also my initial analysis at R Flannigan, 'The Fiduciary Obligation' (1989) 9 *Oxford Journal of Legal Studies* 285, where in my novice enthusiasm to establish significance (at 285–6) I stated that the courts had offered only a 'broad outline' of the regulation and that much was 'tentative' and 'obscure'. Those remarks were prompted and misinformed by the conflicting descriptions of the accountability that already had clouded the regulation. Once one acquires a deeper knowledge of the development of the jurisprudence, it becomes clear that the courts had defined the accountability with precision, but that there were unjustified departures attributable largely to research or expression weaknesses. I clarified that initial work in later articles. See, eg, Flannigan, 'Fiduciary Control of Political Corruption' (n 24); Flannigan, 'Boundaries of Fiduciary Accountability' (n 7); Flannigan, 'Core Nature' (n 1).

state of flux or reorientation and is moving away from the older authorities that conflict with their position. Fourthly, as an indication of research due diligence, they might point to the backscratching review of their work by the persons cited in their first footnotes. They might also claim that their work was vetted by journal referees (if that was the case), even though the anonymity of the referees makes it impossible to ascertain what level of independence (objectivity, bias) or subject competence was applied.¹⁰¹ Fifthly, there literally are no short-term consequences for weak research or scholarship. There is, for example, no realistic recourse for third parties who rely to their detriment on misinformed 'scholarship', at least when it is offered as a public good (rather than as a private opinion). In short, overall, writers are practically free to individually and collectively traffic in misinformation.

The convulsion or agitation of the literature seems only to be accelerating. And recently the disruption has become coordinated. Some writers, having perceived disorder, and wrongly sensing virgin space or foundational vacuum (because of their inadequate investigation), are pursuing an agenda to replace the 'uncertainty' with their own unconventional notions. A collection of writers, most based in the United States, have been closely or loosely aligned in a broad networking exercise in the past few years, the developing objective of which appears to be to reshape and dominate fiduciary scholarship.¹⁰² They have been holding workshops or conferences and publishing the proceedings as edited books

¹⁰¹ I have come to understand that the double-blind refereeing process is a sham in fields where there are relatively few contributors with unique (or uniquely expressed) views. Referees often know the identity of an author, but do not reveal that in their reports. My own experience is that my relatively unique terminology (fiduciary accountability, limited access) invariably identifies me to every referee who has any depth in the literature. And because my analysis has been critical of several other writers in the area, and many widely held misconceptions, a number of my articles initially received heavily negative reviews. When that happens, some editors 'blindly' support their referees because that is their first self-regarding instinct, or because they (like the referee) (who may have been sought for that reason) have a stake in the matter. Consider, in that regard, that opportunistic referees will attempt to shape their reports to avoid the detection of their bias, and neither the editor nor the author will see even the tip of the smear. In short, and not unexpectedly, opportunism in the review process is a problem in the same way it is a problem for every other limited access arrangement.

¹⁰² The individuals who are closely aligned may be ascertained by reviewing their acknowledgments of one another in their books and in the articles they independently publish. Paul Miller and Andrew Gold appear to be at the centre of the networking exercise. At this point I would make the incidental observation that the relative youth of some of these writers means that, through their volume and whatever ability they have to collectively maintain their mutual agenda (to recast, and become authoritative commentators about, fiduciary accountability), they may be able to twist the law for a long time. My one comfort is my understanding that the conventional regulation is rational and sapient and that, once its purpose is clearly understood, and absent some profound change in norm preference, it will prevail over bare assertion and ambition.

with titles that imply the transmission of core principle.¹⁰³ The chapters in the several books are essays of variable depth that often are pocked with references to departures from conventional principle that, in most instances, are not identified as *departures*. The books are not texts that convey a singular conception. They are just *collections* of essays that are not consistent with each other in various respects. The books nevertheless have achieved a presence in the area (at least in the United States) because there are no competing texts¹⁰⁴ and because the aligned writers constantly cite (and praise) one another. I have addressed the work of some of these writers elsewhere, and identified some of their departures, primarily their conflation of nominate and fiduciary accountability.¹⁰⁵ I suggest that it would be wrong to conclude that the mere alliance of writers (or the mere number of them) should somehow establish the substantive quality of their individual contributions. Judges need to test the literature, not assume that formal academic affiliation or ambitious networking is a signal of properly informed analysis.

The third reason courts ought to dismiss all of the departures is that each is incompatible with the conceptual structure of the regulation. Fiduciary

¹⁰³ Consider, eg, Andrew Gold and Paul Miller (eds), *Philosophical Foundations of Fiduciary Law* (Oxford University Press, 2014); Paul Miller and Andrew Gold (eds), *Contract, Status and Fiduciary Law* (Oxford University Press, 2016); Evan Criddle, Evan Fox-Decent, Andrew Gold, Sung Hui Kim and Paul Miller (eds), *Fiduciary Government* (Cambridge University Press, 2018); D Gordon Smith and Andrew Gold (eds), *Research Handbook on Fiduciary Law* (Edward Elgar, 2018); Evan Criddle, Paul Miller and Robert Sitkoff, *The Oxford Handbook of Fiduciary Law* (Oxford University Press, 2019). In the introduction to their first collection (2014), Gold and Miller insisted (at 1) that 'fiduciary law has been woefully under-analyzed by legal theorists'. That is a curiosity they did not explain. They then proceeded to make grandiose claims about the authors and the content of the various essays, including (at 1–2) that the publication of the collection 'will set the agenda for philosophical study of fiduciary law for generations to come'. That remains to be seen. The main concern with the several collections as a group is the persistent theme or perception of the editors and other authors that fiduciary accountability is far more complex than the conventional jurisprudence indicates. One will certainly come to share that conclusion if the turbulent diversity of the assembled essays is absorbed without critical pause. From my reading, literally every issue raised by the multiple authors may be resolved promptly once one takes seriously the analytical predicate that every element of design must be driven or informed by the mischief addressed, and the social predicate that opportunism is a corrosive impulse that requires strict default regulation.

¹⁰⁴ There are no academic textbooks. There are only a few monographs. In addition to the 1977 Finn contribution, see the monographs by Leonard Rotman, *Fiduciary Law* (Thomson Canada, 2005) and Matthew Conaglen, *Fiduciary Loyalty* (Hart, 2010). I have elsewhere examined the views expressed in those texts at R Flannigan, 'A Romantic Conception of Fiduciary Obligation' (2005) 84 *Canadian Bar Review* 391 and Flannigan, 'Access or Expectation' (n 25).

¹⁰⁵ Flannigan, 'Contesting Public Service Fiduciary Accountability' (n 61). I understand that Paul Miller is now arguing that fiduciary law became recognised as a unified field in its own right only within the past five decades. That profoundly misreads or misrepresents the jurisprudence. Consider the observations of counsel in *York Buildings Co v Mackenzie* (1795) 8 Bro PC 42, 63–4; 3 ER 432, 446 (HL), noted above n 25.

accountability was designed by the judiciary to regulate a particular mischief. The judges understood that opportunism was latent in every undertaking to serve. They understood that it was the access that came with the undertaking that allowed for the diversion of the value of associated assets. They also understood that the access facilitated the concealment or fabricated validation of unauthorised advantage. They therefore proscribed any conflict or benefit that was not authorised by the informed consent of the appropriate party. No excuse was acceptable. That functional design, it will be appreciated, is precisely targeted. It does not comprehend cutting back access to the narrower access of, for example, discretion, actual trust or senior employees. Nor does it comprehend any expansion beyond regulating opportunism to regulating, for example, authority, care, best interest or fairness. The jurisdiction does not have the conceptual content to address any mischief other than opportunism.¹⁰⁶ It does not accommodate nuance, situational history, actual intention, level of sophistication or likely collateral effects. The courts have always regarded the mischief as most pernicious, and they explicitly crafted a particular default regulation to exclusively counter its corrosive operation.

In that regard it is important to understand that virtually all of the departures, if ultimately confirmed, will actually serve as new means for opportunistic fiduciaries to exploit their access. Opportunists (or their legal advisors) shape their relations and transactions to take advantage of such distinctions. Where, for example, there are distinctions between discretion and no discretion, senior and junior employees, and commercial and other arrangements, an opportunistic actor will use contractual and other means to cosmetically arrange relations and transactions so as to avoid fiduciary status. Beneficiaries and courts will not often detect that deceptive shaping or colouring. Stock brokers, for example, may insist on terms stating that they do not have discretion, or an advising function, and are only engaged on a 'mere execution' basis.¹⁰⁷ They nevertheless still effectively exercise discretion, and advise, when through their perceived confidence, aggression, charm or greater expertise, they use their access to arrange transactions that give them collateral unauthorised gains. Another example is where there is a 'fairness' criterion involved at any point in an analysis. Opportunists (sophisticated or not) often will attempt to groom the appearance of relations or transactions to meet a fairness test, while again still retaining considerable capacity to divert value. In that sense, the seemingly wholesome (though naïve) fairness criterion is made to work to the

¹⁰⁶ Ibid 36. See Flannigan, 'Boundaries of Fiduciary Accountability' (n 7) 65; Flannigan, 'Fiduciary Accountability Transformed' (n 89) 347; Flannigan, 'Fact-Based Fiduciary Accountability in Canada' (n 30) 453; Flannigan, 'Fiduciary Accountability for Public Service Opportunism' (n 59) 245.

¹⁰⁷ R Flannigan, 'Stock Broker Mutation' (n 73).

advantage of the opportunist. Thus, departures become tools to project opportunism and avoid accountability.

It is of further importance here to dismiss the notion that fiduciary accountability must be revised because informed consent supposedly is not a realistic or adequate conceptual instrument to ensure that advantage to the fiduciary was actually intended. Securing informed consent, it may promptly be conceded, may not truly validate an interaction. Fiduciary businesses (eg trust companies) commonly insist on the full or partial exclusion of their fiduciary duty because they know that individuals, whether ingenuous or sophisticated, are incited more by product desirability, reputation, expertise, personal attributes, affiliations, necessity or other factors, and that they discount the perceived remote risk of compromised performance. And many customers and clients, even if they understand an exclusion, are reluctant to have an uncomfortable conversation about it. But that is on them. They have the autonomy, even if only for passing comfort, to risk compromised performance. There would of course be far less incentive for fiduciaries to try to import such exclusions if we all aggressively challenged their standardised attempts to obtain our informed consent to conflicts or benefits. Beyond that, issues with the reality of informed consent are not peculiar to fiduciary accountability. It is a problem in the law generally, and various legal doctrines are available to resist a defence of consent (eg proper notice, duress, misrepresentation, unconscionability).

Next, it sometimes is said that the courts have intentionally declined to fully define the accountability in order to retain flexibility to respond to the creativity of opportunists, or to do justice in the circumstances. No part of that supposition is accurate or justified. The courts have in fact defined with precision, and simplicity, the function and application of the conventional accountability.¹⁰⁸ The classic cases demonstrate that clearly. Moreover, courts are not seeking flexibility to respond to offensive creativity. That creativity has been constrained, to the full extent socially acceptable, by the structure of the regulation. It was the creativity of opportunists (the difficulty of detection) that compelled the courts to fully envelop the risk of opportunism by declaring that all unauthorised conflicts and benefits are proscribed. There is no conventional 'flexibility' to pursue *ad hoc* justice (that is, justice beyond the justice of established conventional principle). The lack of flexibility in fact is a *virtue* of the regulation. It is the 'justice' granted to beneficiaries, who even then remain vulnerable to compromised function due to conflicts or benefits that are never detected. The 'justice' for fiduciaries, in turn, is that they have the option to validate any conflicts or benefits by the simple means of *ex ante* or *ex post* consent.

¹⁰⁸ Flannigan, 'Boundaries of Fiduciary Accountability' (n 7) 47–8; Flannigan, 'Access or Expectation' (n 25) 28–30.

It must also be observed that the acceptance of several of the departures (eg actual trust, discretion, junior employees, mere execution agents, bare trustees) would represent a rejection of *status* fiduciary accountability. Merely proving the nominate status of an actor would no longer suffice. A fact-based analysis would be required in each case. The established default fiduciary accountability would evaporate. That would fundamentally alter the conventional position, at least idiosyncratically, and potentially the general concept of status accountability. Such a change ought to be grounded in explicit judicial reasoning. To date there is no such reasoning.

It is useful here to add certain observations about the formal distinction between status and fact-based fiduciary accountability. A determination that a limited access relation exists is in a sense itself a status designation. Usually judges point to the nominate character of a relation to establish status accountability and to the presence of a limited access undertaking to establish fact-based accountability. Recognise, however, that a nominate status is, for the purposes of fiduciary accountability, just a proxy identifier for the limited access relation that exists in each nominate case. Accordingly, whether judges are assessing status or fact-based accountability, they are always determining whether a limited access relation has been created. That means essentially that it is the *status* of a *limited access relation* that leads to the imposition of fiduciary accountability. A person who undertakes a limited access relation (a 'service' relation), just like a person who assumes a trust or an agency, is assuming a *status* that attracts fiduciary accountability. Thus, in that sense, even a fact-based analysis is an investigation into status. Was the status of the parties that they were in a limited access relation? That analysis, it will be appreciated, could be performed independently of the determination of nominate status, and thereby initially bypass the distinction between status and fact-based accountability. But then the distinction is immediately reintroduced because one way to establish a limited access relation is to prove the existence of one of the nominate status relations. Accordingly, because a defined test for fact-based accountability creates a status, and because certain nominate relations satisfy a limited access test, status fiduciary accountability remains relevant in those two senses. We could, however, alter that. We might choose to formally eliminate the status accountability of the recognised classes in order to merge status and fact-based accountability into a single universal test of limited access. The effect of that would be that initially we would lose the familiar guidance provided by nominate class ascription, and claimants would lose the usually easier burden of proving fiduciary accountability by proving nominate character. On the other hand, an abstract limited access test may be preferable if our primary concern is to reduce confusion attributable to the notion that idiosyncratic nominate character should drive design. At this point, in my view, the considerations that support retaining classes of nominate status accountability are more compelling, at least until the jurisprudence is swept of the confounding departures.

Consider additionally that a number of the departures illustrate and thereby lend a degree of legitimacy to the 'silo' development of the law, where only the particular nominate character of the relation figures in the origination of the departure. The first concern with silo development is that the departure was not duly informed by the general and generic character of the accountability. The silo context (its nominate idiosyncrasy), and powerful silo stakeholders, may have unduly produced the outcome. The related concern is that, having been fashioned on silo considerations, the departure then bleeds into (or is rejected in) other silos where ostensibly there are different contextual considerations that might suggest different outcomes. Context then appears to be everything, and the law fragments. The law sheds its fundamental generic character and becomes ever more intricate, complex and incoherent. Consider, for example, the silo development of the 'mere execution' departure. If the departure is appropriate in the agency context, why is it not also appropriate in the trust context, given that the mischief is identical? And how would the mere execution departure be received in the employment context? Would it supplement or displace the unjustified distinction between senior and junior employees? Or would it be dismissed because it would tear apart the supposed duty of 'fidelity' of employees? Consider a second example involving the senior/junior employee distinction. It is the senior employee who supposedly is alone accountable as a fiduciary. How does that comport with the apparent distinction between different levels of politicians, where the municipal politician is the clearly recognised fiduciary? These kinds of analytical concerns do not arise if silo analysis is avoided and the generic character of the regulation affirmed. Silo considerations should only have relevance in the aggregate, in the sense that a proposal for a departure should have the benefit of the insight gained by assessing generic fitness across contexts. Thus, a mere execution departure should only be acceptable if it is properly justified as the new *generic* rule for all limited access relations. In that analysis the courts would have to conclude that the justification for the departure generally overrides the justification for the conventional strict regulation of opportunism. As the courts have not identified a plausible justification even in any one of the silo contexts, there is no prospect that they will credibly identify a generic justification.

It is also material to understand the cumulative effect of the *contracting* departures on what has always been definitive principle. Every contraction constitutes an independent defence that would not be available on a conventional analysis. That will give fiduciaries several ways to escape liability, eviscerating the conventional strict character of the regulation. Consider an agent who has digested a personal benefit. The agent's defence to a claim of breach might include that no discretion (whether possessed or not) was exercised, there was only the mere execution of a fully defined transaction, the agent was not actually trusted, the 'contractual' context excluded the default application of the accountability, and there were only commercial interactions. That turns the accountability on its

head. Instead of agents always being accountable for unauthorised conflicts or benefits, it appears that going forward they may rarely be accountable. There has been no discernible shift in public sentiment or in economic or social conditions generally that could justify the introduction of that (or any) level of fresh immunity. Individually each departure constitutes an explicit rejection of the conventional strict character, and the cumulation of departures is a strong indicator of impending wholesale collapse.

It is also relevant to observe that the default strict character of the liability is not, as some might assert, a harsh standard that ought to be abandoned.¹⁰⁹ The option of consent is a full answer to that assertion. Further, to the extent it might be *perceived* as a harsh standard, it is an *intended* standard that is justified by the difficulty in detecting opportunistic impulse. It should also be appreciated that while strict, the regulation is entirely ineffective to the extent that conflicts or benefits are never detected. Consider also that the strict character of the liability actually provides a breaching fiduciary with an effective *moral* defence. Because the liability is strict, every fiduciary who is not directly or implicitly identified by a court as having acted opportunistically is entitled to explain to others that there was no finding of actual misconduct. In that sense, oddly, there is no official reputational cost for a fiduciary breach.

There is also no real substantive concern that the prospect of liability will chill beneficial whistleblowing. An undertaking of service implicitly is an undertaking of *legal* service. A fiduciary cannot be required by the law of fiduciary accountability to essentially have to participate in or condone illegality. That would be incompatible with the very idea of regulating opportunism. The regulation cannot be used to enable the opportunism of beneficiaries in attempting to tie others to their wrongs. More generally, the disclosure of illegal action usually is not within the scope of a fiduciary undertaking. Fiduciary accountability is concerned with protecting beneficiaries from the opportunism of fiduciaries. It is not concerned with shielding beneficiaries from responsibility for their own wrongful actions. Essentially beneficiaries take the risk that their misconduct will be disclosed by their fiduciaries. We may say that beneficiaries, like everyone else, implicitly consent to the application to them of general default

¹⁰⁹ Flannigan, 'Boundaries of Fiduciary Accountability' (n 7) 43–4; Flannigan, 'Strict Character' (n 11). Courts everywhere have long recognised that the strict character of the accountability is a virtue. Consider *Munson v Syracuse, Geneva and Corning Railroad Co* (1886) 103 NY 58 ('The value of the rule of equity, to which we have adverted, lies to a great extent in its stubbornness and inflexibility. Its rigidity gives it one of its chief uses as a preventive or discouraging influence, because it weakens the temptation to dishonesty or unfair dealing on the part of trustees, by vitiating, without attempt at discrimination, all transactions in which they assume the dual character of principal and representative').

communal standards of behavior. Consequently, it is not a fiduciary breach for a fiduciary to disclose illegality.¹¹⁰ That is so even where the fiduciary discloses in anticipation of a payment. The payment is not an unauthorised benefit linked to the legal performance of the undertaking. The fiduciary is as much entitled to the payment as any other actor who might ascertain and disclose the illegality. Consider also disclosure by agents or employees of corporations. In that context it is clear in principle that there is no status fiduciary accountability for disclosure. The agents and employees owe their fiduciary duty to the corporation. The corporation itself has no physical capacity and so must always act through agents and employees. Consequently the whistleblower will always be disclosing the wrongs of other agents or employees (or perhaps shareholders) to whom the whistleblower has no status fiduciary duty. Not being accountable as a fiduciary to them, there can be no status fiduciary breach to them. As for their duty to the corporation, they actually are properly performing their nominate duty to act in the best interest of the corporation by reporting wrongful action. There is no compromise of whatever function they are performing for their corporation.

Another particularly compelling reason to affirm the conventional position is that there is no one general analysis or theory available to replace it. As discussed elsewhere, there are a variety of approaches and proposals reflecting diverse policies and agendas.¹¹¹ A court that rejects the conventional position will have to engage in a sorting or selection exercise, or fashion its own conception of accountability. A senior court that does that will launch a whole new era of analysis, and likely a great deal of controversy.

A final reason the conventional position should be exclusively endorsed is that it constitutes a fitting integration of community and autonomy. Limited access arrangements are the fibre of community. We link ourselves to others in other-regarding arrangements that are engines and channels for mutual and collective advancement. And because they build community, we endeavor to shield those arrangements from the opportunism that will corrode their general utility. We recognise that community withers proportionately with the level of opportunism tolerated. At the same time, our regulation of those arrangements simultaneously respects individual autonomy in two senses. There is no imposition of the accountability without the voluntary assumption of a limited access. The imposition of the accountability only affirms or respects our prior self-interested choices to serve others. That voluntary assumption, it should be appreciated, may be indirect. For example, a person who voluntarily risks agent,

¹¹⁰ That said, fiduciary accountability is always possible on a fact-based analysis. Thus there would be a *fiduciary* breach where a fiduciary manufactured or fabricated the wrong that then was disclosed and attributed to the beneficiary. That fabrication would be a classic example of in-scope opportunism, and should properly attract the conventional regulation.

¹¹¹ See Flannigan, 'Core Nature' (n 1) 399–429; Flannigan, 'Contesting Public Service Fiduciary Accountability' (n 61) 10ff; Flannigan, 'Compound Fiduciary Duty' (n 45).

director, parent or limited access status simultaneously *voluntarily* risks the parallel application of fiduciary accountability. The second sense is that there is no imposition of the accountability if the fully informed consent of the appropriate person has been obtained to the specific conflict or benefit. As a self-activated default accountability, the community benefits of the regulation are not realised at the cost of autonomy. While not everyone understands the term 'fiduciary' (eg those who refer to it as the 'F word', and those who market 'fiduciary' services), everyone intuitively understands corrosive opportunism. That specific mischief requires a dedicated effective regulation. If that regulation is kept simple and sharp, it remains widely comprehensible as virtuous discipline that still respects the autonomy of the actors involved.

VII CONCLUSION

The law of fiduciary accountability is negligently disintegrating. I say negligently because most of the numerous departures I have described have arisen through linguistic, conceptual or research weaknesses. Conventional principle has not been openly confronted and repudiated. Rather, the departures emerged negligently and then just lingered about without resolution of the contradiction they introduced. That has left the *presentation* of the law broadly internally conflicted. Though our anchoring norm has not waned, it currently is obscured by a fog of misinformed supposition. There now *appears* to be many unresolved questions. For example, is the test for accountability a limited access undertaking, or is it actual subjective trust, discretion, reasonable expectation or fairness? Does fiduciary accountability apply to every limited access arrangement, or is it excluded or diluted for commercial interactions? Are there fiduciary distinctions within conventional status classes (eg bare trustees, junior employees, agents with only a mere execution function)? Do political representatives have some sort of unspoken immunity from the accountability? Is there a fiduciary duty of care? Is the accountability concerned with fiduciaries exceeding their authority? Do directors have a fiduciary duty to both the corporation and its shareholders? Do shareholders have a fiduciary duty to their corporation? Does status-based fiduciary accountability still exist? May we still say that fiduciary accountability is strict? In short, the relative simplicity of the jurisdiction has been suppressed, and it now is impossible to identify a coherent regulation if we must accord equal credit to every judge and writer who has purported to describe the animating mischief, and content, of the law.

It perhaps is only when the numerous departures are collected together that the scale of the shading of principle becomes fully apparent. The breadth of the distortion is stupefying. The reality is that we appear to be approaching a tipping point. The issue of the survival of the conventional regulation is at hand. Judges need to understand that the coherence of the jurisdiction is crumbling, and that

they ought to act decisively. This is not an occasion for instrumentally ambiguous speech, or for cushioning those who facilitated or authored unjustified departures. We need intellectual investment that is properly informed, not merely sunk. Clear purpose should determine our communal regulation. Everything hinges on the imperative identification of the mischief that fiduciary accountability is designed to address. That mischief should drive every aspect of the design of the regulation. If the mischief is performance compromised by opportunism, the conventional analysis should be affirmed, and the departures rejected. The alternative is for the courts to identify a different or additional mischief, with a different or additional test, and then explain which of the departures are consistent with their new notion. A choice must be made. A failure or refusal to cleanse the jurisprudence one way or the other will only further abrade the legitimacy of our 'fiduciary' regulation.