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# Banks and Fiduciary Relationships

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**Abstract**
[extract] Bankers' relationships with those who use their services are recognised to have a fiduciary nature in at least some of their aspects. There is Australian and Canadian authority to this effect and even Halsbury's Laws of England now sees things so. Traditionally, things were different. The relationships of banks with those who dealt with them were treated just as instances of the debtor and creditor relation. Mutual obligations were thought to be entirely described by the terms of the contractual retainer subsisting between the parties.

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## Introduction

Bankers' relationships with those who use their services are recognised to have a fiduciary nature in at least some of their aspects. There is Australian and Canadian authority to this effect[1] and even *Halsbury's Laws of England* now sees things so.[2] Traditionally, things were different. The relationships of banks with those who dealt with them were treated just as instances of the debtor and creditor relation. Mutual obligations were thought to be entirely described by the terms of the contractual retainer subsisting between the parties. Or, as Bankes J observed in 1921 in *N Joachimson v Swiss Bank Corporation,*[3]

> [I]n the ordinary case of banker and customer, their relations depend entirely or mainly on implied contract.

Despite a person's 'deposit' of money with the banker, property in the money was treated as transferred outright. No formal relation of trustee and cestui que trust in respect of the money was and is still seen to be present. The banker is only obliged to account to the depositor for the value of what was entrusted. Mutual obligations of the parties from the time of the deposit are expressed accordingly on a 'running account' basis, within the paradigm of an exclusively contractual relation.[4]

Some authorities establishing this 'debtor and creditor' theory describe the relation referred to as that of 'banker and customer.' Both old[5] and more modern[6] United Kingdom cses tend to do this. It is significant that in each the relation of a bank was with a customer who was also a *depositor*. Being a depositor is one of at least three characters that a bank customer may take. Customers might also be borrowers, or persons seeking commercial advice. United States authorities have specifically distinguished the 'banker and depositor' relation from other types of customer relationships.[7] Consider the

1 *Commonwealth Bank of Australia v Smith* (1991) 102 ALR 453 (FC of Fed Crt) and the Canadian cases of *McBean v Bank of Nova Scotia* (1981) 15 BLR 296 and *Hayward v Bank of Nova Scotia* (1984) 45 OR (2d) 542: also GA Weaver and CR Craigie *Law Relating to Banker and Customer in Australia* 2nd edn (1990), [6.10-24].
2 4th edn (1989), 3(1) [251].
3 [1921] 3 KB 110, 117, Bankes J.
4 *Re Metway Bank Ltd* [ 1991] 1 Qd R 120; GA Weaver and CR Craigie, op cit, [6.40].
5 For example, *Devaynes v Noble* (*Sleech's Case*) (1816) 1 Meri 530, 568, 35 ER 771, 780.
6 For example, *R v Davenport* [1954] 1 WLR 569 (CCA).

traditional British case of *Foley v Hill*.[8] A bank had pleaded a statute of limitations defence to its customer's action for the return of a sum deposited. The defence was unmeritorious, but the deposit had been made many years before. To evade it, the customer claimed the deposited sum in equity. The existence of equitable jurisdiction was said to arise from the 'complication' of the accounts and from a 'fiduciary relationship' existing between the parties. As the account had only three entries and was entirely expressed in the pleadings, the first argument was unsuccessful. The second argument amounted, in present-day terms, to a property-based claim to a fiduciary relationship based in an entrusted sum. The 'supposed fiduciary character existing between the banker and his customer' was argued to be analogous to that whereby 'agents', 'factors' and 'stewards' were entrusted with the property of their principals and employers.

All members of the House of Lords in *Foley v Hill* confirmed the non-fiduciary finding of Lord Lyndhurst LC in the Court at first instance. After examining the facts of banking business, Lord Cottenham LC held at 1005 (and other members of the House agreed) that a banker in the course of his trade was not intended to be a trustee of specific money deposited. The pace of banking business would not allow it: instead,

> the banker is bound to return an equivalent by paying a similar sum to that deposited with him when he is asked for it.

In a separate concurring speech Lord Brougham also examined a banker's ordinary trade, adding a significant remark. 'Certain acts that are often performed by a banker', he said at 1008,

> put [the banker] in a totally different capacity. He may in addition to his position of banker, make himself an agent or trustee towards a cestui que trust.

This might be an expression of fiduciary liability in 1848 terms. Lord Brougham gave the example of the brokerage of exchequer bills, suggesting that a fiduciary relation based in property might follow. Comparable things, he said, may also attract obligations of a fiduciary character.

One hundred and fifty years after the House of Lords decision in *Foley v Hill*, the 'trade of a banker' with his or her customers has considerably enlarged. Banking has developed in new directions beyond the acceptance of deposits. Now perhaps,

> modern banking practices involve a highly complicated structure of credit and other complexities which often thrust a bank into a role of an advisor,

7 *Bank of Marin v England* 385 US 99, 101 (1966) (SC); *Klein v First Edina NationalBank* 196 NW 2d 619 (1972); *Stewart v Phoenix National Bank* 64 P 2d 101 (1937);*Klaff v First State Bank* 220 NW 318 (1927) and (Annot) 'Existence of a Fiduciary Relationship Between Bank and Depositor or Customer so as to Impose Special Duty of Disclosure upon Bank' 70 ALR 3d 1344 (1976), 1349-50.

8 (1848) 2 HLC 28, 9 ER 1002.

> thereby creating a relationship of trust and confidence which may result in a fiduciary duty thrust upon the bank.[9]

Reliance, in particular, may inject an equitable element into the banker and customer relation. There are several activities normally now undertaken by banks where customers rely on the bank. In the 1958 case of *Woods v Martin’s Bank Ltd*,[10] Salmon J adumbrated this phenomenon, in connection with whether Martin's Bank owed its customer a duty to give him or her sound investment advice. At 70 he said:

> In my judgement, the limits of a banker's business cannot be laid down as a matter of law. The nature of such a business must in each case be a matter of fact.

After then considering some exhibited advertising brochures of a bank, which had in excess of 600 branches, Salmon J concluded at 71 that:

> it was and is within the scope of the defendant bank's business to advise on all financial matters.

## Fiduciary Characterisation and Reliance

Fiduciary relations associated with a party's reliance on another may take two types. They may, on the one hand, be 'one-sided'. This is where a party places trust in and relies on the other because he or she is reasonably entitled to do so in the circumstances, or because the reliant party is in a position of vulnerability, subordination or information inequality. On the other hand, reliance may be 'two-sided': where it is mutual, or reciprocated, as in a partnership or joint venture. We are concerned with the 'one-sided' case, where the customer relies on the bank's trust-worthiness and trust is invested in the bank. The reliant party is often, but not always, vulnerable or unequal in relation to the banking institution.

Several legal and equitable regimes compete to regulate this type of reliance. First, there is the fiduciary relationship of trust, or what we normally think of as a fiduciary relationship. A person relies on another, as he may be entitled to do so, and if the other disappoints that reliance then a fiduciary relationship of the normal type may have been breached. Next there are the typical facts which the remedy of undue influence attends to. A vulnerable or unequal party in a relationship places his trust in a stronger or more competent party. If the reliance is exploited by the stronger party, a series of remedial obligations is available to limit the stronger party's overreaching. Fiduciary relationships of trust may be often be found in the undue influence type of case.

The 'unequal' or 'vulnerable' type of reliance does not often attract the normal species of fiduciary relationship in Australia. It is much more common

9 *Deist v Wachholz* 678 P 2d 188, 193 (1983).
10 [1959] 1 QB 55.

in the North American cases.[11] In Australia the trusting form of the fiduciary relation is only one of several resources to remedy the untoward consequences of this species of reliance.[12] A different type of 'one-sided' fiduciary relationship is involved with the wrong of undue influence. It is more obviously remedial. Conduct of the party relied upon is scrutinised particularly. Anglo-Australian caselaw tends to class 'one-sided' forms of reliance where the parties are unequal as instances of 'undue influence',[13] or 'unconscionability'.[14] But the law is not always consistent. It is increasingly affected by competing strains of theory coming from Canada and the United States. Dawson J in *Hospital Products Ltd v United States Surgical Corporation*,[15] for example, said in 1984 that 'inherent in the nature' of the fiduciary relation, was

> a position of disadvantage or vulnerability on the part of one of the parties which causes him to place reliance on the other and requires the protection of equity.

This is close to some celebrated words used by EJ Weinrib in an article approved in the Canadian Supreme Court.[16] Fiduciary types are conflated. Multi-national corporations or departments of state, wronged by their fiduciary agents, are made to conform to a claimant's profile intended for the disadvantaged. Undue influence is generally more appropriate where the *consent* of the weaker party can be impeached. Unconscionability, by contrast, looks more to substantive factors - such as a relation's outcome, or what the weaker party was prevailed upon to agree to.

## Customers' Reliance

A bank may be alleged to have unduly influenced a customer to its advantage. The bank's conduct will be what is evaluated, although in the light of the customer's relative position. This happened in *Woods v Martin's Bank Ltd*.[17] A bank counselled an inexperienced young man to make an unwise investment in one of the bank's problem customers. Undue influence may otherwise be alleged where a bank takes a security or guarantee from a customer to secure advances made to another. The bank may have unconscionably shifted a bad risk from itself to the customer who provided the security or guarantee.[18] As is evident from the House of Lords decision in *Barclays Bank plc v O'Brien*,[19] United Kingdom authority still regulates the banker in the banker and customer relation within the terms of the 'undue influence' wrong. This

11 In the United States, see, for example, *Broomfield v Kosow* 212 NE (2d) 556 (1965) and in Canada, *Morrison v Coast Finance Ltd* (1966) 55 DLR (2d) 710 (BCCA).

12 See P Finn 'Fiduciary Principle' in Youdan op cit, 1, 27-30.

13 For example, *Bank of New South Wales v Rogers* (1941) 65 CLR 42.

14 For example, *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447.

15 (1984) 156 CLR 41, 142.

16 'Fiduciary Obligation' (1975) 25 *UTLJ* 1, 6-7, specifically approved by Wilson J in *Frame v Smith* (1987) 42 DLR (4th) 81, 99 (SC).

17 [1954] 1 QB 55.

18 D Waters 'Banks, Fiduciary Obligations and Unconscionable Transactions' (1986) 65 *Can Bar Rev* 37, 43.

19 [1994] 1 AC 180.

largely includes what in Australia is referred to as the 'unconscionable dealing'. Fiduciary relationships on the Australian, Canadian and United States models look more to the position of the weaker party. The one who relies, that is, not the one who exploits the reliance. Customers, rather than bankers, are hence our dominant concern.

Customer reliance on a bank may occur where financial advice has been received in connection with taking a loan. Advice in this connection may relate to the lending transaction itself, or to the use of its proceeds. Alternatively, customers may rely on the bank's loyalty to a particular investment purpose of which they have advised the bank. A customer, for example, may be on one or other side in a corporate takeover war. Not only then a source of funds for that party, the bank may also be in the position of being the party's confidant. Customers in this position may claim an 'entitlement to rely’ on the bank not to frustrate their takeover plans.

Doctrinal as well as policy questions arise in these cases. In theory, why should a bank's liability for the disappointed reliance of its customer be founded on a fiduciary relationship? Would not a breach of an express or implied term of the banker and customer contract, or the commission of a tort, lead to a more satisfactory solution? Or, in policy terms, why should the enhanced 'gain-stripping' and 'insolvency-prioritising' remedies of equity be available when other more measured avenues to relief are open? It is not easy to express exactly what it is in the banker and customer relation that should attract equity's intervention. Others have done this at greater length.[20] Equitable intervention could be justified as being what is necessary to protect customers' 'reasonable expectations' that their bank will act in their interest, not someone else's interest. Donovan Waters, though, has suggested that this rationale is empty and only restates the question.[21]

Bankers' 'reliant' customers may sometimes be corporations larger than themselves, perhaps with in-house lawyers and an abundance of advisors. Will customers such as this as readily be seen to repose reasonable or justifiable trust in the bank? The reliance question may need to be considered in the light of the customer's experience and resources.[22] A finance director applying for a loan on behalf of a large corporation might be expected to have greater knowledge of loan transactions than a sole trader acquiring a taxi licence. If in both cases the bank commits what could be cast as a fiduciary wrong, fiduciary characterisation of the relationship may not be the same. It may be less reasonable for the director to claim to have relied upon and reposed trust in the bank. Fiduciary relationships may be invoked to protect the trusting aspects of

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20 TT Kitada 'Emerging Theories of Banking Liability - The Breach of Covenant of Good Faith and Fair Dealing' (1986) 103 *Banking L J* 80 and E L Symons 'The Banker-Customer Relation' (1983) 100 *Banking L J* 220 and 325.

21 D Waters 'Banks, Fiduciary Obligations and Unconscionable Transactions' (1986) 65 *Can Bar Rev* 37, 41.

22 See *First National Bank of Hopkins v International Machines Corporation* 156 NW 2d 86, 88-9 (1968) (Minn SC), Murphy J and KW Curtis 'The Fiduciary Controversy: Injection of Fiduciary Principles into the Bank-Depositor and Bank-Borrower Relationships' 20 *Loyola L Rev* 795 838-9 (1987).

customers' dealings, but the boundaries of where the banker ceases to be the customer's 'arm's length' debtor and becomes liable for the consequences of the customer's reliance may shift. At the same time, it may be wrong to restrict bankers' fiduciary liability for reliance to where they 'chance their arms' to advise. For bankers will then be able to insulate themselves from adverse consequences by the use of well-drawn disclaimers. Trusting and reliance maybe should be seen as integral and non-excludable parts of modern banking. Fiduciary standards of loyalty should apply in many non-deposit aspects of the relationship and appropriate remedies made available accordingly.

## Bankers' Advice to Customers

Where a banker gives customers advice on their financial affairs, then the banker and customer relations may imply, in addition to any contractual rights, both common law duties of care and fiduciary duties.[23] Remedies in contract, tort and equity may all be called in aid where some forms of defective advice are given.

## Investment Advice

Investment advice is about the employment of money (or its equivalent) for profit. Funds of money advised upon may be the customer's own, or funds which the bank proposes to lend. The 'crucial circumstance' giving rise to an advisor's fiduciary status has been said to be whether the bank knows, or reasonably ought to know, that its advice is being relied upon by the customer. As Donovan Waters puts it:[24]

> Knowing, actually or constructively, of this reliance, the bank may have been negligent in the advice it gave, or in the preparation of documentation it put before the client. It does not need the duty of care in tort law to make the bank liable. *The confidence reposed in the bank, the reliance, and the bank's knowledge of that situation may justify the imposition of an express trustee standard of behaviour upon the bank.* [emphasis added]

A fiduciary liability is said to intrude only where the bank knows that it is being relied upon. It is also significant whether that the bank's advice to the customer was based on all material facts within the bank's knowledge, although this fact is more relevant to breach of a fiduciary duty than characterisation of a relation as fiduciary or not.[25] Factual 'reliance' of the customer on investment advice may occur where the customer has been a customer for a substantial length of time. In *Commonwealth Bank of Australia v Smith*,[26] where the relation was found to be fiduciary, the Commonwealth Bank had been banker and financial adviser to the Smiths for 24 years. In the United States case of

23 *Halsbury's Laws of England* 4th edn, 3(1), [251].
24 'Banks, Fiduciary Obligations and Unconscionable Transactions' (1986) 65 *Can Bar Rev* 37, 59-60.
25 *Kabwand Pty Ltd v National Australia Bank Ltd* (1989) 11 ATPR 50,367, *Commonwealth Bank of Australia v Smith* (1991) 102 ALR 453.
26 (1991) 102 ALR 453.

*Stewart v Phoenix National Bank*[27] the parties had had a '25 year association'. Or, the customer may be inexperienced in finance or in business.[28] Where 'special disadvantage' in the nature of age, infirmity, poor education or difficulty with the English language affects the customer, the ordinary fiduciary relationship is usually not employed in Australia. The matter is more one for the 'unconscionable dealing' wrong. However, if the facts include a factor which should alert the 'properly perceptive banker' to the fact that his advice was being relied upon, then the ordinary fiduciary relationship may have application as well.[29]

It would be the very height of altruism for a bank in its relation with a customer to look *only* to the customer's interests. It is, accordingly, quite uncommercial to expect a bank to advise and lend money with only the interest of the customer in mind, no matter how much the customer may rely. A bank, we are reminded in *National Westminster Bank plc v Morgan*, 'is not a charitable institution'.[30] The United States decision in *Klein v First Edina National Bank* was concerned with an alleged fiduciary duty to disclose and expressed the matter as follows.[31]

> We believe the correct rule to be that when a bank transacts business with a depositor or other customer, it has no special duty to counsel the customer and inform him of every material fact relating to the transaction - including the bank's motive, if material, for the transaction - unless *special circumstances* exist, such as where the bank knows or has reason to know that the customer is placing his trust and confidence in the bank and is relying on the bank'. [emphasis added]

*Klein's* case defines this enquiry in a useful way. If a customer's reliance cannot be expected to elicit complete selflessness from the bank, was there in the facts of the case a 'special circumstance' which might justify a fiduciary response?

Bankers who advise customers on the acquisition of a business or investment are like stockbrokers who tender investment advice. Both have defined non-fiduciary roles in accepting deposits, and buying or selling shares, respectively. Bankers and stockbrokers may each create a fiduciary element in the relation with a customer by assuming to advise a person who is known to rely. In *Daly v Sydney Stock Exchange*[32] a stockbroker acting as an 'investment adviser' was found to be a fiduciary to the extent of his advice. Brennan J expressed (at 385) the principle that:

> Whenever a stockbroker or other person who holds himself out as having

27 64 P 2d 101 (1937).
28 *Commonwealth Bank of Australia v Smith*, supra.
29 D Waters 'Banks, Fiduciary Obligations and Unconscionable Transactions' (1986) 65 *Can Bar Rev* 37, 59.
30 [1983] 3 All ER 85, 91, Dunn LJ (CA).
31 196 NW 2d 619 (1972), 623, curiam.
32 (1986) 160 CLR 371.

> expertise in advising on investments is approached for advice on investments and undertakes to give it, in giving that advice the adviser stands in a fiduciary relationship to the person whom he advises.

A corresponding interpretation of the law was applied to the advising banker in *Commonwealth Bank of Australia v Smith*.[33] Fiduciary relations were seen to be created between a customer, who deliberated on whether to purchase a country hotel, and the local bank manager, who offered his advice on the proposal. An 'interests analysis' inherent in the relation was expressed by the Court at 476.

> A bank may be expected to act in its own interests in ensuring the security of its position as lender to its customer but it may have created in the customer the expectation that nevertheless it will advise in the customer's interest as to the wisdom of a proposed investment. This may be the case where the customer may fairly take it that to a significant extent his interest is consistent with the bank in financing the customer for a prudent business venture.

Both the vendor of the hotel and its prospective purchaser were customers of the bank. It was anticipated that the purchase would be financed by a substantial bank loan. In these circumstances the bank was argued to have an 'apparent commercial self-interest' in facilitating the transaction. The loan was lending business. When the bank adopted the role of 'investment adviser' through its manager, the bank had to think beyond its own interest and discharge a duty owed to the customer. The duty breached in this case was an obvious spring to a fiduciary relationship between the parties. It was, described at 478, an obligation to avoid the conflict of interest arising for the bank by having the vendor and the purchaser of the hotel as its customers at the same time and venturing to tender investment advise to one of them. Although the fact that the vendor was also a customer was disclosed to the purchaser, a recommendation was not given that the purchaser take independent advice. Potential conflict of duties owed by the bank to the two clients prohibited the merits of the transaction being the subject of the bank's advice to either one. If such is a fiduciary duties analysis of the facts, the above 'interests' dicta seem to go further. They suggest that the customer's fiduciary expectation could be defeated by the bank offering no more than 'unwise', careless or inadequate advice.

## Transactional Advice

Transactional advice of a bank is the sort which refers to the explanations given to customers of transactions between the customers and itself. Details of deals entered and the relative obligations of the parties are set out. Advising on transactions is integral to the business of banking. Retail banks enter into commercial relations with their customers every day. A businessman may take out a loan, or parents may guarantee an overdraft extended to a son or daughter.

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33 (1991) 102 ALR 453 (Fed Crt, FC) 476, Davies, Gummow and Shepherd JJ.

Before entering those undertakings, the bank will usually explain to the businessman and the parents what their rights and liabilities in the transaction are. Sometimes the wisdom of the deal from the obligor's perspective is touched on and, at other times, the correlative positions of the bank and third parties are explained. Fiduciary relationships are not the normal way that the law regulates this aspect of the banker's business. Prima facie, and following the principle in *Shaddock & Associates Pty Ltd v Council of the City of Paramatta,*[34] if a bank through its proper officer takes it upon itself to explain the mechanics of a transaction to a customer, the bank is under a tortious duty of care not to misstate the position. Alternatively, persons advised may be able to avoid the transaction in equity by alleging a misrepresentation, or conduct contrary to the *Trade Practices Act* 1974 (Cth). If the 'fiduciary' idea is used in this context, it is usually not pursuant to the ordinary type of fiduciary relationship. The person advised may claim that the bank has acted 'unconscionably', or that the bank or its agent advising have exercised 'undue influence' in the deal.

*James v Australia and New Zealand Banking Group Ltd*[35] involved a reliance-based fiduciary claim arising from 'transactional advice' given in a wider 'investment advice' context. The decision underlined the importance of demonstrating a customer's factual or justified reliance of either kind before a 'transactional advisor' will be found to be a fiduciary. Customers in that case claimed that they received defective transactional advice from a bank when they were about to make a substantial rural investment. Loan funds were desperately needed by the customers to meet commitments that they had already undertaken. The manager of the bank indicated that he could not lend the customers what they wanted and recommended that they apply to a particular Perth mortgage-broker instead. The customers went to the broker, who turned out to be an unlicensed incompetent and they suffered loss as a consequence. The bank manager was, in argument, alleged to be the customers' fiduciary who caused their losses by his breach of duty. Toohey J noted at 3 53 that the customers claimed to this end that:

> they had come to rely upon the bank for advice in financial matters relating to the conduct of their farming operations.

False representations by the manager concerning the availability of bridging finance and loan servicing were also alleged as a cause of loss. Alternately to the fiduciary claim, negligence and conduct contrary to s 52 of the *Trade Practices Act* 1974 (Cwth) were argued.

In his detailed judgement in *James's* case, Toohey J described the following additional facts. The customers were members of an established grazing family in Western Australia. They had several farms and were said at 351 to be 'amongst the biggest landholders in the Katanning district'. Whilst the customers had banked at a local branch of the bank for several years, it was not

34 (1981) 55 ALJR 713.

35 (1986) 64 ALR 347 (Fed Crt, Toohey J).

their only source of finance. They sought the assistance of the bank only from time to time and in order, usually, to fund what had already been purchased. Advice from the bank concerning the decision to invest was never requested, either generally, or in relation to the instant transaction. Toohey J said at 353, concerning fiduciary reliance in that case:

> I do not accept that [the customers] looked to the bank for advice as to what properties they should buy or how they should conduct their farming operations. Indeed, given the long farming history of the James family, it would be surprising if they looked to the branch manager of a bank for farming advice.

Accordingly, at 350-352 he found that the banker and customer relation there was not fiduciary. Reliance was negatived, both in fact and as known by the bank to be expected.

Use of the language of fiduciaries to regulate the banker and customer relation in the United Kingdom has been disciplined by the House of Lords in *National Westminster Bank Plc v Morgan*.[36] The *Morgan* facts concerned a bank manager who obtained a customer's agreement to a mortgage after offering her a transactional explanation. That customer later alleged that the circumstances of the advice put pressure on her to sign - a fact, she said, which should have been evident to the manager at the time. In the English Court of Appeal the customer was allowed to avoid the mortgage by reason of the fact that it was obtained in breach of a banker's fiduciary duty of care'.[37] Reversing this conclusion and introducing a new requirement of 'manifest disadvantage' for the claimant in a (presumed) relation of influence, Lord Scarman said of fiduciary relationships generally (at 703):

> My Lords, I believe that the Lords Justices were led into a misinterpretation of the facts by their use, as is all too frequent in this branch of the law, of words and phrases such as 'confidence', 'confidentiality', 'fiduciary duty'. There are plenty of confidential relationships which do not give rise to the presumption of undue influence.

Lord Scarman thereby conceived that banks might become liable in a 'confidential relationship', or what we have termed the 'ordinary' type of fiduciary relationship. This will not involve the bank being liable for the familiar wrong of undue influence. This must be what is meant where he says that the plaintiffs claim might be a fiduciary one without having presumptive (or undue influence) effect. The possibility was also taken up by Lord Browne-Wilkinson in *CIBC Mortgages plc v Pitt*,[38] when discussing limitations on the wrong of undue influence. A 'wholly separate doctrine of equity' was noted - one which binds:

> those in a fiduciary position who enter into transactions with those to whom they owe fiduciary duties.

36 [1985] 1 AC 686.
37 [1983] 3 All ER 85, Dunn and Slade LJJ.
38 [1993] 4 All ER 433 (HL), 439, Lords Templeman and Lowry agreeing.

Thus where the requirements of undue influence cannot all be proven against a bank and still a customer's trust has still been breached, the customer need not be without an equity. The upshot of the United Kingdom authority seems to be that a bank's breach of fiduciary relationship is usually proven by the customer satisfying the undue influence requirements. But this is not the only possibility. A fiduciary relationship in the ordinary sense may be breached as well.

This is not the approach of the United States authorities. In the Supreme Court of Arizona in 1937, *Stewart v Phoenix National Bank*[39] decided that a bank as fiduciary could not enforce a particular mortgage covenant against a customer. The customer had dealt with the bank for 23 years and had come to habitually rely on its advice. For the bank to subsequently resile from a representation that it would not enforce this covenant in the event of default would be to take advantage of its customer's trust. The existence of a fiduciary relationship prevented it. *Klein v First Edina National Bank* [40] was a similar case, where a customer of 20 years gave a stock mortgage to the bank. It was to assist her employer by securing a new advance of working capital. In fact the advance was used by bank to retire the employer's earlier debt. A fiduciary relationship (and its breach) were found to be established in these circumstances in all but proof of the bank's knowledge of the customer's reliance. The decision in *Deist v Wachholz*[41] was a little more questionable. Its facts concerned a bank customer of 24 years standing, who was advised to sell a ranch which he owned. The ranch's purchaser was the secret partner of the bank vice-president. A breach of fiduciary duty was found to be committed without any evidence of fiduciary reliance being received. The banker and customer relation was just what was evident on the facts. No presumptive effect was accorded to the claim in any of these United States instances of a fiduciary banker and customer relationship.

Canadian authorities are similar. Relief may be forthcoming in Canada, too, within the context of the trusting type of fiduciary relationship. By contrast, in the United Kingdom some identifiable 'undue influence' must be found in order to relieve the customer on the same facts. Application of the undue influence doctrine is qualified in the United Kingdom with the requirement that the claimant establish a 'manifest disadvantage' whenever a presumptive relationship is relied upon. In Australia it seems that there is similar preoccupation with the bank's conduct and with not the client's reliance. The same wrong-centred approach with its focus on the stronger party is taken. Only the bank's undue influence in Australia is expressed more commonly as 'unconscionability' or 'unconscionable dealing' on bank's the part. The difference is minimal. Perhaps the Australian position implies that for a bank to give transactional advice is not an inherently fiduciary matter. Rather, the giving of bad or self-

39 64 P 2d 101 (1937).
40 196 NW 2d 619 (1972).
41 678 P 2d 188 (1984); see also *Pigg v Robertson* 549 SW 2d 597 (1977).

interested advice is an occasional wrong. Where the claimant is able to establish a bank's misconduct, 'unconscionability' or 'unconscionable dealing', the wrong will be redressed.

So most of the authorities for there being an 'ordinary' fiduciary aspect to the banker and customer relationship come from North America. Fiduciary relationships are then based in the customer's reliance and not the bank's wrong. Australia does not yet call a bank's transactional advice 'fiduciary', in the trusting sense. But there may yet be a straw in the wind. In the 1991 Martin Committee report,[42] the view was adopted that current case law was inadequate in relation to the 'fairness' of guarantee liabilities as between banker and customer. Relevant advice and disclosure requirements at the moment were said to be insufficient. In place of the case law regime, it proposed a 'code of banking practice', a co-operative scheme, to regulate this and other aspects of the banking relationship. Inspection of this code indicates that it replicates the decided law in one part and goes further in others.[43] Fiduciary doctrine may yet expand to incorporate these recommendations.

It is therefore a doctrinal possibility that a bank can be bound by fiduciary liabilities to a customer who relies on the bank's advice in a lending transaction. Similarly, a fiduciary relation may arise between a bank and a reliant customer who guarantees the borrowing of another. In either case, a bank which gives a self-interested or incomplete explanation of the transaction is potentially liable according to the trustee-like standard. Once the explanation is relied upon by the customer to the knowledge of the bank, the ordinary class of 'arm's length' lending is arguably transformed into a fiduciary dealing. The reasoning in *Mackenzie v Summit National Bank*[44] becomes applicable here, even though no fiduciary obligation to disclose details about a transaction was imposed where a bank had no reason to believe that a corporate officer was relying on it for advice.

## Limits of the Unconscionability/Undue Influence Approaches

Where a bank's transactional advice produces an agreement or disposition to the benefit of the bank, and some element of disadvantage or inequality affects the position of the customer, we have noted that the doctrines of 'undue influence' and 'unconscionable dealing' tend to be used in Australia. The intuitive idea in both doctrines seems to be that a bank's bargain or benefit cannot be kept if the bank has obtained it by acting oppressively or from a position of strength. What about the situation where the bank deals with a large commercial customer and that customer suffers a loss through reliance on the

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42 *A Pocket Full of Change*: Banking and Deregulation report of the House of Representatives Standing Committee on Finance and Public Administration 1991), [20.152-79]; I am grateful to EV Lanyon for this point.

43 Australian Bankers Association *Code of Banking Practice* (1993): Part B 'Principles of Conduct' 7.0 - 19.1.

44 363 NW 2d 116 (Minn App 1985), Leslie J.

bank's transactional explanations or nondisclosures? A trusting relationship might not be so easily inferred in this case either.

Consider the Californian case of *Barrett v Bank of America*.[45] The Barretts were the principal shareholders in a small electronics company. The company had obtained from the Bank of America a $250,000 loan, guaranteed by the Small Business Administration ('SBA'), as well as a $400,000 'line of credit'. To secure this accommodation, the Barretts gave the bank two personal guarantees. One was for the SBA loan and one was for the line of credit and both were secured by mortgages over residential properties. Less than a month after this was done, the bank informed the Barretts that they were in 'technical default' because the borrower's assets to liability ratio no longer conformed to the bank's requirements. An officer of the bank suggested to the Barretts that they could cure the default by introducing new capital to the company through a merger or acquisition. Specifically, the Barretts were advised that when a new, merged company became responsible for the loans, the personal guarantees would be released. So a merger was consummated with another company and the bank accepted the new entity as its customer. However the new entity filed for bankruptcy before the guarantees had been released. The bank then assigned all its securities to the SBA, including the guarantees and supporting mortgages. The Barretts were eventually forced to sell their home and turn over the proceeds to the SBA. Action was commenced against the Bank of America, inter alia alleging an entitlement to damages for its 'constructive fraud' in breaching a relationship of trust and confidence. The Court of Appeal (4th Dist) upheld the submission made on behalf of the Barretts that the bank was in breach of fiduciary obligation. Wiener Ass-J at 20-21 said (the rest of the Court concurring):

> a relationship of trust and confidence exists between a bank and its loan customers which gives rise to a duty of disclosure of facts which may place the bank or a third party at an advantage with respect to the customer ... Here there is substantial evidence to support the constructive fraud theory. Ronald Barrett perceived his relationship with [the bank officer] as very close and he relied on [the officer's] financial advice implicitly.

It may be appropriate to draw a line here. Further extension of fiduciary liability within the banker and customer relation may be to descend into categories of illusory reference. 'Fiduciary', indeed, increasingly looks like a 'device permitting a secret and even unconscious exercise of ... a creative choice.'[46] Hyperbole in *Commercial Cotton Co v United California Bank*[47] may well be just this. A corporate customer of a bank informed it that some of its cheque forms were missing. The bank then failed to act promptly and stop payment of the relevant cheques. The customer's account was then debited for payment of cheques which had been forged. When the bank declined to admit its negligence and instead relied on a Statute of Limitations defence, the Court said (at 554):

45 229 Cal Rptr 16 (1986).
46 J Stone *Legal System and Lawyers' Reasonings* (1968), 241.
47 209 Cal Rptr 551 (Cal App 4th dist 1985).

> The relationship of bank to depositor is at least quasi-fiduciary and depositors reasonably expect a bank not to claim nonexistent legal defences to avoid reimbursement when the bank negligently disburses the entrusted funds.

Which is all very questionable. Faulty or incomplete explanation of a borrowing transaction which does not produce an obvious benefit to the bank may be beyond the margins of the fiduciary sanction. The possibility has been discussed and conservative views have been expressed by at least one academic commentator.[48]

## Loyalty to customers' purposes

This concerns takeovers. It is a species of reliance by customers with adverse interests which is singularly unamenable to the unconscionability and undue influence approaches. Weakness, subordination and the element of 'special disadvantage' may all be absent. Two sets of hypothetical facts will exemplify what this sub-heading is about.

1. **The target company** - A Co is a bank customer and commences negotiations to obtain a new line of credit. Bank receives from A Co certain non-public information about A Co's corporate health and forward plans. Later D Co, another customer of the bank, applies to the bank for a loan. D Co reveals to the bank that the purpose of the loan is to enable it to make a bid to acquire a voting majority in A Co. In deciding whether to extend credit to D Co and to finance its plans, the bank makes use of the confidential information that it acquired from A Co. Can A Co, the target company, complain of a breach of fiduciary obligation by the bank?[49]

2. **The offeror** - B Co is an large investment company. Whilst not a long-standing bank customer, the bank actively sought B Co's business. This occurred at the highest levels. B Co's board of directors met a director of the bank and outlined the long-term plan of B Co to take over another large investment company, C Co. The bank supported the plan. It promised all the help it could give. However the chairman of the bank, who was not at the meeting with the B Co board, had already committed the bank to invest in C Co with the bank's own funds. Over the following years, both B Co (with assistance from the bank), and the bank itself built up substantial minority shareholdings in C Co. In doing this the bank was not interested in taking over C Co. B Co, however, did have a rival intent on taking over C Co. This was a company which was another customer of the bank. The rival had also been engaged in building up a minority shareholding in the investment company. Matters came to a head. The bank ended up selling its minority shareholding in C Co to the rival and that company became the majority shareholder. As a result, the market value of B Co's minority shareholding in C Co plunged by 50%. B Co, the takeover

48 KW Curtis 'The Fiduciary Controversy' 20 *Loyola of LA Law Rev* 795, 836-840 (1987).

49 See *Washington Steel Corporation v TW Corporation* 602 F 2d 594 (1979).

offeror, was aggrieved. It claimed to be entitled to fiduciary relief against the bank for not disclosing its conflict of interest in relation to the takeover target.[50]

If the parties in each example were found to be in a fiduciary relation, the problem for the bank then was one of conflicting duties.[51] A bank must be loyal to all its customers. We are not concerned here with whether the bank in each example remained neutral and made full disclosure of its interests and divided loyalties. These are breach of duty questions. We are concerned here with whether a fiduciary relationship was initially established. A notable fact in both the cases on which the examples are based is that a fiduciary relation was argued to flow from the same things, namely, the fact of the customer's reliance and the imparting of confidential information to the bank.

In the case of the 'target company', policy aspects were resolved easily. The need to protect A Co's confidentiality should be overridden by the legitimate interest of the bank in making lending decisions on all information available to it. This is the robust way it was expressed by the United States court:[52]

> We do not believe that a bank violates any duty that it may owe to one of its borrowers when it uses information received from that borrower in deciding whether or not to make a loan to another prospective borrower ... the promulgation of a rule restricting the dissemination of confidential information within the loan department of a bank is neither the proper province of a court nor the appropriate subject for state law adjudication ... the adoption of such a rule would make unwise banking policy. To prohibit a bank from considering all available information in making its own loan decisions might engender one or both of two undesirable outcomes. First, it might force banks to go blindly into loan transactions, arguably violating its duties to its own depositors. Alternatively, such a rule might discourage banks from lending money to any company which expresses an interest in purchasing shares of stock of another of the bank's customers. The adverse implications for the free flow of funds [is why the target Co's argument has to fail]. Bank credit is, after all, the largest part, by far, of the national money supply.

It would, the Court continued at 601, be too easy for target companies to develop a 'shark repellent' against takeovers. Loans could be taken from all major banks for the purpose. The Court was not prepared to treat A Co's relation with the bank as fiduciary at all. It refused to 'draw a fiduciary rabbit from a commercial loan agreement hat', lest that might 'wreak havoc with the available funding for capital ventures'. As the Court said, ordinary commercial borrowers, without more, are just customers.[53]

50 See *Standard Investments Ltd v Canadian Imperial bank of Commerce* (1985) 22 DLR (4th) 410 (Ont CA).

51 Suggested by D Waters 'Banks, Fiduciary Obligations and Unconscionable Transactions' (1986) 65 *Can Bar Rev* 37, 40.

52 *Washington Steel Corporation v TW Corporation* 602 F 2d 594 603 (1979) 3rd Circuit (New Jersey), curiam; see also the different reasoning in *American Medicorp Inc v Continental Illinois National Bank and Trust Company of Chicago* 475 F Supp 5.

53 At 600-1; see (Note) 'Bank Financing of Involuntary Takeovers of Corporate Customers: A Breach of Fiduciary Duty?' 53 *Notre Dame Lawyer* 827 (1978).

In the case of 'the offeror', *Standard Investments Ltd v Canadian Imperial Bank of Commerce*,[54] the passage of years and possible loss of confidentiality for B Co's plan left reliance as the only spring to a fiduciary relationship. Seven years had elapsed between B Co's disclosure to the bank of its takeover intention and the rival's assumption of control over the target company. Initial confidentiality had simply evaporated. The final result achieved for the offeror, however was much more promising than for the above target company. Stating the law to be 'clear' that 'in certain circumstances a fiduciary relationship may be created between a bank and its customer', the Court approved the trial judge’s dictum that a 'special circumstance' was necessary before a fiduciary relationship could be found.[55] The judgement at 434-5 went on to list ten factual findings which led to a fiduciary conclusion. Paraphrased, it is worth setting them out, as they indicate the type of facts that courts regard as significant: (1) Standard Investments was not an old customer; (2) its controllers planned to acquire control of the target company; (3) the controllers decided that they would need the 'assistance, advice and financial support' of the bank; (4) the Standard Investments account was then taken to the bank; (5) the bank was gratified to get this and other 'excellent business' through Standard Investment connections; (6) it was obvious that takeover plans of importance to the customer were being disclosed; (7) the identity of the target company and a crucial player in the drama were made known; (8) it was common knowledge that the bank was also banker to the target company, that the crucial player was a common director of the bank and the target company, and that the good offices of the crucial person were essential; (9) the bank came to realise precisely what the controllers wanted; and (10) the bank offered encouragement and assistance for the plan.

Listing of fiduciary 'factors' here is the same methodology as Mason J used in *Hospital Products Ltd v United States Surgical Corporation*[56] and Laskin J used in *Canadian Aero Service Ltd v 0 ‘Malley*.[57] At the end of its enumeration in *Standard Investments* at 435, the Court said that there could be 'no doubt' that the controllers of the offeror

> were relying on the advice, assistance and guidance of [the bank] and that [the bank] through [its manager] was aware of the reliance.

From this it followed that the relationship was fiduciary. A corresponding equitable wrong was seen to have been committed in the absence of any evidence likely to support an unconscionability or undue influence finding. Paul Finn, for one, disapproves of this finding and makes the point that there was nothing especially 'fiduciary' about the relationship at all.

It could, he said, have been as adequately justified on the basis of 'good

54 (1985) 22 DLR (4th) 410, curiam.
55 At 432, approving (1985) 5 DLR (4th) 452, 481.
56 (1984) 156 CLR 41, 98-9.
57 (1973) 40 DLR (3rd) 371, 391.

faith' and 'fair dealing'.[58] The outcome is described by another commentator as inconsistent with the way that modern banking business must be conducted, although this is a view on which there is no unanimity.[59] For it is not yet clear how a banking business can involve ordinary fiduciary wrongdoings.

58 P Finn 'Fiduciary Principle' in Youdan op cit, 1, 22-3.

59 P Graham 'Statutory Regulation of Financial Services in the United Kingdom and the Development of Chinese Walls in Managing Conflicts of Interest' in McKendrick op cit, 49-53; cf Herzl and Colling 'The Chinese Wall and Conflict of Interest in Banks' 34 *Bus Law* 73, 100 (1978) and Lipton and Mazur 'The Chinese Wall Solution to Conflict Problems of Securities Firms'50 *N Y U L Rev* 459, 475 (1975).