TERMINATING FIDUCIARY OBLIGATIONS: IS THERE A DUTY OF LOYALTY TO FORMER CLIENTS?

JACK ZHOU*

The law concerning judicial disqualification of lawyers acting against former clients currently depends on whether there is a risk of misuse of the former client's confidential information. The House of Lords' decision in Prince Jefri Bolkiah v KPMG held that fiduciary obligations do not survive the termination of the retainer. By contrast, in Spincode v Look Software, the Victorian Court of Appeal recognised a fiduciary 'duty of loyalty' following termination of the retainer, which involves a 'negative equitable obligation' enjoining lawyers from acting against a former client in the same or closely related matter. This article argues that this basis exists as a matter of fiduciary doctrine. Drawing on the late Paul Finn's notion of 'misuse liability' as an aspect of the fiduciary principle, a lawyer acting against their former client in the same matter amounts to a misuse of fiduciary position even after the retainer's termination.

I INTRODUCTION

Although the lawyer–client relationship is quintessentially fiduciary,[1] the law has regarded the issue of a lawyer acting against their former client ('former client conflicts') through the lens of misuse of that client's confidential information. This article considers whether lawyers owe equitable fiduciary duties of loyalty to former clients. The House of Lords' decision in *Prince Jefri Bolkiah v KPMG* ('*Bolkiah*') is often taken to stand for the proposition that fiduciary obligations end with the termination of the retainer and that the only basis for judicial disqualification in former client conflicts is based on the risk of misuse of the former client's confidential information.[2]

---

* BA/LLB (Hons) (UNSW). The author would like to acknowledge Professor Simone Degeling and the anonymous peer reviewers for their comments. Any and all errors are my own.

1 *Bristol and West Building Society v Mothew* [1998] Ch 1 ('*Mothew*'); *Maguire v Makaronis* (1997) 188 CLR 449, 463 (Brennan CJ, Gaudron, McHugh and Gummow JJ) ('*Maguire*'); *Clark Boyce v Mouat* [1994] 1 AC 428, 437 (Lord Jauncey for the Board) ('*Clark Boyce*'); *Law Society of New South Wales v Foreman* (1994) 34 NSWLR 408, 434–5 (Mahoney JA); *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 96 (Mason J) ('*Hospital Products*'); *Moody v Cox* [1917] 2 Ch 71, 79 (Lord Cozens-Hardy MR), 83 (Warrington LJ); *Nocton v Lord Ashburton* [1914] AC 932.

2 [1999] 2 AC 222 ('*Bolkiah*').

The Victorian Court of Appeal's decision in *Spincode Pty Ltd v Look Software Pty Ltd* ('*Spincode*') recognised, as part of the lawyer's 'duty of loyalty', a 'negative equitable obligation' to not act against a former client in the *same* or *closely related* matter.[3] It is submitted that this is the preferable approach. Although the commonly invoked principles governing misuse of confidential information will likely cover most instances of former client conflicts, the coherence of fiduciary doctrine is assisted by an examination of this surviving duty of loyalty under *Spincode* to determine how and why fiduciary obligations may exist following termination of the relationship giving rise to them. This article contends that equity provides an answer: a lawyer who acts against a former client in the same or closely related matter amounts to a misuse of the lawyer's fiduciary position, notwithstanding the termination of the retainer. This article adopts the late Paul Finn's notion of 'misuse liability', which can arise so long as the potential for misuse of fiduciary position continues to exist. Where a lawyer-fiduciary proceeds to act directly against their former principal in the same matter, the risk of misuse inherently arises. Fiduciary doctrine, which has as one of its normative aims the prohibition of opportunistic conduct,[4] ought to be able to intervene.

Part II of this article contextualises the law in relation to former client conflicts and the divergence between *Bolkiah* and *Spincode*. Regarding the often-contractual nature of a lawyer–client retainer, Part III examines the relationship between co-existing contractual and fiduciary obligations. It emphasises that the termination of the former may not, by itself, put an end to all incidents of the fiduciary relationship, particularly in a lawyer–client relationship. Part IV examines the situations in which fiduciary obligations can survive the termination of the relationship giving rise to them,[5] including reference to different normative accounts of fiduciary doctrine from James Edelman, Matthew Conaglen, and Finn. It is contended, in Parts IV(C) and V, that *Spincode* furnishes an example of Finn's notion of 'misuse liability'. Consistent with fiduciary doctrine's concern for prohibiting opportunistic conduct, a lawyer acting directly against their former client may be presumed to use information, knowledge, or opportunities from their fiduciary position even after formal termination of the retainer. Part VI addresses some of the commercial and doctrinal objections of accepting the principle in *Spincode* for our understanding of fiduciary regulation of lawyers.

---

3 (2001) 4 VR 501, 522 [53]–[54] (Brooking JA) ('*Spincode*').

4 Robert Flannigan, 'The End of Fiduciary Accountability' (2020) 39(2) *University of Queensland Law Journal* 157, 158–61 <https://doi.org/10.38127/uqlj.v39i2.5019> ('The End of Fiduciary Accountability'); Henry E Smith, 'Why Fiduciary Law Is Equitable' in Andrew S Gold and Paul B Miller (eds), *Philosophical Foundations of Fiduciary Law* (Oxford University Press, 2014) 261, 275 <https://doi.org/10.1093/acprof:oso/9780198701729.003.0014> ('Why Fiduciary Law Is Equitable').

5 It is important to recognise that the label 'fiduciary relationship' may be misleading as it distracts attention from the fact that a person may not be a fiduciary for all purposes: 'It is because a particular rule applies to [the fiduciary] that [they are] a fiduciary or confidant *for its purposes*': Paul Finn, *Fiduciary Obligations: 40th Anniversary Republication with Additional Essays* (Federation Press, 2016) 2 [3] (emphasis in original) ('*Fiduciary Obligations*'). The bulk of this article discusses the lawyer's fiduciary obligation to their client within the scope of their engagement and it will generally be clear for what purposes the relevant fiduciary rules exist. What is controversial is the extent and duration of those rules.

II FIDUCIARY REGULATION OF LAWYERS: DUTY OF LOYALTY AND FORMER CLIENT CONFLICTS

A lawyer will owe a multitude of duties to their clients, sourced in statute, contract, tort and equity.[6] Although categories of fiduciaries are not closed, the lawyer–client relationship has long been regarded as fiduciary.[7] The lawyer is subject to a duty of loyalty, which is the 'distinguishing obligation of the fiduciary'.[8] As to the content of fiduciary obligations, they are broadly regarded to be proscriptive, rather than prescriptive,[9] and embody two related rules:[10] a fiduciary cannot make an unauthorised profit ('no profit rule') and cannot be in a position of conflict in their duties to their principal ('no conflict rule').[11] The no conflict principle further encompasses conflicts of personal interests[12] and conflicts between inconsistent duties to multiple principals.[13] A court will intervene where there is a 'real or substantial possibility of a conflict'.[14]

These two rules represent the 'thin' conception of fiduciary loyalty, which remains the current orthodoxy.[15] 'Thick' accounts of loyalty, in the nature of

---

6 GE Dal Pont, *Lawyers' Professional Responsibility* (Lawbook, 6th ed, 2017) 21–2 [1.95]–[1.100] ('*Lawyers' Professional Responsibility*').

7 *Hospital Products* (n 1) 96 (Mason J).

8 *Mothew* (n 1) 18 (Millett LJ); Sarah Worthington, 'Fiduciaries Then and Now' (2021) 80(S1) *Cambridge Law Journal* s154, s156 <https://doi.org/10.1017/S0008197321000611>; Matthew Conaglen, *Fiduciary Loyalty: Protecting the Due Performance of Non-fiduciary Duties* (Hart Publishing, 2011) 59–76 ('*Fiduciary Loyalty*').

9 *Breen v Williams* (1996) 186 CLR 71, 93–5 (Dawson and Toohey JJ), 113 (Gaudron and McHugh JJ) ('*Breen*'); *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165, 198 [74] (McHugh, Gummow, Hayne and Callinan JJ) ('*Pilmer*'); *P&V Industries Pty Ltd v Porto* (2006) 14 VR 1, 6 [23] (Hollingworth J).

10 *Gibson Motorsport Merchandise Pty Ltd v Forbes* (2006) 149 FCR 569, 574–5 [12] (Finn J).

11 *Chan v Zacharia* (1984) 154 CLR 178, 198–9 (Deane J) ('*Chan*'); *Grimaldi v Chameleon Mining NL [No 2]* (2012) 200 FCR 296, 345–6 [179]–[181] (Finn, Stone and Perram JJ) ('*Grimaldi*').

12 *Bray v Ford* [1896] AC 44, 51 (Lord Herschell); *Aberdeen Railway Co v Blaikie Bros* (1854) 1 Macq 461, 471 (Lord Cranworth LC).

13 See, eg, M Scott Donald, 'A Servant of Two Masters? "Managing" Conflicts of Duties in the Australian Funds Management Industry' (2018) 12(1) *Journal of Equity* 1, 4–7; Man Yip and Kelvin FK Low, 'Reconceptualising Fiduciary Regulation in Actual Conflicts' (2021) 45(1) *Melbourne University Law Review* 323, 324.

14 *Pilmer* (n 9) 198–9 [77]–[78] (McHugh, Gummow, Hayne and Callinan JJ); *Commonwealth Bank of Australia v Smith* (1991) 42 FCR 390, 392–3 (Davies, Sheppard and Gummow JJ); *Beach Petroleum NL v Kennedy* (1999) 48 NSWLR 1, 46–7 [196]–[202] (Spigelman CJ, Sheller and Stein JJA) ('*Beach Petroleum*'); *Farrington v Rowe McBride & Partners* [1985] 1 NZLR 83, 90 (Richardson J) ('*Farrington*'); *Transvaal Lands Co v New Belgium (Transvaal) Land and Development Co* [1914] 2 Ch 488, 503 (Swinfen Eady LJ); *Boardman v Phipps* [1967] 2 AC 46, 126 (Lord Upjohn).

15 *Breen* (n 9) 113 (Gaudron and McHugh JJ); *Children's Investment Fund Foundation (UK) v A-G* [2022] AC 155, 177–8, [46] (Lady Arden JSC). Cf *Westpac Banking Corp v Bell Group Ltd (in liq) [No 3]* (2012) 44 WAR 1, 165–6 [897] (Lee AJA); Joshua Getzler, 'Rumford Market and the Genesis of Fiduciary Obligations' in Andrew Burrows and Alan Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks* (Oxford University Press, 2006) 577, 580 <https://doi.org/10.1093/acprof:oso/9780199206551.003.0032>.

prescriptive or positive duties, have not been accepted,[16] such as duties of care.[17] In Australia, this orthodoxy is usually traced to the High Court's decision in *Breen v Williams* ('*Breen*') and remains well-established, despite some controversy as to whether the Court's reasoning was limited to the facts of the particular case.[18]

Conflicts of interest and conflicts of duties prefigure in the cases concerning lawyers' fiduciary obligations.[19] Where there is a conflict between inconsistent duties, a court will intervene if there is a potential or actual conflict arising from the inconsistent interests of several clients,[20] which the lawyer must disclose.[21] Although courts will carefully scrutinise conflicted representation,[22] there may not be an impermissible conflict where the lawyer can nevertheless properly perform their duties to all principals without inhibition, subject to the clients' fully informed consent.[23]

The application of these fiduciary principles to former client conflicts is unclear.[24] Where the retainer has ended, the case law has considered three possible jurisdictional bases for intervention: (1) preventing the misuse of the former client's confidential information; (2) a continuing duty of loyalty owed to the former client to not act against them in the same or closely related matter; and (3) the inherent jurisdiction of the court over its officers to preserve the appearance of justice.[25] These grounds must be kept conceptually distinct because different rules and remedial responses may apply to each.[26] Ground (2) is the most controversial and forms the main focus of this article.

---

16 Irit Samet, 'Fiduciary Loyalty as Kantian Virtue' in Andrew S Gold and Paul B Miller (eds), *Philosophical Foundations of Fiduciary Law* (Oxford University Press, 2014) 125, 126 <https://doi.org/10.1093/acprof:oso/9780198701729.003.0006>. Cf Robert Flannigan, 'Compound Fiduciary Duties' (2017) 23(7) *Trusts and Trustees* 794, 797 <https://doi.org/10.1093/tandt/ttx099>; Lionel Smith, 'Prescriptive Fiduciary Duties' (2018) 37(2) *University of Queensland Law Journal* 261, 262–5.

17 *Mothew* (n 1) 17 (Millett LJ); Conaglen, *Fiduciary Loyalty* (n 8) 35–9. Cf Weiming Tan, 'Peering through Equity's Prism: A Fiduciary's Duty of Care or a Fiduciary Duty of Care?' (2021) 15(2) *Journal of Equity* 181; JD Heydon, 'Are the Duties of Company Directors to Exercise Care and Skill Fiduciary?' in Simone Degeling and James Edelman (eds), *Equity in Commercial Law* (Lawbook, 2005) 185.

18 *Breen* (n 9) 113 (Gaudron and McHugh JJ). But see at 137–8 (Gummow J). See JD Heydon, MJ Leeming and PG Turner, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (LexisNexis Butterworths, 5th ed, 2015) 211–15 [5-385].

19 *Maguire* (n 1) 483–5 (Kirby J); *Law Society of New South Wales v Harvey* [1976] 2 NSWLR 154, 171–4 (Street CJ).

20 *Mothew* (n 1) 19–20 (Millett LJ); Matthew Conaglen, 'Fiduciary Regulation of Conflicts between Duties' (2009) 125 (January) *Law Quarterly Review* 111, 126; Paul B Miller, 'Multiple Loyalties and the Conflicted Fiduciary' (2014) 40(1) *Queen's Law Journal* 301, 322.

21 *Clark Boyce* (n 1) 435 (Lord Jauncey for the Board); *Stewart v Layton* (1992) 111 ALR 687, 709 (Foster J).

22 *Maguire* (n 1) 465 (Brennan CJ, Gaudron, McHugh and Gummow JJ); *Farrington* (n 14) 90 (Richardson J); *Beach Petroleum* (n 14) 47 [203] (Spigelman CJ, Sheller and Stein JJA).

23 *Clark Boyce* (n 1) 435 (Lord Jauncey for the Board); *Mothew* (n 1) 19 (Millett LJ); Conaglen, *Fiduciary Loyalty* (n 8) 155.

24 See *Oceanic Life Ltd v HIH Casualty & General Insurance Ltd* (1999) 10 ANZ Ins Cas ¶61-438, 74,979–80 [55] (Austin J) ('*Oceanic Life*').

25 *Davies v Clough* (1837) 8 Sim 262; 59 ER 105, 106–7 (Shadwell V-C); *Grimwade v Meagher* [1995] 1 VR 446, 450–1 (Mandie J) ('*Grimwade*'); *Woolf v Snipe* (1933) 48 CLR 677, 678 (Dixon J); *Winters v Mischon de Reya* [2008] EWHC 2419 (Ch), [94] (Henderson J) ('*Winters*').

26 *ACN 092 675 164 Pty Ltd v Suckling* (2018) 56 VR 448, 460 [58] (Riordan J) ('*Suckling*'); *Ismail-Zai v Western Australia* (2007) 34 WAR 379, 387–8 [23] (Steytler P) ('*Ismail-Zai*').

Professional rules also provide guidance on former client conflicts. Under the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules* ('*ASCR*'), rule 10 governs conflicts concerning former clients.[27] Rule 10.1 provides that '[a] solicitor and law practice must avoid conflicts between the duties owed to current and former clients'. The reference to 'duties owed to … former clients' appears to preserve any other duties at general law,[28] apart from the duty of confidentiality already covered by rule 10.2, which is broadly similar to the position formulated in *Bolkiah*. However, courts do not directly enforce the professional rules,[29] and the standards are not necessarily the same with the principles applied by courts.[30] The professional rules are expressly applicable alongside the common law[31] and the general law continues to be applied to judicial disqualification.

It is suggested that a separate equitable fiduciary duty of loyalty may continue to be owed to a former client, especially as former client conflicts remain 'coloured by the fiduciary character of the first-client relationship'.[32] Moreover, as a matter of doctrine, the effect of the termination of a contract of retainer also directs attention to the interrelationship between fiduciary and contractual obligations.

A The Early Authorities

The earliest instance of the rule governing former client conflicts is traced to *Cholmondeley v Clinton* ('*Cholmondeley*').[33] Earl Cholmondeley brought a suit against Lord Clinton over the latter's title to various estates. A partnership of solicitors had acted for Lord Clinton. The partnership subsequently dissolved and one of the partners then acted for Earl Cholmondeley in the matter. Lord Clinton sought an injunction restraining the solicitor from acting against him. Lord Eldon LC doubted that 'a person having been long officiating in a cause as the solicitor, and afterwards discharging himself' could not 'afterwards become the attorney on the other side in that cause',[34] and that the solicitor in the case was not 'discharged'. The precise ratio of *Cholmondeley* remains cryptic.[35] In a subsequent case, *Beer*

27 *Legal Profession (Solicitors) Conduct Rules 2015* (ACT) r 10; *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (NSW) r 10 ('*ASCR*'); *Rules of Professional Conduct and Practice* (NT) r 3; *Australian Solicitors' Conduct Rules 2012* (Qld) r 10; *Law Society of South Australia Australian Solicitors' Conduct Rules 2014* (SA) r 10; *Legal Profession (Solicitors' Conduct) Rules 202*0 (Tas) r 15; *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (Vic) r 10; *Legal Profession Conduct Rules 2010* (WA) r 13.

28 Law Council of Australia, 'Review of the Australian Solicitors' Conduct Rules' (Consultation Discussion Paper, 1 February 2018) 53 <https://lawcouncil.au/docs/4dde1ab8-4606-e811-93fb-005056be13b5/2018%20Feb%20%2001%20ASCR%20Consultation%20Discussion%20Paper.pdf>.

29 *Chamberlain v Law Society of the Australian Capital Territory* (1993) 43 FCR 148, 154–5 (Black CJ).

30 The principles under the court's inherent jurisdiction to regulate its legal practitioners may also differ from the obligations imposed by professional rules: *Dale v Clayton Utz (a firm) [No 2]* [2013] VSC 54, [168] (Hollingworth J) ('*Dale*').

31 See, eg, *ASCR* (n 27) rr 2.1–2.2.

32 Paul Finn, 'Fiduciary Law and the Modern Commercial World' in Ewan McKendrick (ed), *Commercial Aspects of Trusts and Fiduciary Obligations* (Oxford University Press, 1992) 7, 27 <https://doi.org/10.1093/oso/9780198257653.003.0002> ('Modern Commercial World').

33 (1815) 19 Ves Jun 261; 35 ER 484.

34 Ibid 487.

35 *Spincode* (n 3) 511 [31] (Brooking JA).

v Ward, Lord Eldon LC appeared to clarify his earlier reasoning, stating that '[i]t appeared to me, and to all the Judges, that nothing could be more dangerous than to permit a [lawyer] employed by A in a cause between him and B, to leave A while still willing to retain him, and enter into the service of B'.[36] Despite the lack of clarity, some have regarded the rule as based on the danger of the misuse of confidential information.[37]

The leading English authority on former client conflicts before *Bolkiah* was *Rakusen v Ellis, Munday & Clarke* ('*Rakusen*').[38] In that case, several judges in the Court of Appeal considered *Cholmondeley* as being grounded on the risk of misuse of confidential information,[39] holding that intervention was warranted if 'mischief was rightly anticipated'.[40] Nevertheless, Lord Eldon LC did not appear to expressly refer to the client's confidential information as the basis for disqualification, and 'it is not possible to say with confidence what the significance was thought to be of the solicitors' having discharged themselves or whether *Cholmondeley* turned on the danger of the misuse of confidential information'.[41]

B *Prince Jefri Bolkiah v KPMG* and *Spincode v Look Software*

Unlike the position in the United States,[42] there does not appear to be an absolute rule in English law prohibiting lawyers from acting against their former clients in the same or closely related matter.[43] The courts' traditional approach, in accordance with the three jurisdictional bases described above in Part II, was accepted until the decision of the House of Lords in *Bolkiah*,[44] which established that the sole ground was the protection of the former client's confidential information and that a continuing duty of loyalty did not exist to prevent a lawyer from acting against them. In that case, a firm of accountants had been retained by a government agency of Brunei,[45] whose chairman was Prince Jefri, for the purposes of settling litigation against him. The firm was then retained by the government in an unrelated investigation over missing assets alleged to have been misappropriated by Prince

36 (1821) Jac 77; 37 ER 779, 781. See also *Bricheno v Thorp* (1821) Jac 300; 37 ER 864, 865 (Lord Eldon LC).

37 See, eg, Joseph Story, *Commentaries on Equity Jurisprudence*, ed WE Grigsby (Stevens and Haynes, 1884) 621 § 952; Graham J Graham-Green, *Cordery on Solicitors* (Butterworths, 7th ed, 1981) 71. Cf *Little v Kingswood Collieries Co* (1882) 20 Ch D 733, 740–1 (Hall V-C) ('*Little*').

38 [1912] 1 Ch 831 ('*Rakusen*').

39 Ibid 841–2 (Fletcher Moulton LJ), 844–5 (Buckley LJ); *Spincode* (n 3) 510–11 [30] (Brooking JA).

40 *Rakusen* (n 38) 841 (Fletcher Moulton LJ).

41 *Spincode* (n 3) 511 [31] (Brooking JA); *Holdsworth v MR Anderson & Associates Pty Ltd* (Supreme Court of Victoria, Phillips J, 26 August 1994) 20 ('*Holdsworth*').

42 See American Law Institute, *Restatement (Third) of the Law Governing Lawyers* (2000) § 132; Janine Griffiths-Baker, *Serving Two Masters: Conflicts of Interest in the Modern Law Firm* (Hart Publishing, 2002) 80; *EF Hutton & Co Inc v Brown*, 305 F Supp 371, 394 (Noel DJ) (1969).

43 See, eg, *Little* (n 37) 742, where Jessel MR remarked during argument that 'a solicitor may be at liberty to act for an opponent of his former client'.

44 Sandro Goubran, 'Conflicts of Duty: The Perennial Lawyers' Tale' (2006) 30(1) *Melbourne University Law Review* 88, 111, citing *Fordham v Legal Practitioners' Complaints Committee* (1997) 18 WAR 467, 489–90 (Malcolm CJ).

45 Although KPMG were accountants, which traditionally do not carry fiduciary status, they provided litigation support services akin to solicitors: *Bolkiah* (n 2) 226–7 (Lord Hope), 234 (Lord Millett).

Jefri. Despite the firm having erected information barriers, he sought an injunction against the firm on grounds of breach of confidence. Lord Millett, in the leading speech, said:

> The fiduciary relationship which subsists between solicitor and client comes to an end with the termination of the retainer. Thereafter the solicitor has no obligation to defend and advance the interests of his former client. The only duty to the former client which survives the termination of the client relationship is a continuing duty to preserve the confidentiality of information imparted during its subsistence.[46]

This statement is 'peculiar',[47] particularly given that the injunction sought was on grounds of confidential information, rather than any fiduciary obligation owed to Prince Jefri. Nevertheless, Lord Millett formulated the applicable test for disqualification based on confidential information, which requires that: (1) the lawyer possesses the former client's material confidential information, and (2) there is a real risk of disclosure, according to the judgment of a reasonable person informed of the facts.[48] This overturned one aspect of *Rakusen*, which had required a 'reasonable probability of real mischief' before intervention,[49] in favour of a stricter test. English cases since *Bolkiah* have broadly applied Lord Millett's formulation.[50] *Bolkiah* was also distinguished by the Court of Appeal in *Conway v Ratiu* on the basis that a duty of confidence, 'when arising out of … [a fiduciary] relationship, is coterminous with it, but that matters of confidence imparted to a solicitor in anticipation of or flowing from it, may create a duty of confidence that is not coterminous with it'.[51]

Before the reception of *Bolkiah*, several Australian decisions appeared to regard the rules on acting against former clients as independent from rules relating to misuse of confidential information.[52] Nonetheless, *Bolkiah* has since been widely endorsed in Australian jurisdictions.[53] The Victorian Court of Appeal, however, left

---

46 Ibid 235.

47 Robert Flannigan, 'Judicial Disqualification of Solicitors with Client Conflicts' (2014) 130 (July) *Law Quarterly Review* 498, 511 <https://doi.org/10.2139/ssrn.2437213> ('Judicial Disqualification of Solicitors').

48 *Bolkiah* (n 2) 236–7 (Lord Millett); *Re A Firm of Solicitors [No 2]* [1997] Ch 1, 12–13 (Lightman J).

49 *Bolkiah* (n 2) 237 (Lord Millett).

50 *Walsh v Shanahan* [2013] EWCA Civ 411, [38] (Rimer LJ, Hallett LJ agreeing at [82], Laws LJ agreeing at [83]) ('*Walsh*'); *Winters* (n 25) [93] (Henderson J); *Marks & Spencer Group plc v Freshfields Bruckhaus Deringer* [2005] PNLR 4, 72 [6] (Pill LJ); Peter Watts and FMB Reynolds, *Bowstead and Reynolds on Agency* (Sweet & Maxwell, 21st ed, 2018) 238–9 [6-051].

51 *Conway v Ratiu* [2006] 1 All ER 571, [71] (Auld LJ, Laws LJ agreeing at [186], Sedley LJ agreeing at [187]) ('*Conway*').

52 *D & J Constructions Pty Ltd v Head* (1987) 9 NSWLR 118, 123 (Bryson J) ('*D & J Constructions*'); *National Mutual Holdings Pty Ltd v Sentry Corporation* (1989) 22 FCR 209, 229–30 (Gummow J) ('*National Mutual Holdings*'); *Mallesons Stephen Jaques v KPMG Peat Marwick* (1990) 4 WAR 357, 363 (Ipp J) ('*Mallesons*'); *Holdsworth* (n 41) 17 (Phillips J); *Wan v McDonald* (1992) 33 FCR 491, 513 (Burchett J) ('*Wan*'); *Fruehauf Finance Corporation Pty Ltd v Feez Ruthning (a firm)* [1991] 1 Qd R 558, 568–70 (Lee J) ('*Fruehauf Finance*').

53 *Técnicas Reunidas SA v Andrew* [2018] NSWCA 192, [35] (Leeming JA, Bathurst CJ agreeing at [1], White JA agreeing at [86]) ('*Técnicas Reunidas*'); *Sanna v Wyse and Young International Pty Ltd [No 1]* [2015] NSWSC 580, [14]–[15] (Darke J); *Marshall v Prescott [No 3]* [2013] NSWSC 1949, [109] (Beech-Jones J) ('*Marshall*'); *Cooper v Winter* [2013] NSWCA 261, [96] (Ward JA, McColl JA agreeing at [1], Barrett JA agreeing at [2]) ('*Cooper*'); *Campbell v Illawarra Golf Club Pty Ltd (in liq)* [2012]

open a ground for disqualification based upon a fiduciary duty of loyalty to the former client. The Victorian Court of Appeal in *Spincode* recognised that a lawyer owed a continuing duty of loyalty to their former client. In that case, a law firm had been retained by a software company since its incorporation and continued to act for it in a shareholder dispute. However, it was also acting for two of the company's shareholders and, when the company entered liquidation, subsequently acted for those shareholders in winding up proceedings. In correspondence between the parties, the firm's principal solicitor attempted to distance the firm from the company and asserted that they had never acted for it. The company sought an injunction against the shareholders from retaining the firm, which was granted at first instance on the basis of confidential information. This was upheld on appeal, but Brooking JA, after discussing the ambiguity of *Cholmondeley* and subsequent cases,[54] expressly recognised an extended fiduciary duty of loyalty:[55]

> Once the contract of retainer comes to an end the solicitor does, it is true, cease to have active duties to perform for the former client. But why should we not say that 'loyalty' imposes an abiding negative obligation not to act against the former client in the same matter? The wider view, and the one which commends itself to me as fair and just, is that the equitable obligation of 'loyalty' is not observed by a solicitor who acts against a former client in the same matter.[56]

This formulation, involving a 'negative equitable obligation', is consistent with the negative, proscriptive content of fiduciary duties as articulated in *Breen*, discussed earlier. To accept that a duty of loyalty to the former client may be breached, it is implicit that the fiduciary duty must exist even after the termination of the retainer.[57]

In situations where a lawyer acts against their former client in the same matter, it would be striking if fiduciary law had nothing to say where a lawyer terminates their relationship with their client and then acts against them, particularly where equitable doctrines of confidentiality are now recognised to have different normative functions than fiduciary law.[58] This issue came before the Federal Court

---

NSWSC 1252, [78]–[80] (Garling J); *Cleveland Investments Global Ltd v Evans* [2010] NSWSC 567, [38]–[39] (Ward J); *Asia Pacific Telecommunications Ltd v Optus Networks Pty Ltd* [2007] NSWSC 350, [31] (Bergin J); *Asia Pacific Telecommunications Ltd v Optus Networks Pty Ltd* [2005] NSWSC 550, [32]–[34] (Bergin J) ('*Asia Pacific First Application*'); *Kallinicos v Hunt* (2005) 64 NSWLR 561, 571 [34]–[35], 579 [66] (Brereton J) ('*Kallinicos*'); *British American Tobacco Australia Services Ltd v Blanch* [2004] NSWSC 70, [34]–[37] (Young CJ in Eq) ('*British American Tobacco*'); *Photocure ASA v Queen's University at Kingston* (2002) 56 IPR 86, 95 [47], 97–8 [54]–[55] (Goldberg J) ('*Photocure*'); *Belan v Casey* [2002] NSWSC 58, [17] (Young CJ in Eq) ('*Belan*'); *GAC v CNT* [2013] QSC 127 (Henry J); *Flanagan v Pioneer Permanent Building Society Ltd* [2002] QSC 346, [10] (Dutney J); *DPP (Cth) v A Legal Practitioner* [2012] WASC 459, [55], [69] (Heenan J); *Spaulding v Adams* [2012] TASSC 61, [93] (Crawford CJ); *Styles v O'Brien* (2007) 16 Tas R 268, 274 [17]–[18] (Crawford J); *A and B*, *Legal Practitioners v Disciplinary Tribunal* (2001) 10 Tas R 152, 164–5 [46]–[50] (Underwood J).

54 *Spincode* (n 3) 511 [31].

55 Ibid 523–4 [57], 525 [59].

56 Ibid 522 [53].

57 Joseph Campbell, 'Fiduciary Relationships in a Commercial Context' (Legal Studies Research Paper No 14/26, Sydney Law School, March 2014) 52 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2404202> .

58 Conaglen, *Fiduciary Loyalty* (n 8) 241–4; Tang Hang Wu, 'Confidence and the Constructive Trust' (2003) 23(1) *Legal Studies* 135, 143 <https://doi.org/10.1111/j.1748-121X.2003.tb00208.x>.

of Australia in *Dealer Support Services v Motor Trade Association of Australia* ('*Dealer Support*').[59] In a dispute concerning the ownership of a registered trade mark, the Motor Trade Association of Australia ('MTAA') sought an injunction against Dealer Support restraining it from retaining its then current law firm, HWL Ebsworth. A predecessor firm had previously acted for MTAA for the registration of that trade mark. The original lawyers associated were either no longer associated with HWL Ebsworth, made undertakings to not disclose any relevant confidential information, or were quarantined from the matter. Beach J refused the application as there was no risk of misuse of MTAA's confidential information.[60] His Honour conducted an extensive survey of the authorities, ultimately rejecting the continuing duty of loyalty in *Spincode*.[61] His Honour concluded that the pre-*Spincode* cases did not provide a secure foundation for a standalone duty of loyalty, and that Brooking JA's remarks were merely dicta.[62] However, it is also arguable that Lord Millett's proposition is similarly dicta given that the fiduciary issue regarding former clients was not squarely raised.

Nevertheless, *Spincode*, as an appellate authority, continues to be approved in subsequent Victorian decisions,[63] often for the proposition that fiduciary obligations may survive the termination of the relationship giving rise to them.[64] As a matter of practice, it is difficult to imagine situations where this duty of loyalty ground will not also sufficiently make out the misuse of confidential information ground.[65] The Law Council of Australia's review of the *ASCR* also did not express a settled view, noting that *Spincode* was 'a peculiarly Victorian issue'.[66] However, this issue

59 (2014) 228 FCR 252 ('*Dealer Support*').

60 Ibid 277 [104].

61 Ibid 262–5 [45]–[51].

62 Ibid 261 [36].

63 *Suckling* (n 26) 461–3 [60]–[65] (Riordan J); *Sent v John Fairfax Publications Pty Ltd* [2002] VSC 429, [103] (Nettle J) ('*Sent*'); *Australian Liquor Marketers Pty Ltd v Tasman Liquor Traders Pty Ltd* [2002] VSC 324, [14] (Habersberger J); *Village Roadshow Ltd v Blake Dawson Waldron* (2004) Aust Torts Reports ¶81-726, 65,338 [40] (Byrne J); *Wagdy Hanna and Associates Pty Ltd v National Library of Australia* (2004) 185 FLR 367, 372–4 [31]–[42] (Higgins CJ); *Adam 12 Holdings Pty Ltd v Eat & Drink Holdings Pty Ltd* [2006] VSC 152, [40] (Whelan J) ('*Adam 12 Holdings*'); *Pinnacle Living Pty Ltd v Elusive Image Pty Ltd* [2006] VSC 202, [14] (Whelan J); *Commonwealth Bank of Australia v Kyriackou* [2008] VSC 146, [10] (Judd J), affd [2009] VSCA 241, [22]–[23] (Neave, Mandie JJA and Byrne AJA); *Connell v Pistorino* [2009] VSC 289, [25]–[29] (Byrne J); *Dale* (n 30) (Hollingworth J); *Lee v Korean Society of Victoria Australia Inc* [2014] VSC 316, [8]–[10] (Dixon J); *Break Fast Investments v Rigby Cooke Lawyers* [2015] VSC 305, [2] (Bell J); *Babcock & Brown DIF III Global v Babcock & Brown International Pty Ltd* [2015] VSC 453, [58] (Riordan J); *Watson v Ebsworth & Ebsworth* (2010) 31 VR 123, 168–70 [145]–[150] (Neave, Mandie and Hansen JJA). The Supreme Court of Queensland recently commented on the conflicting authorities on whether a duty of loyalty may continue once the retainer ends: *Groupline Constructions Pty Ltd v CDI Lawyers Pty Ltd* [2024] QSC 209, [40] (Muir J).

64 See, eg, *Schmidt v AHRKalimpa Pty Ltd* [2020] VSCA 193, [94]–[99], [142] (Kyrou, Hargrave and Emerton JJA); *Edmonds v Donovan* (2005) 12 VR 513, 546 [56] (Phillips JA) ('*Edmonds*'); Rhonda Chesmond and Tina Cockburn, 'Fiduciary Obligations between Parties to Unincorporated Joint Ventures' in WD Duncan (ed), *Joint Ventures Law in Australia* (Federation Press, 2nd ed, 2005) 43, 69–70 [2.3.2].

65 *Ismail-Zai* (n 26) 388 [24] (Steytler P).

66 Law Council of Australia, *Review of the Australian Solicitors' Conduct Rules* (Report to Legal Services Council, 5 May 2021) 52, 56 <https://www.lawsociety.com.au/sites/default/files/2022-02/2021%20Dec%201%20-%20Final%20ASCR%20Report.pdf> ('*Review of the ASCR*').

is more relevant to the coherence of the law, particularly in how it can explain the application of a fiduciary relationship following the termination of another legal relationship which had given rise to it.[67] While the case law is admittedly overshadowed by the cases focusing on confidential information, *Spincode* remains significant, especially as the decisions which have opted to follow *Bolkiah* instead generally do not grapple with Brooking JA's reasoning,[68] with the exception of *Dealer Support*. The existence of this divergence in fiduciary law across Australian jurisdictions is undesirable, particularly because there is only one common law (and equity) throughout the Commonwealth.[69] Short of High Court authority, the divergence seen in Victorian law should be resolved on the basis of principle. It is submitted that fiduciary doctrine supports the approach in *Spincode*.

III THE TERMINATION OF CONTRACTUAL AND FIDUCIARY OBLIGATIONS

It is often said that fiduciary obligations end along with the corresponding relationship or circumstances that initially gave rise to them.[70] In *Attorney-General v Blake*, the Court of Appeal said: 'We do not recognise the concept of a fiduciary obligation which continues notwithstanding the termination of the particular relationship which gives rise to it.'[71] This may not categorically be so, for instance, in the key Australian decision on the nature of fiduciary obligations in *Chan v Zacharia* ('*Chan*').[72] In that case, a partnership was carrying on a medical practice at leased premises. When the partnership subsequently dissolved, but before it had actually been wound up,[73] one of the partners took an agreement for a lease over the premises. This was held by the High Court to have been subject to a constructive

67 Coherence, in one sense, can refer to the consistency of the law's underlying reasons, such that the application of a rule to a set of facts does not contradict another rule's application to the same set of facts: Andrew Fell, 'The Concept of Coherence in Australian Private Law' (2018) 41(3) *Melbourne University Law Review* 1160, 1177. What is at stake, therefore, is the consistency between rules concerning the end of fiduciary relationships and those affecting the end of contractual relationships.

68 Goubran (n 44) 125, discussing *Asia Pacific First Application* (n 53) [37]–[55] (Bergin J).

69 *Lipohar v The Queen* (1999) 200 CLR 485, 505–6 [43]–[46], 509–10 [55]–[57] (Gaudron, Gummow and Hayne JJ), citing *Kable v DPP (NSW)* (1996) 189 CLR 51, 112 (McHugh J); *Dealer Support* (n 59) 274 [87] (Beach J).

70 Matthew Conaglen, 'Fiduciaries' in John McGhee and Steven Elliot (eds), *Snell's Equity* (Sweet & Maxwell, 34th ed, 2020) 155–6 [7-013] ('Fiduciaries'); Heydon, Leeming and Turner (n 18) 149 [5-020]; GE Dal Pont, *Law of Agency* (LexisNexis Butterworths, 3rd ed, 2014) 670 [25.37] ('*Law of Agency*'). Cf Peter Young, Clyde Croft and Megan Smith, *On Equity* (Lawbook, 2009) 518–19 [7.120].

71 [1998] Ch 439, 453 (Lord Woolf MR, Millett and Mummery LJJ); *Walsh* (n 50) [38] (Rimer LJ). See also *Collard v Western Australia [No 4]* (2013) 47 WAR 1, 292 [1513] (Pritchard J).

72 *Chan* (n 11).

73 Relevantly, section 38 of the *Partnership Act 1891* (SA) provided that partnership rights and obligations would continue upon dissolution of the partnership but only for the purpose of winding up the partnership or to complete unfinished transactions. However, there was no ongoing transaction at the time of dissolution for section 38 to operate: see ibid 184 (Murphy J). According to Deane J (at 197):

> The relationship between the partners was curtailed and altered by the dissolution of the partnership. It did not however cease. … [E]ach doctor, by reason of his position as a former partner, remained under fiduciary obligations in respect of the partnership property which was to be realized and applied in paying

trust in favour of the dissolved partnership.[74] In the context of the lawyer–client relationship, Lord Millett's speech in *Bolkiah* confirmed that the termination of the retainer results in no surviving fiduciary obligations. Considering the fact that the retainer usually takes the form of a contractual dealing, this Part discusses the effect which contractual obligations may have on lawyers' fiduciary duties, bearing in mind their 'conceptually distinct' nature.[75]

While the impact of consent-based contractual obligations upon the scope and content of fiduciary relationships has been extensively debated,[76] questions about the contract's existence and termination are less well-developed. The coexistence of contractual and fiduciary obligations (eg, where the contract itself amounts to the course of dealing giving rise to a fiduciary relationship) was recognised in Mason J's influential dissent in *Hospital Products v United States Surgical Corporation*.[77] After noting that fiduciary and contractual relationships may coexist, his Honour emphasised that it is 'the contractual foundation which is all important … 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.'[78] It has been subsequently observed that Mason J's point was that fiduciary doctrines can be accommodated in purely arms-length contractual relationships.[79] In these situations, while equity independently imposes a fiduciary relationship, the terms of the contract will define the boundaries of that fiduciary relationship, or even remove the scope for a fiduciary relationship to arise.[80]

This understanding is an appropriate conceptual starting point in determining the effect of the retainer on the lawyer–client relationship. If the fiduciary relationship is founded expressly upon a contract, then it would be coherent for both the fiduciary and contractual relationship to terminate simultaneously. But in other circumstances, the contract is not given controlling weight on the question of the existence and duration of those coexisting fiduciary obligations, but rather informs

---

or discharging partnership debts and liabilities and the expenses of and incidental to the winding up of the partnership affairs …

74 *Keech v Sandford* (1726) Sel Cas King 61; 25 ER 223, 223–4 (Lord King LC).

75 *Norberg v Wynrib* [1992] 2 SCR 226, 272 (McLachlin J). '[T]he essence of a fiduciary relationship is that it creates obligations of a different character from those deriving from the contract itself': *Re Goldcorp Exchange Ltd (in rec)* [1995] 1 AC 74, 98 (Lord Mustill for the Board).

76 See generally Joshua Getzler, 'Ascribing and Limiting Fiduciary Obligations' in Andrew S Gold and Paul B Miller (eds), *Philosophical Foundations of Fiduciary Law* (Oxford University Press, 2014) 39 <https://doi.org/10.1093/acprof:oso/9780198701729.003.0003> ('Ascribing and Limiting Fiduciary Obligations').

77 *Hospital Products* (n 1).

78 Ibid 97.

79 Joshua Getzler, 'Financial Crisis and the Decline of Fiduciary Law' in Nicholas Morris and David Vines (eds), *Capital Failure: Rebuilding Trust in Financial Services* (Oxford University Press, 2014) 193, 202 <https://doi.org/10.1093/acprof:oso/9780198712220.003.0009>.

80 *Breen* (n 9) 132 (Gummow J); Simone Degeling and Greg Weeks, 'The Essence of a Fiduciary Relationship: Justice Mason's Dissent in *Hospital Products Ltd v United States Surgical Corporation* (1984)' in Andrew Lynch (ed), *Great Australian Dissents* (Cambridge University Press, 2016) 209, 223 <https://doi.org/10.1017/CBO9781316665824.012>. Cf *Streetscape Projects (Australia) Pty Ltd v City of Sydney* (2013) 85 NSWLR 196, 215 [100] (Barrett JA, Meagher JA agreeing at 198 [1], Ward JA agreeing at 239 [239]).

its scope.[81] In *United Dominions Corporation Ltd v Brian*, the High Court held that parties to a joint venture owed fiduciary obligations, as they had undertaken steps in the venture, prior to executing a contract.[82] By parity of reasoning, the termination of the contractual relationship need not be determinative of the duration of the fiduciary relationship. For example, a fiduciary relationship may be established in a course of dealing before the execution of a contract,[83] so that the termination of the latter may not affect the former. A status-based fiduciary relationship may also not depend for its complete existence upon a contract, such as that between a lawyer and client.[84] The fact that certain fiduciary obligations may not be contracted out of in a lawyer–client relationship also suggests that the contract of retainer is not always paramount.[85] Its distinct nature was noted by Lord Walker in *Hilton v Barker Booth & Eastwood* ('*Hilton*'):

> A solicitor's duty to his client is primarily contractual and its scope depends on the express and implied terms of his retainer. … *A solicitor's duty of single-minded loyalty to his client's interest, and his duty to respect his client's confidences, do have their roots in the fiduciary nature of the solicitor-client relationship*. But they may have to be moulded and informed by the terms of the contractual relationship.[86]

It follows that the duty of loyalty is grounded in the lawyer's fiduciary undertaking, but is then moulded by the contractual retainer along with the lawyer's other duties.[87] Precisely what has been undertaken is determined objectively in light of the facts in each case.[88] Nevertheless, the termination of the retainer 'though a highly relevant consideration, does not always conclude fiduciary duties'.[89]

IV POSSIBLE BASES FOR SURVIVING FIDUCIARY LIABILITY

This Part of the article discusses three broad types of situations where fiduciary liability has been recognised post-termination of the relationship giving rise to them (whether or not contractual). The discussion so far has inquired into how a contract, such as a retainer, sets the scope of fiduciary obligations and how the

81 Mark Leeming, 'The Scope of Fiduciary Obligations: How Contract Informs, but Does Not Determine the Scope of Fiduciary Obligations' (2009) 3(3) *Journal of Equity* 181, 183 ('The Scope of Fiduciary Obligations'); *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1, 34–5 [87] (French CJ, Gummow, Hayne, Heydon and Kiefel JJ) ('*John Alexander's Clubs*').

82 *United Dominions Corporation Ltd v Brian Pty Ltd* (1985) 157 CLR 1, 12 (Mason, Brennan and Deane JJ).

83 *Australian Securities and Investments Commission v Citigroup Global Markets Australia Pty Ltd [No 4]* (2007) 160 FCR 35, 85 [345]–[346] (Jacobson J) ('*ASIC v Citigroup*').

84 Ibid 80 [305].

85 Leeming, 'The Scope of Fiduciary Obligations' (n 81) 190, 200; Samuel J Hickey, 'The Non-negotiable Baseline of Lawyers' Fiduciary Obligations' (2016) 10(2) *Journal of Equity* 115, 127. Cf *Strother v 3464920 Canada Inc* [2007] 2 SCR 177, 250–1 [135] (McLachlin CJ, dissenting in part, observed that 'the duty of loyalty is not a duty in the air. It is attached to the obligations the lawyer has undertaken pursuant to the retainer') ('*Strother*').

86 [2005] 1 WLR 567, 575 [28] (emphasis added) ('*Hilton*').

87 *Strother* (n 85) 204 [34] (Binnie J).

88 Young, Croft and Smith (n 70) 525 [7.190].

89 Dal Pont, *Lawyers' Professional Responsibility* (n 6) 230 [6.85]; *Beach Petroleum* (n 14) 46 [192], [195], 48–9 [208]–[211] (Spigelman CJ, Sheller and Stein JJA).

termination of a contract of retainer does not exclude the possibility that fiduciary obligations may still subsist. In particular, it may be rationalised according to the different normative accounts of fiduciary duties offered by James Edelman, Matthew Conaglen and Paul Finn. It is ultimately suggested that the 'negative equitable obligation' in *Spincode* is best comprehended by Finn's account of 'misuse liability'. These accounts are by no means exhaustive of the vast theoretical writing on fiduciary law in existence. Lionel Smith has described three broad categories of fiduciary theory: reductionist theories, exceptionalist theories and relational theories.[90] Reductionist theories take fiduciary duties as explicable according to another basic legal category, such as contract.[91] For example, Edelman has argued, as will be detailed below, that fiduciary obligations essentially arise on the basis of objectively manifested voluntary undertakings by a person to be subject to those obligations.[92] Exceptionalist theories posit that fiduciary obligations are ultimately imposed by some form of public policy.[93] Conaglen's conception of fiduciary duties may also be characterised as an exceptionalist theory, with its emphasis on fiduciary law's primary function as on deterrence of improper performance of non-fiduciary duties, discussed in more detail below.[94] Relational theories emphasise the aspect of the 'relationship' in which a person acts for or exercises legal powers for another. Relational theories understand the scope and nature of fiduciary duties to be what they are because the nature of the particular, other-regarding relationship demands it.[95] This may produce a more expansive scope for fiduciary duties, as they are dictated by what is considered necessary to give full effect to that other-regarding kind of relationship; the primary example is the support for the relationship between parent and child to be one of a fiduciary nature – a position that is not accepted in Australian law.[96]

---

90 Lionel Smith, 'Parenthood Is a Fiduciary Relationship' (2020) 70(4) *University of Toronto Law Journal* 395, 414 <https://doi.org/10.3138/utlj.2017-0098> ('Parenthood').

91 Ibid 402, referring specifically to contractarian theories of fiduciary relationships.

92 See Part IV(A) below.

93 Smith, 'Parenthood' (n 90) 406.

94 See also GE Dal Pont, *Equity and Trusts in Australia* (Lawbook, 7th ed, 2019) 105–10 [4.50]–[4.70] ('*Equity and Trusts*'), while broadly supporting Finn's 'reasonable expectation' view, highlights the ultimate indeterminacy of such a framework. See also Deborah A DeMott, 'Beyond Metaphor: An Analysis of Fiduciary Obligation' (1988) 37(5) *Duke Law Journal* 879, 915 <https://doi.org/10.2307/1372643>. Other exceptionalist theories might be said to include those of North American scholars such as Leonard Rotman and Tamar Frankel who emphasise fiduciary law's foundation in standards of morality: Leonard I Rotman, 'Fiduciary Law's "Holy Grail": Reconciling Theory and Practice in Fiduciary Jurisprudence' (2011) 91(3) *Boston University Law Review* 921, 932; Tamar Frankel, *Fiduciary Law* (Oxford University Press, 2010) 6. See also Irit Samet's account of fiduciary obligations as a sui generis product of equity's regard for moral reasoning: Irit Samet, *Equity: Conscience Goes to Market* (Oxford University Press, 2018) 122, 151 <https://doi.org/10.1093/oso/9780198766773.001.0001> ('*Equity*').

95 See Lionel Smith, 'Fiduciary Relationships: Ensuring the Loyal Exercise of Judgement on Behalf of Another' (2014) 130 (October) *Law Quarterly Review* 608, 618 ('Fiduciary Relationships'); Lionel Smith, *The Law of Loyalty* (Oxford University Press, 2023) 265, arguing that it is a feature of particular relationships, such as advisor roles, that gives it a fiduciary character. See also Duncan Sheehan, 'Identifying Fiduciary Relationships: A Hohfeldian Analysis' (2023) 37(3) *Trust Law International* 141, 143–8.

96 *Paramasivam v Flynn* (1998) 90 FCR 489, 506 (Miles, Lehane and Weinberg JJ).

Recognising that it is beyond the scope of this article to engage with the entire literature on the subject, it has limited itself to the particular insights of Edelman, Conaglen and Finn. Their accounts are theoretically useful to the question of whether and how fiduciary obligations survive following the termination of the relationship giving rise to them. This is not to suggest that any one of them is right or wrong, especially given the fertile debates in the field. They may thus usefully shed light on this question.

A Subsequent Fiduciary Undertakings

The question of how a fiduciary relationship may terminate requires consideration of how they arise in the first place. Edelman has offered an account that has sought to rationalise the Anglo-Australian and Canadian case law on fiduciary duties away from the notion of a fiduciary relationship arising by 'status', with the office of the trustee being the classic example. He argues, instead, that objectively manifested voluntary undertakings are the necessary, but not sufficient, condition for the creation of a fiduciary relationship. The circumstances of that undertaking – such as trust, confidence, and vulnerability – must be such to create an expectation that the party will act in accordance with the fiduciary duties of loyalty.[97]

Edelman's emphasis on voluntary undertakings is not novel in fiduciary theory,[98] and while his thesis may bear some resemblance with 'contractarian' views of fiduciary relationships,[99] his notion of 'voluntary undertakings' is significantly broader. Undertakings can become binding fiduciary undertakings without a formal contract,[100] including 'unilateral undertakings made without consideration'.[101] Traditionally understood 'status-based' fiduciary relationships are rationalised as instances where the relevant 'status or officeholding is one relevant factor in construing' the undertaking.[102] If the undertaking arises by contract, the recognition that fiduciary obligations must be 'moulded' or 'accommodated' to the contract might be considered to reflect the primacy of a voluntary undertaking.[103] In the case of a lawyer–client relationship, the lawyer's fiduciary duty of loyalty is

97 James Edelman, 'When Do Fiduciary Duties Arise?' (2010) 126 (April) *Law Quarterly Review* 302, 317 ('When Do Fiduciary Duties Arise?').

98 For example, see Austin Scott, 'The Fiduciary Principle' (1949) 37(4) *California Law Review* 539, 540 <https://doi.org/10.2307/3477686>. The focus on an 'undertaking' by the fiduciary features prominently in *Hospital Products* (n 1) 96–7 (Mason J); *Galambos v Perez* [2009] 3 SCR 247, [76] (Cromwell J). See James Edelman, 'The Role of Status in the Law of Obligations: Common Callings, Implied Terms and Lessons for Fiduciary Duties' in Andrew S Gold and Paul B Miller (eds), *Philosophical Foundations of Fiduciary Law* (Oxford University Press, 2014) 21, 35 <https://doi.org/10.1093/acprof:oso/9780198701729.003.0002> ('The Role of Status').

99 Dyson Heydon, 'Modern Fiduciary Liability: The Sick Man of Equity?' (2014) 20(10) *Trusts and Trustees* 1006, 1009–10 <https://doi.org/10.1093/tandt/ttu148>; Paul B Miller, 'Justifying Fiduciary Duties' (2013) 58(4) *McGill Law Journal* 969, 984 <https://doi.org/10.7202/1019051ar>.

100 James Edelman, 'The Importance of the Fiduciary Undertaking' (2013) 7(2) *Journal of Equity* 128, 128–9 ('Importance of the Fiduciary Undertaking').

101 Based on the recognition of non-contractual undertakings imposing legal duties articulated in *Hedley Byrne v Heller* [1964] AC 465, 502–3 (Lord Morris), 517 (Lord Devlin); Edelman, 'When Do Fiduciary Duties Arise?' (n 97) 306.

102 Edelman, 'The Role of Status' (n 98) 27.

103 Edelman, 'When Do Fiduciary Duties Arise?' (n 97); ibid 35.

engrafted onto the undertaking; that undertaking, whether contractual or not, must be objectively construed.[104] It follows that '[o]nce the retainer is gone there is no obligation upon which to engraft the duty of loyalty. If there is no obligation to perform, a fiduciary's conduct, however objectionable, is not disloyal.'[105]

It would also follow that fiduciary obligations may continue after the termination of the particular relationship, if that continuity is nevertheless referable to an objectively manifested undertaking.[106] On this view, where a fiduciary relationship arises by virtue of a contractual undertaking, then one would expect both to come to an end simultaneously, in accordance with Lord Millett's statement in *Bolkiah*.[107] The corollary of this is that fiduciary obligations which arise otherwise than by the contract itself could nevertheless continue after the termination of the contract. The fiduciary undertaking may be disaggregated from the contractual undertaking within a course of dealing, either because the existence of the former predates the latter,[108] or because the fiduciary relationship exists over a different scope than that which is covered by the contract. Indeed, it is possible, that 'a non-contractual fiduciary undertaking augments a contractual fiduciary undertaking'.[109] As discussed in Part III, although the fiduciary aspects of a lawyer–client relationship are moulded according to the contract of retainer,[110] they do not necessarily originate from it.

In light of these observations, Edelman has suggested a more nuanced description of how fiduciary duties may continue post-termination 'within the *Prince Jefri* rule'.[111] A contractual relationship may terminate, but a 'new non-contractual relationship may still arise',[112] consistent with the necessity of an undertaking. An example is the England and Wales Court of Appeal's decision in *Longstaff v Birtles*,[113] where it was held that a lawyer–client fiduciary relationship survived the lapsing of the retainer, because there were continuing circumstances of trust and confidence. The claimants were advised by their solicitors to purchase a pub in accordance with the retainer, but the purchase failed. Subsequently, the solicitors advised the Longstaffs to invest in a partnership in which they had an interest. It was held that the solicitors had breached their fiduciary duties, by placing themselves in a position of a conflict of interest. Mummery LJ held that

---

104 Edelman, 'Importance of the Fiduciary Undertaking' (n 100) 132–3.

105 James Edelman, 'Unanticipated Fiduciary Liability' (2008) 124 (January) *Law Quarterly Review* 21, 23.

106 James Edelman, 'The Fiduciary "Self-Dealing" Rule' in Jamie Glister and Pauline Ridge (eds), *Fault Lines in Equity* (Hart Publishing, 2012) 107, 108 n 7.

107 *Bolkiah* (n 2) 235.

108 *ASIC v Citigroup* (n 83) 85 [345]–[346] (Jacobson J); Joshua Getzler, '*ASIC v Citigroup*: Bankers' Conflict of Interest and the Contractual Exclusion of Fiduciary Duties' (2007) 2(1) *Journal of Equity* 62, 67.

109 Matthew Harding, 'Fiduciary Undertakings' in Paul B Miller and Andrew S Gold (eds), *Contract, Status, and Fiduciary Law* (Oxford University Press, 2016) 71, 83 <https://doi.org/10.1093/acprof:oso/9780198779193.003.0004>; *Birtchnell v Equity Trustees, Executors & Agency Co Ltd* (1929) 42 CLR 384, 407–8 (Dixon J).

110 Edelman, 'The Role of Status' (n 98) 35.

111 James Edelman, 'Four Fiduciary Puzzles' in Elise Bant and Matthew Harding (eds), *Exploring Private Law* (Cambridge University Press, 2010) 298, 308 <https://doi.org/10.1017/CBO9780511779213.015>.

112 Ibid.

113 [2002] 1 WLR 470.

the 'relationship [of trust and confidence] did not cease on the termination of the retainer'.[114] This approach rightly recognises that fiduciary liability may operate quite independently from the termination of a particular relationship, such as a contractual dealing.[115] Thus, the particular undertaking (whether contractual or not) which gives rise to the original fiduciary relationship may ostensibly lapse, but this does not prevent a kind of novation or replication of the fiduciary undertaking within the same course of dealing.

B Preventing the Circumvention of Fiduciary Duties

Conaglen has explained that instances of why fiduciary duties are recognised post-termination is to prevent them from being 'emasculated'.[116] As noted, Conaglen has advanced an instrumentalist view of fiduciary obligations, positing there the essential nature of non-fiduciary duties. Even so, Conaglen's view also accounts for situations where a fiduciary deliberately resigns from their non-fiduciary relationship, such as a contract or a directorship, for the purpose of evading their fiduciary obligations.[117] Apart from this, he has otherwise denied that fiduciary obligations survive the termination of the relationship giving rise to them. This can be seen in Conaglen's account which posits that fiduciary obligations' existence depends on the concurrent existence of non-fiduciary duties for which fiduciary duties' strict nature and ample remedies serve a subsidiary, prophylactic function.[118] To deter improper performance, those peculiarly fiduciary duties – which broadly encompass the no profit and the no conflict rules – serve to increase the chance of proper performance of non-fiduciary duties which otherwise characterise a given legal relationship.[119] In response to Edelman, Conaglen points out that voluntary undertakings are not necessary to explain the nature of fiduciary relationships.[120] In Conaglen's account, fiduciary duties serve a subsidiary prophylactic function, thereby increasing the chance of the proper performance of non-fiduciary duties.[121] It is necessary to identify the precise duties that are owed to the principal, which gives the fiduciary duties of loyalty a sensible function and ambit.[122] Therefore, it must be asked what non-fiduciary duties, if any, survive termination of the retainer. A solicitor is, in general, engaged for the purposes of their retainer and will not owe non-fiduciary duties, whether based in contract or tort, to a former

114 Ibid 477 [35].

115 Cf Conaglen, *Fiduciary Loyalty* (n 8) 193. See also *McMaster v Byrne* [1952] 1 All ER 1362, 1367–8 (Lord Cohen for the Board), referring to *Allison v Clayhills* (1907) 97 LT 709; Finn, *Fiduciary Obligations* (n 5) 204–5 [443]–[444].

116 Conaglen, *Fiduciary Loyalty* (n 8) 190; Conaglen, 'Fiduciaries' (n 70) 156 [7-013].

117 *Addstead Pty Ltd (in liq) v Liddan Pty Ltd* (1997) 70 SASR 21, 59 (Debelle J).

118 Conaglen, *Fiduciary Loyalty* (n 8) 185–7.

119 Ibid 62–3.

120 Matthew Conaglen, 'Fiduciary Duties and Voluntary Undertakings' (2013) 7 *Journal of Equity* 105, 106 ('Fiduciary Duties and Voluntary Undertakings').

121 Conaglen, *Fiduciary Loyalty* (n 8) 26–7. See generally Matthew Conaglen, 'The Nature and Function of Fiduciary Loyalty' (2005) 121 (July) *Law Quarterly Review* 452; Peter Birks, 'The Content of Fiduciary Obligation' (2000) 34 *Israel Law Review* 3, 29–31 <https://doi.org/10.1017/S0021223700011870>.

122 Conaglen, *Fiduciary Loyalty* (n 8) 95–6, 185; Conaglen, 'Fiduciary Duties and Voluntary Undertakings' (n 120) 114.

client once the retainer comes to an end.[123] In discussing Brooking JA's judgment in *Spincode*, Conaglen argues that a lawyer who no longer owes any non-fiduciary duties to their former client will correspondingly not owe any further duty of loyalty.[124] Nevertheless, Conaglen recognises occasions in which fiduciary liability has existed post-termination, but solely to prevent the circumvention of fiduciary protection which otherwise would have applied during the subsistence of the particular relationship.[125] Thus, resignation cannot be used as a device to avoid fiduciary liability, where, 'but for the resignation, the acts of the [fiduciary], taken in totality, would amount to a breach of his obligations of loyalty'.[126] Indeed, the act of resignation might itself be part of the conduct which constitutes a breach of fiduciary duty. Applied to certain kinds of former client conflicts, 'the act of termination is an act of disloyalty. The act of preferring client B to client A, who still desires to retain him, is an act of disloyalty. *The state of mind of that solicitor is one of a disloyal fiduciary*.'[127]

Cases which highlight this formulation have often fallen under the 'corporate opportunity doctrine',[128] such as *Industrial Developments Consultants v Cooley*[129] and *Canadian Aero Service Ltd v O'Malley*,[130] which appear to place the focus on the fiduciary's subjective intentions at the point of their resignation.[131] Although liability does not ordinarily turn on the fiduciary's good faith,[132] company directors who resign from their office may continue to be accountable for exploiting 'maturing business opportunities' that belong to the company.[133] The basis of this liability enquires into the director's intention prior to or at resignation.[134] This is a 'fact-sensitive' analysis,[135] and often depends on the scope of the fiduciary relationship to which the director is subject.[136] Nevertheless, liability turns on

123 Conaglen, *Fiduciary Loyalty* (n 8) 191, 244.
124 Ibid 194; Conaglen, 'Fiduciary Duties and Voluntary Undertakings' (n 120) 118.
125 Conaglen, 'Fiduciary Duties and Voluntary Undertakings' (n 120) 119.
126 Pearlie Koh, 'Once a Director, Always a Fiduciary' (2003) 62(2) *Cambridge Law Journal* 403, 417 <https://doi.org/10.1017/S0008197303006366> ('Once a Director'); Watts and Reynolds (n 50) 216–17 [6-038].
127 *Dealer Support* (n 59) 268 [59] (Beach J) (emphasis added).
128 Conaglen, *Fiduciary Loyalty* (n 8) 139–41.
129 [1972] 1 WLR 443, 451–3 (Roskill J).
130 [1974] SCR 592, 615–16 (Laskin J for the Court).
131 See Smith, 'Fiduciary Relationships' (n 95) 614. See also Stephen R Galoob and Ethan J Leib, 'Intentions, Compliance, and Fiduciary Obligations' (2014) 20(2) *Legal Theory* 106, 129–31 <https://doi.org/10.1017/S1352325214000032>.
132 *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134, 144–5 (Lord Russell); Irit Samet, 'Guarding the Fiduciary's Conscience: A Justification of a Stringent Profit-Stripping Rule' (2008) 28(4) *Oxford Journal of Legal Studies* 763, 766 <https://doi.org/10.1093/ojls/gqn029>.
133 *Edmonds* (n 64) 537–8 [59] (Phillips JA); Robert P Austin and Ian M Ramsay, *Ford, Austin and Ramsay's Principles of Corporations Law* (LexisNexis Butterworths, 17th ed, 2018) 645 [9.270].
134 *CMS Dolphin Ltd v Simonet* [2002] BCC 600, 623 [96] (Lawrence Collins J); *Recovery Partners GP Ltd v Rukhadze* [2019] Bus LR 1166, 1183–7 [69]–[84] (Cockerill J) ('*Recovery Partners*').
135 *Burnell v Trans-Tag Ltd* [2021] EWHC 1457 (Ch), [406] (Mr Ashley Greenbank); *Foster Bryant Surveying Ltd v Bryant* [2007] Bus LR 1565, 1589 [69] (Rix LJ) ('*Foster Bryant Surveying*'); *Island Export Finance Ltd v Umunna* [1986] BCLC 460, 482 (Hutchison J).
136 *In Plus Group Ltd v Pyke* [2002] EWCA Civ 370, [89]–[90] (Sedley LJ); *Quarter Master UK Ltd (in liq) v Pyke* [2005] 1 BCLC 245, 264 [57] (Paul Morgan QC); Pearlie Koh, 'The Resigning Director: A Tale of Two Cases' [2008] (1) *Singapore Journal of Legal Studies* 205, 212.

whether the fiduciary's 'resignation can be fairly said to have been prompted or influenced by a wish' to exploit a maturing business opportunity of the company.[137] Some cases have held that the fiduciary breach occurred during the subsistence of the relationship as they were in a position of conflict prior to resignation,[138] but the breach may be manifested post-termination.[139]

A similar principle would apply to a lawyer resigning with the express intention of acting against their client. Some cases have read Lord Eldon LC's judgment in *Cholmondeley* as authority for this basis;[140] this situation may be properly regarded as a breach of fiduciary duty.[141] Conaglen rightly points out that equity is alert to the possibility of a fiduciary intentionally shirking their obligations by resigning or by a 'colourable retirement'.[142] However, it is submitted that this is not the only instance of fiduciary obligations surviving termination of the relationship or circumstances giving rise to them. Where a lawyer acts against their former client in the same or closely related matter, it is not chiefly their state of mind which disqualifies them from the perspective of fiduciary law.

C Subsequent Misuse of Fiduciary Position

Another way of approaching the nature of fiduciary obligations is to focus on the extent of the liabilities, rather than to focus on the circumstances in which they arise. Seen in this way, a lawyer acting against a former client in the same matter raises the danger of a misuse of 'fiduciary position or of opportunity or knowledge',[143] drawing from Finn's notion of 'misuse liability', which will be discussed below. To identify what exactly about the fiduciary position is being misused, it should be clear that the lawyers' fiduciary obligation includes the non-abuse of their client's trust and confidence in respect of a particular matter, which places restrictions on the lawyer's ability to later act against them in the same matter. This is distinct from any other duty of confidentiality.

1 Defining Misuse Liability

The notion of 'misuse liability' was put forward by Finn in 2014 while revisiting his earlier thinking on fiduciary obligations.[144] In his original view, once a party is reasonably entitled in the circumstances to expect another person to act in their

137 *Recovery Partners* (n 134) 1184 [74] (Cockerill J).
138 *Foster Bryant Surveying* (n 135) 1589 [69] (Rix LJ).
139 *Recovery Partners* (n 134) 1184–5 [75]–[76] (Cockerill J).
140 *Dealer Support* (n 59) 262–3 [45] (Beach J). See also *Fruehauf Finance* (n 52) 570 (Lee J); Finn, *Fiduciary Obligations* (n 5) 150 [312].
141 *Dealer Support* (n 59) 267–8 [58]–[59] (Beach J).
142 Frederick Jordan, *Select Legal Papers* (Legal Books, 1983) 115. This is also the reading used by English commentators to reconcile *Spincode* (n 3) with *Bolkiah* (n 2): Charles Hollander and Simon Salzedo, *Conflicts of Interest* (Sweet & Maxwell, 6th ed, 2020) 35–6 [2-040]: 'It might be material to the analysis whether the retainer was terminated by consent or by unilateral act of the fiduciary.'
143 *Chan* (n 11) 198 (Deane J).
144 See Paul D Finn, 'The Fiduciary Principle' in TG Youdan (ed), *Equity, Fiduciaries and Trusts* (Carswell, 1989) 1 ('The Fiduciary Principle').

interests,[145] the fiduciary principle insists from that person 'a fine loyalty', expressed in the now orthodox rules prohibiting conflicts and unauthorised profits.[146] Against this conceptual background, he had previously discussed former client conflicts primarily through the rules regarding misuse of confidential information.[147] Nevertheless, he had also noted that former client conflicts where the lawyer terminates the retainer with the intention of acting against their client might squarely engage the duty of loyalty, citing *Cholmondeley*.[148] In this context, it may be helpful to recall one of the important normative functions of fiduciary duties, namely, as a control on opportunism. This idea has been explored by various commentators,[149] and debate over the normative functions of fiduciary obligations has been as extensive as the question of identifying which relationships between legal actors are 'fiduciary'. Robert Flannigan has argued that the duty of loyalty enjoined by fiduciary accountability serves the 'narrow purpose of controlling the opportunism'.[150] This control of opportunistic conduct is necessary when a person undertakes a particular arrangement which affords them 'limited access' to another's property, assets and information.[151] For Flannigan, fiduciary doctrine is concerned with the mischief of opportunism 'latent in all relations of service' or control over another person's autonomy.[152] The strict prophylactic nature of fiduciary duties is justified by the inability of courts to readily detect disloyal conduct.[153] This task requires that intervention can extend 'beyond the formal temporal boundaries of a relation' – this extended 'penumbral' liability

145 Ibid 46; Paul Finn, 'Contract and the Fiduciary Principle' (1989) 12(1) *University of New South Wales Law Journal* 76, 84; *Grimaldi* (n 11) 345 [178] (Finn, Stone and Perram JJ); *Hodgkinson v Simms* [1995] 3 SCR 377, 421 (La Forest J). It should be noted that Edelman's undertaking thesis is not inconsistent with this view: Edelman, 'Importance of the Fiduciary Undertaking' (n 100) 129.

146 Finn, 'The Fiduciary Principle' (n 144) 27–8; Finn, 'Modern Commercial World' (n 32) 9–10; Charles Harpum, 'Fiduciary Obligations and Fiduciary Powers' in Peter Birks (ed), *Privacy and Loyalty* (Oxford University Press, 1997) 145, 147 <https://doi.org/10.1093/oso/9780198764885.003.0007>.

147 Paul Finn, 'Conflicts of Interest and Professionals' (Seminar Paper, Legal Research Foundation Inc Seminar, 1987) 16 ('Conflicts of Interest and Professionals'); Finn, 'Modern Commercial World' (n 32) 22, 31; Paul Finn, 'Professionals and Confidentiality' (1992) 14(3) *Sydney Law Review* 317, 326.

148 Finn, 'Conflicts of Interest and Professionals' (n 147) 43 n 23; Finn, *Fiduciary Obligations* (n 5) 150 [312].

149 Henry Smith defines opportunism as

> behavior that is undesirable but that cannot be cost-effectively captured – defined, detected, and deterred – by explicit ex ante rulemaking. … It often consists of behavior that is technically legal but is done with a view to securing unintended benefits from the system, and these benefits are usually smaller than the costs they impose on others.

Smith, 'Why Fiduciary Law Is Equitable' (n 4) 275; Henry E Smith, 'Equity as Second-Order Law: The Problem of Opportunism' (Working Paper No 15-13, Harvard Public Law, 2015) 14, 26 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2617413>; Henry E Smith, 'Equity and Administrative Behaviour' in PG Turner (ed), *Equity and Administration* (Cambridge University Press, 2016) 326, 338–40 <https://doi.org/10.1017/CBO9781316529706.018>; Henry E Smith, 'Equity as Meta-Law' (2021) 130(5) *Yale Law Journal* 1050, 1076–80.

150 Robert Flannigan, 'The Core Nature of Fiduciary Accountability' [2009] (3) *New Zealand Law Review* 375, 415–18; Robert Flannigan, 'Access or Expectation: The Test for Fiduciary Accountability' (2010) 89(1) *Canadian Bar Review* 1, 3–14.

151 Flannigan, 'The End of Fiduciary Accountability' (n 4) 168.

152 Ibid 161, 194–5. See also Smith, 'Fiduciary Relationships' (n 95) 613.

153 Robert Flannigan, 'The Strict Character of Fiduciary Liability' [2006] (2) *New Zealand Law Review* 209, 211; *Whichcote v Lawrence* (1798) 3 Ves Jun 740; 30 ER 1248, 1253 (Lord Loughborough LC).

may constitute a 'necessary conceptual adjunct to facilitate the effective control of opportunism'.[154] This understanding can be applied to former client conflicts as there is 'considerable potential for harm in solicitors acting against former clients'.[155]

Drawing on Deane J's canonical formulation of the 'fundamental rule' of fiduciary liability in *Chan*, Finn refashioned his conception of the fiduciary principle to focus on two overlapping themes: conflicts of interest and liability flowing from misuse of fiduciary position (or 'misuse liability'). The latter is 'given its own province and its own justification'.[156] A conflict of interest or duty in the strict sense is no longer apposite in the case of a former fiduciary's subsequent conduct. But misuse liability extends beyond the 'cessation of, or resignation from' the fiduciary position.[157] Deane J's expression of a misuse by use or reason of the fiduciary position is not marked by a temporary qualification and is broad enough to cover situations where the fiduciary office is 'in operation or has terminated'.[158] Finn discusses a number of cases answering this description, the first set involving conduct which is 'decided upon, or is engaged in, prior to the cessation of, or resignation from, the fiduciary position'.[159] The corporate opportunity doctrine, discussed in Part IV(B), provides an example,[160] recognising the fiduciary will have improperly acquired opportunities which may then crystallise at a point after they relinquish their office.[161] This gives full effect to Deane J's careful formulation of the two fiduciary 'themes' in *Chan*, particularly the second aspect:

> The first is that which appropriates for the benefit of the person to whom the fiduciary duty is owed any benefit or gain obtained or received by the fiduciary in circumstances where there existed a conflict of personal interest and fiduciary duty or a significant possibility of such conflict: the objective is to preclude the fiduciary from being swayed by considerations of personal interest. The second is that which requires the fiduciary to account for any benefit or gain obtained or received *by reason of or by use of his fiduciary position or of opportunity or knowledge resulting from it*: the objective is to preclude the fiduciary from actually misusing his position for his personal advantage. Notwithstanding authoritative statements to the effect that the

154 Robert Flannigan, 'The Boundaries of Fiduciary Accountability' (2004) 83(1) *Canadian Bar Review* 35, 44–5. Flannigan has argued that this need to control opportunism in limited access arrangements provides the analytical basis for identifying why fiduciary relationships arise in the first place (as opposed to Finn's reasonable expectation thesis which attributes the role of external, social factors). This view has been criticised; for example, although Conaglen also recognises that this is an important normative function of fiduciary duties, he denies that it can comprehensively explain the existence of a fiduciary relationship: Conaglen, *Fiduciary Loyalty* (n 8) 252, 254.

155 Flannigan, 'Judicial Disqualification of Solicitors' (n 47) 499, 503.

156 Paul Finn, 'Fiduciary Reflections' (2014) 88 *Australian Law Journal* 127, 131–2, citing Deane J's key statement of principle in *Chan* (n 11) 198–9.

157 Finn, 'Fiduciary Reflections' (n 156) 134.

158 Gerard MD Bean, *Fiduciary Obligations and Joint Ventures: The Collaborative Fiduciary Relationship* (Oxford University Press, 1995) 239 n 182; RP Austin, 'Fiduciary Accountability for Business Opportunities' in PD Finn (ed), *Equity and Commercial Relationships* (Lawbook, 1987) 141, 159–60.

159 Finn, 'Fiduciary Reflections' (n 156) 134. See, similarly, Dal Pont, *Equity and Trusts* (n 94) 104 [4.45], describing this process as 'relat[ing] back' post-termination breaches of fiduciary duty to a point where that relationship was on foot.

160 See Koh, 'Once a Director' (n 126) 425.

161 Flannigan, 'Judicial Disqualification of Solicitors' (n 47) 511.

> 'use of fiduciary position' doctrine is but an illustration or part of a wider 'conflict of interest and duty' doctrine … the two themes, while overlapping, are distinct.[162]

The full implications of Finn's reformulation of the fiduciary principle and the recent evolution of his thought since his seminal 1977 monograph have yet to be fully appreciated, especially in current practice. This article does not suggest a departure from the orthodox 'no conflict' and 'no profit' rules as the content of fiduciary duties. 'Misuse liability' has been criticised for apparently deviating from Finn's earlier 'no conflict' and 'no profit' reading of the fiduciary principle.[163] Nevertheless, Finn stresses that the two themes laid out by Deane J in *Chan* 'state comprehensively the bases on which the fiduciary principle exacts *personal* liability from all fiduciaries'.[164] More relevantly, Finn did not appear to provide a working analytical basis for determining the ambit of misuse liability, only stating that it extends to circumstances where the 'potential for misuse of fiduciary position or knowledge or opportunity resulting from it subsists'.[165]

An example is the purchasing rules which bar a fiduciary from purchasing trust property (or property held in a confidential character) even long after the end of the relationship. As two important cases decided by Lord Eldon LC illustrate, these rules are concerned with the fiduciary's access to information and knowledge, which generate the position of conflict.[166] In *Ex parte Lacey*, Lord Eldon LC held that the purchase of certain properties from a bankrupt's estate by the assignee in bankruptcy without fully informed consent of all beneficiaries (namely, the creditors) must be set aside because 'the Law supposes him to have acquired all the knowledge a trustee may acquire; which may be very useful to him' but 'the Court can never be sure' that he has made full disclosure to the beneficiary.[167] In *Ex parte James*, a case which might now be considered as involving the 'fair dealing' rule, involving a solicitor to a commission of bankruptcy, Lord Eldon LC considered that a fiduciary who manages or disposes of another's property was prohibited from purchasing for themselves 'unless he shakes off the character altogether; putting himself altogether out of the trust; and not then without a little more than merely parting with the character'.[168] Thus, even after resignation and with no further active duties concerning the property,[169] these fiduciaries are nevertheless furnished with 'inside information about the sale property itself' for which they are presumed to misuse in purchasing without the beneficiary's fully

---

162 *Chan* (n 11) 198–9 (emphasis added) (citations omitted).

163 Sarah Worthington, 'Fiduciaries: Following Finn' in Tim Bonyhady (ed), *Finn's Law: An Australian Justice* (Federation Press, 2016) 33, 47 ('Following Finn').

164 Finn, 'Fiduciary Reflections' (n 156) 135 (emphasis in original).

165 Ibid 134. See also Nelson Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (Sweet & Maxwell, 4th ed, 2023) 228 [14-022]–[14-023]: 'So long as the confidence derived by the solicitor from the relationship continues, their fiduciary duties remain alive.'

166 Flannigan, 'The End of Fiduciary Accountability' (n 4) 169 n 40.

167 (1802) 6 Ves Jun 625; 31 ER 1228, 1228; *Tate v Williamson* (1866) LR 2 Ch App 55, 61 (Lord Chelmsford); *Ex parte Bennett* (1805) 10 Ves Jun 381; 32 ER 893, 897 (Lord Eldon LC); *McPherson v Watt* (1877) 3 App Cas 254, 263–4 (Lord Cairns).

168 (1803) 8 Ves Jun 338; 32 ER 385, 389 ('*Ex parte James*'). See also *Coles v Trecothick* (1804) 9 Ves 247; 32 ER 592, 598 (Lord Eldon LC); *Gould v O'Carroll* [1964] NSWR 803, 805 (Jacobs J).

169 *Ex parte James* (n 168) 388; Finn, *Fiduciary Obligations* (n 5) 182 [390].

informed consent.[170] The disability continues because the reasons for which the rule is founded continue to exist.[171]

Any analogue between *Spincode* with these rules applicable to trustees must be qualified. Firstly, it is possible for the parties to modify this rule by the relevant trust instrument.[172] Secondly, these rules are not absolute, and may not be engaged depending on the circumstances of the fiduciary's relationship to the property and beneficiaries.[173] Nevertheless, the analogy is useful for highlighting how misuse liability responds to the fiduciary's presumed acquisition of knowledge and information in the course of holding that office. This is also relevant for former client conflicts. In *Carter v Palmer*,[174] a barrister employed as counsel was precluded from enforcing securities over a former client's estate, which were purchased by him at an undervalue without fully informed consent of the client. The counsel had managed the client's affairs for a number of years and had previously negotiated a compromise with respect to those securities on his client's behalf. This was because he was 'necessarily … acquainted with all the circumstances connected with these securities' and how they are paid.[175] In reaching this decision, Lord Cottenham referred to cases where

> solicitors have been restrained from acting against their former clients, or communicating information acquired in such employment, [which] proceed upon a principle which governs this case: for *it cannot be contended that they are to be at liberty to use for their own benefit, and to the prejudice of their former clients, information acquired whilst acting for them*, which they are not permitted to communicate or to use for the benefit of others.[176]

These observations were not made in the context of breach of confidence. On this view, a lawyer is not able to act against their former client, in the same way trustees are disabled from purchasing property without full disclosure,[177] because of the presumptive advantages from having occupied that fiduciary position.[178]

Liability arises where 'the fiduciary does (or is presumed to) misuse confidential knowledge or information which resulted from that position'.[179] Finn includes cases involving purchases by parties in a 'confidential character', attracting fiduciary accountability under the 'fair-dealing rule'.[180] Without full

---

170 Worthington, 'Following Finn' (n 163) 53.

171 M Cope, 'The Equitable Obligation of a Purchaser, Who Is a Fiduciary, to Make Full Disclosure of Material Information' (1982) 12(2) *University of Queensland Law Journal* 74, 88.

172 *Barnsley v Noble* [2017] Ch 191, 201 [28] (Sales LJ).

173 *Holder v Holder* [1968] Ch 353, 398–400 (Danckwerts LJ), 402–3 (Sachs LJ); *Re Bole's and British Land Co's Contract* [1902] 1 Ch 244, 246–7 (Buckley J).

174 (1842) 9 Cl & F 111; 8 ER 256.

175 Ibid 277 (Lord Cottenham).

176 Ibid 278 (emphasis added).

177 See also *Demerara Bauxite Co v Hubbard* [1923] AC 673, 675–6 (Lord Parmoor for the Board).

178 See *Sinclair v Ridout* [1955] OR 167, 183 (McRuer CJHC), citing Peter Allsop, *Bowstead on Agency* (Sweet & Maxwell, 11th ed, 1951) 101–2 (emphasis added): 'It is the duty of a solicitor … not to act for the opponent of his client, or of a former client, in any case in which his knowledge of the affairs of such client or former client will give him *an undue advantage*.'

179 Finn, 'Fiduciary Reflections' (n 156) 134.

180 See JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 8th ed, 2016) 381–4 [17-44]–[17-47]. The often-cited formulation by Megarry V-C states:

disclosure by the fiduciary and the fully informed consent of the principal or beneficiary, a fiduciary's purchase of the beneficial interest may be set aside, no matter how substantively fair the transaction. Liability is imposed because of the fiduciary's access to knowledge from their position, which need not be specific and might include 'simply the possible possession of undisclosed knowledge and information',[181] given that the rule demands a high standard of disclosure by the fiduciary.[182] It would follow that this is distinct from the notion of 'information' necessary to found a claim for breach of confidence.[183]

A duty of confidence – whether arising under contract or in equity's auxiliary jurisdiction or the court's jurisdiction to enforce the lawyer's duty of confidentiality – is separate to a fiduciary duty. Confidentiality is of a narrower concern than fiduciary doctrine, namely that of the protection of confidential information, which has arguably permitted easier acceptance of more expansive temporal boundaries even after the end of the relationship or contract giving rise to it.[184] This is so even if a lawyer's duty of confidentiality is sometimes characterised as 'fiduciary' in nature.[185] A person may be subject to both fiduciary duties and duties of confidentiality at the same time. The application of those rules may overlap with former client conflicts and the rules relating to misuse of confidential information are further discussed below.[186]

Beach J in *Dealer Support* referred briefly to Finn's discussion of 'misuse liability'.[187] However, Brooking JA's formulation in *Spincode* of the duty of loyalty may be another example of this 'misuse liability'. His Honour drew analogies with cases like, among others, *Ex parte James*.[188] While there is no absolute rule

---

> The self-dealing rule is (to put it very shortly) that if a trustee sells the trust property to himself, the sale is voidable by any beneficiary *ex debito justitiae*, however fair the transaction. The fair-dealing rule is (again putting it very shortly) that if a trustee purchases the beneficial interest of any of his beneficiaries, the transaction is not voidable *ex debito justitiae*, but can be set aside by the beneficiary unless the trustee can show that he has taken no advantage of his position and has made full disclosure to the beneficiary, and that the transaction is fair and honest.

Tito v Waddell [No 2] [1977] Ch 106, 241; *Clay v Clay* (2001) 202 CLR 410, 434 [50] (Gleeson CJ, McHugh, Gummow, Hayne and Callinan JJ).

181 Finn, *Fiduciary Obligations* (n 5) 204 [444].

182 Ibid 201–2 [437]–[438]; *Yunghanns v Elfic Ltd (formerly known as Elders Finance and Investment Co Ltd)* (Supreme Court of Victoria, Gillard J, 3 July 1998) 10–11: '[T]he relationship between solicitor and client may be such that the solicitor learns a great deal about his client, his strengths, his weaknesses, his honesty or lack thereof, his reaction to crisis, pressure or tension, his attitude to litigation and settling cases and his tactics.' See also *Re Timbercorp Finance Pty Ltd (in liq)* (2019) 137 ACSR 189, 203 [79] (Anderson J); *Malone v Queensland (The Clermont-Belyando Area Native Title Claim)* [2019] FCA 2115, [32] (Reeves J).

183 *Moorgate Tobacco Co Ltd v Philip Morris Ltd [No 2]* (1984) 156 CLR 414, 438 (Deane J); *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 222–3 [30] (Gleeson CJ). See also *Seven Network Ltd v News Ltd* [2007] FCA 1062, [2949]–[2952] (Sackville J); *Marshall* (n 53) [150]–[156] (Beech-Jones J).

184 GE Dal Pont, *Law of Confidentiality* (LexisNexis, 2nd ed, 2020) 34 [12.14] ('*Law of Confidentiality*').

185 Tanya Aplin et al, *Gurry on Breach of Confidence: The Protection of Confidential Information* (Oxford University Press, 2nd ed, 2012) [9.102]–[9.106].

186 See below Part V(A).

187 *Dealer Support* (n 59) 268–9 [60] (Beach J).

188 *Spincode* (n 3) 523 [56] (Brooking JA).

prohibiting a lawyer from acting against a former client,[189] the circumstance of a lawyer acting against a former client in the same or related matter elicits the same danger of opportunism underlying fiduciary accountability. The purchasing rules (including the fair-dealing rule) have been considered instances of the no conflict principle.[190] In the same way, a lawyer is expected to act in their clients' interests without impermissible conflicts of interest or duty in a particular matter.[191] In doing so, they will have acquired 'inside information' about their client.[192] Their service is depended on by the client who is entitled to expect that this knowledge and information will not be used against them in that *same* or *closely related matter*. These circumstances pose an inherent danger of the possibility for misuse. Where the lawyer proceeds to act against their former client, they 'may (or [are] *presumed to*) misuse confidential knowledge or information which resulted from that position'.[193] Apart from confidential information, this kind of former client conflict raises the concern that the knowledge derived from their position – which might be subconsciously retained and practically impossible for a court to examine[194] – will be used against them in the particular matter without their fully informed consent.

2 Application of Misuse Liability to Lawyers

As noted, because Finn did not describe when exactly forms of 'misuse liability' arise, the extended duty of loyalty in *Spincode* must be articulated with precision to explain why misuse can emerge following termination of the retainer. It has been doubted whether the 'duty of loyalty' is in fact legally self-contained but rather a 'meta-obligation',[195] which is descriptive of particular rules such as the prohibition against conflicts and unauthorised profits or good faith.[196] In Canada, by contrast, there is greater emphasis placed on a lawyer's 'duty of loyalty' to former clients.[197] This more expansive view in Canadian jurisprudence

189 *Rakusen* (n 38) 842 (Buckley LJ).

190 Congalen, *Fiduciary Loyalty* (n 8) 138–9; Matthew Conaglen, 'A Re-appraisal of the Fiduciary Self-Dealing and Fair-Dealing Rules' (2006) 65(2) *Cambridge Law Journal* 366, 367, 392 <https://doi.org/10.1017/S000819730600715X>; *Wright v Lemon [No 2]* [2021] WASC 159, [325]–[326] (Le Miere J). Cf Richard Nolan, '*Regal (Hastings) Ltd v Gulliver* (1942)' in Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in Equity* (Hart Publishing, 2012) 499, 523–4.

191 Samet, *Equity* (n 94) 127.

192 Donald Nicholson and Julian Webb, *Professional Legal Ethics: Critical Interrogations* (Oxford University Press, 2000) 154–5 <https://doi.org/10.1093/acprof:oso/9780198764717.003.0005>.

193 Finn, 'Fiduciary Reflections' (n 156) 134 (emphasis added).

194 *Mallesons* (n 52) 371 (Ipp J); *David Lee & Co (Lincoln) Ltd v Coward Chance (a firm)* [1991] Ch 259, 268 (Sir Nicolas Browne-Wilkinson V-C).

195 *Dealer Support* (n 59) 272 [77] (Beach J); RP Austin, 'Moulding the Content of Fiduciary Duties' in AJ Oakley (ed), *Trends in Contemporary Trust Law* (Oxford University Press, 1996) 153, 153 <https://doi.org/10.1093/oso/9780198262862.003.0007>.

196 *Mothew* (n 1) 18 (Millett LJ); Conaglen, *Fiduciary Loyalty* (n 8) ch 3; *Ismail-Zai* (n 26) 397–8 [63] (Heenan AJA).

197 *R v Neil* [2002] 3 SCR 631, 650 [31] (Binnie J), citing American Law Institute (n 42) § 121; *Canadian National Railway Co v McKercher LLP* [2013] 2 SCR 649 ('*Canadian National Railway*'); Richard F Devlin and Victoria Rees, 'Beyond Conflicts of Interest to the Duty of Loyalty: From *Martin v Gray* to *R v Neil*' (2005) 84(3) *Canadian Bar Review* 433, 443; Harvey L Morrison, 'Conflicts of Interest and the Concept of Loyalty' (2008) 87(3) *Canadian Bar Review* 565, 617–18.

has not been adopted in Australia,[198] and the 'duty of loyalty' owed by lawyers to their former clients remains elusive. In *Holborow v MacDonald Rudder*, while Heenan J considered that the lawyer's duty of loyalty 'controls the situations which may arise when a solicitor may be asked to act against a former client',[199] it only extended to a proscription against adopting a posture 'hostile to a former client', but not to 'prevent that practitioner acting against him no matter what the circumstances might be'.[200] This section of the article suggests that this may be assisted by reconsidering the lawyers' initial fiduciary undertaking.

The duty of loyalty in the form of the 'negative equitable obligation' expressed by Brooking JA in *Spincode* may be considered an incident of the lawyer's fiduciary obligation to the client.[201] The nature of the lawyer–client fiduciary relation may involve an undertaking to not misuse that position, by acting against them in the same matter at some point in the future. As Edelman has pointed out, the precise content of fiduciary obligations depends on the relevant undertaking,[202] and not all fiduciary obligations are of the same nature. For instance, the termination of an agency will generally put an end to the fiduciary relationship where the agent is expected to carry out specific instructions for a particular purpose.[203] However, in the case of lawyers, the relevant undertaking encompasses the trust and confidence reposed by the client in respect of their carriage of the relevant matter. The lawyer's fiduciary undertaking includes certain non-derogable features, including the commitment to not misuse the trust and confidences of their client.[204] The retainer may specifically mould the scope and duration of the work expected, but as Lord Walker observed in *Hilton*, the 'single-minded loyalty to his client's interest, and his duty to respect his client's confidences' is ultimately rooted in the lawyer–client fiduciary relationship.[205]

This aspect of not abusing a client's trust and confidence reposed during the currency of the relationship can be regarded as part of the fiduciary undertaking made by the lawyer.[206] To permit a lawyer to act against their former client in

198 Dal Pont, *Lawyers' Professional Responsibility* (n 6) 229 [6.75].

199 [2002] WASC 265, [25].

200 Ibid. See also *Ismail-Zai* (n 26) 400 [72] (Heenan AJA).

201 Andrew Mitchell, 'Whose Side Are You on Anyway? Former Client Conflict of Interest' (1998) 26(6) *Australian Business Law Review* 418, 426.

202 Edelman, 'The Role of Status' (n 98) 34–6.

203 *Parker v McKenna* (1874) LR 10 Ch App 96, 118 (Lord Cairns LC); Dal Pont, *Law of Agency* (n 70) 285 [12.48]; Deborah A DeMott, 'Fiduciary Principles in Agency Law' in Evan J Criddle, Paul B Miller and Robert H Sitkoff (eds), *The Oxford Handbook of Fiduciary Law* (Oxford University Press, 2019) 23, 32–3 <https://doi.org/10.1093/oxfordhb/9780190634100.013.2>. However, American law does recognise certain fiduciary duties owed by a former agent to a former principal: Deborah A DeMott, 'Fiduciary Duties on the Temporal Edges of Agency Relationships' in Arthur B Laby and Jacob Hale Russell (eds), *Fiduciary Obligations in Business* (Cambridge University Press, 2021) 23, 33.

204 *Conway* (n 51) [71]–[72] (Auld LJ); *Beach Petroleum* (n 14) 44 [188]–[189] (Spigelman CJ, Sheller and Stein JJA); Hickey (n 85) 134; Getzler, 'Ascribing and Limiting Fiduciary Obligations' (n 76) 50–2. See also, in the context of core, irreducible duties of a trustee, *Armitage v Nurse* [1998] Ch 241, 253 (Millett LJ).

205 *Hilton* (n 86) 575 [30], 577 [34]; *Strother* (n 85) 204 [34] (Binnie J).

206 The language of 'abuse of confidence' is picked up by Enonchong (n 165) to describe situations where a fiduciary enters into a transaction with the principal, which is presumptively voidable unless the fiduciary can prove the transaction is fair: at 217 [14-001].

that same matter would undermine that undertaking, justifying the continued link between principal and fiduciary. The court's intervention is not necessarily affected by the expiration of the retainer.[207] Several Australian cases have stated that courts are to ensure that the 'duty of loyalty to the former client is respected, notwithstanding termination of the retainer, and to uphold as a matter of public policy the special relationship of solicitor and client'.[208] As Nettle J said in *Sent v John Fairfax* ('*Sent*') while apparently endorsing the reasoning in *Spincode*:

> The trust which a party to litigation reposes in their counsel is more often than not complete. *It is and must remain beyond question that the trust is never abused, and accordingly the trust must not only be preserved but must be seen to be preserved*. To sanction the prospect of counsel acting against a former client in a matter upon which there is a commonality of issue or inquiry would not be preservative of either.[209]

A similar sentiment was expressed by Gummow J in *National Mutual Holdings Pty Ltd v Sentry Corp*, where his Honour considered an application for an injunction by a former client based in Sydney against a solicitor who was to act against them in New York proceedings:

> [E]ven among fiduciaries solicitors stand in a special position. There is an underlying principle that a person should be entitled to seek and obtain legal advice in the conduct of his affairs without the apprehension of his being thereby prejudiced; the concern is with the general preservation of confidentiality and encouragement of full and frank disclosure between client and solicitor …[210]

Recognition of the special fiduciary position of lawyers recurred in the Australian cases concerning the appropriate test for misuse of confidential information.[211] Nevertheless, it may be that this special fiduciary relationship is also such that the client is entitled to expect that the lawyer will act with loyalty in their cause and not undermine that relationship by subsequently acting against them in representing their new client.[212] These general statements may not be sufficiently precise to articulate a fiduciary duty to not abuse a former client's trust and confidence in this sense, but they do indicate that 'modern fiduciary principles would be at least as restrictive upon the solicitor's freedom to act',[213] directing attention to the circumstances a lawyer can misuse the fiduciary position which they held towards their former client.

---

207 '[I]n my opinion the duty of confidentiality and the need to preserve it in this type of case will still arise out of the fiduciary nature of the previous relationship': *Pradhan v Eastside Day Surgery Pty Ltd* [1999] SASC 256, [47] (Bleby J, Doyle CJ agreeing at [1], Prior J agreeing at [2]).

208 *McVeigh v Linen House Pty Ltd* [1999] 3 VR 394, 398 (Batt JA) ('*McVeigh*'); *Wan* (n 52) 513 (Burchett J); *Mallesons* (n 52) 362–3 (Ipp J); *Farrow Mortgage Services Pty Ltd (in liq) v Mendall Properties Pty Ltd* [1995] 1 VR 1, 5 (Hayne J).

209 *Sent* (n 63) [107] (emphasis added).

210 *National Mutual Holdings* (n 52) 229.

211 *Mallesons* (n 52) 361 (Ipp J); *Carindale Country Club Estate Pty Ltd v Astill* (1993) 42 FCR 307, 311–12 (Drummond J) ('*Carindale Country Club Estate*'); Finn, 'Professionals and Confidentiality' (n 147) 326; Lee Aitken, 'Chinese Walls and Conflicts of Interests' (1992) 18(1) *Monash University Law Review* 91, 103–4 ('Chinese Walls and Conflicts of Interests').

212 See also Morrison (n 197) 618; Federation of Law Societies of Canada, 'Model Code of Professional Conduct' (October 2022) 47 [3.4-10].

213 *Oceanic Life* (n 24) 74,979–80 [55]–[56] (Austin J).

V THE SURVIVING DUTY OF LOYALTY IN *SPINCODE*

Notwithstanding Lord Millett's proposition in *Bolkiah*, courts have imposed fiduciary liability even after the termination of the particular relationship giving rise to them. In light of the discussion of the possible normative bases for surviving fiduciary obligations in Part IV, the cases can be said to generally follow along these patterns:

1. There are situations where, despite the nominal termination of the relevant relationship, the parties' course of dealing involves a continued fiduciary undertaking of 'trust and confidence'. As recognised in *Longstaff v Birtles* and *Conway v Ratiu*, fiduciary expectations may extend beyond the duration of the retainer.[214]
2. A fiduciary may have terminated or contrived the end of the relevant relationship in order to avoid their fiduciary obligations. This turns on proof or inference of the intentions of the fiduciary.[215] These instances may be better regarded as breaches of fiduciary duty notwithstanding the timing of the formal termination,[216] rather than depending on a surviving fiduciary obligation post-termination. The act of resignation itself does not have 'any particular significance'.[217]
3. There are instances where liability is imposed because the fiduciary misuses or is presumed to misuse their 'fiduciary position, knowledge, and opportunities'; this can apply subsequent to the termination of the fiduciary relationship, as the misuse is considered 'by reason' of that fiduciary position.[218] This would include cases concerning transactions subsequent to a dissolution of a partnership, of which *Chan* is a representative example.

The principle in *Spincode* is liable to operate in category (2), conformably with Conaglen's argument discussed in Part IV(B). Brooking JA recognised 'by analogy that … a fiduciary … cannot quit his or her position *in order to escape* the conflict of duty and duty rule'.[219] Indeed, the facts of *Spincode* would fall into this category. The same partner from the same firm of solicitors was still ostensibly acting for the company 'at the time' they were acting for the shareholder in the winding up proceedings.[220]

However, Brooking JA's formulation of principle appears broader where his Honour speaks of a 'negative equitable obligation' which exists post-termination

---

214 See also *Oliver Hume South East Queensland Pty Ltd v Investa Residential Group Pty Ltd* (2017) 259 FCR 43, 152 [414] (White J); *UTi (Aust) Pty Ltd v The Partners of Piper Alderman* [2008] NSWSC 219, [33] (Barrett J); *Diamantides v JP Morgan Chase Bank* [2005] EWCA Civ 1612, [35] (Moore-Bick LJ).

215 GE Dal Pont, 'Conflicts of Interest: The Interplay between Fiduciary and Confidentiality Law' [2002] *Australian Mining and Petroleum Law Association Yearbook* 583, 600 ('Conflicts of Interest').

216 Ibid 599.

217 RP Austin, 'Fiduciary Accountability for Business Opportunities' in PD Finn (ed), *Equity and Commercial Relationships* (Lawbook, 1987) 141, 180.

218 *Chan* (n 11) 198 (Deane J).

219 *Spincode* (n 3) 523 [56] (emphasis added).

220 Ibid 525 [59]; Goubran (n 44) 132.

of the retainer.[221] This obligation is consistent with the nature of 'misuse liability' and the principle in *Spincode*, as a standalone rule, may thus fit within category (3). It is submitted that recognising the duty of loyalty laid out in *Spincode* does not result in fiduciary doctrine being 'stretched too far out of shape in the pursuit of an objective that is not one of its core purposes'.[222] Being negative in nature, the obligation is also consistent with the prescriptive orthodoxy in Australian fiduciary doctrine. As an example of misuse liability, the obligation serves one of the important functions of fiduciary duties by sanctioning opportunistic conduct. Insofar as a conflict of interests or duties can be identified, the former lawyer-fiduciary no longer has any active duties to the principal, and so cannot be a duty–duty conflict in a strict sense. It would not be right to say that the former lawyer is under a duty to faithfully serve the interests of the former client. Rather, it may be more sensibly described as a conflict of interest – the interest the lawyer has 'in advancing the case of his new client'.[223]

A Distinguished from Risk of Misuse of Confidential Information

In his 2014 article, Finn placed the misuse of confidential information within the category of 'misuse liability'.[224] Despite this article's focus on his revised account of fiduciary obligations, the duty of confidentiality applicable specifically to lawyers as discussed in *Bolkiah* or the equitable obligation of confidentiality should not be considered fiduciary obligations.[225] Whatever the juridical nature of these confidentiality doctrines recognised by law,[226] *Spincode* ultimately describes a breach of fiduciary duty rather than a misuse of confidential information; otherwise, as Beach J indicated in *Dealer Support*, it would amount to a duplication of the test for misuse of confidential information laid out in *Bolkiah*.[227] Brooking JA was clear that confidential information was not the only basis for dealing with former client conflicts; besides the inherent jurisdiction of the court over its officers, there was a 'negative equitable obligation' couched within a (fiduciary) duty of loyalty.[228] Confidentiality might be said to be a fiduciary incident of the lawyer–client relationship.[229] Although a complete separation from fiduciary law

221 *Spincode* (n 3) 522 [54].
222 Conaglen, *Fiduciary Loyalty* (n 8) 195.
223 *Mallesons* (n 52) 363 (Ipp J); Stephen Donaghue, 'Acting against a Former Client: Reforming a Misconceived Disqualification Standard' (1995) 1(1) *Newcastle Law Review* 11, 21.
224 Finn, 'Fiduciary Reflections' (n 156) 133–4. See Finn, *Fiduciary Obligations* (n 5) ch 19, where the duty of confidence is labelled as one of the 'duties of good faith' characterising fiduciary obligations.
225 *Belan* (n 53) [17] (Young CJ in Eq).
226 John Glover, 'Is Breach of Confidence a Fiduciary Wrong? Preserving the Reach of Judge-Made Law' (2001) 21(4) *Legal Studies* 594, 603–4 <https://doi.org/10.1111/j.1748-121X.2001.tb00182.x>. In the United Kingdom, doctrines concerning confidentiality have since assumed tortious dimensions: James Goudkamp and Edwin Peel, *Winfield and Jolowicz on Tort* (Sweet & Maxwell, 19th ed, 2014) 421–5 [13-151]–[13-158].
227 *Dealer Support* (n 59) 272 [80] (Beach J).
228 *Spincode* (n 3) 522 [54].
229 Mitchell (n 201) 423.

is doubtful,[230] misuse of confidential information is better regarded as a separate right in equity with different purposes from fiduciary regulation.[231] It is worth noting that the decision in *Rakusen*, which is now understood to turn on misuse of confidential information, was also decided when doctrines of confidentiality were at an 'embryonic' stage,[232] and discussion was still heavily couched in fiduciary language.[233] Furthermore, numerous cases have arguably conflated a 'conflict of interest' with situations involving lawyers' misuse of confidential information. For example, a lawyer who breaches the duty of confidentiality to a former client has been described to 'be in a position of conflict if his or her duty to do so conflicted with a duty to another client on another matter'.[234] Nonetheless, as discussed above, it is preferable to regard fiduciary duties and duties of confidentiality as separate and distinct legal obligations recognised by equity or contract.[235] This leaves the scope of fiduciary law in former client conflicts relatively minor, but it may be of importance in particular cases. For example, it may apply where a party cannot readily prove the requirement of demonstrating a 'real' risk of misuse of confidential information.[236] This test, as framed in *Carindale Country Club Estate Pty Ltd v Astill*,[237] posits the need to particularise the information with 'precision' not merely in 'global terms'.[238]

B The Same Matter Requirement and the Scope of Fiduciary Obligations

This duty under *Spincode* owed to the former client is applicable where the lawyer acts against their former client in the 'same' or 'closely related' matter. The requirement of adverse representation in the same or closely related matter operates as a substantive threshold to engage this extended duty of loyalty.[239] Thus, lawyers will not invariably be prevented from acting against former clients. Importantly, the same matter requirement also reflects the centrality of the inquiry into the scope

---

230 See Robert Flannigan, 'The (Fiduciary) Duty of Fidelity' (2008) 124 (April) *Law Quarterly Review* 274, 275, 284; Heydon, Leeming and Turner (n 18) 1165 [42-070].

231 Wu (n 58) 143.

232 Finn, 'Conflicts of Interest and Professionals' (n 147) 17.

233 *LAC Minerals v International Corona Resources Ltd* [1989] 2 SCR 574, 640 (La Forest J), 666 (Wilson J); Sir Anthony Mason, 'Themes and Prospects' in PD Finn (ed), *Essays on Equity* (Lawbook, 1985) 242, 247. See also *Marcolongo v Mattiussi* [2000] NSWSC 834, [36] (Young J).

234 *Cooper* (n 53) [97] (Ward JA). See also Spender J's explanation of the conflict of interest:

> [T]he conflict of interest involved is that between a solicitor's continuing duty to a former client not to disclose information imparted in confidence, nor use that information to the prejudice of the confider of that information, and the duty owed to the new client of advancing that client's interest.

Murray v Macquarie Bank (1991) 33 FCR 46, 49.

235 *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169, 189–90 [30] (French CJ, Bell and Keane JJ).

236 Dal Pont, *Law of Confidentiality* (n 184) 322–3 [15.38].

237 *Bolkiah* (n 2) 235 (Lord Millett); *Dyer v Chrysanthou [No 2] (Injunction)* [2021] FCA 641, [93] (Thawley J) ('*Dyer*').

238 *Carindale Country Club Estate* (n 211) 314 (Drummond J), citing *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434, 443 (Gummow J); *Independent Management Resources Pty Ltd v Brown* [1987] VR 605, 609 (Marks J). See also *Digital Central Australia (Assets) Pty Ltd v Stefanovski [No 2]* [2017] FCA 1000, [35] (Logan J); *Ismail-Zai* (n 26) 389 [29] (Steytler P).

239 Goubran (n 44) 109; *Macquarie Bank v Myer* [1994] 1 VR 350, 359 (Marks J).

of fiduciary obligations.[240] Sandro Goubran has observed that this requirement is the same in cases dealing with concurrent client conflicts.[241] The lawyers' fiduciary undertaking is to act loyally for the client in the particular matter.[242] By acting in the same matter against the former client, an 'actual opposition of interests' can be detected,[243] whether that be of the lawyers' own interest or a conflict of duties.[244] The duty in *Spincode* is consistent with the proposition that the relevant inquiry into the scope of fiduciary obligations depends on the retainer in light of the parties' course of dealings. On matters unrelated to the retainer, this fiduciary obligation may not be engaged,[245] or at least it is unreasonable for the client to expect that the lawyer will not act against them in those circumstances.[246] Such a qualification is consistent with the central importance of the inquiry into the scope of a fiduciary obligation, where 'the critical issue will be whether the conduct which is impugned falls within the scope of that obligation',[247] which may be broader or narrower depending on an assessment of the facts of the particular case or what the fiduciary undertook. This involves an identification of the 'subject matter' of the fiduciary obligation, separate to the question of the existence of such a relationship.[248] Undoubtedly, the subject matter of a lawyer's fiduciary obligations to the client will at least include the matter over which they have been retained. Distinct attention to subject matter can provide a frame of reference by which to assess a fiduciary's impugned conduct following the termination of the retainer or the relevant relationship.

The requirement of a same or closely related matter is pitched higher than the more well-recognised jurisdiction governing former client conflicts based on misuse of confidential information.[249] In several of the cases that declined to apply *Spincode*, it was held that the same matter requirement would not have been made out in any event.[250] For example, in *Dealer Support* itself, the firm of solicitors had previously acted for the applicants in a different matter, namely the registration of the trade mark, although overlapping in some respects with the instant dispute regarding ownership of the trade mark.[251] Disqualification based on the risk of misuse of confidential information arises in circumstances where the lawyer possesses confidential information of a former client which 'is or may be relevant to the new matter in which the interest of the other client is or may be adverse to

240 Leeming, 'The Scope of Fiduciary Obligations' (n 81) 190; *Howard v Federal Commissioner of Taxation* (2014) 253 CLR 83, 100–1 [34] (French CJ and Keane J); *Kelly v Cooper* [1993] AC 205, 214–15 (Lord Browne-Wilkinson for the Board); *Securities and Exchange Commission v Chenery Corporation*, 318 US 80, 85 (Frankfurter J) (1943).

241 Goubran (n 44) 109–11.

242 Dal Pont, *Lawyers' Professional Responsibility* (n 6) 119–21 [4.40]–[4.55].

243 *Farrington* (n 14) 90 (Richardson J).

244 *Mallesons* (n 52) 363 (Ipp J).

245 *Blythe v Northwood* (2005) 63 NSWLR 531, 542 [50]–[51] (Mason P).

246 *Canadian National Railway* (n 197) 667 [37] (McLachlin CJ).

247 *Anderson v Canaccord Genuity Financial Ltd* (2023) 113 NSWLR 151, 194–5 [166] (Leeming JA).

248 Ibid 194 [164].

249 *Sacca v El Saafin* [2021] FCA 383, [28]–[30] (Anastassiou J).

250 *Nasr v Vihervaara* (2005) 91 SASR 222, 229 [35] (Doyle CJ, Vanstone J agreeing at 231 [45], White J agreeing at 231 [46]); *Suckling* (n 26) 470 [86] (Riordan J).

251 *Dealer Support* (n 59) 276 [101] (Beach J).

his own'.[252] On the other hand, the breach of fiduciary duty considered by Brooking JA in *Spincode* turned on 'inconsistent representation', in which 'the [lawyer] who formerly acted for one client in the same [or closely related] matter now acts in that matter for a client with an interest adverse to that of the former client'.[253] The necessity for 'direct opposition' to the former client's interest provides *Spincode* its own field of operation, although the test is more readily applicable in contentious litigation.[254] Nevertheless, application of this narrower test requires a careful assessment of the particular facts of the case; as Nettle J said in *Sent*:

> Questions of 'the same matter' and 'closely related matter' may sometimes be problematic. But in the end they are questions of fact and degree. In litigation, at least, there can be no doubt about what constitutes the same matter … If there are significant issues in one matter that arise in another, or factors which are significant to one matter which will be significant to another, the matters are likely to be closely related.[255]

VI IMPLICATIONS OF A SURVIVING DUTY OF LOYALTY

The main argument of this article is that there is a fiduciary 'negative equitable obligation' which enjoins a lawyer from acting against their former client in the same or closely related matter. The upshot of this position is that it calls for the express recognition that fiduciary obligations can, under certain circumstances, survive the termination of the legal relationship giving rise to them. This Part of the article considers some implications and objections to this position, particularly those raised by Beach J in *Dealer Support*. It is submitted that accepting the duty of loyalty in *Spincode* would be consistent with fiduciary accountability's normative function, without debilitating the general mobility of lawyers. The proposition initially laid down in *Rakusen* that a solicitor is generally free to act against a former client in the same matter must be reconsidered.[256] Given that *Rakusen* itself was substantially overturned by *Bolkiah*, as noted in Part II(B), as well as by the Australian cases that have departed from it earlier,[257] that aspect of that decision may be reopened or at least questioned, as Austin J did in *Oceanic Life v HIH Casualty & General Insurance*.[258]

---

252 *Bolkiah* (n 2) 235 (Lord Millett); *ASCR* (n 27) r 10.2.

253 *Spincode* (n 3) 522 [53].

254 *Dyer* (n 237) [103]–[104] (Thawley J).

255 *Sent* (n 63) [108]. In that case, a lawyer was barred from acting against a former client in a related matter some 14 years after the termination of the retainer.

256 *Rakusen* (n 38) 839 (Cozens-Hardy MR).

257 A number of Family Court decisions had earlier departed from *Rakusen* (n 38): *Thevenaz v Thevenaz* (1986) 84 FLR 10, 12–13 (Frederico J); *McMillan v McMillan* (2000) 26 FLR 653, 667–74 [43]–[56] (Finn, Kay and Moore JJ); *Karapataki v Karapataki* [2011] FMCAfam 6, [43]–[45] (Walters FM).

258 Austin J's remarks were as follows:

> In *Rakusen*'s case it was held that a solicitor may act for a new client while keeping secret some information obtained from a former client which is relevant to the new client's case. As indicated earlier, that holding may relate to the practical duty of the solicitor to the court rather than to the modern law of fiduciary duties. But if it is taken as a statement of the law of fiduciary duties, it must now be regarded as incorrect.

Oceanic Life (n 24) 74,979–80 [55]–[56].

Statements that have doubted the fiduciary duty of loyalty under *Spincode* instead raise another ground for disqualification sourced from the inherent jurisdiction of the court over its officers as more appropriate.[259] The basis of this jurisdiction is framed as a conflict between the lawyer's duty to the court as well as the proper administration of justice, rather than a conflict between duties to their client.[260] Questions of public interest and convenience are particularly important considerations.[261] This ground is also applicable in situations not involving a lawyer acting directly against a former client in the same or closely related matter.[262] However, disqualification on the basis of the inherent jurisdiction is exercised sparingly,[263] based on whether a fair-minded, reasonably informed member of the public would conclude that the proper administration of justice requires the lawyer's disqualification from acting.

Moreover, public interest and policy considerations can equally inform the fiduciary regulation of lawyers.[264] The rules governing former client conflicts involve balancing competing policy considerations,[265] including the interests of current clients in their choice of counsel and the freedom of lawyers in seeking employment.[266] Beach J in *Dealer Support* expressly averted to these considerations, noting that there is a public interest in promoting fluidity in the market for lawyers.[267] The scepticism towards fiduciary doctrine, which has been described as the 'spearhead of equity's incursions' into commercial transactions,[268] may have informed Beach J's view of *Spincode* as unattractive in the contemporary 'world of the corporatized firm that has floated at a premium'.[269] These remarks evoke the discussions over the 'commercialisation' of the legal profession and its effect on the fiduciary aspects

259 Conaglen, *Fiduciary Loyalty* (n 8) 194–5; *Dealer Support* (n 59) 275 [88] (Beach J).

260 *Abse v Smith* [1986] QB 536, 546 (Donaldson MR); *Giannarelli v Wraith* (1988) 165 CLR 543, 555 (Mason CJ).

261 *Geelong School Supplies Pty Ltd v Dean* (2006) 237 ALR 612, 620 [35] (Young J); *Bowen v Stott* [2004] WASC 94, [52] (Hasluck J); *Black v Taylor* [1993] 3 NZLR 403, 408–9 (Richardson J).

262 *Kallinicos* (n 53); *Ausmedic Australia Pty Ltd v Whiteley Medical Supplies Pty Ltd* [2012] NSWSC 1270; *R & P Gangemi Pty Ltd v D & G Luppino Pty Ltd* [2012] VSC 168.

263 *Técnicas Reunidas* (n 53) [76] (Leeming JA); *Kallinicos* (n 53) 582–3 [76] (Brereton J). See generally Ian Dallen, 'Restraining a Lawyer from Acting in Aid of the Administration of Justice: Exceptional Circumstances and Caution Prevail' (2017) 6(1) *Journal of Civil Litigation and Practice* 321; *Raats v Gascoigne Wicks* [2006] NZHC 598, [29] (Gendall J).

264 Hickey (n 85) 132; Finn, 'Modern Commercial World' (n 32) 10, 28.

265 *MacDonald Estates v Martin* [1990] 3 SCR 1235, 1243 (Sopinka J) ('*MacDonald Estates*').

266 *Equiticorp Holdings Ltd v Hawkins* [1993] 2 NZLR 737, 739 (Henry J); *Canadian National Railway* (n 197) 660–1 [22] (McLachlin CJ); Dal Pont, 'Conflicts of Interest' (n 215) 598.

267 *Dealer Support* (n 59) 274 [88].

268 Sir Anthony Mason, 'The Place of Equity and Equitable Remedies in the Contemporary Common Law World' (1994) 110 (April) *Law Quarterly Review* 238, 245. Cf *John Alexander's Clubs* (n 81) 35–6 [90] (French CJ, Gummow, Hayne, Heydon and Kiefel JJ); Stephen Gageler, 'Expansion of the Fiduciary Paradigm into Commercial Relationships: The Australian Experience' in Peter Devonshire and Rohan Havelock (eds), *The Impact of Equity and Restitution in Commerce* (Hart Publishing, 2018) 165, 176–7 <https://doi.org/10.5040/9781509915675.ch-008>.

269 *Dealer Support* (n 59) 274 [88].

of the profession.[270] These are significant concerns,[271] and it has been noted that confidentiality or fiduciary doctrines may be difficult to apply to 'mega-firms',[272] especially given the practical reality of increasing diversification of practice and migratory lawyers.[273] However, it is questionable whether these can outweigh the 'heightened concern' taken by the courts to duties owed by professionals such as solicitors, advisers and trustees.[274] Indeed, in regulating the fiduciary aspects of the lawyer–client relationship, it is the public interest which 'shapes the private relationship between the lawyer and her client'.[275] Lawyers' fiduciary duties should not contemplate the 'efficient withdrawal' from their clients under market-driven calculations.[276] Arguments regarding mobility of employment and restraint on trade are less compelling in the context of the special position of lawyers.[277]

Additionally, the careful balance involved will not be destabilised by accepting the duty of loyalty in *Spincode*, as it will be a rare case where equity will intervene *solely* on that basis considering that most cases in which a lawyer acts against a former client in the same matter will usually be found to involve a real risk of misuse of the former client's confidential information.[278] Yet recognising that this amounts to a misuse of fiduciary position would enhance public confidence in the profession by ensuring that a lawyer's duty of loyalty to their client will not subsequently be undermined through direct adverse representation. Fiduciary regulation of professionals such as lawyers expresses 'social expectations',[279] and there are indications by courts that a lawyer who acts against a former client in

---

270 See James Allsop, 'Professionalism and Commercialism: Conflict or Harmony in Modern Legal Practice?' (2010) 84(11) *Australian Law Journal* 765, 770.

271 Aitken, 'Chinese Walls and Conflicts of Interests' (n 211) 94.

272 Ian Dallen, 'The Rise of the Information Barrier: Managing Potential Legal Conflicts within Commercial Law Firms' (2014) 88(6) *Australian Law Journal* 428, 428 ('The Rise of the Information Barrier'); John Glover, 'Conflicts of Interest, Conflicts of Duty and the Information Professional' (2002) 23 *Adelaide Law Review* 215, 216 ('Conflicts of Interest'); Aitken, 'Chinese Walls and Conflicts of Interests' (n 211) 111–12.

273 David Coult, 'Typhoid Marys: The Ethical Dilemmas of Lawyers Who Switch Firms' (1998) 28(1) *Victoria University of Wellington Law Review* 41, 54–6 <https://doi.org/10.26686/vuwlr.v28i1.6087>. See, in the context of barristers, *Mintel International Group Ltd v Mintel (Australia) Pty Ltd* (2000) 181 ALR 78, 88 [44] (Heerey J).

274 *Maguire* (n 1) 474 (Brennan CJ, Gaudron, McHugh and Gummow JJ).

275 Samet, *Equity* (n 94) 127; *Blackwell v Barroile Pty Ltd* (1994) 51 FCR 347, 360 (Davies and Lee JJ); *Tyrrell v Bank of London* (1862) 11 ER 934, 941 (Lord Cranworth).

276 Daniel Markovits, 'Sharing *Ex Ante* and Sharing *Ex Post*: The Non-contractual Basis of Fiduciary Relations' in Andrew S Gold and Paul B Miller (eds), *Philosophical Foundations of Fiduciary Law* (Oxford University Press, 2014) 209, 222 <https://doi.org/10.1093/acprof:oso/9780198701729.003.0011>.

277 *PCCW-HKT Telephone Ltd v Aitken* (2009) HKCFAR 114, 137 [62] (Lord Hoffmann); Richard Nolan, 'When Principles Collide' (2009) 125 (July) *Law Quarterly Review* 374, 377.

278 *Suckling* (n 26) 470 [87] (Riordan J); *British American Tobacco* (n 53) [112] (Young CJ in Eq); *Ismail-Zai* (n 26) 388 [24] (Steytler P); *Adam 12 Holdings* (n 63) [35]–[40] (Whelan J).

279 Irit Samet, 'Fiduciary Law as Equity's Child' in Paul B Miller and Andrew S Gold (eds), *Contract, Status, and Fiduciary Law* (Oxford University Press, 2016) 139, 159–60 <https://doi.org/10.1093/acprof:oso/9780198779193.003.0007>; Glover, 'Conflicts of Interest' (n 272) 217–19, 224.

the same matter nevertheless gives rise to a conflict of interest which undermines public perception of the profession.[280]

Pragmatic concerns can also be addressed by equity's remedial inquiry.[281] In the context of disqualification of lawyers based on former client conflicts, Goubran points out that 'whether the duty of loyalty persists is an issue of jurisdiction. Whether or not a court decides to grant an injunction will, of course, depend on the facts of each case.'[282] In cases where a lawyer is restrained from acting against their former client, it will usually be an injunction that is sought to prevent a breach of the duty of loyalty and the ordinary discretionary factors apply.[283] This remedial inquiry also opens the door to possible equitable money remedies,[284] which may be different where the disqualification is considered under the court's inherent jurisdiction over its legal professionals.[285]

Another possible objection to the duty of loyalty in *Spincode* is that it might be overinclusive. Beach J in *Dealer Support* considered this scenario:

> [T]he solicitor has been retained for client A in a matter. Client A pays the solicitor for his present services but does not pay for any option or first right of refusal for his future services. Say the matter is concluded. Five years later, client B comes along and retains the solicitor in that or a related matter. Assume also that client A independently has chosen to engage a different solicitor in any event. Is it suggested that these two situations should be treated in the same terms of this duty of loyalty [in *Spincode*]? In my view, they should not be.[286]

---

280 *D & J Constructions* (n 52) 123–4 (Bryson J); *McVeigh* (n 208) 398 (Batt JA); *MacDonald Estates* (n 265) 1266 (Cory J). In the United States, it has been said that

> [f]or a law firm to represent one client today, and the client's adversary tomorrow in a closely related matter, creates an unsavory appearance of conflict of interest that is difficult to dispel in the eyes of the lay public – or for that matter the bench and bar – by the filing of affidavits, difficult to verify objectively, denying that improper communication has taken place or will take place between the lawyers in the firm handling the two sides.

Analytica Inc v NPD Research, Inc, 708 F 2d 1263, 1269 (Posner J) (7th Cir, 1983).

281 RP Austin, 'Commerce and Equity: Fiduciary Duty and Constructive Trust' (1986) 6(3) *Oxford Journal of Legal Studies* 444, 448 <https://doi.org/10.1093/ojls/6.3.444>. See also *Maguire* (n 1) 493 (Kirby J).

282 Goubran (n 44) 132.

283 ICF Spry, *Equitable Remedies* (Lawbook, 9th ed, 2013) 429; Heydon, Leeming and Turner (n 18) 700–1 [21-015].

284 For example, equitable damages under the *Chancery Amendment Act 1858*, 21 & 22 Vict, c 27, s 2 (which has been re-enacted in the *Supreme Court Act 1970* (NSW) s 68); Katy Barnett and Michael Bryan, 'Lord Cairns' Act: A Case Study in the Unintended Consequences of Legislation' (2015) 9(2) *Journal of Equity* 150, 154; JA Jolowicz, 'Damages in Equity: A Study of Lord Cairns' Act' (1975) 34(2) *Cambridge Law Journal* 224, 225 <https://doi.org/10.1017/S0008197300086104>; *Johnson v Agnew* [1980] AC 367, 400 (Lord Wilberforce).

285 It does not appear to have been recognised that compensatory orders lie within the court's inherent jurisdiction, although penalties such as fines and costs orders have been expressly awarded: *Re Law Society of the Australian Capital Territory and Chamberlain* (1993) 116 ACTR 1, 18 (Miles CJ, Gallop J agreeing at 21–2); *Re Guild and Legal Practitioners Ordinance (1970)* (1979) 32 ACTR 13, 29 (Blackburn CJ, Connor and Davies JJ); *Ex parte A-G (Cth); Re a Barrister and Solicitor* (1972) 20 FLR 234, 244 (Fox, Blackburn and Woodward JJ). Note also that part 5.5 of the *Legal Profession Uniform Law 2014* (NSW) permits the disciplinary authority to make a compensation order against a lawyer at the request of a complainant in defined circumstances. Section 311 also leaves 'any other remedy available to an aggrieved person' unaffected.

286 *Dealer Support* (n 59) 268 [59].

However, with respect, it does not immediately follow that scenarios such as this pose difficulties to accepting the principle in *Spincode*. First, it is not clear whether that solicitor is acting against client A on behalf of client B (in the sense of 'inconsistent representation') over that matter, in which case *Spincode* would not apply, and the client may instead seek protection based on misuse of their confidential information or the court's inherent jurisdiction. Second, if the original solicitor directly acts against them, client A can still waive its equitable right, having independently retained a different solicitor 'in any event'.[287]

At any rate, the fully informed consent of the former client may also overcome the restriction on acting against former clients,[288] although in certain concurrent conflicts, the fully informed consent of both (or all) clients may not be able to permit the lawyer to act in situations of actual conflict or where they would not be able to properly perform their duties.[289] However, it must be noted that the duty of loyalty in *Spincode* may fit difficultly with the existing defence to misuse of confidential information by use of information barriers or 'Chinese walls' in firms. Information barriers seek to isolate parts of a firm to prevent the internal disclosure of confidential client information.[290] However, courts have taken an exacting view of this defence, given the unavoidable danger of inadvertent disclosure.[291] These barriers must be 'effective' and integrated in the firm's structure,[292] a position reflected in rule 10.2 of the *ASCR*. However, under *Spincode*, because the adverse

---

287 *Duke of Leeds v Earl of Amherst* (1846) 2 Ph 117; 41 ER 886, 889 (Lord Cottenham LC); *Lindsay Petroleum Co v Hurd* (1894) LR 5 PC 221, 239–40 (Lord Selborne LC for the Board); *Colonial Portfolio Services Ltd v Nissen* (2000) 35 ACSR 673, 700 (Rolfe J). See also, in the context of breach of trust, a beneficiary's waiver of strict performance of a trustee's obligations and its effect on the beneficiary's remedy: James Edelman, 'Money Awards for the Cost of Performance' (2010) 4 *Journal of Equity* 122, 129–30.

288 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 138–9 [107], [108] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ), citing *Maguire* (n 1) 466 (Brennan CJ, Gaudron, McHugh and Gummow JJ); *Clark Boyce* (n 1) 435–6 (Lord Jauncey for the Board); Simone Degeling, 'Breach of Fiduciary Duty: Consent and Prior Court Authorisation' in Paul S Davies, Simon Douglas and James Goudkamp (eds), *Defences in Equity* (Hart Publishing, 2018) 99, 111–12.

289 *Hilton* (n 86) 576 [31]–[32] (Lord Walker); *Jennings v Zilahi-Kiss* (1972) 2 SASR 493, 511 (Bray CJ); *Re A Practitioner* (1975) 12 SASR 166, 172 (Bray CJ, Zelling J and Jacobs J agreeing at 173); *Farrington* (n 14) 90 (Richardson J); *Spector v Ageda* [1973] Ch 30, 48 (Megarry J).

290 Dallen, 'The Rise of the Information Barrier' (n 272) 431; Lee Aitken, '"Chinese Walls", Fiduciary Duties and Intra-firm Conflicts: A Pan-Australian Conspectus' (2000) 19(2) *Australian Bar Review* 116, 130; Elizabeth Nosworthy, 'Ethics and Large Law Firms' in Stephen Parker and Charles Sampford (eds), *Legal Ethics and Legal Practice: Contemporary Issues* (Oxford University Press, 1995) 57, 63 <https://doi.org/10.1093/acprof:oso/9780198259459.003.0004>; Harry McVea, '"Heard It through the Grapevine": Chinese Walls and Former Client Confidentiality in Law Firms' (2000) 59(2) *Cambridge Law Journal* 370 <https://doi.org/10.1017/S0008197300000167>; Audrey Benison, 'The Sophisticated Client: A Proposal for the Reconciliation of Conflicts of Interest Standards for Attorneys and Accountants' (2000) 13(4) *Georgetown Journal of Legal Ethics* 699, 700–1; Janine Griffiths-Baker, 'Further Cracks in Chinese Walls' (1999) 149 *New Law Journal* 162, 175; Finn, 'Conflicts of Interest and Professionals' (n 147) 33.

291 *Bolkiah* (n 2) 239 (Lord Millett); *Zalfen v Gates* [2006] WASC 296, [101]–[102] (Master Newnes); *Newman v Phillips Fox* (1999) 21 WAR 309, 323–5 [65]–[77] (Steytler J); *D & J Constructions* (n 52) 122–3 (Bryson J); Law Commission (UK), 'Fiduciary Duties and Regulatory Rules: A Consultation Paper' (Consultation Paper No 124, 1992) 144 [4.5.7].

292 *Photocure* (n 53) 103 [79] (Goldberg J); *Bureau Interprofessionel des Vins de Bourgogne v Red Earth Nominees Pty Ltd (Taltarni Vineyards)* [2002] FCA 588, [54]–[59] (Ryan J) ('*Bureau Interprofessionel des Vins de Bourgogne*'); *Young v Robson Rhodes (a firm)* [1999] 3 All ER 524, 539 (Laddie J).

representation itself amounts to a breach of the 'negative equitable obligation',[293] there is no inquiry into confidential information and inter-firm disclosure. Rather, the relevant issue arises where individual lawyers have joined a law firm or where a firm has merged with another firm which then acts against that lawyer or firm's former client in the same matter.[294] In this scenario, Beach J in *Dealer Support* suggested that the kind of fiduciary liability under *Spincode*, if recognised, can be 'imposed only on the individual solicitors involved, and [only] extending to the precise firm at that time'.[295] The duty can only be breached by the individual lawyers, although the other partners in the merged firm will be jointly liable in equity.[296] It would follow that the only defence to a breach of duty under *Spincode* would be the fully informed consent of the former client.[297]

Ultimately, the extended duty of loyalty in *Spincode* consisting of this 'negative equitable obligation' is consistent with fiduciary law's concern against opportunistic conduct and forms a principled example of fiduciary obligations subsisting after the termination of the relationship calling them into being. Despite practical overlaps with the rules concerning misuse of confidential information, it may prove useful in rare circumstances that warrant judicial intervention but where the former client cannot show misuse of confidential information nor invoke the 'exceptional' inherent jurisdiction of the court.[298] Above all, it illustrates the possible operations of fiduciary doctrine at its margins.

VII CONCLUSION

This article has argued that the position of the Victorian Court of Appeal to judicial disqualification of lawyers, expressed by Brooking JA in *Spincode*, correctly engages fiduciary doctrine in the context of former client conflicts. While the test based on misuse of confidential information has been reasonably settled since the House of Lords' decision in *Bolkiah*, it is not necessarily exhaustive of equity's intervention in these situations. At the level of fiduciary law, it is true that fiduciary obligations, in usual cases, end with the legal relationship or circumstances initially giving rise to them. However, this article has sought to illustrate how incidents of fiduciary duties can continue after the termination of the relationship which gave rise to them and how those circumstances may be rationalised. The 'negative equitable obligation' enjoining a lawyer from acting against a former

293 *Spincode* (n 3) 522 [53] (Brooking JA).

294 '[I]t is now well established that the knowledge of a solicitor joining a new firm should not automatically be imputed or attributed to other lawyers or employees in that firm': *Bureau Interprofessionnel des Vins De Bourgogne* (n 292) [34] (Ryan J); *Unioil International Pty Ltd v Deloitte Touche Tohmatsu* (1997) 17 WAR 98, 107–8 (Ipp J); Dal Pont, *Lawyers' Professional Responsibility* (n 6) 319–20 [8.240].

295 *Dealer Support* (n 59) 275 [90].

296 Ibid.

297 Law Council of Australia, *Review of the ASCR* (n 66) 57.

298 Goubran (n 44) 131–2; Dal Pont, *Lawyers' Professional Responsibility* (n 6) 282 [8.40] n 28; *Waiviata Pty Ltd v New Millennium Publications Pty Ltd* [2002] FCA 98, [10] (Sundberg J); *British American Tobacco* (n 53) [105]–[112] (Young CJ in Eq); *Grimwade* (n 25) 454 (Mandie J).

client in the same or closely related matter is a form of 'misuse liability' as conceived by Paul Finn and referable to fundamental fiduciary principles such as those propounded by Deane J in *Chan*. Because lawyers must act for their clients with loyalty, a lawyer who subsequently acts against them in this situation can be presumed to misuse the fiduciary position they had occupied. This gives effect to one of the underlying normative functions of fiduciary accountability, namely, the prevention of opportunistic conduct. The principle reflects equity's special concern for lawyer-fiduciaries. *Spincode*'s limitation to adverse representation against the former client in the same matter also conforms with the importance of identifying the precise scope of fiduciary obligations. Despite the doubtful status of *Spincode* outside of Victoria, it is suggested that Brooking JA's judgment charts both a defensible and preferable approach.