FIXING THE FIDUCIARY OBLIGATION: THE PRESCRIPTION-PROSCRIPTION DICHOTOMY

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ABSTRACT

The nebulous nature of the field of equity has been highlighted by Owen J's laborious exposition on the fiduciary obligation in the case of *Bell Group Limited (in liq) v Westpac Banking Corporation* where he effectively questions the traditional model of labelling the fiduciary obligation as strictly proscriptive. This article seeks to analyse the progressive development in this field of equitable jurisprudence, compare and contrast it with similar debates in other Commonwealth jurisdictions and finally, arrive at a conclusion as to the viability of Owen J's principle in the context of Australian fiduciary law.

I INTRODUCTION

A fiduciary relationship is one that is based on trust and confidence.[1] Such a relationship subsists between two persons when one (the fiduciary) has 'undertaken to act in the interest of the other' (the beneficiary).[2] The fiduciary obligation is essentially a tool implemented by the courts to protect those relationships where one has the discretion to control or manage the asset of another to his detriment. The 'basic model'[3] of the fiduciary obligation has traditionally been twofold:[4] the duty to ensure that his/her private interests do not conflict with his or her role as a fiduciary;[5] and the duty to not obtain any advantage by virtue of his or her position as a fiduciary.[6]

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[1] Butterworths, *Halsbury's Laws of Australia*, vol 10 (at 20 May 2008) 185 Equity, '4 Fiduciaries' [185 - 665].
[2] *Bell Group Limited (in liq) v Westpac Banking Corporation (No 9)* (2009) 70 ACSR 1, [4552] (Owen J).
[3] Ibid as quoted in R Langford, '"The Fiduciary Nature of the Bona Fide and Proper Purposes Duties of Company Directors": *Bell Group Ltd (in liq) v Westpac Banking Corp' (No 9)*' (2009) 31 *Australian Bar Review* 236, 244.
[4] P. Finn, 'The Fiduciary Principle', in T. Youdan (ed), *Equity, Fiduciaries and Trusts* (1989, Carswell: Toronto) 1. See also *Breen v Williams* (1996) 186 CLR 71, 113 (Gaudron and McHugh JJ).
[5] *Phipps v Boardman* [1967] 2 AC 46. Hereinafter referred to as the 'no conflict rule'.
[6] *Chan v Zacharia* (1984) 154 CLR 178; *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41. Hereinafter referred to as the 'no profit rule'.

As is evident, fiduciary duties have traditionally been explicitly proscriptive – they tell the fiduciary what not to do.[7] Over judicial discourse, the only exception to this rule has been the relationship between a trustee and a beneficiary where prescriptive obligations are imposed upon the trustee.[8] However, as shall be elaborated upon later in this paper, in *Bell Group Limited (in liq) v Westpac Banking Corporation (No 9)* (*Bell Group* case),[9] Owen J stipulated that in special circumstances, additional fiduciary duties may be imposed which may be prescriptive in nature.[10]

First, the researcher intends to look at the traditional conception of the fiduciary duty which was exclusively proscriptive in contradistinction to judgments in Commonwealth jurisdictions in favour of prescriptive duties which necessitate positive action.[11] The latter is part of a series of judicial decisions in Commonwealth jurisdictions such as Canada's which seek to impart a greater degree of flexibility to the fiduciary obligation. Courts in Canada have donned the activist hat and endeavoured to include prescriptive duties within the spectrum of fiduciary duties.[12] Similar arguments have been made by legal scholars.[13] The High Court of Australia has, however, rejected the activist approach and adhered to the traditional conception of fiduciary duties being exclusively proscriptive. This paper seeks to examine the 'strictly proscriptive' path taken by the High Court of Australia in light of the judgment in the *Bell Group* case.[14]

II EXPLAINING THE PRESCRIPTIVE-PROSCRIPTIVE DICHOTOMY

The underlying objective of the fiduciary concept is to protect the beneficiary by holding the fiduciary to certain standards of loyalty. Should the fiduciary undertake a venture in the pursuit of private profit which is in conflict with his role as a fiduciary, it might be near impossible for

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[7] R. Nolan, 'The Proper Purposes Doctrine and Company Directors', in B Rider (ed), *The Realm of Company Law* (1998, Kluwer Law International: London) 12. See also C. Harpum, 'Fiduciary Obligations and Fiduciary Powers: Where Are We Going?' in P. Birks (ed), *Privacy and Loyalty* (1997, Clarendon Press: Oxford) 145.
[8] Samantha Hepburn, *Principles of Equity and Trusts* (2nd ed, 1997) 289.
[9] *Bell Group Limited (in liq) v Westpac Banking Corporation (No 9)* (2009) 70 ACSR 1. Hereinafter referred to as 'Bell Group case'.
[10] Ibid, [4569] (Owen J).
[11] H. Ford and W. Lee, *Principles of the Law of Trusts* (3rd ed, 2001) [9000].
[12] J. Brebner, '"*Breen v Williams*": A Lost Opportunity or Welcome Conservatism?' (1996) 3 *Deakin Law Review* 237.
[13] R. Lee, 'Rethinking the Content of the Fiduciary Obligation' [2009] *Conveyancer and Property Lawyer* 236.
[14] *Bell Group Limited (in liq) v Westpac Banking Corporation (No 9)* (2009) 70 ACSR 1.

the courts to adjudge whether such action of the fiduciary has detrimentally affected the beneficiary. That is why the Courts have prohibited fiduciaries from entering into any situation that even remotely envisages a conflict of duty or potential private gain at the expense of the beneficiary.[15] Matthew Conaglen captured the essence of the fiduciary obligation when he described it as a system of insulation to prevent the fiduciary's digression from his 'non-fiduciary duties'.[16] Thus the role played by the fiduciary obligation is to 'prophylactically deter fiduciaries from being tempted to consider self-interest over loyalty'.[17] It seeks to supplement the performance of the fiduciary's non fiduciary duties.[18]

This being said, it is wrong to assume that a fiduciary owes no other duty to the beneficiary. These non-fiduciary duties stem from contract, tort or other legal mechanisms and may be prescriptive in nature. However, these duties are not explicitly based on the relationship of trust, loyalty and confidence and therefore cannot be classified as fiduciary in nature.[19]

A Oh Canada!

In the opinion of the Supreme Court of Canada in *McIrney v. MacDonald*,[20] a fiduciary is encumbered with the prescriptive duty of acting with 'the utmost good faith and loyalty'[21] towards the beneficiary. In this case, a doctor refused to give a patient access to medical records that were prepared by the patient's previous physicians. The Court first ruled that the relationship between a doctor and patient was fiduciary in nature as it was based on trust and confidence.[22] Furthermore, it was held that providing access to medical records was incidental to the fiduciary duty imposed upon the doctor.[23]

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[15] D. Jensen, 'Prescription and Proscription in Fiduciary Obligations' (2010) 21 *King's Law Journal* 333, 334.
[16] M. Conaglen, 'The Nature and Function of Fiduciary Loyalty' (2005) 121 *Law Quarterly Review* 452, 453.
[17] *Maguire v Markonis* (1997) 188 CLR 449, 495 (Kirby J) as quoted in G. Dempsey and A. Geinke, 'Proscriptive Fiduciary Duties in Australia' (2004) 25 *Australian Bar Review* 1, 2.
[18] Conaglen, above n 16.
[19] Finn, above n 4, 1, 25, 28.
[20] *McIrney v. MacDonald* (1992) 93 DLR (4th) 415.
[21] Ibid, 423 (La Forest J).
[22] Ibid.
[23] Ibid.

This pronouncement is not without criticism in Canadian legal circles with legal scholars having termed the approach as 'a conceptual muddle'.[24] It has been lambasted within judicial circles as well. In *A(C) v. Critchley*,[25] the Crown placed orphans in the care of certain foster parents who sexually abused them. The Trial Court held the Crown liable for breach of their fiduciary duty by inferring a positive fiduciary obligation on the Crown to look after the children. The British Columbia Court of Appeal reversed the Trial Court judgment. It was held that there was no breach of fiduciary duty as the Crown and its employees were found to have acted honestly.[26] Notably, it was held that the Supreme Court had not adopted a principled approach in extending the ambit of the fiduciary obligation and that the inclusion of prescriptive duties was not doctrinally sound.[27]

B 'The Law in this Country'

1 Breen v Williams[28]

The outright rejection of importing prescriptive duties into the ambit of Australian fiduciary law was stressed upon in *Breen*.[29] In this case, a lady was unhappy with her breast implants and sued the manufacturers of the implants in the United States. To substantiate her claim, she was required to attach her medical records but was denied access to them by her doctor. The matter reached the High Court where she argued that a fiduciary relationship existed between doctors and patients and that part of the fiduciary obligation imposed upon a doctor was the positive duty to grant the patient right to his or her medical records. The Canadian authority of *McIrney*[30] was cited in support of this claim. The High Court of Australia, however, dismissed the suit. While the Honourable Court acceded to inferring a fiduciary relationship between doctors and

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[24] J. Berryman, '"Equitable Compensation for Breach by Fact-Based Fiduciaries": Tentative Thoughts on Clarifying Remedial Goals' (1999) 37 *Alberta L Rev* 95 as quoted in G. Dempsey and A. Geinke, 'Proscriptive Fiduciary Duties in Australia' (2004) 25 *Australian Bar Review* 1, 4.
[25] *A(C) v. Critchley* (1998) 166 DLR (4th) 475.
[26] Ibid, 500 (McEachren CJBC).
[27] Ibid, 496.
[28] *Breen v Williams* (1996) 186 CLR 71.
[29] Ibid.
[30] *McIrney v. MacDonald* (1992) 93 DLR (4th) 415.

patients,[31] it refused to acknowledge a prescriptive duty as part of the fiduciary obligation.[32] Brennan CJ rejected the Canadian ruling saying that it did not 'accord with the law of fiduciary duty as understood in this country'.[33] Gummow J expressed his disagreement in even stronger words, saying that 'it would be to stand established principle on its head' to say that a doctor, as a fiduciary, was burdened with the positive obligation to act in the patient's best interest.[34] Meagher JA was of the opinion that the Canadian decision lacked any concrete doctrinal foundation.[35] It was remarked that Canadian and American courts sought to develop the fiduciary concept on an ad hoc basis with the objective of reaching a preferred result in the matter at hand and that their conception of fiduciary obligation could not be applied in Australia.[36] Importing positive obligation into the fiduciary concept was seen as embarking on a slippery slope since it would affect all other categories of fiduciary obligations.[37]

2 Pilmer v Duke Group Ltd (in liq)[38]

Another landmark decision on this point of law was that of the High Court of Australia in *Pilmer*.[39] In this case, the plaintiff invested in a company on the advice of a financial advisor. Soon after this investment, the share price plummeted and the plaintiff suffered a sizeable loss. He went on to sue the advisor with the claim that he had breached his fiduciary duty by not exercising due care in preparing the valuation report on which the plaintiff had relied. The Honourable Court adopted the principle of law laid down in *Breen*[40] in the following words:

> [f]iduciary obligations are proscriptive rather than prescriptive in nature; there is not imposed upon fiduciaries a quasi tortious duty to act solely in the best interests of their principals.[41]

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[31] *Breen v WIlliams* (1996) 186 CLR 71, 83.
[32] Ibid, 113 (Gaudron and McHugh JJ).
[33] Ibid, 83 (Brennan CJ).
[34] Ibid, 137 (Gummow J).
[35] Ibid, 570 (Meagher JA).
[36] Ibid, 95 (Dawson and Toohey JJ).
[37] Ibid, 112 (Gaudron and McHugh JJ).
[38] *Pilmer v Duke Group Ltd (in liq*) (2001) 207 CLR 165.
[39] Ibid.
[40] *Breen v Williams* (1996) 186 CLR 71, 83.
[41] *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165, 197 (McHugh, Gummow, Hayne and Callinan JJ).

3 The Bell Group case[42]

Just when it seemed rather cut and dry that fiduciary duties can only be proscriptive in nature, Owen J, in the *Bell Group* case,[43] raised the question of prescription within the fiduciary obligation yet again.[44] The central focus of this matter was the fiduciary relationship that subsisted between a director of a company and the company. Historically, equity has imposed on the director of a company the duty to act bona fide in the company's interests[45] and the duty to exercise powers for purposes for which they were expressly or impliedly conferred[46] in addition to the no conflict rule and no profit rule.[47] The former duties are classified as fiduciary in nature despite being prescriptive as they stem from the relationship of trust and loyalty that exists between a director and company. In light of the decisions in *Breen*[48] and *Pilmer*,[49] the fiduciary character of the abovementioned duties was thrown into doubt. Owen J attempted to reconcile this apparent contradiction in his judgment in the *Bell Group* case.[50] The Bell Group was a group of companies out of which some companies had borrowed from a bank with assets of the group as security for the transaction. The directors therefore 'acted in the overall interests of the corporate group but not in the interest of the individual companies'.[51] On liquidation, the banks realised their securities. However shareholders and creditors of some individual companies within the group believed that they had been prejudiced by the alleged breach of the directors' fiduciary duties to act bona fide in the interest of the company and for proper purposes. It was argued before the Supreme Court of Western Australia that in light of the decisions in *Breen*[52] and *Pilmer*,[53] the bona fide rule and the proper purposes rule could no longer be characterised as fiduciary as they were prescriptive in nature. However Owen J dismissed this argument and found that these duties were indeed fiduciary in nature. In doing so, he qualified the rulings of

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[42] *Bell Group Limited (in liq) v Westpac Banking Corporation (No 9)* (2009) 70 ACSR 1.
[43] Ibid.
[44] Ibid, [4539].
[45] *Re Smith and Fawcett Ltd* [1942] Ch 304, 306 (Lord Greene MR). Hereinafter referred to as the 'bona fide rule'.
[46] Hereinafter referred to as the 'proper purposes rule'.
[47] Langford, above n 3.
[48] *Breen v Williams* (1996) 186 CLR 71
[49] *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165.
[50] *Bell Group Limited (in liq) v Westpac Banking Corporation (No 9)* (2009) 70 ACSR 1.
[51] P. Radan and C. Stewart, *Principles of Australian Equity and Trusts* (2010) 182.
[52] *Breen v Williams* (1996) 186 CLR 71.
[53] *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165.

the High Court of Australia by suggesting that the conception of the fiduciary duty as merely twofold, ie only the no conflict rule and the no profit rule was a fundamental or 'core' understanding of the fiduciary concept and that in certain circumstances, additional fiduciary obligations may be imposed.[54] On this point, Owen J said the following:

> [t]he fact that a relationship is categorised as fiduciary does not mean that all of the obligations arising from it are themselves fiduciary. Unless there are some special circumstances in the relationship, the duties that equity demands from the fiduciary will be limited to what I have described as the core obligations: not to obtain any unauthorised benefit from the relationship and not to be in a position of conflict.[55] (emphasis supplied)

In spite of the abovementioned remarks, Owen J went on to demonstrate how both the bona fide rule and the proper purposes rule could be phrased in a manner that was proscriptive in nature.[56] However, his formulation of the practical requirements of the rules was markedly prescriptive in character. While essaying out the requirements of the bona fide rule, he said:

> The directors must give real and actual consideration to the interests of the company. The degree of consideration that must be given will depend on the individual circumstances. But the consideration must be more than a mere token: it must actually occur.[57]

While commenting on the fiduciary duties of directors of a soon-to-be-insolvent company to the company's creditors, Owen J held:

> In the circumstances that I have outlined it was not reasonable for [the director] to commit the companies to the grant of securities without:
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> (a) identifying the creditors each company in the group might have and considering what effect the proposed securities might have on the creditors and shareholders of that company; and
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> (b) having a plan worked out, not in absolute detail but with sufficient precision to make sense, to deal with the longer term problems of the companies and, in particular, with the consequences for each individual company of the proposed course of action.[58]

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[54] Langford, above n 3, 244.
[55] *Bell Group Limited (in liq) v Westpac Banking Corporation (No 9)* (2009) 70 ACSR 1, [4552], [4569] (Owen J).
[56] Ibid, [4580], [4581].
[57] Ibid, [4619].
[58] Ibid, [6088].

These seemingly prescriptive obligations on directors give true meaning to Owen J's justified clarification of the 'exclusively proscriptive' rule in *Breen*[59] and *Pilmer*.[60] What we can take away from Owen J's exposition of fiduciary law is that in certain extra-ordinary circumstances, fiduciary obligations may be prescriptive though the burden of proof required to elevate an ordinary fiduciary obligation to one that incorporates prescriptive duties ought to be high.

III CONCLUSION

In conclusion, the researcher believes that fiduciary law in Australia requires a nuanced approach specifically tailored to the requirements of the relationship being considered. The rulings in *Breen*[61] and *Pilmer*,[62] while contextually justified, cannot be applied in a blanket manner to all fiduciary relationships. At the same time, the Canadian ruling in *McIrney* that all fiduciary obligations may be prescriptive in nature is also untenable owing to its generic character. Certain fiduciary relationships are not suited to have the broad-ranging obligations that prescriptive duties imply.[63] Yet, Owen J's voluminous judgment in the *Bell Group* case makes it clear that age old fiduciary obligations have implied prescriptive duties.

While it may appear to an opinionated reader that the researcher has chosen to sit on the fence in this issue, it must not be forgotten that fiduciary law is but a strata of equity and equity sees as done what ought to be done. The driving force of the law of equity has been to temper the rigours of the common law, yet from the above discussion it seems that equity has assumed an even more rigid posture. Owen J has belled the proverbial cat in the *Bell Group* case[64] by seeking to carve a niche for those fiduciary obligations that cannot be satisfied by proscriptive requirements. Though he attempts to tread the line of the High Court of Australia, he reverts back to prescriptive formulations to satisfy his proscriptive duties. A nuanced and problematised approach is the sole solution to the proscriptive-prescriptive dichotomy.

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[59] *Breen v Williams* (1996) 186 CLR 71.
[60] *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165.
[61] *Breen v Williams* (1996) 186 CLR 71.
[62] *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165.
[63] For example, journalists, accountants, bank officers etc: *Breen v Williams* (1996) 186 CLR 71, 112 (Gaudron and McHugh JJ).
[64] *Bell Group Limited (in liq) v Westpac Banking Corporation (No 9)* (2009) 70 ACSR 1.

It is not the researcher's opinion that the law in *Breen*[65] and *Pilmer*[66]ought to be discarded. The fundamental two fold obligation of the fiduciary concept and their proscriptive nature is doctrinally sound and must be retained. A high burden of proof must be imposed on he or she who seeks to import prescriptive duties into a fiduciary relationship. Furthermore, strict regard should be had to the common law and statutory law before any such step. As was held in *Breen,*[67]the fiduciary relationship cannot 'distort' a subsisting contractual one or any duty imposed by the common law. The ruling in *Breen* was factually justified since common law duties were inherent in a doctor-patient relationship. Yet, there ought to be scope for clarification where needed. The fiduciary relationship between a trustee and a beneficiary is acknowledged to be an exception to the 'strictly proscriptive' rule and courts should be flexible enough to consider more exceptions. The litanies of those wronged by those they trusted may be better remedied by such guided and principled open mindedness. Kirby J acknowledged the state of flux in this field in *Breen*[68] when he said that the fiduciary principle is 'in a state of development whose impetus has not been spent to the present day'. Deane J once commented that fiduciary law will not accommodate 'idiosyncratic notions of what is fair and just'.[69] While that may be justified, if what is fair and just is deemed to be idiosyncratic solely on the basis of mere semantics, 'the law in this country' will soon stagnate.

[65] *Breen v Williams* (1996) 186 CLR 71.
[66] *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165.
[67] *Breen v Williams* (1994) 35 NSWLR 527, 552 (Kirby J).
[68] Ibid, 543.
[69] *Pavey & Matthews Pty Ltd. v Paul* (1986-1987) 162 CLR 221, 256 (Deane J) as quoted in J Brebner, above n 12, 249.