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How Contractual Terms Determine Fiduciary Duties: A Two-Stage Process

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Abstract

The determination of the scope of the fiduciary duty of loyalty, when created by contract, is not a unitary process. It is raised following a multi-factorial enquiry, which considers the nature of the engagement, in a first stage. Here, no single factor is conclusive. It is then, in a separate, second stage, reduced by qualifying contractual terms, which are applied almost strictly logically. This second stage uses the contractual doctrines of interpretation and implication. However, since it is a form of the fiduciary doctrine of authorisation, those contractual doctrines are modified according to fiduciary principles. We argue this follows from the underlying nature of the fiduciary obligation as a way of resolving its internal tensions. While this division has not yet been fully recognised in the cases, the courts have been inching towards it. However, not fully recognising this inevitable division and eliding the two stages has led to defective reasoning and outcomes.

Keywords: fiduciary duties; equity; contractarianism; construction; implication; authorisation.

How Contractual Terms Determine Fiduciary Duties: A Two-Stage Process

In this article, we seek to identify the processes in which the equitable duty of loyalty, or, equivalently, the fiduciary duty, responds to any contractual terms that form part of the engagement between the parties. It might be thought that the duty of loyalty is created in a single-stage process. One starts with a blank slate, and then positively implies the duty of loyalty if the nature of the engagement – defined by the terms of the contract – demands it. In this, one moves in a single step from having nothing to something.

This account is too simplistic. However, it is clear from the leading cases that the scope of the duty of loyalty does depend on the terms of the engagement.[1] By scope, we mean to which interests it does or does not apply and any particular acts, within those interests, to which it does or does not apply. There must, therefore, be some role for the contract. We propose that the true framework is that there are two distinct stages in which the contract terms influence the duty of loyalty in very different ways.

First, the duty of loyalty is raised if the parties are in one of the recognised fiduciary relationships or because of the existence of factors – determined from the terms of the contract – that demand single-minded loyalty. Here, no one factor is conclusive, making this stage relatively uncertain. This is the wholly positive process, moving from nothing to something.

Conversely, the second stage is a wholly negative process, where the terms of the contract, both express and implied, only reduce the scope of the duty of loyalty. The second stage is a form of fiduciary authorisation (meaning where the principal consents to what would otherwise be a breach of fiduciary duty), differing from the conventional process of subsequent or mid-term authorisation mainly in that its terms are defined before the engagement has commenced and not after. Here, the contractual terms, express and implied, are applied almost strictly logically, making it much more certain, although they are still subject to overriding fiduciary principles.

We argue this follows from the purpose of the duty of loyalty. It is said that the duty of loyalty exists to protect the principal and deter the fiduciary from acts of disloyalty by taking away the advantage or profit.[2] However, there is a competing imperative. The principal is entitled, when fully informed of the consequences of doing so, to relax that rule and authorise what would otherwise be a breach. It has been observed that it may very much be in his or her commercial advantage to do so.[3] The tension between these aims is best resolved through such a two-stage process.

The courts have not explicitly recognised this. Indeed, authorisation has been not been subject to much critical analysis in judgments or commentary.[4] Nonetheless, they have been

[1] E.g. *Kelly v Cooper* [1993] AC 205 (PC) 213–4; *Henderson v Merrett Syndicates Ltd (No 1)* [1995] 2 AC 145 (HL) 206.
[2] E.g. *Murad v Al-Saraj* [2005] EWCA Civ 959, [2005] WTLR 1573 [74]; *Boardman v Phipps* [1967] 2 AC 46 (HL); *Regal (Hastings) Ltd v Gulliver* [1967] AC 134, [1942] 1 All ER 378 (HL).
[3] *Boulting v Association of Cinematograph, Television and Allied Technicians* [1963] 2 QB 606 (CA) 636, 637.
[4] Jennifer Payne, 'Consent' in Peter Birks and Arianna Pretto (eds), *Breach of Trust* (Hart 2002) 297 citing *Spellson v George* [1992] NSWLR 666 (NSWCA) 669. The other major piece on authorisation is Ying Khai

inching towards this position as they seek, case by case and issue by issue, to develop the law in accordance with its underlying principles. Thus, in addition to justifying the two-stage process as a matter of principle, we examine the state of the law, showing how far the courts have come towards this outcome and where there is still some way to go.

Recognising the two-stage process explicitly brings three advantages. First, failure to do so results in an elision of the different principles in each stage (for instance, judges treating second stage issues as purely contractual), which results in faulty reasoning and incorrect outcomes. Second, it makes the law easier to apply because the character and applicable rules of each stage are better illustrated. Third, one can determine the outcome of stage two relatively easily and with a high degree of certainty. While stage one is still inevitably uncertain, by making it clear that some matters only apply to stage two, stage one becomes a little more certain.

We begin in section 1 by considering the tension in the underlying principles and how it can be resolved via a two-stage process. In section 2, we examine the different role of contract law in each stage. Essentially, contractual doctrines can only be used when they are compatible with fiduciary principles, which means the implication of terms in fact only works well in stage two. We continue in section 3 by showing how other contractual principles are modified to make them compatible with fiduciary law so they are apt for stage two. Finally, in section 4, we conclude by showing how the framework we advance is easier to apply and how it illuminates errors in judges' reasoning and decisions.

1 The Two Stages in Principle

(A) One Stage or Two?

It is clear that fiduciary duties can arise not only in traditional fiduciary relationships (such as agent-principal, trustee-beneficiary, solicitor-client and director-company), but also in 'ad hoc' relationships provided the right factors exist. Consider what the courts have said about raising and scoping the duty of loyalty. Most judgments proceed on the basis that, in ad hoc cases, the terms of the contract are important in some rather nebulous way. The classic exposition is in *Hospital Products Ltd v United States Surgical Corporation*, which illustrates this:

> [I]t is the contractual foundation which is all important because it is the contract that regulates the basic rights and liabilities of the parties. The fiduciary relationship, if it is to exist at all, must accommodate itself to the terms of the contract so that it is consistent with, and conforms to, them. The fiduciary relationship cannot be superimposed upon the contract in such a way as to alter the operation which the contract was intended to have according to its true construction.[5]

This passage has been quoted in the stage two cases of *Northampton Regional Livestock Centre Company Ltd v Cowling*,[6] *Hilton v Barker Booth & Eastwood*[7] and *Global Container*

Liew and Charles Mitchell, 'Beneficiaries' Consent to Trustees' Unauthorised Actions' in Paul S Davies, Simon Douglas and James Goudkamp (eds), *Defences in Equity* (Hart 2018).

[5] (1984) 156 CLR 41 (HCA) 97.

[6] [2014] EWHC 30 (QB) [180] this point not raised on appeal: [2015] EWCA Civ 651, [2016] PNLR 5. The issue was disclosure, a stage two issue.

[7] [2005] UKHL 8, [2005] 1 WLR 567 [30]. The issue was whether there was an implied term meaning disclosure was not required.

Lines Ltd v Bonyad Shipping Co (No 1)[8] and the stage one cases of *Ranson v Customer Systems plc*[9] and *Fujitsu Services Ltd v IBM United Kingdom Ltd*.[10] *Ranson* was cited with approval by Lord Neuberger MR in the stage two case of *Rossetti Marketing Ltd v Diamond Sofa Co Ltd*.[11] Further vague statements can be seen, such as '[t]he precise scope of [the duty of loyalty] must be moulded according to the nature of the relationship'[12] and the defendant's 'capacity to make decisions … is inconsistent [with the existence of a general fiduciary relationship.]'[13]

These *dicta* suggest a compendious single-stage process of identifying a fiduciary duty and its scope by considering a range of factors. In *Hospital Products*, the High Court of Australia identified some of these, such as a relationship of trust of confidence, inequality of bargaining power and the absence of arm's length contracting.[14] The English cases have further suggested an undertaking of assumption of responsibility and entrustment of property, affairs, transactions or interests.[15]

Before considering the reasons for having two different stages, it is helpful to illustrate them with some concrete facts. In *University of Nottingham v Fishel*,[16] a stage one case, the question was to which interests of his employer, if any, Dr Fishel was responsible to as a fiduciary. The scope of his duty was determined by considering the many factors. Against the existence of the duty of loyalty stood his employer's encouragement of outside consultancy and that he was merely an employee. In favour was the business-like structure of his academic unit and that he had a key role. The court held that he was subject to the duty of loyalty in managing a team of embryologists for his employer.[17] He should have directed them to work for his employer and so he incurred liability for using them for his own personal benefit. Nonetheless, he was not under a fiduciary duty for work conducted outside of the UK, since he was not acting for his employer there.

In *Ross River Ltd v Waveley Commercial Ltd*,[18] concerning both stages, the parties were joint venturers so the *prima facie* position was that, in the absence of agency or partnership, there is no fiduciary duty.[19] There was a fiduciary duty because Ross River 'reposed a very high degree of trust' in Waveley Commercial (the stage one issue).[20] The key issue was under what terms payment could be made without it being a breach of fiduciary duty. The answer was that it had to be in accordance with clause 10.5 of the contract, providing that the development profit be paid by the fiduciary to Ross River before it could pay itself except: (i) in respect of proper expenses incurred; or (ii) with the agreement of Ross River. This was

[8] [1998] 1 Lloyd's Rep 528 (QB) 546.
[9] [2012] EWCA Civ 841, [2012] IRLR 769 [26].
[10] [2014] EWHC 752 (TCC), [2014] 1 CLC 353 [123].
[11] [2012] EWCA Civ 1021 [21].
[12] *New Zealand Netherlands Society 'Oranje' Inc v Kuys* [1973] 1 WLR 1126 (PC) 1130.
[13] *Hospital Products* (n 5) 98.
[14] ibid 69ff.
[15] *Peskin v Anderson* [2001] BCC 874 (CA) [34] quoted in *Sinclair Investment Holdings SA v Versailles Trade Finance Ltd* [2007] EWHC 915 (Ch), [2007] 2 All ER (Comm) 993 [79].
[16] [2000] ICR 1462 (QB).
[17] ibid 1494.
[18] [2013] EWCA Civ 910.
[19] *Crossco No 4 Unlimited v Jolan Ltd* [2011] EWCA Civ 1619, [2012] 2 All ER 754 [88]. See also *Murad v Al-Saraj* [2004] EWHC 1235 (Ch) [325]–[341].
[20] *Ross River v Waveley* (n 18) [39].

held to be consistent with the existence of a fiduciary duty (in stage one),[21] but precluded a breach of fiduciary duty provided Waveley Commercial kept to it (stage two).

The different character of each enquiry is immediately apparent. Stage one is the weighing of a multitude of factors. It looks to the contract, because the terms of the contract can make out the factors the court looks to, particularly assumption of responsibility. For instance, Dr Fishel's overall responsibility was defined by a multitude of terms. Conversely, stage two is a crystalline, sharply logical and ordered process.[22] Here, the terms of the contract directly define the exceptions to the duty of loyalty, as in *Ross River*, and the parties' intention, as expressed in the terms, has a much more direct effect on the duty of loyalty.

(B) FUNDAMENTAL PRINCIPLES

Now consider how the different characters of each stage may be justified. We argue that this arrangement is the result of the resolution of a tension between three conventional fundamental principles of fiduciary law. Provided one accepts the validity of these principles, the conclusion follows.[23]

The first fundamental principle of fiduciary law is deterrence or prophylaxis. The duty of loyalty exists to protect the principal by deterring the fiduciary from the temptation to put his or her interests ahead of his or her duty or to make an unauthorised profit.[24] It does this by giving remedies over and above those that exist in the law of contract, namely strict liability to account for profits[25] and susceptibility to rescission.[26] By taking away the fruits of the breach – even if the principal suffers no loss – the fiduciary is deterred from pursuing it.[27]

The second is autonomy. In the mid-term authorisation case of *Boulting v Association of Cinematography Television & Allied Technicians*, it was said that:

> [T]he person entitled to the benefit of the rule may relax it, provided he is of full age and sui juris and fully understands not only what he is doing but also what his legal rights are, and that he is in part surrendering them [If so,] there is no reason

[21] ibid [40], [94].
[22] John Rawls, *A Theory of Justice* (Harvard University Press 2009) 36ff uses the term 'lexically ordered'.
[23] They are conventional, but can be controverted. See, e.g., John H Langbein, 'Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?' (2005) 114 Yale LJ 929; Lionel Smith, 'Deterrence, Prophylaxis and Punishment in Fiduciary Obligations' (2013) 7 J Eq 87; Robert Flannigan, 'The Fiduciary Obligation' (1989) 9 OJLS 285; Ernest J Weinrib, 'The Fiduciary Obligation' (1975) 25 UTLJ 1; J E Penner, 'Distinguishing Fiduciary, Trust, and Accounting Relationships' (2014) 8 J Eq 202; Lionel Smith, 'The Motive, Not the Deed' in Joshua Getzler (ed), *Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn* (LexisNexis 2003); Stephen A Smith, 'The Deed, Not the Motive' in Paul B Miller and Andrew S Gold (eds), *Contract, Status, and Fiduciary Law* (OUP 2016); Matthew Conaglen, *Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary Duties* (Hart 2011); Matthew Conaglen, 'The Nature and Function of Fiduciary Loyalty' (2005) 121 LQR 452; Rebecca Lee, 'In Search of the Nature and Function of Fiduciary Loyalty: Some Observations on Conaglen's Analysis' (2007) 27 OJLS 327.
[24] *Bray v Ford* [1896] AC 44 (HL).
[25] *Boardman v Phipps* (n 2); *Regal Hastings* (n 2); *Keech v Sandford* (1726) Sel Cas Ch 61, 25 ER 223.
[26] *Aberdeen Railway Co v Blaikie Brothers* (1854) 1 Macq 461, [1843–60] All ER Rep 249 (HL Sc).
[27] Smith, 'Deterrence, Prophylaxis and Punishment in Fiduciary Obligations' (n 23) considers the difference between deterrence and prophylaxis, but it is not material for present purposes.

> why he should not relax the rule, and it may commercially be very much to his advantage to do so.[28]

It is trite that parties make bargains for their mutual benefit. If the principal is sufficiently appraised, considering all the circumstances, including his or her knowledge and sophistication, the protective function of fiduciary law is achieved without the need for the duty of loyalty itself.[29] This would have been the case in *Ross River*, and it is only because Waveley Commercial paid themselves outside of the agreed strictures that they were liable. One can also easily imagine that a director, with the knowledge and approval of the company, might offer it a good price for its property or an opportunity. As Chitty LJ said, 'the real evil is not the payment of money, but the secrecy attending it'.[30]

The third is that the protective function must prevail. Fiduciary duties are of course voluntarily assumed – one cannot foist the duty of loyalty on someone.[31] The stage one enquiry looks to whether sufficient responsibility has been assumed by the would-be fiduciary. However, there are aspects of the duty of loyalty that do not respond directly to the parties' intentions and prevail over them. The duty of loyalty has an 'irreducible core' that cannot be excluded no matter how hard the parties try.[32] The core provides mandatory rules, which are imposed in direct opposition to the express terms of a contract, reflecting the protective purpose of the duty of loyalty. This is common theme in equity, also seen in the law of mortgages and unconscionable bargains.[33] This makes fiduciary duties hard to conceptualise as contractual terms implied in fact, because in contract law express terms trump implied ones.[34] Moreover, as Smith points out, the ability to modify an obligation does not necessarily mean the modifier comes from the same source.[35]

This can be demonstrated by considering the core requirement of disclosure.[36] Consider an engagement where the fiduciary is entitled to take fees or commissions on management activities. While at common law it is perfectly possible to stipulate 'a reasonable commission' for subcontracting work, the details of that commission must be disclosed in

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[28] (n 3) 636, 637. See also *Re Pauling's Settlement Trusts* [1962] 1 WLR 86 (Ch) 108: 'having given his concurrence, [the beneficiary should not be able to sue] provided that he fully understands what he is concurring in.'

[29] An argument also made by Matthew Conaglen, 'Fiduciary Duties and Voluntary Undertakings' (2013) 7 J Eq 105, 118. Conaglen of course takes the position that the purpose of fiduciary duties is to ensure the proper performance of non-fiduciary duties: Conaglen, *Fiduciary Loyalty* (n 23). Nonetheless, this argument applies even if one takes the purpose of fiduciary duties to be the conventional one of prophylaxis.

[30] *Shipway v Broadwood* [1899] 1 QB 369 (CA) 373.

[31] *Hospital Products* (n 5) 97; *Williams v Central Bank of Nigeria* [2014] UKSC 10, [2014] AC 1189 [9]. A fiduciary has power, trust and confidence reposed in him or her; there are no constructive fiduciaries: Lionel Smith, 'Constructive Fiduciaries?' in Peter Birks (ed), *Privacy and Loyalty* (Clarendon 1997).

[32] *Armitage v Nurse* [1998] Ch 241 (CA) 253. See also Mark Leeming, 'The Scope of Fiduciary Obligations: How Contract Informs, but does not Determine, the Scope of Fiduciary Obligations' (2009) 3 J Eq 181 for instances where the contract is not predominant.

[33] *G & C Kreglinger v New Patagonia Meat and Cold Storage Co, Ltd* [1914] AC 25 (HL) ('clogs and fetters' and the mortgagee's equity of redemption); *Credit Lyonnais Bank Nederland NV v Burch* [1997] 1 All ER 144 (CA).

[34] E.g. *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2016] AC 742 [18].

[35] Lionel D Smith, 'Contract, Consent and Fiduciary Relationships' in Paul B Miller and Andrew S Gold (eds), *Contract, Status, and Fiduciary Law* (OUP 2016) 123ff. He gives the example of contract modifying tort obligations.

[36] It is not a free-standing duty: *Item Software (UK) Ltd v Fassihi* [2004] EWCA Civ 1244, [2004] BCC 994.

order to avoid liability if a fiduciary duty exists.[37] This is perhaps the paradigm case of how fiduciary law's norms override the intentions of the parties. Unless there is sufficient disclosure, the principal's autonomy is impaired and the prophylactic remedies remain.

Exploring the possible outcomes to such an attempt demonstrates not only the existence of the irreducible core, but gives an early indication of a principled need for two stages. Consider, for example, a term providing that disclosure to the 'principal' is not required and the 'principal' is to take independent advice. First, it could be that the reduction in the duties of the 'fiduciary' are such that the duty of loyalty is wholly displaced (in what we characterise as stage one). In *Chan v Zacharia*, Deane J suggested that '[i]t is conceivable that the effect of the provisions of a particular partnership agreement … could be that any fiduciary relationship between the partners is excluded.'[38] Second and alternatively, the courts could still find that there is a fiduciary relationship, and any particular terms attempting to exclude the need for disclosure (or indeed another core facet of the duty of loyalty) would be ineffective. A Canadian judge, Moore J, has said that '[t]he fiduciary duty transcends these terms and it is abhorrent for contractual terms to abrogate that duty'.[39] Once the duty is owed, one cannot derogate from its irreducible core.

That is not to say that all terms will go this way. If the term falls in the middle ground, such that it is neither abhorrent to the duty of loyalty (in stage one), it creates a limited exception, reducing the scope of the duty of loyalty in part (in stage two). A very simple example is a non-secret commission. If the fiduciary stipulates a commission of 10 per cent, this is perfectly legitimate. Taking more is clearly a breach of fiduciary duty, so the duty of loyalty is not displaced altogether.

(C) RESOLVING THE TENSION

The inevitable consequence of the combination of the protective function and the irreducible core of the duty of loyalty is that, doctrinally, the process of raising it simply cannot be a sharply logical process of applying crystalline, well-defined rules. Instead, using Rose's terminology, it must be a 'muddy' process of determination.[40] Rather than having a set of rules with results of 'yes' or 'no', there are factors with answers of 'maybe' or 'maybe not'. The discussion of *Fishel* is a good illustration of this.[41] It can also be called a 'multi-factorial' or 'range of factors' approach, terminology used in the doctrines of frustration,[42] illegality,[43]

[37] If the size of the commission is a trade custom and the principal aware of it, this is probably sufficient: *Hurstanger Ltd v Wilson* [2007] EWCA Civ 299, [2007] 1 WLR 2351 [36]ff. See also Peter Watts, *Bowstead and Reynolds on Agency* (20th edn, Sweet & Maxwell 2016) para 6–086; the 'half-secret commission' in the example may attract the remedy of account of profits but not rescission.
[38] (1984) 154 CLR 178 (HCA) 196.
[39] *Penner v Yorkton Continental Securities Inc* [1996] AWLD 456 (Alberta Court of Queen's Bench) [90].
[40] Carol M Rose, 'Crystals and Mud in Property Law' (1988) 40 Stan L Rev 577.
[41] Above, text from n 16.
[42] *Edwinton Commercial Corp v Tsavliris Russ (Worldwide Salvage & Towage) Ltd (The Sea Angel)* [2007] EWCA Civ 547, [2007] 2 Lloyd's Rep 517 [111].
[43] *Patel v Mirza* [2016] UKSC 42, [2017] AC 467 [83], [107].

mitigation[44] and the common intention constructive trust.[45] It is thought to be generally applicable where the question is whether there is an assumption of responsibility.[46]

There are two reasons why a multi-factorial approach is required. The first is flexibility. If one adopts crystalline rules to determine questions of determination of responsibility, the risk of being driven to unsatisfactory outcomes by those rules or having excessively complicated rules to avoid such outcomes becomes a likelihood. This was the case in the doctrine of illegality, where after a series of unsatisfactory cases, a majority of the Supreme Court eventually adopted a multi-factorial approach to avoid this problem in *Patel v Mirza*.[47] Moreover, in the context of frustration, it is said that determining the allocation of risk (which is quite like responsibility) was not simply a matter of express or implied provision, but something that takes in 'less easily defined matters such as "the contemplation of the parties"'.[48]

The second is to uphold a standard. Responsibility is always to a certain standard, and when standards are to be upheld, one sees terms such as 'reasonable care', 'satisfactory quality' or 'good reason'. Holding a person to a standard and not merely a checklist of rules inherently favours muddy rules over crystalline ones. It means holding that person to the spirit as well as the letter of the law, but if this is to be legally enforceable, it is the spirit and not the letter that must be binding. If it were the letter – which it would be if the determination were a series of tests with yes/no answers – there would be a considerable danger of imaginative contracting out or working around.[49] Given the vulnerability of the principal, this is all the more important. This muddy rules approach, as Rose points out, is very much in the spirit of Holmes' 'bad man'.[50] Judges have constantly justified fiduciary duties as responding to the realities of 'human nature' or 'human infirmity'.[51] The process of raising the duty of loyalty must therefore take this approach.

Curiously, the same premise, that we must plan for the 'bad man' fiduciary, leads to the different conclusion that stage two must be crystalline. A simple economic and behavioural argument is that unless parties can be sufficiently sure of their responsibilities, they will not contract. If there is a risk of a party becoming a fiduciary, that party needs to be sure of what to do so that he or she will still gains a benefit from the engagement without the risk of losing it all via the account of profits remedy. While the 'bad man' cannot be allowed to evade his responsibility, he must be allowed to know where he stands. This is all the more important

[44] *LSREF III Wight Ltd v Gateley LLP* [2016] EWCA Civ 359, [2016] PNLR 21 [38].
[45] *Jones v Kernott* [2011] UKSC 53, [2012] 1 AC 776 [61].
[46] *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)* [2008] UKHL 48, [2009] 1 AC 61 [93] (Lady Hale).
[47] *Patel v Mirza* (n 43). Cf the very complex crystalline approach, putting exception upon exception, proposed by Lord Sumption in the minority. See Paul S Davies, 'The Illegality Defence: Turning Back the Clock' [2010] Conv 282 in addition to *Patel* for further illustrations of the problems.
[48] *The Sea Angel* (n 42) [111]. The matter of allocation of risk was key in *Davis Contractors Ltd v Fareham UDC* [1956] AC 696 (HL) 743.
[49] Rose (n 40) 592–3; Rawls (n 22) 36ff; H L A Hart, *The Concept of Law* (OUP 2012) 131ff; Duncan Kennedy, 'Form and Substance in Private Law Adjudication' (1976) 89 Harv L Rev 1685; George P Fletcher, 'The Right and the Reasonable' (1984) 98 Harv L Rev 949, 962ff; cf Bruce Chapman, 'Law, Incommensurability, and Conceptually Sequenced Argument' (1997) 146 U Pa L Rev 1487. Chapman's counter-proposal requires the use of weights to facilitate a more ordered, crystalline approach, which are suspiciously malleable, like factors.
[50] Rose (n 40) 592; Oliver Wendell Holmes, *The Common Law* (Little, Brown & Co 1881).
[51] E.g. *Bray v Ford* (n 24) 51; *Keech v Sandford* (n 25); *Ex p Bennett* (1805) 10 Ves Jun 381, 394; 32 ER 893, 897.

when the remedy of account of profits might give the principal a windfall in such cases, something the courts are wary of doing.[52] This means crystalline, or at least sufficiently crystalline, rules are required. Then, since stage one cannot have crystalline rules, we are is driven to the conclusion that there must be a separate stage, which can.

Nonetheless, that is as far as it goes. It does not follow from this argument that authorising terms, such as clause 10.5, are paramount, even if they are agreed by both parties. The argument does not displace the need for the dominance of fiduciary principles. The most one can say is that the precise terms agreed are applied in a crystalline way in stage two when fiduciary principles make that possible and not otherwise. Granted, this may not fully resolve the tension, but it must greatly reduce it.

This leads to the key question of the role of contractual doctrines in stages one and two. The argument thus far goes only to the character of the rules. It does not mandate the presence of absence of contractual doctrine in either, despite these early indications. There are two strands to explore in answering this question: normative and descriptive. Respectively, we consider the role contract law could have in principle and to what extent the courts have adopted it in practice.

2 The Role of Contract Law

(A) A COMPATIBLE ROLE FOR CONTRACT

To determine the role of contractual doctrines in creating and scoping the duty of loyalty, one must determine its role both in its home field – interpretation and the implication of terms in fact in the law of contract – as well as in fiduciary law. This is for two reasons. The first is because it might be thought that, even in a two-stage process, the creation of the duty of loyalty is a form of contractual implication, as Edelman has suggested.[53] The second is because, if this is not the case, implication is indeed used in the cases and this must be explained.[54]

The view that implied terms create and scope the duty of loyalty is, at first blush, attractive, because if the duty of loyalty can be scoped by the terms of the contract, one rather suspects they can create it too. Then, contract law and fiduciary law are similar in purpose, divided only by doctrine but ultimately doing the same things.[55] Moreover, by confirming that ad hoc fiduciary duties can be created from contracts in addition to arising from 'status'

[52] See, e.g., *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2011] EWCA Civ 347, [2012] Ch 453 [47]; *Murad v Al-Saraj* (n 2) [82].

[53] James Edelman, 'When do Fiduciary Duties Arise?' (2010) 126 LQR 302. See also James Edelman, 'The Role of Status in the Law of Obligations' in Andrew S Gold and Paul B Miller (eds), *Philosophical Foundations of Fiduciary Law* (OUP 2014); John H Langbein, 'The Contractarian Basis of the Law of Trusts' (1995) 105 Yale LJ 625, 631: 'the contractarian character of the trust is transparent'; Frank H Easterbrook and Daniel R Fischel, 'Contract and Fiduciary Duty' (1993) 36 J of L and Ec 425; Henry N Butler and Larry E Ribstein, 'Opting out of Fiduciary Duties: A Response to the Anti-Contractarians' (1990) 65 Wash L Rev 1; Robert H Sitkoff, 'The Economic Structure of Fiduciary Law' (2011) 91 BU L Rev 1039.

[54] *Kelly v Cooper* (n 1); see also *Hilton v BBE* (n 7); *Rossetti* (n 11); *Northampton Livestock (HC)* (n 6).

[55] Edelman, 'When do Fiduciary Duties Arise?' (n 53) 303 also notes they deal with the same difficult remedial issues.

– being in one of the standard fiduciary relations – *Hospital Products* supports, to some extent, this view.[56]

However, there are two main difficulties. The first is that, because of the irreducible core and the dominance of fiduciary principles, sometimes the implied term will need to prevail over express terms to the contrary in order to create the irreducible core.[57] The second is that a term will not be implied in fact unless it is necessary for the business efficacy of the agreement[58] or it goes without saying,[59] and it is sufficiently certain.[60] Terms will not be implied simply because it is reasonable to do so, even if this would reflect the intentions of the parties.[61] Fiduciary duties are rarely necessary for the contract to function. For instance, the buyer of a hotel still got the hotel despite the purchasing agent taking a secret commission, which merely drove up the price.[62]

There was once a possible route around these problems. For a brief period following *A-G of Belize v Belize Telecom Ltd*,[63] it was thought that the doctrine of terms implied in fact had been expanded considerably such that the necessity requirement had been diluted.[64] In this case, Lord Hoffmann characterised the process of implying a term in fact as a form of contractual interpretation (or construction) where the ultimate purpose of the exercise was to convert the common intentions of the parties into contractual terms and therefore this function could take precedence over merely doctrinal requirements such as necessity.[65] One might also speculate that this expansion may have permitted implied terms to prevail over express ones. Edelman expressly relied on this in making his argument that the duty of loyalty was implied in fact as though a contractual term.[66]

However, any travel in this direction was reversed by the Supreme Court case of *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd*. It was 'wrong in

[56] See above, text to n 5.
[57] See above, text to n 34.
[58] *The Moorcock* (1889) 14 PD 64 (CA).
[59] *Shirlaw v Southern Foundries (1926), Ltd* [1939] 2 KB 206 (CA).
[60] *Marks & Spencer v Baird Textiles Holdings Ltd* [2001] EWCA Civ 274, [2002] 1 All ER (Comm) 737.
[61] *Liverpool City Council v Irwin* [1977] AC 239 (HL).
[62] *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45, [2015] AC 250.
[63] [2009] UKPC 10, [2009] 1 WLR 1988.
[64] *F&C Alternative Investments (Holdings) Ltd v Barthelemy (No 2)* [2011] EWHC 1731 (Ch), [2012] Ch 613 [225]: 'There are similarities between the reasoning by which terms may be implied into a contract and the way in which fiduciary obligations may be found to arise in a contractual context, and it may be that with the new, unified approach to the question of implication of contract terms set out in *AG of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988 the law is moving towards some assimilation of the relevant tests (see the discussion in J. Edelman, "When Do Fiduciary Duties Arise?" (2010) 126 LQR 302), albeit the two processes have traditionally been conceptualised as different.' This passage was quoted in *Ross River Ltd v Waveley Commercial Ltd* [2012] EWHC 2487 (Ch) [243]. For commentary, see Gerard McMeel, 'The Rise of Commercial Construction in Contract Law' [1998] LMCLQ 382; Sir Christopher Staughton, 'How do Courts Interpret Commercial Contracts' (1999) 58 CLJ 303; Richard Buxton, '"Construction" and Rectification after *Chartbrook*' (2010) 69 CLJ 253; David McLauchlan, 'The Lingering Confusion and Uncertainty in the Law of Contract Interpretation' [2015] LMCLQ 406. Even those who emphasise the fact that Lord Hoffmann did not introduce new principles of construction accept the change of emphasis, e.g., Lord Bingham of Cornhill, 'A New Thing Under the Sun? The Interpretation of Contract and the *ICS* Decision' (2008) 12 Edin LR 374. See Kim Lewison, *The Interpretation of Contracts* (5th edn, Sweet & Maxwell 2011) para 1.01ff.
[65] *Belize Telecom* (n 63) [18]. It is possible to cleave a distinction between construction and interpretation (see J W Courtney and Wayne Carter, '*Belize Telecom*: A Reply to Professor McLauchlan' [2015] LMCLQ 245, 248ff), but we take them to mean the same thing.
[66] Edelman, 'When do Fiduciary Duties Arise?' (n 53) 317.

law' to say *Belize Telecom* had expanded the jurisdiction of the courts to imply terms.[67] The process of interpretation has limits[68] and a term will not be implied unless it is necessary for the contract to function.[69] The foundation for Edelman's argument has been swept away.

Most importantly, the fall of *Belize Telecom* prompted a reconsideration of what these contractual doctrines are for. Carter and Courtney propose that the contractual construction of terms is internally structured and has three aspects: (1) to apply the requirements of certain contract doctrines; (2) to rebut a presumption of intention; and (3) the interpretative function.[70] Function (1) is extensible to non-contractual doctrines such as fiduciary law. Call that function (1B). Carter and Courtney consider that Lord Hoffmann's approach elevated the interpretative function above the others.[71] Upon its retrenchment, it is back in the right role, feeding into other doctrines rather than supplanting them.[72] We must consider how they might work with fiduciary law, but first, consider a brief examination of how they work with contractual implication, both to illustrate Carter and Courtney's framework, but also as a preliminary step in assessing the compatibility of contractual implication with fiduciary law.

The third function needs no introduction. We must interpret what the parties mean before their intentions can be applied in any respect. The second is not relevant for present purposes. The first is precisely in point and describes the role for interpretation in doctrines where more than mere interpretation is required. Consider *The Moorcock*. The parties agreed to moor the claimant's ship at the defendant's jetty. The question was whether a term could be implied providing the dock be deep enough. The interpretative function had little work to do here. It was the particular doctrine of implication in fact that was in play:

> [T]he law is raising an implication from the *presumed* intention of the parties with the object of giving, to the transaction such efficacy as both parties must have intended that at all events it should have.[73]

The real work is being done by the legal rules in function (1) – a 'presumed intention' that may not recognise actual intention (even if a common intention), and a requirement that any implied term is necessary for the efficacy of the contract. The interpretative function is filtered by this rule of law and subordinate to it.

Thus, at a high level of abstraction, this conventional theoretical role for interpretation fits the non-contractual doctrine of raising and scoping the duty of loyalty. The terms of the contract, interpreted using the usual contractual approaches, go into the two stages. In the first stage, they are applied in the multi-factorial approach of determining if one party has assumed fiduciary responsibilities. In the second, they are applied to reduce those fiduciary obligations.

Difficulties may occur at a lower level of abstraction. At stage one this is unlikely, for two reasons. First, an implied term is unlikely to make a material difference to the multi-factorial

[67] (n 34) [31], [69].
[68] ibid [29], [31].
[69] ibid [21], [23].
[70] J W Carter and Wayne Courtney, 'Unexpressed Intention and Contract Construction' (2017) 37 OJLS 326, 334.
[71] ibid 355.
[72] For another critique of contract being called to do more than it is suitable for in another context, see Margaret Jane Radin, 'The Deformation of Contract in the Information Society' (2017) 37 OJLS 505.
[73] (n 58) 68 (emphasis added).

enquiry. It is just one factor among many and, since it was derived from the same source as the other factors, it will point the same way. Second, there is little chance of problems with the logic. With sharply logical rules, each with a yes/no answer, the correctness of the result depends on them all being correct. In the multi-factorial first stage, if the interpretative function or any other rule gives a wrong result, that is just one factor of many and, when weighing them all up, the judge can take that into account and explain it away with a new factor accordingly. Implication is therefore broadly irrelevant to stage one.

Consider, then, how contractual terms would work in stage two. Recall how they cannot displace all fiduciary obligations. We now sharpen our proposal: Stage two is the application of the usual contractual doctrines, interpretation and implication, and then any relevant fiduciary principles *afterwards*. This is the simplest process that comports with the underlying principles and takes into account the existence of the contract. It allows the detailed terms of the contract to determine the precise scope of the authorisation, and then fiduciary principles are applied thereafter to ensure it meets fiduciary standards, rejecting them if not.

The complication is that the contractual terms that feed into this stage could be both express and implied. For express terms, there is no difficulty. The express terms will reduce the duty of loyalty provided they do not conflict with the overriding fiduciary principles. Implied terms are more troublesome. If the law uses the contractual doctrine of implied terms, it is relying on both the interpretative function, the particular doctrine of contract law (namely implication) and then a *subsequent* fiduciary doctrine – functions (3), then (1) and then (1B) rather than (3) then (1B). While interpretation is relatively unobtrusive, implication is in fact is obtrusive in that it contains contractual principles and norms, particularly the necessity test, which was not designed to work harmoniously with fiduciary law.

However, it so happens that, at stage two, the same principle of necessity is apt in fiduciary law. In contract law, one function of the necessity requirement is to act as a proxy for evidence of the parties' true intentions in order to allow the court to be confident[74] the implied term was indeed intended.[75] It is relatively safe to take a party to have agreed to something if it is necessary for the engagement to function. In fiduciary law, the requirement is that the fiduciary be restrained from committing a disloyal act. If, however, that act is necessary for the engagement to function, then it can hardly be considered disloyal. It may be that 'necessity' must be construed more restrictively, but, in broad terms, it is the right basis. The flip side is that because the test is notionally the same, it is easy to forget that its purpose is not and additional steps may be needed to fulfil that purpose.

Rather surprisingly then, the conventional doctrine of terms implied in fact turns out to be compatible with fiduciary law. At stage one, it does nothing of substance. But at stage two, it is suitable for use as one of that stage's sharply logical rules.

(B) AUTHORITY FOR THE ROLE OF CONTRACT

Nonetheless, having established their compatibility, we must now establish a positive case for the reception of contractual interpretation and implication as the input to an ultimately

[74] A term used in *Reigate v Union Manufacturing Co (Ramsbottom), Ltd v Elton Cop Dyeing Company, Ltd* [1918] 1 KB 592 (CA) 603.
[75] *Peng v Mai* [2012] SGCA 55, [2012] 4 SLR 1267 [35].

fiduciary process in stage two. Otherwise, the argument that stage two should be wholly non-contractual would stand unopposed and our framework would be of purely academic interest. Certainly mid-term authorisation does not necessarily have to be contractual; it can even be by conduct alone.[76]

There are indeed a significant number of authorities where it has. This supports our claim that the courts are edging towards the two-stage framework. Consider first the proposition that stage two is indeed a form of authorisation. This is essential if one is to be able to draw from the wider body of authorisation case law to see how contractual authorisation would work and indeed to rebut the argument that stage two is purely contractual.

There is apparently no direct authority to this effect. Most cases are concerned with the quotidian task of determining whether the disclosure had been sufficient, sometimes at great length.[77] However, some authorities do indeed see authorisation as an umbrella doctrine that takes different forms. In *Lewin on Trusts*, it is claimed that the rules of authorisation for making a profit from one's office are the same as those for trustees dealing with trust property for their own benefit.[78] In *Knight v Frost*, Hart J applied *dicta* from *Re Pauling's Settlement Trusts* that, following analysis of the nineteenth century trusts cases, concluded that the same test of consent applies to company cases where the fiduciary is a director.[79] These are all mid-term cases. However, the underlying instrument may expressly or impliedly authorise a conflict in settlement trusts[80] and will trusts,[81] which are not. It goes little further to say the underlying authorising instrument could be the contract creating the fiduciary duty too. More to the point, the outcome of inductive reasoning is clear: the simplest way of reconciling these authorities is to see authorisation as a general doctrine, applying to all fiduciaries, whether at the outset or mid-term.

Consider now support for the proposition that contractual doctrines then feed into the fiduciary doctrines in the (3)/(1)/(1B) sequence. In *Bank of Credit and Commerce International SA v Ali* (concerning a release from contractual liability), it was said that there is no separate equitable doctrine of construction.[82] While the absoluteness of this proposition can be doubted (and on this, see section 3), the differences appear to be only contextual and the *fundamentals* of interpretation are the same. The contractual principles of interpretation have been applied in the context of certainty of intention of trusts,[83] to interpret provisions as to the identity of the subject matter[84] and to determine the rules of pension schemes (which are trusts).[85] The scope of the authorisation, again at least for trusts, is a matter of

[76] *Queensland Mines Ltd v Hudson* (1978) 18 ALR 1 (PC).
[77] *Re Pauling* (n 28).
[78] Lynton Tucker, Nicholas Le Poidevin and James Brightwell, *Lewin on Trusts* (19th edn, Sweet & Maxwell 2015) para 20–095.
[79] *Knight v Frost* [1999] BCC 819 (Ch) 828; *Re Pauling* (n 28) 108.
[80] *Wright v Morgan* [1926] AC 788 (PC) 796.
[81] *Re Beatty* [1990] 1 WLR 1503 (Ch) 1506; *Wright v Morgan* (n 80).
[82] [2001] UKHL 8, [2002] 1 AC 251 [17], [25], [44], [79].
[83] *Staden v Jones* [2008] EWCA Civ 936, [2008] 2 FLR 1931 [18]ff; see also *Hageman v Holmes* [2009] EWHC 50 (Ch), [2009] 1 P & CR DG17.
[84] *Brudenell-Bruce v Moore* [2012] EWHC 1024 (Ch), [2012] WTLR 931.
[85] *Premier Foods Group Services Ltd v RHM Pension Trust Ltd* [2012] EWHC 447 (Ch), [2012] Pens LR 151; *PNPF Trust Co v Taylor* [2010] EWHC 1573 (Ch), [2010] Pens LR 261.

construction.[86] Finally, in *Sargeant v National Westminster Bank Plc* the court indeed went on to apply fiduciary principles after construing the relevant clauses.[87]

Consider now implied terms. They tend to appear in cases where a fiduciary acts for multiple principals where the permission to do so is not spelled out expressly. Then, it is a difficult and contentious issue as to whether such a term is implied. In *Kelly v Cooper*, the issue was that an estate agent (and fiduciary) sold two houses, belonging to different sellers (and principals), to the same buyer. The houses were adjacent and the obvious inference was that the buyer was particularly interested in them for that reason. One can infer that a higher price might have been obtained as a consequence. The claimant seller's arguments were that non-disclosure of this information was a breach of fiduciary duty, as was the conflict of interest in obtaining a surer commission on both sales over the risk of losing one or both in the process of negotiating and trying to drive the prices up.

The Privy Council rejected these arguments, holding that 'like every other contract, the rights and duties of the principal and agent are dependent upon the terms of the contract between them, whether express or implied.'[88] The necessity requirement applied: 'despite this conflict of interest, [residential] estate agents must be free to act for several competing principals otherwise they will be unable to perform their function.'[89] A term permitting it was implied accordingly. Similarly, in *Hilton v Barker Booth & Eastwood*, Lord Walker made express reference to the traditional tests for implied terms.[90]

The necessity requirement makes the availability of such terms very limited. Such a term could also apply to investment intermediaries, who often act for multiple principals.[91] The fiduciary would still be constrained by any other duties; the authorisation is narrow in scope.[92] Permission to act for multiple principals is as far it goes.[93] Such a term would not permit the fiduciary to act in a manner that conflicts with his or her principal's interests[94] or for multiple principals in the same transaction.[95] Moreover, in *Hilton*, Lord Walker said that the proposition that one breach of duty owed to one principal could exonerate a breach of a duty owed to another 'seems contrary to common sense and justice'.[96] In *Rossetti Marketing Ltd v Diamond Sofa Company Ltd*, Lord Neuberger MR noted that whilst a residential estate agent must be free to act for multiple principals, the same could not be said for an agent who sold furniture.[97] Most recently, in *Northampton Regional Livestock Centre Company Ltd v*

[86] *Sargeant v National Westminster Bank Plc* (1990) 61 P&CR 518 (CA) 521; *Edge v Pensions Ombudsman* [2000] Ch 602 (CA).
[87] (n 86).
[88] *Kelly v Cooper* (n 1) 213.
[89] ibid 214.
[90] (n 7) [37].
[91] Law Commission, *Fiduciary Duties of Investment Intermediaries (Consultation Paper)* (Law Com CP 215, 2013); *Eckerle v Wickeder Westfalenstahl GmbH* [2013] EWHC 68 (Ch), [2014] Ch 196; Law Commission, *Fiduciary Duties and Regulatory Rules* (Law Com No 236, 1995) para 3.32.
[92] See, e.g., *Plus Group Ltd v Pyke* [2002] EWCA Civ 370, [2003] BCC 332 [83] citing J Gower, *Principles of Modern Company Law* (6th edn, Sweet & Maxwell 1997) 622; see also *Farrington v Rowe McBride* [1985] 1 NZLR 83 (NZCA) 90. The independence of such duties is discussed in Charles Mitchell, 'Good Faith, Self-Denial and Mandatory Trustee Duties' [2018] TLI 92; see also Companies Act 2006, s 170ff.
[93] Acknowledged in *Gwembe Valley Development Co Ltd v Koshy (No 3)* [2003] EWCA Civ 1048, [2004] 1 BCLC 131 [56].
[94] See, for example, Law Commission, LC236 (n 91) para 3.31.
[95] *North & South Trust Co v Berkeley* [1971] 1 WLR 470 (QB) 482 distinguished in *Kelly v Cooper* (n 1) 215.
[96] (n 7) [38].
[97] (n 11) [27].

Cowling, the judge noted that an implied term permitting the individual to act for conflicting principals was only available in situations where such multiple undertakings were inherent to the business.[98]

In these cases, while one sees examples of how the necessity requirement in the doctrine of implied terms is aligned with the necessity requirement of fiduciary law, one also sees unease about going too far. At stage two, even for contractually created fiduciary duties, fiduciary principles are still paramount. This suggests a narrower interpretation of necessity may be appropriate for fiduciary authorisation, where the necessity goes to the necessity of the authorisation rather than merely the business efficacy of the arrangement.

3 Four Key Rules of Contractual Authorisation

Stage two should therefore be called contractual authorisation.[99] In this section, we summarise and expand the main rules of contractual authorisation, drawing on and expanding the rules in the case law for contractual and mid-term authorisation and taking into account the similarities and differences. We identify four key rules. While not an exhaustive list, these are the most important because of the frequency at which they come up and because they interact with contract law doctrines. This shows the extent to which the framework has gained a foothold in the authorities and the pitfalls to avoid.

(A) Sufficiency of Disclosure and Autonomy

It bears repeating: The first key rule of contractual authorisation is that the intention of the parties, ascertained through the conventional contractual interpretation and implication processes, is only accepted as effective authorisation if there is sufficient disclosure. As noted above, this requires the provision of enough information such that the principal can make a fully-informed decision. Then, the principal's autonomy is respected and the protective function of fiduciary law is achieved without the need for the duty of loyalty.[100] The courts have been concerned with fleshing out what is sufficient, which is summarised here. There is also one key difference between mid-term and contractual authorisation that warrants exploring: in mid-term authorisation, the engagement is already on foot.

In general, and in accordance with the rigour of fiduciary law, the courts have been strict in their requirements in the mid-term cases. There must be 'full and frank disclosure of all material facts'.[101] The principal 'must be honestly acquainted with all the material circumstances of the case'[102] and 'fully understand[] what he is concurring in'.[103] Not only the existence of the interest, but also its extent, must be disclosed.[104] There must be no *suppressio veri* or *suggestio falsi*, the consent must be clear and must not be obtained through

[98] (n 6) [186].
[99] It is tempting to call it authorisation *ex ante* to go alongside (non-contractual) authorisation *ex post*. But consider the case of directors' releases from liability where a *second* contract is signed. The release is *ex ante* the second (releasing) contract but *ex post* the first. This terminology is thus apt to confuse and should be avoided.
[100] Above, text to n 29.
[101] *Kuys* (n 12) 1227. See also *Re Pauling* (n 28) 107; *Boardman v Phipps* [1964] 1 WLR 993 (Ch) 1011ff affd *Boardman v Phipps* (n 2); *Dunne v English* (1874) 18 Eq 524 (MR) 533.
[102] *Lewin* (n 78) para 20–140ff.
[103] *Re Pauling* (n 28) 108. See also Payne (n 4) 300.
[104] E.g. *Gwembe Valley* (n 93) [65]; *Medsted Associates Ltd v Canaccord Genuity Wealth (International) Ltd* [2017] EWHC 1815 (Comm). See John McGhee, *Snell's Equity* (33rd edn, Sweet & Maxwell 2015) para 7–015.

pressure.[105] For company directors, disclosure must be to the board,[106] but also to those independent of the transaction if necessary. Disclosure to a boardroom dominated by those with interests in the transaction is insufficient, and then disclosure to shareholders would be necessary.[107] It has also been said any information that may affect the decision to proceed must be disclosed.[108]

The quotations hint that the requirement is subjective, not objective, meaning that the particular principal must have been sufficiently appraised. It is not enough that a hypothetical 'reasonable principal' in his or her position would have been. For example, a retail investor would be less well-versed in the risks associated with a particular investment than an institutional investor and would have to be given more information. The *dicta* in *Boulting* also suggest the test is subjective[109] and in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*, the High Court of Australia placed great weight on these considerations.[110]

Kelly v Cooper is further authority for the subjectivity requirement. That case was decided as it was because 'their Lordships [were] of the view that … the plaintiff was *well aware* that the defendants would be acting also for other vendors.'[111] But some cases are less emphatic. In *Rossetti*, Lord Neuberger said that 'residential estate agents could not sensibly carry out their function if the normal conflict rule applied, and any person instructing an estate agent *must appreciate* that fact.'[112] This could be construed as laying down an objective requirement, as not distinguishing between an objective and subjective requirement, or as a by-the-by observation. In *Hurstanger Ltd v Wilson* the distinction does not appear to have been in point and the judgment does not consider it.[113]

Since contractual authorisation is a form of the general doctrine of authorisation, these requirements still apply. It is important not to forget them and take the contractual terms as conclusive. This will be in issue where fiduciaries attempt to exclude liability by stipulating they aim their explanations at a more sophisticated level or, more bluntly, that only limited or no disclosure at all is required.

Consider now the difference in timing. Greater disclosure will often be required for mid-term authorisation outside the original contract than authorisation in that contract. This is a consequence of the fact that the equitable duty of loyalty has a more relational quality than the law of contract.[114] Unlike in a simple transactional agreement, in a long-term engagement the timing of any such agreement and disclosure matters. As time goes on, the information asymmetry problem will worsen as the fiduciary gains more information that might not be passed on to the principal. Moreover, after performance of the engagement has begun and

[105] *Lewin* (n 78) para 20–140.
[106] *Queensland Mines* (n 76).
[107] *Gluckstein v Barnes* [1900] AC 240 (HL) 258; *Regal Hastings* (n 2) 150.
[108] *Brickenden v London Loan & Savings Co* [1934] 3 DLR 465 (PC) 469; *Johnson v EBS Pensioner Trustees Ltd* [2002] EWCA Civ 164, [2002] Lloyd's Rep PN 309 [69], [72], [83]; see also *FHR European Ventures LLP v Makarious* [2011] EWHC 2308 (Ch), [2012] 2 BCLC 39 [79]; *FHR v Cedar* (n 62).
[109] Above, text to n 28.
[110] [2007] HCA 22, (2007) 230 CLR 89 [107].
[111] (n 1) 215 (emphasis added).
[112] (n 11) [25] (emphasis added).
[113] (n 37) [34]ff.
[114] T T Arvind, 'Contract, Transactions and Equity' in L A Di Matteo and others (eds), *Commercial Contract Law: Transatlantic Perspectives* (CUP 2013); Scott FitzGibbon, 'Fiduciary Relationships Are Not Contracts' (1999) 82 Marq L Rev 303.

money has been sunk into it, there will be greater pressure to cooperate in order to keep the agreement alive and avoid wasting those costs.[115] Conversely, before the agreement is concluded, the principal still has the opportunity to bargain for better terms, demand more information, consider other business partners and walk away if unsatisfied with the deal on offer.

As an illustration, consider again the case of *Ross River*, where clause 10.5 spelled out the narrow circumstances in which Waveley Commercial could pay itself. The Court of Appeal held this term was sufficient to reduce the duty of loyalty within its narrow parameters. Now consider what the outcome would be if there had been no such term and instead Waveley Commercial had invited its principal to authorise such a payment after the conclusion of the contract. Unless they had been suitably informed of how commercially advantageous this was to Waveley Commercial, sufficient disclosure may not have been made and payment, even within the specified parameters, may have been a breach of fiduciary duty.

(B) BURDEN OF PROOF

The second key rule of contractual authorisation concerns the burden of proof. At the first stage, the principal must adduce evidence that makes out the factors that lead to the imposition of the duty of loyalty. That stage is even-handed in the sense that no presumptions are made against the defendant because it is not yet established that he or she is a fiduciary. While there are apparently no direct statements to this effect in the authorities, there is a conspicuous absence of presumptions against the would-be fiduciary and there is even-handed consideration of the relevant factors.[116] More positive support can be derived from the courts' attitude that the duty of loyalty should not be imposed instrumentally; in *A-G v Blake Jonathan Cape Ltd (Third Party)* the Court of Appeal said that '[f]iduciary duties should not be superimposed on those common law duties simply to improve the nature or extent of the remedy'.[117]

[115] See, e.g., Richard A Posner, *Economic Analysis of Law* (9th edn, Aspen 2011) 9 for an economic analysis of 'sunk costs'.
[116] E.g. *Hospital Products* (n 5); *Kuys* (n 12); *Barthelemy* (n 64) [221]ff; *Fishel* (n 16) 1489ff; *Ranson* (n 9); *Helmet Systems Ltd v Tunnard* [2006] EWCA Civ 1735, [2007] FSR 16; *Peskin v Anderson* (n 15) [34].
[117] [1998] Ch 439 (CA) 453 quoting *Norberg v Wynrib* (1992) 92 DLR (4th) 449 (SCC) [147] (Sopinka J), noted in *Fishel* (n 16) 1490.

At the second stage, however, the burden of proof shifts. This is because of the evidential uncertainties and the inherently stronger position of the fiduciary. It is the only way to respect the autonomy of the principal given the information asymmetries between fiduciary and principal and thus uphold the aim of fiduciary law. For mid-term authorisation, this matter has been long settled.[118] For contractual authorisation, the reverse burden of proof was made explicit in *Ross River Ltd v Waveley Commercial Ltd*.[119] Lloyd LJ, with whom Fulford and Mummery LJJ agreed, held that:

> [I]f a fiduciary duty exists at all, it throws the burden on the party subject to the duty to justify any payment in any case where there is any doubt as to whether it was properly made.[120]

This is another instance where the norms of fiduciary law coincidentally match those of contract law; in contract law it is for the propounder of the implied term to prove it.[121] More to the point, however, is how the shifting burden precisely reflects the two different stages.

(C) DOUBTS RESOLVED AGAINST THE FIDUCIARY

It further follows that only a conservative form of interpretation will respect the principal's autonomy. The third key rule is then that any doubts or uncertainties in the agreement as to the scope of the fiduciary duty must be resolved against the fiduciary. This is the contractual principle of *contra proferentem*, where uncertainty is resolved against the proferrer. On the facts of the fiduciary-principal relationship where the fiduciary is accused of a breach of fiduciary duty, this uncertainty will always be resolved against the fiduciary.

There are apparently no mid-term authorisation cases where this has been applied terribly clearly, but few old cases could be interpreted to support the application of *contra proferentem*.[122] Where there was undue influence, the court would not rely on concurrence 'fished out from a loose expression in a letter'.[123] Where the circumstances were suspicious, only the clearest evidence would do.[124] However, in cases of authorisation from the start the courts have expressly applied *contra proferentem*. This has been where where clauses in the trust deed have attempted to exonerate trustees or limit their liability for breach of trust[125] and breach of fiduciary duty.[126]

There are two issues to consider: the survival of *contra proferentem* and its compatibility. It is clear that the *contra proferentem* rule is in something of a decline in the law of contract.[127] However, it does appear to have a future, albeit a limited one. In the recent Court

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[118] *Tito v Waddell (No 2)* [1977] Ch 106 (Ch) 225 (dealing with trust property); *Rossetti* (n 11) [22]; *Northampton Livestock (HC)* (n 6) [188] (affirming *Rossetti*) revd on other matters: *Northampton Regional Livestock Centre Company Ltd v Cowling* (n 6) (acting for two principals); *Cobbetts LLP v Hodge* [2009] EWHC 786 (Ch) [108] (fiduciaries); *Hurstanger v Wilson* (n 37) [35] (agents).

[119] (n 18). This principle from *Ross River* was applied in *Psycare Ltd v Mundy* [2013] EWHC 4573 [30]ff.

[120] *Ross River v Waveley* (n 18) [64]. See also at [95].

[121] Carter and Courtney (n 70) 339.

[122] *Lewin* (n 78) para 20–140.

[123] *Carpenter v Heriot* (1759) 1 Eden 338, 341; 28 ER 715, 716.

[124] *Morse v Royal* (1806) 12 Ves Jun 355, 373; 33 ER 134, 141.

[125] *Bogg v Raper* The Times, April 22 1998 (CA) [28]ff; this point affd *Wight v Olswang (No 1)* (1999) 1 ITELR 783 (CA). See generally *Armitage v Nurse* (n 32); *Walker v Stones* [2001] QB 902 (CA).

[126] *Barnsley v Noble* [2016] EWCA Civ 799, [2017] Ch 191 (self-dealing). See also the discussion of *Global v Bonyad* (n 8) in section 4.

[127] Edwin Peel, '*Whither* Contra Proferentem?' in Andrew Burrows and Edwin Peel (eds), *Contract Terms* (OUP 2007); Edwin Peel, 'Contra Proferentem Revisited' (2017) 133 LQR 6.

of Appeal case of *Persimmon Homes Ltd v Ove Arup and Partners Ltd*, it was said that it still has a role where there is a power imbalance.[128] Fiduciary relations are probably the paradigm case of a power imbalance and so the continuing existence of *contra proferentem* seems secure here.

As for compatibility, the rule is already context-sensitive. This was observed in *Bogg v Raper*, where Millett LJ noted that it had two aspects. *Contra proferentem* requires one both to construe against the party relying on the clause, and also against the author of the instrument. For contracts, the two aspects are aligned, but for trusts this is not usually the case.[129] There is no reason, therefore, that *contra proferentem* cannot be retained and adapted so it is compatible in stage two.

Two adaptations are required. First, since authorisation looks to the subjective, any terms should be construed with this in mind. The interpretation must be within the range of reasonable interpretations of the authorisation this particular principal actually decided to grant. It must take into account the information asymmetry problem – the principal will know less of the background information and the words must be interpreted accordingly.

Second, there is the relational nature of a fiduciary engagement, which endures longer than most transactional contracts. One must construe any reducing clause narrowly, with a view to the many possible futures of the engagement and permit the fiduciary the minimum possible. This is best illustrated with the case of the company director. Directors usually have uncircumscribed fiduciary duties, because they take responsibility for all possible interests of the company with no specific direction on how the outcome should be achieved.[130] The scope of the duty is set at the time of the initial engagement, i.e. the appointment of the director, yet any change in circumstances will not be known until later. It would be impossible to start with a fine-tuned duty of loyalty that covers such future events unless they are expressly and very clearly defined.

(D) HONESTY, GOOD FAITH AND NEGLIGENCE

The fourth key rule is that any fiduciary duty-reducing terms are subject to the requirements of honesty and good faith, not something generally found in the law of contract. It is clear from the case law that these requirements can persist even where self-interest has been permitted.[131] This means the authorisation would not cover acts that require the exercise of discretion unless that discretion is exercised honestly and without self-interest. While Millett LJ said '[a] servant who loyally does his incompetent best for his master is not unfaithful',[132] the flip side is that a fiduciary who deliberately acts against his or her principal very much is.

The case law on this matter is relatively rare. Since it requires a discretion, it comes up most often in trusts cases. One non-trusts case, regarding disclosure, is *Industrial Development Consultants Ltd v Cooley*, where the director's release from liability was

[128] [2017] EWCA Civ 373, [2017] PNLR 29 [52].
[129] (n 125) [28]ff.
[130] *Re Allied Business & Financial Consultants Ltd* [2009] EWCA Civ 751, [2009] BCC 822 [71]; David Gibbs, 'The Absolute Limit of Directors' Fiduciary Liability for Conflicts of Interest: the Director's Perspective' (2015) 36 Co Law 231.
[131] Mitchell (n 92).
[132] *Bristol and West Building Society v Mothew* [1998] Ch 1 (CA) 18.

vitiated because he had dishonestly represented that he was in ill-health.[133] It was a trusts case, *Armitage v Nurse*, where the general rule was laid down. The trustee may be excused from all liability except that caused by his or her fraud or dishonesty. Millett LJ held that dishonesty:

> connotes at the minimum an intention on the part of the trustee to pursue a particular course of action, either knowing that it is contrary to the interests of the beneficiaries or being recklessly indifferent whether it is contrary to their interests or not.[134]

While this test is commonly applied to the selection of investments,[135] it could well be applied to a fiduciary joint venture. In the absence of a suitable reported case, consider this hypothetical. Suppose there is a term providing that a fiduciary joint venturer 'is wholly entitled to "highly speculative" drilling opportunities where, in its opinion and such opinion is final, the chance of striking oil is less than 50 per cent'. The fiduciary would only have to honestly believe the chance was less than 50 per cent under that definition. The subjective 'own opinion' provision would displace the contractual duty to evaluate such opportunities with reasonable care and skill (an objective standard).

This has given rise to much criticism, including judicial dissent.[136] For professional trustees the test was modified in *Walker v Stones*, but only so far such that that if no reasonable trustee would have considered their actions in the interests of the beneficiaries, this too would be outside the exemption clause.[137] This makes the test objective. This would mean that the hypothetical exclusion clause would not be effective. It follows, perhaps surprisingly, from *Walker v Stones*, that a non-excludable duty to act with reasonable care and skill – a true negligence standard – is fixed upon professional trustees, and by extension, professional fiduciaries. One may quibble about whether a certain class of person is 'professional' for these purposes, but if *Walker v Stones* applies, that is the result.

At first blush, this seems wrong. Investment and management decisions are ordinarily not fiduciary in character. They ought, therefore, to be subject to non-fiduciary norms and thus liability for breach ought to be subject to exclusion except when the breach is dishonest (and therefore takes on a fiduciary character). The surprising outcome is that in the authorisation stage a negligent fiduciary decision may well be a breach of fiduciary duty no matter what any authorising terms provide for. Nonetheless, given the controversy over this standard, judicial revision of it would not be unexpected.

4 Application and Utility of the Two-Stage Approach

Finally, we aim to demonstrate the practical utility of the two-stage framework. One can look to taxonomy scholarship to identify relevant benchmarks. That scholarship suggests that certainty in the law and the reduction of costs is important,[138] as is ease of use, facilitating a critical overview to assist the analysis of the underlying field of law itself and providing

[133] [1972] 1 WLR 443 (Birmingham Assize).
[134] (n 32) 251.
[135] E.g. *Walker v Stones* (n 125); *Fattal v Walbrook Trustees (Jersey) Ltd* [2010] EWHC 2767 (Ch), [2012] Bus LR D7; *Spread Trustee Co Ltd v Hutcheson* [2011] UKPC 13, [2012] 2 AC 194.
[136] E.g. Gerard McCormack, 'The Liability of Trustees for Gross Negligence' [1998] Conv 100; *Spread Trustee Co Ltd v Hutcheson* (n 135) [240]ff.
[137] (n 125).
[138] Peter Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26 U W Austl L Rev 1, 1.

normative guidance for decision-makers.[139] A critical overview has already been provided. As for the other matters, we show here how the two-stage framework makes the law easier to apply and errors harder to make and easier to spot.

The scenarios that come up most often are fiduciary joint ventures and directors' releases from liability. There are not terribly many relevant reported cases. However, this is not to be unexpected. *Hospital Products*, which solidified the idea that we can have fiduciary duties based on the peculiar facts of an engagement, was decided in 1984.[140] *Bristol and West Building Society v Mothew*, which, by holding that not every duty of a fiduciary was a fiduciary duty, bolstered the proposition that fiduciary duties can be scoped, was decided only in 1996.[141] Previously, fiduciary duties were thought in some quarters to be monolithic. Indeed, in its 1992 consultation paper, the Law Commission thought there were two approaches to fiduciaries: 'status-based' and 'contract first'. In the former the contract could not modify or exclude the duties of a fiduciary where they were incompatible with the essence of the relationship, but in the latter contract terms would more readily relax the duty of loyalty.[142] The view that contractual terms can modify any instance of the duty of loyalty is new. However, the relevant factual scenarios are commonplace and while it will take time for decisions to emerge, emerge they should.

First, consider the error where judges have muddled the type of reasoning and applied stage one thinking in stage two or vice versa. The worst outcome is when this faulty reasoning leads to the wrong decision. The first instance judge in *Ross River* made this mistake.[143] He applied clause 10.5 in stage one as though it were a 'yes/no' sharp-edged contractual term – how it is applied at stage two – rather than as just one factor of many, concluding that it was incompatible with the existence of a fiduciary duty not to profit or to avoid conflicts and thus some payments outside its specification were permitted.[144] His decision had to be reversed. The Court of Appeal correctly thought that the fiduciary rules were paramount. The two-stage framework assists in two ways. First, it indicates that clause 10.5's dominance was only at stage two, not stage one. Second, it makes it clear that fiduciary norms dominate and are not so easily displaced.

The next class of errors is where fiduciary norms were not applied to stage two. Here, the judges applied contractual doctrines but not the additional fiduciary principles. It is possible that this is because they have implicitly accepted the idea that fiduciary duties are implied contractual terms, despite the post-*M&S v BNP* shift.[145] It is also possible that they have been led astray by the easy fit of the test for implication in stage two, which has led them to think that it is the only test rather than just the first one.[146] In the following cases, the judges' reasoning fell into error but, more by luck than judgment, they reached the right decisions.

Global Container Lines Ltd v Bonyad Shipping Co (No 1) concerned a fiduciary shipping joint venture between the parties, who themselves operated shipping services

[139] Emily Sherwin, 'Legal Taxonomy' (2009) 15 LEG 25, 39ff.
[140] (n 5).
[141] It appeared in the Law Reports somewhat later, in 1998: *Mothew* (n 132).
[142] Law Commission, *Fiduciary Duties and Regulatory Rules* (Law Com CP 124, 1992) paras 3.3.9 – 3.3.10.
[143] See above, text to n 21.
[144] [2012] EWHC 81 (Ch) [259]; see generally [255]ff.
[145] See n 64.
[146] Above, text near n 75.

independently.[147] There were two relevant geographic areas. The 'existing services area' comprised Global's existing Indian Ocean and Red Sea services and the 'joint venture area' comprised services calling the rest of the Persian Gulf but excluding those in the existing services area. The basic issue was that Global, as a fiduciary, was prohibited from competing with its principal (the joint venture operation) unless clear consent was obtained. It was held that no competition was permitted in the joint venture area. This is not surprising – the duty of loyalty is inconsistent with the right to compete. Conversely, it was held that competition in the existing services area was impliedly consented to by Bonyad and thus there the fiduciary duty was displaced altogether.

One may reach this route by applying the framework. As Rix J found, while express consent could not be construed from the various minutes in evidence before the court, it could be found through necessary implication. Bonyad had known about Global's extensive existing business and, in essence, giving up 51 per cent of their liner business and 75 per cent of their tramp business would have been 'unbusinesslike'.[148] The minutes Bonyad signed reflected the reality that they knew and accepted that this business would continue and this constituted consent.[149] One may go on to apply the regulating fiduciary rules. Bonyad knew the facts. The necessity was so strong, even resolving doubts against the proferrer it was possible to infer subjective consent from it. The case went beyond *Kelly v Cooper*, which demonstrated implied consent to act for two principals, and demonstrated consent to compete in certain areas.

The problem is that while Rix J started along this route, rather than considering the regulating fiduciary rules, he applied *Kelly v Cooper* rather mechanically. Competition was inherent to the business and as such 'duties … of … natural candidates for the status of fiduciaries … have to be tailored to the facts and circumstances'.[150] He thought that *Kelly v Cooper* was 'particularly instructive'[151] and the present case was 'if anything clearer cut' than it. The last point is certainly true, but the factual differences were not considered in full. The outcome of *Kelly v Cooper* was merely that a fiduciary was permitted to act for multiple principals. Moreover, estate agents act for multiple clients but they do not positively compete with them. Self-sacrifice is inherent to a fiduciary relationship and permitting the estate agent in *Kelly v Cooper* to act for multiple principals made considerably fewer inroads into this norm. If a case is to go further, one must explore why rather more fully.

Gamatronic (UK) Ltd v Hamilton concerned two directors' releases of liability for, *inter alia*, breaches of fiduciary duty.[152] This question was the scope of the release agreements. As a stage two issue, sufficiently informed consent is required, which is a subjective requirement,[153] but the principal was not aware of the relevant breaches of fiduciary duty when the releases were drawn up. The judge applied the contractual law of releases, for

[147] (n 8).
[148] ibid 543.
[149] ibid 545.
[150] *Global v Bonyad* (n 8) 545.
[151] ibid 545.
[152] [2016] EWHC 2225 (QB). A curious question is why the Companies Act 2006, s 232, purportedly voiding such exclusions, was not litigated. As Ross Cranston, 'Limiting Directors' Liability: Ratification, Exemption and Indemnification' [1992] JBL 197, 198 says, its relationship with ratification (authorisation) has not been clarified (considering its forerunners: Companies Act 1985, s 310; Companies Act 1948, s 205).
[153] See above, text to n 113.

which the leading case is *Bank of Credit and Commerce International SA v Ali*.[154] He held that since the principal was not aware of the relevant breaches when the release was made, it did not cover them.[155] This indeed is the right rule but the problem is that it was reached without consider the fiduciary norms and authority was applied without considering its applicability.

The complication is that the law of releases has become detached from its equitable roots. It once required the relevant matters to have been in the actual contemplation of the parties, i.e. it was explicitly a subjective test.[156] Nowadays, contract doctrine holds that the test is objective. As a purely common law contract case (Ali was not a fiduciary), the House of Lords rejected an inquiry into the parties' subjective states of mind; 'the court … makes an objective judgment based on the materials already identified'.[157] The Law Lords simply did not consider whether matters should be different for fiduciary liability. Perhaps they would have been sensitive to the question of fiduciary breach had it been put to them, and perhaps they would have held that equitable principles should have continued to apply to equitable duties. The judge in *Gamatronic* did not look behind *Ali*, and thus this issue was not considered. Our framework, specifically the sufficiency rule, makes the correct enquiry clear by expressly stating the subjectivity requirement.

The same error also occurred in an interim hearing in the same proceedings, where another first instance judge also thought *Ali* applied without considering the material differences between contract law and fiduciary law.[158] Again, in *John Youngs Insurance Services Ltd v Aviva Insurance Service UK Ltd*[159] and in *Nathan v Smilovitch*[160] the judges went straight to *Ali* without considering fiduciary matters. *John Youngs* was correctly decided because the release was held not to apply even on the less-stringent contract law principles; similarly, in *Nathan v Smilovitch*, the relevant term could not be implied even in contract.

It is surely inevitable that at some point a case will come up where the relevant term will be sufficient on contract law principles, but not on fiduciary law principles. Then, unless the fiduciary rules are applied, the wrong decision will be made.

5 Conclusion

The two-stage framework results inevitably when constructing doctrine from the fundamentals of fiduciary law, namely the purposes of protection and autonomy and that even the 'bad man' fiduciary needs some level of certainty. The need to uphold fiduciary standards and protect the principal demands a multi-factorial approach. The need for a fiduciary to be fairly and safely remunerated demands a sharply logical ruleset. Since these requirements are fundamentally opposed, they can only exist in separate stages.

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[154] (n 82).
[155] *Gamatronic* (n 152) [156]ff.
[156] *Lyall v Edwards* (1861) 6 Hurl & N 337, 158 ER 139; *Farewell v Coker* (1726) 2 Jac & W 192; 37 ER 599; (1726) 2 Mer 171, 354; 35 ER 905, 973.
[157] *BCCI v Ali* (n 82) [8].
[158] *Gamatronic (UK) Ltd v Hamilton (interim application)* [2013] EWHC 3287 (QB) [16]ff.
[159] [2011] EWHC 1515 (TCC), [2012] 1 All ER (Comm) 1045. There is also *SPL Private Finance (PF1) IC Ltd v Arch Financial Products LLP* [2014] EWHC 4268 (Comm) [295] where Walker J held that 'This contention falls to be considered in accordance with well-established principles for determining the true meaning of contracts' in a fiduciary case.
[160] [2002] EWHC 1629 (Ch) [13].

Conclusion

In coming to this conclusion, there has been one key thread running through the argument, namely the dominance of fiduciary principles. Thus, when contractual doctrines are compatible and useful, they can be and have been received into fiduciary law. However, one must not forget that contractual authorisation is predominantly fiduciary, and fiduciary principles take precedence over contractual principles. The duty of loyalty is not always moulded by the terms of the contract and does not always accommodate itself to them. This is easy to forget, and in some cases has been forgotten.

As they apply the fundamentals of fiduciary law, the courts appear to be inching towards this framework. That it has not yet been recognised explicitly is unsurprising in a system of case by case development in an immature part of the law, particularly given that the judge's primary task is to decide the instant case rather than construct theory. The post-*Hospital Products* era has been short and what is going on appears to be an instance of what Llewellyn called 'slow-growing wisdom'.[161] As the common law – including equity – moves on, it creates a consistent and coherent body of law, even as it makes mistakes along the way.

[161] K N Llewellyn, *The Bramble Bush: On Our Law and Its Study* (Oceana 1951) 44.