

IN SEARCH OF THE NATURE AND FUNCTION OF FIDUCIARY LOYALTY OF COMPANY DIRECTORS: SOME OBSERVATIONS ON CONAGLEN'S ANALYSIS

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Good corporate governance requires high standards of directors' responsibilities. Directorial behaviour is often measured against conventional notions of fiduciary duties of directors. But fiduciary law is in a state of flux: although the core obligation of a fiduciary is an obligation of loyalty, what "fiduciary loyalty" encompasses is less clear.

Conaglen recently suggests that the function of fiduciary loyalty is to protect non-fiduciary duties, and its nature is prophylactic and subsidiary. To directors, this means that a fiduciary duty of loyalty is imposed to protect performance of their other (non-fiduciary) duties such as the duty to act in the company's best interests. This paper contends that his analysis is not supported by case law and creates a number of inexplicable implications for the fiduciary doctrine.. In the final analysis, a firm grip on the concept of "fiduciary loyalty" is essential before any corporate governance reforms can intelligently shape expectations for directors' conduct.

I. INTRODUCTION

In the past decades, there has been burgeoning growth in the law pertaining to the concept of "fiduciary duty". It is now generally accepted that the distinguishing obligation of a fiduciary is an obligation of loyalty,¹ and that fiduciary loyalty relates to prohibition of improper profits and avoidance of conflicts of interests.² Despite having a relatively clear core concept, the precise boundary of the notion of "fiduciary loyalty" is still largely unsettled.

Against this background, Conaglen adds a recent contribution to our understanding of the nature and function of fiduciary loyalty.³ In an attempt to distinguish fiduciary duties from non-fiduciary duties, Conaglen puts forward two propositions relating respectively to the *nature* and *function* of fiduciary loyalty. Conaglen suggests that in a fiduciary relationship, a fiduciary owes basic non-fiduciary duties (in contract and tort, for example). At the same time, he also owes fiduciary duties. The main thrust of his two propositions is that fiduciary loyalty, whether its nature or function, is explicable by the protection for non-fiduciary duties: where there is a heightened risk of breach of non-fiduciary duties, fiduciary loyalty is imposed to insulate fiduciaries from inconsistent influences that might distract them from proper performance of non-fiduciary duties.⁴ The nature of fiduciary duties is therefore

¹ *Bristol & West Building Society v. Mothew* [1998] Ch. 1 (C.A.), 18 (Millett L.J.).

² P.D. Finn, "The Fiduciary Principle" in T.G. Youdan (ed.), *Equity, Fiduciaries and Trusts* (Toronto: Carswell, 1989) 1, 27; *Bray v. Ford* [1896] A.C. 44 (H.L.), 51 (Lord Herschell); *Chan v. Zacharia* [1983-1984] 154 C.L.R. 178 (H.C.A.), 198-9 (Deane J.).

³ M. Conaglen, "The Nature and Function of Fiduciary Loyalty" (2005) 121 *L.Q.R.* 452 (hereafter "Conaglen"). Conaglen has been referred to by courts in *Murad v. Al-Saraj* [2005] EWCA Civ 959; [2005] WTLR 1573 (C.A.) at [82]; and *Chirnside v. Fay* [2006] NZSC 68; [2007] P.N.L.R. 6 (Sup. Ct. of NZ) at [16].

⁴ Conaglen, *ibid.*, at 453 and 460.

subsidiary in the sense that they assist with enhancing performance of non-fiduciary duties, and prophylactic in the sense that they are designed to avert breaches of non-fiduciary duties.

This paper critically examines two aspects of Conaglen's analysis: (a) first, its alleged support; and (b) second, the doctrinal problems it creates. It will be argued that when a fiduciary obligation of loyalty is superadded to the common law or equitable obligations of diligence and skill,⁵ it is conceptually superfluous and doctrinally unsound to suggest that the fiduciary obligation is to protect non-fiduciary duties. What follows is an attempt to expose the inadequacies of Conaglen's analysis.

II. Weak Support for Conaglen's Analysis

Conaglen contends that his analysis derives support from: (i) the Anglo-Australian jurisprudence; and (ii) the remedies available to a breach of fiduciary duty. It is submitted that the alleged support does not bear close scrutiny.

A. *Judicial support from the Anglo-Australian jurisprudence*

Conaglen cites a number of cases as supporting the protective function of fiduciary duty. Chief amongst them is the case of *Aberdeen Railway Co. v. Blaikie Bros.*⁶ There, the director, Mr. Blaikie, was entrusted with the task of negotiating a contract to buy iron chairs for his railway company; he bought them from a firm in which he was the principal partner. This prompted Lord Cranworth L.C. to lay down the celebrated statement that no one having fiduciary duties to discharge shall be allowed to enter into engagements in which he has a conflicting personal interest.⁷ His Lordship explained that Mr. Blaikie's duty to obtain the chairs "at the lowest possible price" conflicted with his personal interest (as seller) to obtain a price "as high as possible". From these statements, Conaglen propounds that the fiduciary prohibition plays a subsidiary function in protecting Mr. Blaikie's "basic", "non-fiduciary" duty to obtain the best possible bargain.

With respect, Lord Cranworth L.C.'s reference to the duty to obtain the best bargain at most supports the claim that a fiduciary owes a duty; it does not follow that such a duty is necessarily non-fiduciary in nature, as argued by Conaglen. His Lordship simply did not address the issue whether such a duty is fiduciary or not, let alone whether fiduciary duties served the subsidiary function of protecting non-fiduciary duties. What can at most be derived from *Aberdeen Railway Co.* is that the rationale of the fiduciary duty is to prevent the pursuit of inconsistent self-interest. In fact, in introducing the specific fiduciary prohibition on self-dealing, his Lordship formulated the wrongdoer's duty in broad terms that might or might not be fiduciary in nature:

A corporate body can only act by agents, and it is, of course, the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting.⁸

Accordingly, while it is true that in preferring one's inconsistent self-interest the fiduciary's non-fiduciary duty might very often be compromised, *Aberdeen Railway Co.* is not authority for the view that fiduciary duty operates to protect non-fiduciary duties.⁹ Such protection is at best incidental.

⁵ See also *Armstrong v. Jackson* [1916-1917] All E.R. Rep. 1117.

⁶ (1854) 1 Macq. 461; 149 R.R. 32 (H.L.).

⁷ At 471; 39. Quoted by Conaglen, note 3 above at 460.

⁸ At 471; 39.

⁹ Besides, it is not necessarily the case that the wrongdoer's non-fiduciary duties may be compromised or not performed where there is a breach of fiduciary duty: see discussion in Part III below.

Apart from *Aberdeen Railway Co.*, Conaglen also refers a number of older authorities. It is submitted that those cases likewise merely show that the mischief behind the fiduciary rule is the pursuit of inconsistent self-interest. For example, the trustee in *Whichcote v. Lawrence*¹⁰ was not allowed to purchase trust assets because of the fear that he might not act with “want of interest”, “total absence of temptation” or “the same degree of vigilance and attention [as] he applied to his own affairs”. The employee in *Boston Deep Sea Fishing & Ice Company v. Ansell*¹¹ might have a “temptation not faithfully to perform his duty to his employer” because of his inconsistent self-interest. The honesty of the agent in *De Bussche v. Alt*¹² was found to be irrelevant in ascertaining his fiduciary liability in order to remove any temptation to enter into doubtful transactions. In these cases, fiduciary duties were imposed in recognition of human frailty so that the beneficiary’s interest was given paramount importance; whether they offered subsidiary protection for non-fiduciary duties simultaneously was quite beside the point.

B. Remedies for breach of fiduciary duty

Apart from case law, Conaglen also suggests that the subsidiary protective function of fiduciary loyalty finds support from a policy of deterrence underlying “the pre-eminent remedies of rescission and profit-stripping” for breach of fiduciary duty.¹³ For him, since rescission undoes transactions that should not have taken place by removing the fruits of breaches of non-fiduciary duties (and hence any temptation to such breaches), it supports the fiduciary duty’s prophylactic and protective function.¹⁴

Regrettably, this represents only a very rudimentary understanding of the remedy of rescission. To begin with, rescission is not a remedy peculiar to breach of fiduciary duty. A claimant who, for example, enters into a contract under the undue influence of another party is also entitled to the primary remedial response of rescission to set the contract aside.¹⁵ Notwithstanding so, it has never been suggested by courts that the doctrine of undue influence, or the claimant’s equity to rescind, serves a prophylactic or protective function of ensuring proper performance of the influencer’s other duties. Besides, one may easily adapt Conaglen’s view to suggest that rescission for undue influence supports a protective understanding of the doctrine, for it removes any attraction which the impugned transaction might have for the influencer, in order to deter him from exploiting his influence. This exposes the generality of Conaglen’s analysis and hence its potential applicability to other kinds of duties (whether fiduciary in nature or not). What Conaglen’s analysis fails to explain is what, if any, substantive difference there is between rescission for breach of fiduciary duty and rescission for other vitiating factors (such as undue influence) such that the former attracts a subsidiary protective epithet.¹⁶

In summary, Conaglen has yet to demonstrate that his analysis is well-substantiated by case law or remedies available for breach of fiduciary duty. The alleged support appears to be misguided. On the other hand, whereas Conaglen’s analysis has been commended for

¹⁰ (1798) 3 Ves. Jun. 749.

¹¹ (1888) 39 Ch. D. 339 (C.A.).

¹² (1878) 8 Ch. D. 286 (C.A.).

¹³ Conaglen, note 3 above at 463.

¹⁴ *Ibid.*

¹⁵ *TSB Bank v. Camfield* [1995] 1 W.L.R. 430 (C.A.).

¹⁶ Further, it would not be tenable to argue that undue influence is a kind of breach of fiduciary duty and, hence, also offers subsidiary and prophylactic protection for non-fiduciary duties. Between parties where the doctrine of undue influence operates, such a fiduciary duty clearly does not need a primary contractual or tortious duty. It can therefore hardly be said that they owe any such primary duty to be protected by the fiduciary duty: see J.C. Shepherd, *The Law of Fiduciaries* (Toronto: Carswell, 1981), at 49.

showing that “fiduciary obligations do not arise in a vacuum” but are “underpinned by other duties”,¹⁷ what follows is a discussion on why his analysis is fundamentally mistaken.

III. Problems with Conaglen’s Analysis

While Conaglen’s analysis seeks to differentiate between fiduciary and non-fiduciary duties, it is submitted that his formulation fails to achieve this very objective. The fundamental flaws of Conaglen’s analysis, it is submitted, are that: (a) the subsidiary and prophylactic nature of fiduciary duties presupposes or is dependent on the co-existence of non-fiduciary duties; and (b) even if non-fiduciary duties do co-exist with fiduciary duties, his analysis presupposes that fiduciary duties necessarily protect the co-existing non-fiduciary duties and the two types of duties are necessarily associated with each other. Consequently, (c) performance of non-fiduciary duties appears to be sufficient to absolve fiduciary liability. Unfortunately, none of these doctrinal assumptions and implications is reflective of the current law.

A. Presupposed co-existence of non-fiduciary duties with fiduciary duties

Conaglen suggests that the subsidiary nature of fiduciary loyalty offers protection for non-fiduciary duties. Likewise, prophylaxis goes to the very nature of the fiduciary doctrine in the sense that the very object of the fiduciary rules is to remove incentives that might tempt a fiduciary not to perform his non-fiduciary duties in situations where there is a heightened risk of breach.¹⁸ From this subsidiary and prophylactic understanding of fiduciary duties, it appears that Conaglen’s analysis presupposes the co-existence of a (positive) non-fiduciary duty to be enforced or protected in the first place. For example, in *Aberdeen Railway Co.*,¹⁹ Mr. Blaikie had a positive non-fiduciary duty to obtain the best deal for his company.

It is doubtful, however, that such presupposition is necessary, as there are cases which clearly suggest that the absence of (positive) non-fiduciary duties on the fiduciary would not preclude a fiduciary duty from being imposed on him. For example, in *Regal (Hastings) Ltd v. Gulliver*,²⁰ the directors had no duty to give personal guarantees for the company’s debts, nor were they under any duty to acquire the additional shares in question. Nonetheless, the directors who took the shares up personally were held liable to account for the profits when their shares were subsequently sold. There was also no suggestion that they had not performed their (non-fiduciary) directors’ duties, or that their acts posed an increased risk of abandoning their non-fiduciary duty in favour of their personal interests. Lord Wright perceptively observed that whether a (non-fiduciary) duty was owed (and breached) was irrelevant to the finding of fiduciary liability:

What the [directors] did, it was said, ... involved no ... breach of duty. However ... if a person in a fiduciary relationship makes a secret profit out of the relationship ... [t]he fact is in itself a fundamental breach of the fiduciary relationship.²¹

¹⁷ V. Vann, “Causation and Breach of Fiduciary Duty” [2006] *Sing. J.L.S.* 86 at 88.

¹⁸ Conaglen, note 3 above at 469. According to Conaglen, prophylaxis in the fiduciary doctrine goes beyond the conventional understanding of an evidential prophylaxis arising from the difficulties of proof, and relates to the very nature of the fiduciary doctrine itself. For example, in *Keech v. Sandford*, the prophylactic nature means that fiduciary duty exists to make it more likely that the trustee would perform his non-fiduciary duty of obtaining a renewal for his beneficiary. In this paper, “prophylactic” refers to the sense attributed to it by Conaglen, rather than its conventional understanding.

¹⁹ (1854) 1 Macq. 461; 149 R.R. 32 (H.L.).

²⁰ [1967] 2 A.C. 134 (H.L.).

²¹ *Ibid.*, at 154F.

The limits of Conaglen's analysis can also be illustrated by *Swindle v. Harrison*.²² Mrs. Harrison instructed the solicitors to execute the documents relating to a hotel purchase transaction. Later, when the loan necessary to finance her hotel transaction failed to materialise, the solicitors provided a bridging loan for her without disclosing to her that they were making a profit out of it. The Court of Appeal had no difficulty in holding the solicitors liable for breach of fiduciary duty; the only dispute was over the extent of their liability.

Here, it is clear that the solicitors had performed their non-fiduciary (contractual) duty to exercise skill and care within the scope of the retainer in relation to the preparation and execution of documentation for the hotel transaction.²³ Needless to say, the bridging loan did not fall within the scope of the retainer. The solicitors had also advised Mrs. Harrison to take independent legal advice in relation to their proposed loan. Mummery L.J. found that there was no breach of (non-fiduciary) duty in relation to the hotel transaction.²⁴ Nonetheless, a fiduciary obligation was still imposed and found to have been breached. This demonstrates that fiduciary loyalty operates irrespective of whether it serves (or has fulfilled) any subsidiary function of protecting non-fiduciary duties.

Indeed, the significance of not conflating fiduciary with non-fiduciary duty was also highlighted in the determination of the extent of the solicitors' liability (for equitable compensation) before the Court. Evans L.J. remarked that "[fiduciary duties] of fidelity and loyalty ... exist independently of, though often in conjunction with, a duty of care".²⁵ Mummery L.J. therefore observed that identifying the scope of fiduciary duty was the correct starting point and discussed the need for a sufficient nexus between the breach of fiduciary duty and the loss.²⁶ Non-fiduciary duties were irrelevant in the determination of whether a breach occurred, and if so, the extent of liability.

B. Perceived association between fiduciary and non-fiduciary duties

Second, even if fiduciary duties do co-exist with non-fiduciary duties, Conaglen's analysis is fundamentally flawed, in that it presupposes that the two duties are necessarily associated with each other, and the former necessarily protect the latter. Why does Conaglen perceive an association between fiduciary and non-fiduciary duties? As noted above, the pursuit of self-interest to the harm of the beneficiary's interest is the *raison d'être* for fiduciary loyalty.²⁷ One possible reason for this perceived association is that the pursuit of inconsistent self-interest may also jeopardise the fiduciary's performance of his other (non-fiduciary) duties. For example, Mr. Blaikie's self-interest might lead him not to perform his agency duty of striking the best bargain for the company.

Nonetheless, although acting in self-interest constitutes, in most cases, a failure to act in the best interest of the company, it must be noted that this is conceptually distinct from directors failing to act in the best interest of the company other than for reasons of inconsistent self-interest.²⁸ If a fiduciary acts in self-interest, fiduciary law has adopted a

²² [1997] 4 All E.R. 705 (C.A.).

²³ Indeed, Mrs. Harrison was not seeking advice on the prudence of the transaction: *Swindle* at 708c.

²⁴ Alternatively, Hobhouse L.J. expressed that any breaches of contractual duty in failing to advise Mrs. Harrison that the first loan was not forthcoming were marginal: see *Swindle* at 720.

²⁵ *Swindle* at 716.

²⁶ *Swindle* at 734j-735c. Since it was found that Mrs. Harrison would have taken up the loan to finance her hotel transaction anyway even if there had been full disclosure by the solicitors, the loss flowed from her own decision to take the risk involved in the hotel transaction: *Swindle* at 708c (Evans L.J.); 719e (Hobhouse L.J.); 729e (Mummery L.J.).

²⁷ See *Aberdeen Railway Co* above.

²⁸ R. Flannigan, "The Adulteration of Fiduciary Doctrine in Corporate Law" (2006) 122 *L.Q.R.* 449. See also D. DeMott, "Breach of Fiduciary Duty: On Justifiable Expectations of Loyalty and Their Consequences" (2006) *Arizona Law Review* 48.

strict approach that allows only fully informed consent to exonerate him from liability. But in deciding whether there is a breach of non-fiduciary duties, such as whether Mr. Blaikie breached his agency duty to negotiate for the best contract terms for the company, the court usually defers to the business judgments of directors. Thus, to the extent that fiduciary loyalty is said to enhance performance of non-fiduciary duties, courts may be asked to investigate whether the non-fiduciary duties has been performed, an inquiry which courts are generally reluctant to make. Adoption of Conaglen's view therefore risks running contrary to current judicial sentiment.²⁹

A further reason why any perceived association between fiduciary and non-fiduciary duties should be rejected is because these two types of duties are imposed for different reasons. The attack on the pursuit of inconsistent self-interest, hence disloyalty to the beneficiary's interest, is the concern of fiduciary duty. As Finn perceptively observes, a disloyal tendency is sufficient to hold the fiduciary liable: but no more than loyalty is exacted.³⁰ If a fiduciary fails to perform his non-fiduciary duties, but without being disloyal, it would be overkill to invoke the fiduciary doctrine in the circumstances. As Millett L.J. stressed in *Bristol & West Building Society v. Mothew*,³¹ fiduciary disloyalty could not depend on mere incompetence, oversight or lack of skill and care. Thus, to avoid an over-inclusive analysis such as that of Conaglen's, the function of fiduciary loyalty should be directed to (even if rhetorical) ensuring loyal performance of fiduciary duty. The indifference to non-fiduciary duties is likely to be disturbed by mandating fiduciary loyalty to protect the performance of non-fiduciary duties.

C. (Enhanced) performance of non-fiduciary duties sufficient to absolve fiduciary liability

More significantly, if the function of fiduciary loyalty is to protect performance of non-fiduciary duties, then as a corollary, performance of those non-fiduciary duties shall absolve a fiduciary from liability for breach of fiduciary duty. Such a doctrinal implication is not accepted by English law. In an attempt to avoid this implication, Conaglen qualifies his analysis carefully: the protective function of fiduciary loyalty only operates to *enhance* performance of the non-fiduciary duties, but does not guarantee the most desirable outcome. It seems to follow that so long as Mr. Blaikie in *Aberdeen Railway Co.* did use his best endeavours to negotiate for the company he would not have been liable, even if he failed to obtain the most beneficial bargain.

Despite such a qualification, Conaglen's analysis is still open to doubt. *Keech v. Sandford*³² might well illustrate its deficiencies. To start with, the trustee had "a non-fiduciary duty to seek to obtain a renewal of the lease for the benefit of his beneficiary".³³ Yet it was common ground that the trustee did apply for such a renewal,³⁴ and it was only when the landlord refused to do so that the trustee took the lease for his own benefit. If the logic which supports Conaglen's analysis of *Aberdeen Railway Co.* were to apply, the trustee,

²⁹ This amounts to only a *risk* only, because Conaglen does try to keep fiduciary duties analytically distinct from non-fiduciary duties by postulating that proof of breach of fiduciary duty is not dependent upon proof of breach of non-fiduciary duties (see Conaglen, note 3 above at 471). Risk of conflation nonetheless exists so long as the duties are so closely related together that the function of one is justified with reference to other. Besides, it is not clear what conceptual advancement his analysis makes if, after crafting an additional (non-fiduciary) duty onto the fiduciary doctrine, the fiduciary doctrine is as independent and separate from other doctrines as before.

³⁰ See P.D. Finn, "The Fiduciary Principle" in T.G. Youdan (ed.), *Equity, Fiduciaries and Trusts* (Toronto: Carswell, 1989), at 27-28; and *Keech v. Sandford*.

³¹ [1998] Ch. 1 (C.A.).

³² (1726) Sel. Cas. Ch. 61; 25 E.R. 223.

³³ Conaglen, note 3 above at 470.

³⁴ At 61; 223.

so long as having acted in such a way that made renewal of the lease for the beneficiary more likely, had performed and discharged his (non-fiduciary) duty even though the lease was not ultimately renewed.³⁵ Yet it is highly doubtful how far English courts would accept arguments such as that the trustee had done all that he could in the performance of his non-fiduciary duty. Indeed, English law has not afforded a defence to a fiduciary who has enhanced performance of his non-fiduciary duties.³⁶ When Lord King L.C. held that the trustee in *Keech v. Sandford* was “the only person of all mankind who might not have the lease”, his observation was made apparently irrespective of whether he had enhanced performance of his non-fiduciary duty. Similarly, the directors’ acting in the best interests of the company in subscribing the additional shares in *Regal (Hastings) Ltd v. Gulliver*³⁷ was no defence to a claim for breach of fiduciary duty. This lies the strictness of the fiduciary doctrine. To the extent that Conaglen’s analysis implies a possible inquiry into whether the (enhanced) performance or not of the beneficiary’s non-fiduciary duties should exonerate the fiduciary from liability, it is doctrinally unsound and should be rejected.

To reiterate, in asserting that fiduciary duty offers a form of subsidiary prophylactic protection for non-fiduciary duties, Conaglen focuses on only one, albeit common, factual scenario in which a fiduciary duty occurs. This, however, does not exhaust the circumstances of its occurrence. Indeed, a number of factual variations expose the limitations of Conaglen’s analysis. Fiduciary duties can exist without the co-existence of non-fiduciary duties. Any association between fiduciary and non-fiduciary duties is misconceived: even where both types of duties do co-exist, fiduciary duties can still be breached where non-fiduciary duties are performed. These deficiencies illustrate the very limited explanatory power of Conaglen’s analysis. Insofar as securing enhanced performance of non-fiduciary duties is at most of peripheral relevance to fiduciary loyalty, his analysis is unconvincing and conceptually superfluous. Even if there were a valid point to be made about *Aberdeen Railway Co.*, Conaglen’s analysis cannot be readily exported to explain other orthodox fiduciary cases.

IV. Conclusion

Conaglen’s analysis advances two propositions relating to the nature and function of fiduciary loyalty. The main thrust underlying these two propositions is essentially the same: fiduciary duties offers protection for non-fiduciary duties. Accordingly, the fiduciary doctrine, as he envisions it, is not a doctrine with its own inner intelligibility and is preoccupied with the task of removing improper influences that might affect the fiduciary’s performance of non-fiduciary duties. It is hoped that this paper exposes some of the fallacies of his analysis.

The suggestion that fiduciary duty is protective of non-fiduciary duties is a travesty of the fiduciary doctrine. Fiduciary duty can, in appropriate cases, operate to protect non-fiduciary duties. But this is not its primary concern. Conaglen has not shown adequate

³⁵ It would be implausible to argue that the trustee’s non-fiduciary duty was a duty to ensure that the landlord renewed the lease for the beneficiary, because on the facts, the trustee would not have breached his fiduciary duty had he not renewed the lease for his own benefit. He breached his fiduciary duty because he obtained the lease for his own benefit; he did not breach his fiduciary duty because he failed to obtain a renewal the lease for the benefit of the beneficiary.

³⁶ Cf. Langbein who argues has argued that the strict trustee duty of loyalty, that a transaction is conclusively presumed to be invalid merely because it is tainted by a conflict or profit, should be relaxed by affording a defence to those conflicted or profited trustees where they have acted in the best interest of the beneficiaries: J. Langbein, “Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?” (2005) 114 *Yale L.J.* 929; replied by M.B. Leslie, “In Defense of the No Further Inquiry Rule: A Response to Professor Langbein” (2005) 47 *William & Mary Law Review* 541 and Robert Flannigan, “The Strict Character of Fiduciary Liability” [2006] *New Zealand Law Review* 209 at 231-241.

³⁷ [1967] 2 A.C. 134 (H.L.).

judicial support for his analysis. Nor has he considered carefully the assumptions or implications of his analysis. It is submitted that the internal coherence of the fiduciary doctrine can be more easily deciphered if one identifies the nature and function of fiduciary loyalty without recourse to non-fiduciary duties. By assigning a subsidiary and prophylactic role to the fiduciary doctrine, Conaglen's analysis may have compromised the salutary independence of the fiduciary doctrine, an independence which is essential to the preservation of the fiduciary institution itself. In the final analysis, in view of the problems and difficulties engendered by Conaglen's analysis, his attempt to identify the nature and function of fiduciary duties that mark them out from other categories of legal duty must be discarded. One could only await further analyses on how fiduciary obligations are to be fit into the map of private law obligations.