

*From Disability to Duty: from Constructive Fraud to Equitable
Wrongs*

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Abstract

This thesis concerns the changing nature of the law's regulation of two particular types of interpersonal power abuse: acting in conflict of interest and exercising undue influence. In the 18th Century, both types of behaviour were covered by Equity's jurisdiction over "constructive fraud". However, in the 19th Century, two more specific doctrines arose to govern them. The law of fiduciaries applied to actions in conflict of interest; the law of undue influence covered the misuse of influence.

When they first emerged, both these areas of law were underpinned by the "good man" theory of Equity. Those whose conduct they regulated were thought of as disabled, as against those over whom they held their power, from asserting rights acquired as a result of abusing their position. This idea had powerful and idiosyncratic remedial implications described in this thesis.

As time moved on, for various reasons (both internal and external to each doctrine), the courts began to perceive that the remedial regimes the two entailed were in some way deficient. They therefore began to take steps to amend them. This thesis identifies cases where the only way of accounting for both the language used by the judges and the remedy granted is on the basis that those in fiduciary positions/positions of influence were subject to a duty, as against those over whom they held their position, not to abuse it.

Consequently, as a matter of fact, both areas of law are currently in theoretically hybrid states. Some (often older) authorities support the idea that those in positions of power are merely subject to a disability, while others – which are necessarily newer – reject it. As this thesis demonstrates, this inconsistency is currently giving rise to several practical uncertainties relating both to remedies and procedure (including limitation periods).

Impact Statement

This thesis contains biographies of the law of fiduciaries and the law of undue influence. It tracks their respective developments from their inceptions to the present day. It shows that the way in which the courts have conceptualised each doctrine has changed over time. This information could be put to good use in at least five different ways.

- 1) *Advancing scholarship and practice through increased clarity.* There is considerable confusion about the nature and function of the law of undue influence and the law of fiduciaries. Each involves seemingly contradictory judicial pronouncements and gives rise to differing academic views. This thesis aims to improve the general understanding of both scholars and practitioners. By ending some of the battles of the past, it should push lawyers towards considering new questions relating to each area of law.
- 2) *International impact.* Though each have developed their own characteristics, the fundamental source material for Australian, Canadian, and New Zealand Equity is the same. Thus, what this thesis says about English cases may also be true, *mutatis mutandis*, for those jurisdictions. Consequently, scholars and practitioners in each of those countries may have their work improved by this research.
- 3) *Practical impact.* Both the law of fiduciaries and the law of undue influence are areas where the answers given to conceptual questions have important practical effects, particularly on commercial parties. Remedies like constructive trusts and equitable compensation are potent and can import considerable financial consequences. This thesis shows how having a sound understanding of the history and theory underpinning each of the doctrines under its consideration helps one better appreciate when and why those remedies will be awarded. This should aid lawyers advising their clients, and judges deciding cases.
- 4) *Bringing new information to light.* There is a dearth of knowledge concerning the law of fraud in the 18th Century, particularly that aspect of it which fell into Equity's exclusive jurisdiction. As this thesis explains, many treatments of "constructive fraud" are superficial or rely on anachronistic distinctions. Chapter 4 contains a full and systematic analysis of that doctrine. In particular, it engages in a detailed textual

analysis of Lord Hardwicke LC's judgment in *Earl of Chesterfield v Janssen*. Given the absence of any such treatment previously, this study should be of benefit both to legal historians and modern lawyers considering connected areas of law, not least the tort of deceit or the doctrine of unconscionable bargains.

- 5) *Contributing to wider debates*. There is a long-standing and widespread debate about whether legal principles derived from Equity are special. The law of fiduciaries, in particular, has been discussed by both sides to this debate. Ironically, the contents of this thesis should give each pause for thought. The changing theoretical underpinnings of that doctrine mean that neither side's position is completely supported by it. However, the idea that things are not necessarily as simple as the 'Is Equity Special?' debate might suggest, should ultimately enrich the overall quality of that discourse.

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Introduction

The aim of this thesis is to improve the general understanding of the nature and function of each of the modern law of fiduciaries and the modern law of undue influence. It will do this by considering the development of each doctrine from their (contemporaneous) inceptions up to the present day. There are two connected reasons for taking this approach. First, the way in which the courts have understood each area of law has changed over time. Second, and as a result, they both now display various otherwise puzzling characteristics. These features manifested themselves at different stages of the two doctrines' growths, and despite subsequent conceptual advances have not yet been replaced. It is therefore only by taking a long view of each subject that their current structures can be properly appreciated.

Consequently, while this thesis is primarily designed to clarify the operation of two separate but related areas of subsisting law, it will be partly a history of their individual doctrinal developments, and partly an examination of some of the ways in which judges have thought about – and continue to think about – how important parts of Equity work. It therefore contains information of interest not just to contemporary doctrinal lawyers but also to legal historians and legal theorists. One group of readers who shall be left wanting will be those seeking to be persuaded as to what either the law of fiduciaries or the law of undue influence should be in the future. Those two questions go beyond the scope of this thesis, although, as shall be explained, any consideration of them should take into account the information disclosed herein.

I. The Need for Clarity

Few areas of law are more in need of a coherent explanation than the law of fiduciaries and the law of undue influence. Major academic debates, such as whether a bribe taken by a fiduciary should be held on constructive trust for his principal, or whether a victim of undue influence

can recover equitable compensation from the perpetrator, have become intractable.¹ Likewise, there is no general agreement as to whether the fetters those two doctrines impose are special (and so worthy of particular treatment), or are in substance no different to those articulated by the law of tort.² Even the relationship between both sets of rules is somewhat unclear. In some cases, particularly those involving presumed undue influence, there appears to be a substantial overlap between them.³ In others, they are sharply distinguished.⁴

Taken from the law of fiduciaries, a particularly clear example of confusion comes from the apparently irreconcilable contradiction between the following statements. In *Erlanger v New Sombrero Phosphate Co*,⁵ Lord Blackburn said:

‘[Where a fiduciary acts unlawfully in his capacity as a fiduciary] a Court of Equity [cannot] give damages, and, unless it can rescind [any transaction which his behaviour has procured], can give no relief [in respect of it]’.⁶

In *Swindle v Harrison*,⁷ Mummery LJ stated:

‘[The] remedies available [when a fiduciary acts unlawfully in his capacity as a fiduciary and causes loss to his principal] include [a] payment of compensation ... to

¹ See, for example, P Millett, ‘Bribes and Secret Commissions’ [1993] RLR 7; G Virgo, ‘Profits Obtained in Breach of Fiduciary Duty: Personal or Proprietary Claim?’ (2011) 70 CLJ 502; W Swadling, ‘Constructive Trusts and Breach of Fiduciary Duty’ (2012) 18 T&T 985; P Millett, ‘Bribes and Secret Commissions Again’ (2012) 71 CLJ 583; and JD Heydon, ‘Equitable Compensation for Undue Influence’ (1997) 113 LQR 8; P Birks, ‘Unjust Factors and Wrongs: Pecuniary Rescission for Undue Influence’ [1997] RLR 72; L Ho, ‘Undue Influence and Equitable Compensation’ in P Birks and F Rose (eds), *Restitution and Equity, Volume One: Resulting Trusts and Equitable Compensation* (Mansfield Press 2000).

² See, for example, *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391, 474; RFV Heuston, *Salmond & Heuston on the Law of Torts* (19th edn, Sweet & Maxwell 1987) 14; and *Attorney General of Hong Kong v Reid* [1994] 1 A.C. 324; *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2011] EWCA Civ 347. See Section IV, below, for a statement of terminology to be used when describing various legal ties.

³ See, for example, *Tate v Williamson* (1866-67) L.R. 2 Ch. App. 55, 61; *Mahoney v Purnell* [1996] 3 All E.R. 61, 90-91.

⁴ See, for example, *Re the Estate of Brocklehurst (Deceased)* [1978] Ch. 14, 41; *National Westminster Bank Plc v Morgan* [1985] 1 AC 686, 703.

⁵ *Erlanger v New Sombrero Phosphate Co* (1878) 3 App. Cas. 1218.

⁶ *ibid.* 1278.

⁷ *Swindle v Harrison* [1997] P.N.L.R. 641.

put the [principal] “in as good a position pecuniarily as that to which he was in before [his] injury””.⁸

Given that, in using the term ‘damages’, Lord Blackburn was referring to exactly the same remedy which Mummery LJ described as ‘compensation’, there is here one senior judge expressly denying the availability of a certain personal remedy against misbehaving fiduciaries and another explicitly recognising it.

Substantively identical remarks can also be found in two leading secondary sources. Sealy, for instance, thought that the notion that ‘a remedy in the shape of damages’ could be awarded in response to an act of fiduciary misfeasance ‘[could not] be supported on any accepted equitable principles’.⁹ Burrows, on the other hand, has stated that the availability of such relief is, or ought to be, ‘plain’.¹⁰

It is true that there is asynchrony between each limb of both pairs of remarks. However, as shall be explained, it is insufficient to account for their differences solely on that basis. Age alone does not diminish the strength of a precedent, nor the veracity of a commentator’s analysis. In fact, both *Erlanger* and *Re Leeds and Hanley Theatres of Varieties Ltd*¹¹ (the case relied on by Sealy) are still-extant authorities. As will be seen in Chapters 6 and 7, the law *has*, in part, developed since each was decided, hence Mummery LJ and Burrows’ comments. But this has not been to the complete exclusion of the earlier cases.

Turning to the law of undue influence, an analogous set of comments can be found in two relatively recent judgments. In *Agnew v Länsförsäkringsbolagens AB*,¹² Lord Millett stated that:

‘There is no “obligation” not to exercise undue influence in order to persuade a party to enter into a contract. The party exercising influence incurs no liability [if he does]. It

⁸ *ibid.* 672.

⁹ LS Sealy, ‘Some Principles of Fiduciary Obligation’ (1963) 21 CLJ 119, 124.

¹⁰ A Burrows, ‘We Do This at Common Law but That in Equity’ (2002) 22 OJLS 1, 9.

¹¹ *Re Leeds and Hanley Theatres of Varieties Ltd* [1902] 2 Ch. 809.

¹² *Agnew v Länsförsäkringsbolagens AB* [2001] 1 A.C. 223.

is merely that the party whose consent was obtained by [its] exercise ... is entitled to have [any] contract [it produced] set aside'.¹³

Conversely, just 13 years later in *Bovingdon v Belcher*,¹⁴ the judge held that, because 'the deceased ... was persuaded to [pay a third party a sum of money] by means of [the defendant's] exercise of undue influence', an amount of 'equitable compensation' equal in value to that which he lost '[could] be ordered to be repaid [to the deceased's estate] by [the defendant]'.¹⁵ Clearly there is a stark difference between these two judicial pronouncements. Nevertheless, once again, my observations about asynchrony apply.

Turning from Equity itself to the relationship between Equity and the Common Law more widely, it is also perhaps little wonder that, once they have considered the law of fiduciaries and the law of undue influence, some modern commentators have described that relationship as discordant.¹⁶ However, this raises the possibility that, if this thesis succeeds in its overall aim, it may contribute to an improvement in the general understanding of how those two parts of our legal system relate.

II. Accounting for the Disorder

How did it come to this? In my view, the answer is that most lawyers – whether they are judges, practitioners, or academics – take no more than an incomplete (or monist) view of the principles that underlie the two doctrines. They perceive them as grounded solely on one of two different theoretical bases – one involving the imposition of (inherently breachable) duties, the other concerned with the imposition of (inherently non-breachable) disabilities – and they do not engage with the idea that different parts of each jurisdiction must be explained in a different way.¹⁷

The implications of this conduct are considerable. For example, as Mitchell has explained, the breach of an equitable duty is nowadays 'conceptualized as a civil wrong that triggers a

¹³ *ibid.* 265.

¹⁴ *Bovingdon v Belcher* [2014] EWHC 599 (Ch).

¹⁵ *ibid.* [37].

¹⁶ See, for example, Burrows (n 10).

¹⁷ For a notable exception, see C Mitchell, 'Equitable Compensation for Breach of Fiduciary Duty' (2013) 66 CLP 307.

secondary duty ... to pay compensation for loss'.¹⁸ In contrast, acts which fall within the scope of an equitable disability have never been understood to sound in that way. In Lord Millett's extrajudicial words: 'the remedy [in such cases] is not damages ... but account and payment, [something not ordered] as a monetary remedy for [a] wrong'.¹⁹ Even just in remedial terms, then, there is an obvious tension between the two ways of thinking about the law.

The problem with taking a monist view of the conceptual basis of either the law of fiduciaries or the law of undue influence is that it renders it impossible to properly understand how either doctrine really works. As shall be explained, as a matter of fact, both are currently – albeit to varying degrees – in a theoretically hybrid state. To a greater or lesser extent, they each display some characteristics of being duty-based and some characteristics of being disability-based in their nature. This is why, for example, the victim of an act of fiduciary misfeasance can now seek either an account of profits or a loss-based personal remedy in respect of a single transaction²⁰ (assuming those remedies are alternative, not cumulative).²¹ The former is justified by the disability-oriented way of understanding the law of fiduciaries, the latter by the duty-focused approach. Accepting these facts, and thereby taking a dualist view, is thus essential.

Indeed, the apparent contradiction between the statements in *Erlanger* and *Swindle* can be accounted for on just this basis. Like Sealy, Lord Blackburn took a disability-based view of the law, whereas, like Burrows, Mummery LJ relied on a duty-based one. As it happens, at the time that *Erlanger* was decided, the duty-based conception of a fiduciary's position had not yet come into being. The principle upon which Lord Blackburn's observation was premised was ubiquitous.

Substantially the same explanation can be given for the inconsistency between the statements in *Agnew* and *Bovingdon*. The former was decided at a time when there was a dominant disability-based view of how Equity regulated the conduct of those in positions of influence. The latter is part of a group of decisions which have only just have introduced a duty-based conception of the same. Moreover, it is for this reason that, whatever the leading textbooks still

¹⁸ *ibid.* 315.

¹⁹ P Millett, 'Book Review' (2002) 2 OUC LJ 291, 294.

²⁰ See, for example, J McGhee (ed), *Snell's Equity* (34th edn, Sweet & Maxwell 2019) 7-051.

²¹ See *Tang Man Sit (Deceased) v Capacious Investments Ltd* [1996] A.C. 514, 520-522.

say,²² the extant authorities may now provide that a victim of undue influence can seek either to set aside any transaction they have entered into, or to leave it in place and claim equitable compensation from the perpetrator instead.

III. Proving the Point

When matters are put as such, it becomes apparent that an appreciation of time is key. Indeed, this is why, to achieve its aim of improving the general understanding of the nature and function of each of the law of fiduciaries and the law of undue influence, this thesis will examine the development of both doctrines from their respective inceptions up to the present day. The theoretically hybrid nature of the two jurisdictions is a product of their histories and so understanding that their individual stories are stories of change *through time* is essential. It forces one to accept that taking a dualist view of their respective conceptual bases is not just a valuable way of perceiving their structures but is also an accurate one. On top of this, once that is established, it is plain – retrospectively – why accounts of either area of law premised on a monist view are either incomplete or in some way inconsistent with the cases. They are all in some respect anachronistic.

Of course, this thesis is by no means the first work to study the historical development of *parts of* either the law of fiduciaries or the law of undue influence.²³ However, what distinguishes it from those contributions is precisely what should give it its explanatory force: the fact that it contains an overview, in more or less detail (depending on what is necessary), of the entire course of their respective existences.

The starting point of this account – contained in Chapter 2 – is an examination of “fraud” in its jurisdictional sense, at least insofar as that term had such a meaning as a matter of 18th Century Equity. At that time, “fraud” was one of the three great heads of Equity’s jurisdiction. For its judges to intervene in any matter, a claimant would have to show that there was ‘[some] fraud,

²² See, for example, McGhee (n 20) 8-039.

²³ See, for example, W Hart, ‘The Development of the Rule in *Keech v Sandford*’ (1905) 21 LQR 258; J Getzler, ‘Rumford Market and the Genesis of Fiduciary Obligations’ in A Burrows and A Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks* (OUP 2006); W Winder, ‘Undue Influence and Coercion’ (1939) 3 MLR 97; R Honey, ‘Deconstructing the Equitable Doctrine of Undue Influence: Insights from a Genealogy’ (2020) 14 J Eq 58.

... a trust, or some accident'²⁴ involved in his case. Chapter 2 also establishes that, as a matter of 18th Century Equity, “fraud” in its jurisdictional sense was wide enough to cover more than one ground of intervention. As shall be explained in Chapters 4 and 5, the law of fiduciaries and the law of undue influence both developed out of the 18th (and early 19th) Century law of “constructive fraud”, and “constructive fraud” was one of the two legally operative occurrences which constituted “fraud” in its jurisdictional sense.

Chapter 3 is also about part of English law as it once was: the 18th Century law of “actual fraud” (or, at least, those aspects of it covered by Equity as opposed to Law). Although it is my thesis that both the law of fiduciaries and the law of undue influence grew out of the law of “constructive fraud”, what ground of intervention that label covered cannot be accurately determined until what was referred to, contemporaneously, as “actual fraud” is known. Ultimately, it shall be demonstrated that, throughout the 18th Century, “constructive fraud” was that legally operative occurrence which entitled a court of Equity to exercise jurisdiction over a dispute on the basis of “fraud”, even though no “actual fraud” had been committed (and no statute gave that court authority to intervene).²⁵

Chapter 4 looks at “constructive fraud” itself. It argues that, across the 18th Century, that term concerned just one definable ground of intervention. “Constructive fraud” was therefore both a limited and unitary phenomenon. Chapter 4 also shows that “constructive fraud” involved no more and no less than (what it shall call) the “abuse of interpersonal power”. Indeed, because of that, this thesis’ explanation of the scope and content of that label differs considerably from many which have previously been advanced.²⁶

Chapter 5 explains why the 18th (and early 19th) Century law of “constructive fraud” looked the way it did. It therefore examines the legal theory which underpinned it: the “good man”

²⁴ *Lord Bath v Sherwin* (1706) Prec. Ch. 261, 261. See, alternatively, *Earl of Bath v Sherwin* (1710) 10 Mod. 1; *Dominus Rex v Hare and Mann* (1718) 1 Str. 146, 151.

²⁵ Equity drew a sharp distinction between ‘acts [which were] fraudulent at Common Law [or] in Equity’, and ‘acts [which were] fraudulent by Statute’, see T Tomlins, *The Law-Dictionary* (A Strahan 1797) *Fraud*. Only actions in the first category were substantively fraudulent. The second covered certain conveyances of property which, were it not for the terms of a particular statute, would otherwise have been lawful. Their fraudulence came from the fact that they were legislatively proscribed: they were only formally frauds. Statutory frauds will not be considered in this thesis.

²⁶ See, for example, C Croft, ‘Lord Hardwicke’s Use of Precedent in Equity’, *Legal Record and Historical Reality: Proceedings of the Eighth British Legal History Conference* (Hambledon Continuum 1989) 129; *Hart v O’Connor* [1985] A.C. 1000, 1024.

theory of Equity. Significantly, the “good man” theory was one which, in this context at least, mandated the imposition of primary disabilities on those whose conduct it sought to regulate.

In my view, knowing about the “good man” theory is important because such knowledge helps one make sense of the past and because that theory still shapes parts of the law today. Although, in the first half of the 19th Century, the law of “constructive fraud” was replaced by several substantively distinct doctrines, those doctrines included the nascent laws of fiduciaries and undue influence, and both of them began by conforming to the same theoretical basis as their predecessor. Thus, although the law of “constructive fraud” itself ceased to be applied, the theory which animated it survived and shaped fundamentally the two areas of law under this thesis’ consideration.

Chapter 6 charts the development of the law of fiduciaries and the law of undue influence from the second half of the 19th Century to the first half of the 20th. It shows that, throughout that period, the judges deciding most cases of fiduciary misfeasance remained faithful to the disability-based view mandated by the “good man” theory of Equity. It also explains that, for identifiable reasons, there were at least three occasions on which the courts chose to engage with an alternative approach. Rather than thinking about fiduciaries as merely disabled, as against their principals, from asserting rights acquired as a result of acting in a certain proscribed manner, the judges in those cases conceived of them as subject to a duty, as against their principals, not to behave in that way. This brought with it the possibility that compensatory remedies might be awarded against fiduciaries acting in default. A new wrongs-based view of this part of Equity thereby emerged.

Chapter 6 also demonstrates that, for the law of undue influence, the turn of the 20th Century was a period of conspicuous theoretical continuity. There does not appear to be a single case which raised it in which the “good man” theory was not applied to the exclusion of all other approaches. This period therefore saw the start of a process of partial conceptual divergence between the two doctrines under this thesis’ consideration.

The story of both the law of fiduciaries and the law of undue influence is completed in Chapter 7, which considers their theoretical developments from the middle of the 20th Century up to the present day. It explains that, with respect to the former, the small-scale change noted in Chapter 6 has been consolidated, and that awards of equitable compensation for so-called breach of

fiduciary duty are now commonplace and relatively uncontroversial. It also demonstrates that the wrongs-based view which they reflect has started to have wider application within that jurisdiction. In recent years, for instance, a challenge to the availability of constructive trusts as a remedy for an acquisitive act of fiduciary misfeasance – something uncontroversial on a disability-based view – was made on the basis that, on its own, a breach of duty does not justify such a response.²⁷

Turning to the law of undue influence, Chapter 7 argues that, while for almost the entire period under its consideration that doctrine continued to rest solely on its original conceptual basis, in the last seven years that has begun to change. The settled position was that all those with influence (in the relevant sense) were merely disabled, as against those over whom they held their influence, from asserting rights acquired as a result of exercising it. However, a small number of recent authorities can only be accounted for on the basis that the judges deciding them viewed the parties with influence before them as subject to duties not to exercise their influence.²⁸ As shall be explained, in some cases at least, there may therefore be a sense in which, like fiduciary misfeasance, the exercise of undue influence is now regarded as an “equitable wrong”. Indeed, if that is correct, something of a partial conceptual re-convergence between those two parts of Equity may be occurring.

IV. Definitions

At this stage, something must be said about terminology, and specifically on what this thesis means by duties and disabilities. As has been said, each have certain peculiar characteristics. For example, duties are inherently breachable whereas disabilities are inherently non-breachable.

As Salmond identified in 1902, one particular long-term weakness in private law theory is that ‘there is no generic term which is the correlative of right in the wide sense, and includes all the burdens imposed by the law, as ... right [can include] all the benefits conferred by it’.²⁹

²⁷ See *Sinclair Investments (UK) Ltd. v Versailles Trade Finance Ltd.* (n 2), discussed below, and in Chapter 7, Section II.

²⁸ See *Hart v Burbidge* [2013] EWHC 1628 (Ch); *Bovingdon v Belcher* (n 14), discussed in Chapter 7, Section III.

²⁹ JW Salmond, *Jurisprudence or The Theory of Law* (Stevens & Haynes 1902) 236.

Nevertheless, it is possible to identify four particular kinds of limitation: duties, disabilities, liabilities, and (what Hohfeld would later describe as) ‘no-rights’.³⁰ Because of the lack of one standardised term for the correlative of right in the wide sense, this thesis shall use the word “encumbrance” to describe the general notion of a personal legal fetter *viz.* a certain burden ‘imposed [by law] on one person for the benefit of another’.³¹ The terms: duty, disability, liability, and no-right, shall be used to describe the four specific instances of them.

Staying with Salmond and Hohfeld, by duty, this thesis shall mean a legal requirement, owed to another, to do (or not do) a certain act. The term obligation is often used as a synonym for duty,³² but, for clarity’s sake, this thesis will avoid doing so. ‘A duty is the absence of [a] liberty’³³ and a liberty is an individual entitlement against another specific party to do (or not do) a particular act as one pleases. Consequently, there is an inverse correspondence between duties and wrongs. A failure by someone who is the subject of a duty to do (or not do) that which they are required to is a breach of duty *vis-à-vis* the party he owes it to; a civil wrong. In Salmond’s words:

‘The commission of a wrong is the breach of a duty, and the performance of a duty is the avoidance of a wrong’.³⁴

Building on this point, Chapter 7 contains a definition of an “equitable wrong”. As shall be explained, a necessary (but on its own insufficient) element of such an event is the breach of an equitable duty.

The correlative of a duty is a right (‘in the strict and proper sense’),³⁵ sometimes called a claim-right. As Hohfeld put it: ‘If X has a right against Y that he shall stay off the former’s land, the correlative (and equivalent) is that Y is under a duty toward X to stay off the place’.³⁶ Corresponding to the four types of encumbrance known to English law, there are four types of

³⁰ WN Hohfeld, ‘Some Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (1913) 23 Yale LJ 16, 32.

³¹ NJ McBride, *The Humanity of Private Law: Part I: Explanation* (Hart Publishing 2018) 40.

³² See, for example, Salmond (n 29) 218; *Agnew v Länsförsäkringsbolagens AB* (n 12) 265.

³³ Salmond (n 29) 236.

³⁴ *ibid.* 218.

³⁵ *ibid.* 231.

³⁶ Hohfeld (n 30) 32.

entitlement a person may enjoy as against another: rights (*stricto sensu*), liberties, immunities, and powers. Again, there is no distinct collective term for all of them. As has been averred to, the term right is sometimes employed in a broad way to describe every type of legal benefit together. However, to aid the reader's understanding, this thesis will avoid doing so.

By disability this thesis will mean a legal encumbrance constituted by 'the absence of [a] power [to do something]'³⁷ vis-à-vis another. If a power is a legal ability to effect 'a change in a given legal relationship',³⁸ then a disability is the lack of an ability to do so. Whatever alteration a party might intend to effect as between himself and another, if he is unable to bring that change about, *viz.* if, as against that other, he has no power to cause it, then, as a matter of law, that alteration will not occur as between himself and his counterparty, even if he purports to make it.

Disabilities correspond with immunities. Salmond said that 'an immunity is the benefit derived from the absence of power in other persons', and this definition is also adopted here. This fits with the definition of a liability, which is the correlative of a power, and which is a vulnerability to having a particular legal relation changed. As McBride has stated: 'liabilities allow something to be done to you ... which will alter the legal relations between [you] and another individual'.³⁹

Various parts of Chapters 5, 6, and 7 explain in detail why the violation of a duty and the presence of a disability have the particular remedial consequences that Section II, above, ascribed to them. Suffice it to say that the reason the remedies available when a duty is breached are, generally speaking, compensatory is because, consistently with what it means to be duty-bound at all, the party in default *did* have the power to act in the way he did.⁴⁰ The law, which – in this respect, at least – does not indulge in fictions,⁴¹ does not deny that such an event has occurred. Instead, it aims to remove the wrong's effect on its victim so far as reasonably possible.

³⁷ Salmond (n 29) 236.

³⁸ Hohfeld (n 30) 44.

³⁹ McBride (n 31) 54.

⁴⁰ That is not to say that all breaches of duty involve the *exercise* of a power. Depending on the content of the duty, a *failure to exercise* a power may constitute a breach of it.

⁴¹ See, also, the discussion of fictions in Chapter 8, Section V.

In contrast, when an individual is subject to a disability as against a particular person and acts inconsistently with it, he has *no* power as against that person to act in the way he does. *Vis-à-vis* that other person, he must therefore be placed as much as he can be into the position he would have been had he not acted in that way as a matter of fact. The law makes available remedies designed to reverse the relative practical impact of his conduct by stripping away any benefits it caused him to accrue in his counterparty's favour. When it comes to distinguishing between duties and disabilities, then, considering the form of relief available in any particular case is a good way to detect which type of encumbrance the defendant was subject to.

V. Two Forms of Hybridisation

A second issue on which to elaborate concerns the form of the theoretical hybridisation referred to above. All that has been said so far is that to varying degrees both the current law of fiduciaries and the current law of undue influence display some characteristics of being duty-based and some characteristics of being disability-based in their nature. Indeed, that is why taking a dualist approach to both subjects is essential.

Rationally, there are at least two ways in which this hybridisation could work. One is that one conception of the law applies to certain cases to the exclusion of the other. If that were the case, an individual whose conduct is regulated by either the law of fiduciaries or the law of undue influence would be subject to *either* a duty *or* a disability, depending on which theory the court was prepared to engage with in his particular case. This sort of hybridisation can be described as "exclusionary". A second type of hybridisation could be that all cases of fiduciary misfeasance and all cases of undue influence are covered by both ways of thinking. On this view, every fiduciary and every party with influence is subject to *both* a duty *and* a disability and, all other things being equal, it is open to claimants to rely on whichever encumbrance they choose when bringing an action. This type of hybridisation might be labelled: "overlapping".

As things stand, the actual status of each doctrine is not wholly clear. There are good reasons to think that both areas of law are in a state of overlapping hybridisation. Indeed, as both Chapter 7 and the next Subsection shall demonstrate, when it comes in particular to the law of fiduciaries there may be practical problems caused by overlooking the possibility of a disability-based analysis and conceiving of it as solely duty-based, not least when it comes to remedies. In other words, the best (but not entirely certain) view might be that in every case

both types of encumbrance subsist. However, there are also reasons – albeit perhaps less convincing ones – why the alternative may be true. As the remainder of this Section will demonstrate, the relevant points in this debate can be sorted under three headings. Each should be kept in mind as this thesis progresses. If the developmental trends identified in Chapters 6 and 7 continue, as both the law of fiduciaries and the law of undue influence continues to grow, matters might become more discernible.

i. The Authorities

There is no specific authoritative answer to the question of whether either the law of fiduciaries or the law of undue influence are in a state of exclusionary or overlapping hybridisation. Nevertheless, it is possible to find *dicta* which appear to support the exclusionary analysis, at least in respect of fiduciary doctrine. If they are correct, and if the developmental trends identified in Chapters 6 and 7 continue, the same may also be true – or at least become true – of the doctrine of undue influence. In *Halliburton Co v Chubb Bermuda Insurance Ltd*,⁴² for example, Lady Arden referred to:

‘The debate ... as to whether a fiduciary is subject to a duty not to have a conflict of interest *or [is] merely under a disability* so that the transaction into which he ... enters while he ... has a conflict of interest is liable to be set aside’.⁴³

Substantive support for the exclusionary view may be derived from *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd*.⁴⁴ In that case, the Court of Appeal was required to determine the circumstances in which a fiduciary would hold a bribe or secret commission obtained as a result of acting in conflict of interest on trust for his principal. As is well known, it gave a restricted reply.⁴⁵ In the course of his judgment, Lord Neuberger MR surveyed the relevant authorities and noted that, while some supported a more expansive conclusion, others supported a narrower one. He did not explicitly say why, but the answer is undoubtedly that

⁴² *Halliburton Company v Chubb Bermuda Insurance Ltd* [2020] UKSC 48.

⁴³ *ibid.* [161] (emphasis added).

⁴⁴ *Sinclair Investments (UK) Ltd. v Versailles Trade Finance Ltd.* (n 2), also discussed in Chapter 7, Section II.

⁴⁵ See *ibid.* [88].

they line up with the disability and duty-based conceptions of the law of fiduciaries.⁴⁶ In the end, the Master of the Rolls decided that, when it came to the specific issue of constructive trusts of bribes and secret commissions, he was bound by those cases supporting the application of the duty-based approach.

The implications of this holding were significant. In the first instance, it meant that, as indicated above, his Lordship set out a restrictive answer to the question before him. In addition, and as a result, the claimant in *Sinclair Investments* was not awarded proprietary relief.⁴⁷ More generally, though, Lord Neuberger MR's judgment might indicate that, once a court has decided which conceptual approach a certain part of the law of fiduciaries is governed by, that determination closes the door on the application of any other. If the theoretical hybridisation in existence was overlapping, it should have been open to the court to move beyond its conclusion that: 'the mere fact that [a] breach of duty enabled [a fiduciary] to make a profit should not, of itself, be enough to give [his principal] a proprietary interest in that profit',⁴⁸ and apply the (more pro-claimant) disability-based approach.⁴⁹ The fact that the Court of Appeal did not do so might thus suggest the existence of exclusionary theoretical hybridisation.

Of course, it is possible that the court in *Sinclair Investments* was simply wrong to not go on and consider the application of the disability-based analysis of fiduciary law to the same facts. What is more, this would be consistent with the fact that, as will be explained in Chapter 7, in *FHR European Ventures LLP v Cedar Capital Partners LLC*,⁵⁰ the Supreme Court overruled that decision.⁵¹

Chapter 7 will also examine *Gwembe Valley Development Company Ltd v Koshy*⁵² and *Murad v Al-Saraj*.⁵³ In my view, properly understood, both decisions provide support for the idea that the law of fiduciaries involves overlapping hybridisation. Indeed, in *Koshy*, Mummery LJ

⁴⁶ See, for example, D Hayton, 'Proprietary Liability for Secret Profits' (2011) 127 LQR 487; D Hayton, 'No Proprietary Liability for Bribes and Other Secret Profits?' (2011) 25 TLI 3; R Goode, 'Proprietary Liability for Secret Profits - a Reply' (2011) 127 LQR 493.

⁴⁷ See O Sherman, 'Fine-Tuning FHR' (2019) 33 TLI 3, 13-14, for doubts as to whether, even on a disability-based view, a constructive trust should have been available.

⁴⁸ *Sinclair Investments (UK) Ltd. v Versailles Trade Finance Ltd.* (n 2) [52].

⁴⁹ See, for example, *Attorney General of Hong Kong v Reid* (n 2).

⁵⁰ *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45.

⁵¹ See Chapter 7, Section II, Subsection *iv*.

⁵² *Gwembe Valley Development Co Ltd v Koshy* [2003] EWCA Civ 1048.

⁵³ *Murad v Al-Saraj* [2005] EWCA Civ 959. See Chapter 7, Section II, Subsection *ii*.

expressly countenanced that fact while considering the limitation rules relevant in that case. He said:

‘Whether viewed as duties or disabilities, [both the self-dealing rule and the fair-dealing rule] are aspects of [a] fiduciary’s primary obligation of loyalty [and] are all subject, directly or by analogy, to section 21 [of the Limitation Act 1980]’.⁵⁴

ii. *A Matter of Principle*

As a matter of legal principle, it is perfectly possible for an individual to be subject simultaneously to a duty and a disability in respect of the same activity. What is more, the same one factual event can give rise to both encumbrances. This means that, beyond any specific authorities, there is nothing to preclude the possibility of overlapping theoretical hybridisation in both the law of undue influence and the law of fiduciaries.

Consider, for example, a case of deceit. One person (D) makes a false representation to another (C), ‘(1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false’,⁵⁵ and with an intention that it should be acted upon. If, in reliance on that representation, C suffers loss by entering into a transaction with D, C can sue D for damages *and* rescind the transaction.⁵⁶

C’s right to damages arises in response to a breach of duty on D’s part. In *Derry v Peek*,⁵⁷ Lord Herschell stated that the victim of a misrepresentation actionable in deceit has a ‘legal right, the violation of which [gives] rise to an action for damages [in his favour]’.⁵⁸ With respect to its scope, he added that it must ‘correspond with that of the ... duty, [a] departure from which [involves] making an untrue statement without any reasonable ground for believing it to be

⁵⁴ *Gwembe Valley Development Co. Ltd. v Koshy* (n 52) [108].

⁵⁵ *Derry v Peek* (1889) 14 App. Cas. 337, 374.

⁵⁶ See, for example, *Newbigging v Adam* (1886) 34 Ch. D. 582, 592. The only limit is the rule against recovering twice for the same loss, see *Archer v Brown* [1985] Q.B. 401, 415.

⁵⁷ *Derry v Peek* (n 55).

⁵⁸ *ibid.* 362.

true'.⁵⁹ More recently, Stevens has described this right, in positive terms, as 'a right not to be lied to'.⁶⁰

Furthermore, it is beyond doubt that the origin of this duty is, as it always was, the Common Law.⁶¹ The cases cannot be clearer that deceit is a tort in the sense that it involves the breach of a Legal duty imposed generally, regardless of the wishes of its subjects.⁶² In *Derry* itself, both Lord Fitzgerald and Lord Herschell made this point. The former stated that a claim based on deceit was:

'A mere common law action [not] in the least altered in its characteristics by having been instituted in the Chancery Division'.⁶³

The latter added that the proposition that 'there [is] no such thing as an equitable action for deceit' was '[not] open to dispute'.⁶⁴

Turning to rescission, the first thing to say is that, as opposed to damages, this remedy is normally justified (in part) by thinking of an individual against whom it is granted as disabled, as against his counterparty, from enforcing rights acquired as a result of his impugned conduct. To invoke a contractual example, this is why:

'If one party to a bilateral contract is induced to make it by fraudulent representations by the other party, ... the promise of the defrauder is enforceable, while that of the injured party is not'.⁶⁵

⁵⁹ *ibid.*

⁶⁰ R Stevens, *Torts and Rights* (OUP 2009) 291. For alternative rights-based analyses of deceit, see JCP Goldberg, AJ Sebok and BC Zipursky, 'The Place of Reliance in Fraud' (2006) 48 *Arizona L Rev* 1001; J Neyers, 'Form and Substance in the Tort of Deceit' in A Robertson and J Goudkamp (eds), *Form and Substance in the Law of Obligations* (Hart Publishing 2019).

⁶¹ See, for example, *Arkwright v Newbold* (1881) 17 Ch. D. 301, 320; *Angus v Clifford* [1891] 2 Ch. 449, 470.

⁶² This is, of course, Winfield's definition of the same, see PH Winfield, *The Province of the Law of Tort* (Cambridge University Press 1931) 32, and 104.

⁶³ *Derry v Peek* (n 55) 356.

⁶⁴ *ibid.* 360.

⁶⁵ AL Corbin, *Corbin on Contracts* (One Volume Edition, West Publishing Co 1952) 214.

As Corbin explained, in such a case, the victim of the fraud has both ‘a power to avoid and a power to validate [the contract]’⁶⁶ and so either abrogate or render enforceable the duty of performance it would otherwise impose on him. Where the power to avoid is exercised, both parties’ duties retrospectively cease to exist. However, until that time, the victim has an immunity from any claim by the fraudster premised on the existence of the contract. ‘In an action by [a fraudster] on [his victim’s] promise’, Corbin said, ‘if [the fraudster’s] own complaint had shown the fraud and [the] absence of ratification, [the victim can] successfully [demur]’.⁶⁷

Naturally, the fraudster’s own position correlates with this. Before his victim has exercised either of his powers, he is under a liability to have his legal relations with his victim changed. Where the power to validate is exercised, the fraudster is no longer subject to a disability, and is free to enforce the contract as against his victim.⁶⁸

A victim of deceit actually has two different powers to set aside any transaction which it has caused him to enter: one Legal,⁶⁹ the other equitable.⁷⁰ Indeed, this means that, reciprocally, the defendant is subject to two different disabilities as against the claimant. This reflects the fact that, since at least the start of the 18th Century, Equity has had a concurrent jurisdiction over such conduct.⁷¹ The functional difference between these powers is not relevant to the present discussion, nor is the fact that the equitable power is in fact available in all cases of misrepresentation, fraudulent or otherwise.⁷² What matters is that, at Law at least, a victim of fraud’s option to rescind arises in response to the defendant’s commission of a wrong,⁷³ such that, overall, pursuant to the same one breach of duty, the Law imposes several different types of encumbrance on one individual.

⁶⁶ *ibid.* 10.

⁶⁷ *ibid.*

⁶⁸ Of course, it is true that ‘a suit to enforce the defrauder’s promise, brought with knowledge of the fraud, operates as a ratification’. Nonetheless, ‘prior to the suit, the defrauder [is] bound, while the defrauded party [is] not’. See *ibid.* 214.

⁶⁹ See, for example, *Load v Green* (1846) 15 M. & W. 216; *Car and Universal Finance Co Ltd v Caldwell* [1965] 1 Q.B. 525.

⁷⁰ See, for example, *Redgrave v Hurd* (1881) 20 Ch. D. 1.

⁷¹ See *Nocton v Lord Ashburton* [1914] A.C. 932, 951, and the discussion in Chapter 3, Section III.

⁷² See *Redgrave v Hurd* (n 70) 12-13.

⁷³ See *Car and Universal Finance Co. Ltd. v Caldwell* (n 69) 549, 555, and 557; *Redgrave v Hurd* (n 70) 12-13.

iii. *Lessons from the Law of Trusts*

Theoretical hybridisation is not restricted to the law of fiduciaries and the law of undue influence. It also occurs within the law of trusts. It could therefore be instructive to consider which form of hybridisation has manifested itself within that part of Equity. The settled operation of either model under discussion might support, by analogy, its functioning in relation to one or both of the doctrines examined in this thesis.

It is trite law that stewards of property – including express trustees – are proscribed from acting otherwise than in accordance with the terms of their custody, if any, and the general law. This is clear from both late-Victorian Equity textbooks⁷⁴ and modern-day appellate court decisions.⁷⁵ What is more, as Mitchell has explained, traditionally that rule ‘[was thought to disable them] from validly disposing of the property [in their charge] otherwise than in accordance with [their] instructions’.⁷⁶

However, in the last 25 years, that situation has begun to change. In certain cases, the courts have described a steward as subject to a duty, as against the person for whom he is acting, not to misapply the property in his control.⁷⁷ They have also characterised the remedy available when there is a misapplication as equitable compensation, a damages-like award.⁷⁸ This contrasts with the older way of understanding the relief given in such cases, which is as the payment of ‘an equitable debt, or [a] liability in the nature of [a] debt’,⁷⁹ corresponding in size to the value of the assets dissipated.

⁷⁴ See, for example, A Birrell, *The Duties and Liabilities of Trustees: Six Lectures* (MacMillan and Co Ltd 1897) 22.

⁷⁵ See, for example, *Target Holdings Ltd v Redfems (A Firm)* [1996] A.C. 421, 434; *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2015] A.C. 1503, [64].

⁷⁶ C Mitchell, ‘Stewardship of Property and Liability to Account’ (2014) 78 Conv 215, 216. See, for example, *Knott v Cottee* (1852) 16 Beav. 77, 79-80; *Magnus v Queensland National Bank* (1888) 37 Ch. D. 466, 471-472, 477, and 480; *Re Salmon* (1889) 42 Ch. D. 351, 357.

⁷⁷ See, for example, *Target Holdings Ltd. v Redfems (A Firm)* (n 75) 434; *AIB Group (UK) Plc v Mark Redler & Co Solicitors* (n 75) [51].

⁷⁸ See, for example, *Target Holdings Ltd. v Redfems (A Firm)* (n 75) 439; *AIB Group (UK) Plc v Mark Redler & Co Solicitors* (n 75) [93].

⁷⁹ *Re Collie* (1878) 8 Ch. D. 807, 819.

The question is whether the new duty just referred to exists to the exclusion of a disability or in addition to it. As with the fiduciary law cases considered in Subsection *i*, above, there are points in support of both possibilities.

Consistent with the view that this area of law is in a state of exclusive hybridisation is the idea that, in the relevant cases, the courts consciously chose to limit the application of the disability-based view of stewardship. This was in order to introduce a need for claimants to show a causal link between the misapplication of property they complained about, and the loss for which they were seeking satisfaction.⁸⁰ The aim was to reduce the size of the money awards made in certain cases. Consider, for example, the words of Lord Browne-Wilkinson in *Target Holdings Ltd v Redferns (A Firm)*:⁸¹

‘[Here the] trustees have been held liable to compensate [the beneficiaries] for a loss caused otherwise than by [a] breach of trust [on their part]. I approach the consideration of the relevant rules of equity with a strong predisposition against such a conclusion’.⁸²

One might argue that the obvious way such a policy could be given effect to would be by stipulating that, while in some cases stewards are subject to disabilities, in others they are *only* under duties.

A detailed set of rules governing the scope of the duty-based view’s application has been developed. As a matter of present authority, it is only relevant if 1) a claimant is or was the beneficiary of a bare trust in the commercial context,⁸³ 2) the underlying transaction which that trust was created to facilitate has been executed,⁸⁴ and 3) the steward has misapplied the property in breach of a duty to take certain active steps to secure its release.⁸⁵ Outside this

⁸⁰ It is possible, though ultimately incidental to the analysis in this Subsection, that the new law is in fact defendant-focused, offering the possibility of defeating a claim on the basis that there was no causal link between the misapplication of property complained of and the loss for which redress is sought, see PG Turner, ‘The New Fundamental Norm of Recovery for Losses to Express Trusts’ (2015) 74 CLJ 188.

⁸¹ *Target Holdings Ltd. v Redferns (A Firm)* (n 75).

⁸² *ibid* 432-433. See, alternatively, *AIB Group (UK) Plc v Mark Redler & Co Solicitors* (n 75) [64]-[66].

⁸³ See *Target Holdings Ltd. v Redferns (A Firm)* (n 75) 436; *AIB Group (UK) Plc v Mark Redler & Co Solicitors* (n 75) [70]-[71].

⁸⁴ See *Target Holdings Ltd. v Redferns (A Firm)* (n 75) 436; *AIB Group (UK) Plc v Mark Redler & Co Solicitors* (n 75) [72]-[74].

⁸⁵ See *Various Claimants v Giambone and Law (A Firm)* [2017] EWCA Civ 1193, [61]-[62].

sphere of application, the traditional disability-based approach can still be invoked.⁸⁶ On one view, the existence of these rules appears to be consistent with the idea that stewards are not subject to *both* duties *and* disabilities, but – at least in the cases which fall within them – are only encumbered by a duty.

The alternative view is that the judges in cases like *Target Holdings* were wrong to overlook the possibility of disability-based reasoning applying to provide each claimant with a larger financial remedy. In other words, there has been no conscious design to reduce the operative scope of a steward’s disability, but instead errors on the part of the courts. Indeed, as several commentators have pointed out, in substance, the duty-based analysis of a steward’s position can account for several of its most prominent characteristics, such that it would be easy to overlook the existence of a parallel disability.⁸⁷ If this is right, assuming that cases like *Target Holdings* really have introduced a duty-based analysis into the law of stewardship, the possibility that the doctrine is in a state of overlapping hybridisation remains open.

VI. Three Additional Contributions

Along with demystifying some of the confusion surrounding the nature and function of both the modern law of fiduciaries and the modern law of undue influence, this thesis will make three further contributions to the general understanding of Equity. However, in contrast to its central argument, these points will not underscore the totality of what is to come. Instead, each relates to different parts of it.

The first additional contribution shall be in positing a distinct definition of what the 18th Century courts of Equity meant by “constructive fraud”. It is possible to find other descriptions of this term,⁸⁸ but, for reasons to be given in Chapter 4, each is ultimately unsatisfactory. In my view, this thesis’ explanation of what constituted “constructive fraud” is valuable because, unlike almost every other account, it reflects what was actually said by the judges deciding the cases which raised the issue at the time. As shall be demonstrated, in contrast to the way in

⁸⁶ See, for example, *Brudenell -Bruce v Moore* [2014] EWHC 3679 (Ch), [242]-[251]; *Auden McKenzie (Pharma Division) Ltd v Patel* [2019] EWCA Civ 2291, [31]-[49].

⁸⁷ See, for example, P Millett, ‘Equity’s Place in the Law of Commerce’ (1998) 114 LQR 214; J Edelman and S Elliott, ‘Money Remedies Against Trustees’ (2004) 18 TLI 116; Mitchell (n 76).

⁸⁸ See, for example, Croft (n 26) 129-149; *Earl of Aylesford v Morris* (1872-73) L.R. 8 Ch. App. 484, 490-491.

which the label is used today, “constructive fraud” was not a catch-all covering a variety of different grounds of intervention.⁸⁹ Rather, it referred to a single legally operative event.

As part of the process of determining the meaning of “constructive fraud”, this thesis will engage in a detailed analysis of Lord Hardwicke LC’s judgment in *Earl of Chesterfield v Janssen*.⁹⁰ His Lordship’s decision is regularly ascribed with considerable legal effects.⁹¹ Yet, until now, it has largely evaded forensic doctrinal examination.⁹² For more than one reason, then, the contents of Chapter 4 should have novelty in their own right, as well as being an important part of this thesis’ more general analysis.

A second additional contribution will be to the collective understanding of an important, though generally under-analysed, part of private law theory: the “good man” theory of Equity. While explaining how lawyers originally thought about cases that would nowadays be said to involve either undue influence or fiduciary misfeasance, Chapter 5 will describe that theory’s nature and function in detail. As shall be explained, in the 18th Century, and at least insofar as it applied to the law of “constructive fraud”, the “good man” theory of Equity required the imposition of disabilities on those whose conduct it sought to regulate. Indeed, in doing so, the theory reflected – as it still reflects – a uniquely equitable way of conceiving of private law relationships. As Sheridan and Keeton observed:

‘The distinction between common law and equity is not only one of history, but ... one of attitude. The equitable conception of [how rules of law should be structured] was fundamentally different from that of the common law’.⁹³

⁸⁹ Modern lawyers generally use the term “constructive fraud” in the same way as Viscount Haldane LC in *Nocton v Lord Ashburton* (n 71) 953-954 viz. to refer to any action inconsistent with an encumbrance ‘enforced by a Court that [regards] itself as a Court of conscience’. See, for example, *Armitage v Nurse* [1998] Ch. 241, 250; *Pitt v Holt* [2012] Ch. 132, [165]. In *Armitage*, at 252, Millett LJ linked that definition to five more specific legal events: ‘breach of fiduciary duty, undue influence, abuse of confidence, unconscionable bargains and frauds on powers’. See, also, *Pitt*, at [165].

⁹⁰ *Earl of Chesterfield v Janssen* (1751) 2 Ves. Sen. 125.

⁹¹ See, for example, *Heathcote v Paignon* (1787) 2 Bro. C.C. 167, 173-174; F White and O Tudor, *A Selection of Leading Cases in Equity*, vol 1 (W Maxwell 1849) 410; *Nocton v Lord Ashburton* (n 71) 952; LA Sheridan, *Fraud in Equity: A Study in English and Irish Law* (Pitman Publishing 1957) 7.

⁹² See, for example, M Halliwell, *Equity and Good Conscience in a Contemporary Context* (Old Bailey Press 1997) 40-43; *Lancashire Loans Ltd v Black* [1934] 1 K.B. 380, 403-404.

⁹³ LA Sheridan and GW Keeton, *Equity in the Supreme Court* (Barry Rose 1985) 3.

Chapters 6 and 7 will show that the “good man” theory of Equity is still occasionally invoked by judges deciding cases involving both fiduciaries and the parties with influence respectively. However, overall, its operation is poorly understood. Moreover, several attacks on the theory’s continued application have been launched, founded on incorrect appreciations of its workings.⁹⁴ By setting out how the “good man” theory once operated, this thesis should dispel some of those misunderstandings, and thereby improve the general comprehension of its application to the law of fiduciaries and the law of undue influence today.

While detailing the historical nature and function of the “good man” theory, Chapter 5 will also make various points which could help those considering how it applies to the modern law of contract and the modern law of express trusts.⁹⁵ More widely still, as shall be touched on in this thesis’ Conclusion, what is disclosed in Chapter 5 may also assist in articulating what is distinctive about Equity in general.⁹⁶

The final additional contribution shall come in Chapter 7. As part of its efforts to improve the general understanding of the nature and function of the law of undue influence, this thesis will posit an up-to-date and therefore new account of its contents. Such a description is necessary because, since *Royal Bank of Scotland Plc v Etridge (No 2)*,⁹⁷ many leading statements of the law have ossified, not least with respect to remedies. Lord Nicholls’ speech, and the solely disability-based analysis it reflects, is taken to be the final word on how the doctrine is arranged.⁹⁸ The suggestion that any part of it, particularly that concerning relief, might have changed, is swiftly rejected.⁹⁹

The problem with these positions is that descriptions of undue influence only rooted on *Etridge* cannot accommodate several recent decisions which, properly understood, may have precipitated the start of a fundamental alteration in its operation. In the last seven years,

⁹⁴ See, for example, Swadling (n 1) 998-999; S Gardner, ‘Two Maxims of Equity’ (1995) 54 CLJ 60, 60-63.

⁹⁵ See, for example, D Hayton, ‘The Development of Equity and the “Good Person” Philosophy in Common Law Systems’ (2012) 76 Conv 263, 267-268, on specific performance; L Smith, ‘Equity Is Not a Single Thing’ in D Klimchuk, I Samet and HE Smith (eds), *Philosophical Foundations of the Law of Equity* (Oxford University Press 2020), on remedies for the misapplication of property held by a steward.

⁹⁶ See, for example, Smith, ‘Equity Is Not a Single Thing’ (n 95).

⁹⁷ *Royal Bank of Scotland Plc v Etridge (No 2)* [2002] 2 A.C. 773.

⁹⁸ See, for example, E Peel, *Treitel on The Law of Contract* (14th edn, Sweet & Maxwell 2015) 10-013-10-042; C Mitchell, P Mitchell and S Watterson, *Goff & Jones: The Law of Unjust Enrichment* (9th edn, Sweet & Maxwell 2016) 11-05-11-57; McGhee (n 20) 8-009-8-039.

⁹⁹ See, for example, Peel (n 98) 10-035; Mitchell, Mitchell and Watterson (n 98) 11-28; McGhee (n 20) 8-039.

judgments which can only be explained on the basis that the courts have adopted a duty-based view of a party with influence's encumbrance have been handed down.¹⁰⁰ For ascertainable reasons, some judges have started to think about the law of undue influence as wrongs-based. They have also started to award equitable compensation to make good losses suffered by the victims of that behaviour.

Given that these developments have occurred since *Etridge*, and given they may have to be taken into account if the true nature and function of the law is to be fully appreciated, having a genuinely up to date account of this jurisdiction's contents should be of value in and of itself, and may potentially be instrumentally significant. To the extent that a conceptual re-convergence between the law of fiduciaries and the law of undue influence is in fact underway, the relatively sophisticated nature of the duty-based analysis of a fiduciary's encumbrance may provide a range of useful analogies for undue influence's future development.

VII. Where to Begin

Disputes concerning conduct which would nowadays be described as either fiduciary misfeasance or the exercise of undue influence have been brought before the English courts for centuries. However, this thesis will begin in the 18th Century. There are two reasons for this.

Firstly, before the 18th Century, our knowledge of substantive Equity is blighted by the existence of a serious evidential deficit. As Macnair has explained, only a small proportion of the cases decided before then were reported in such a way that they can nowadays be used to sustain the sort of doctrinal and theoretical analyses this thesis will engage in.¹⁰¹ Most reports consisted merely of extracts from the record – a statement of the facts of a case and its outcome – and disclose no judicial reasoning. Of course, this does not preclude historians from identifying potentially informative patterns of litigation, but, for present purposes, before

¹⁰⁰ See *Hart v Burbidge* (n 28); *Bovingdon v Belcher* (n 14).

¹⁰¹ See M Macnair, 'The Nature and Function of the Early Chancery Reports' in C Stebbings (ed), *Law Reporting in Britain: Proceedings of the Eleventh British Legal History Conference* (Hambledon 1995).

around 1700, there is not enough to see. Even if, by then, there was some general concept of precedent in Equity,¹⁰² it simply does not make sense to start this thesis any earlier.¹⁰³

Indeed, there could be considerable danger in doing so. As Waddilove has demonstrated, trying to properly understand a decision by looking at only a single brief report of it can lead to substantial confusion.¹⁰⁴ This is because it is difficult to guarantee that such a report contains the real gist of the judge's reasoning. On some issues, the evidential deficit referred to above could therefore be insurmountable. As Waddilove explained, almost everything that has ever been made of Coventry LK's decree in *Emmanuel College v Evans*¹⁰⁵ has been based on an inaccuracy in the one report of it promulgated at the time.

A second reason for starting in the 18th Century is that secondary literature on the law in the 17th Century indicates that, at that time, there was no coherent or concerted legal approach to the issues under examination.¹⁰⁶ In his Introduction to the second volume of *Lord Nottingham's Chancery Cases*,¹⁰⁷ for example, Yale made clear that, while that Lord Chancellor's time on the woolsack was one in which great swathes of Equity were regularised for the first time, that process focused on the property side of his jurisdiction, not the encumbrances side. Indeed, it seems this was a deliberate choice on his Lordship's part. He recognised that, to maintain Equity's legitimacy as a part of the legal system, it had become important for the law relating to institutions like trusts and mortgages to become certain.¹⁰⁸ He was also of the view that:

‘The detailed enunciation of rules [in relation to fraud] would only in the course of time bind [his] own hands and not the hands of those whose frauds deserved ... frustration’.¹⁰⁹

¹⁰² See W Winder, ‘Precedent in Equity’ (1941) 57 LQR 245, 246-251.

¹⁰³ This may explain the proliferation of references to *Keech v Sandford* (1726) Sel. Cas. Ch. 61; and *Whitackre v Whitackre* (1725) Sel. Cas. Ch. 13 in judgments in similar cases decided since. Neither report is particularly detailed, but at least they exist.

¹⁰⁴ See D Waddilove, ‘*Emmanuel College v Evans* (1626) and the History of Mortgages’ (2014) 73 CLJ 142.

¹⁰⁵ *Emmanuel College v Evans* (1626) Rep. Ch. 18.

¹⁰⁶ See, for example, W Swain, ‘Reshaping Contractual Unfairness in England 1670-1900’ (2014) 35 JLH 120, 122-123.

¹⁰⁷ DEC Yale, *Lord Nottingham's Chancery Cases*, vol 2 (Selden Society 1961) *Introduction*.

¹⁰⁸ See, for example, his remarks in *Earl of Faverham v Watson* (1678), *ibid.* 639.

¹⁰⁹ *ibid.* 7.

As Croft has stated, no kind of fixed and determinable rules on that issue would start to be posited until the 18th Century.¹¹⁰ Thus, even if there were enough adequate reports, it is unlikely that there would be sufficient material to properly group together and analyse.

VIII. Four Final Points

To provide clarity for the reader, this thesis will distinguish that part of our judge-made law which is not Equity from all non-statutory legal rules (including Equity), by referring to the Law (or the Common Law) for the former and the law (or the common law) for the latter. To ensure consistency across its pages, it will use the word claimant throughout, in lieu of switching between claimant and – as would be appropriate for older decisions – plaintiff. For the same reason, and in aid of clarity, when this thesis uses generic pronouns, they will be male (he/him/his). This thesis was written on the basis of the law of England as it was on the 17th April 2021.

¹¹⁰ Croft (n 26).

1700-1800

“Fraud” in its Jurisdictional Sense

I. Introduction

This Chapter concerns “fraud” in its jurisdictional sense, at least insofar as that term had such a meaning as a matter of 18th Century Equity. Establishing what it entailed is of foundational importance. As Chapter 4 will explain, for the entirety of that period, one constituent part of “fraud” was “constructive fraud”. What is more, as Chapter 5 shall show, in the first half of the 19th Century, both the law of fiduciaries and the law of undue influence emerged to replace aspects of (what was until then) Equity’s settled jurisdiction over “constructive fraud”. Thus, the 18th Century law of “constructive fraud”, and, through it, the contemporary law of “fraud” more generally, constitutes both those doctrines’ prehistory.¹

Only two main points shall be made. The first is about what it meant to say that, as a matter of 18th Century Equity, “fraud” had any sort of jurisdictional sense. The second is as to what sort of conduct that term actually covered. Knowing the former is important because it makes clear that, whatever the term “fraud” (and, within it, “constructive fraud”) applied to, it was necessarily limited in its scope. Although the facts of different cases could vary considerably, the number of different legally operative occurrences “fraud” related to was finite and so the principle underlying the concept must be definable.

¹ I thereby disagree with those who think that the law of fiduciaries emerged from Equity’s original jurisdiction over trusts. See, for example, LS Sealy, ‘Fiduciary Relationships’ (1962) 20 CLJ 69, 69-71; P Birks, ‘The Content of Fiduciary Obligation’ (2000) 34 Israel L Rev 3, 8. The fact that the law of fiduciaries was recognised as capable of applying to trustees does not necessarily inform us about its origins, see C Mitchell, ‘Equitable Compensation for Breach of Fiduciary Duty’ (2013) 66 CLP 307, 312-313.

Understanding the latter point is also significant because it explains why each of the different grounds of intervention which constituted “fraud” in its jurisdictional sense were – as occasionally they still are² – referred to as fraudulent. This is despite the fact that, even in the 18th Century, some such events appeared to be materially dissimilar to what Chapter 3 will explain was the paradigm case of “fraud”: the knowing making of a misrepresentation. As this thesis will demonstrate, just as it is today,³ to describe an action, without more, as “fraud” in Equity, was not, at that time, to make any specific claim about either its form or its moral status. Instead, it was to express no more than a conclusion that, all other things being equal, a court of Equity could intervene in relation to it.

II. Bringing Proceedings in 18th Century Equity

Throughout the 18th Century, the word “fraud” in its jurisdictional sense related to the bringing of justiciable proceedings in Equity. A suit seeking relief from the Court of Chancery, for example, had to be commenced by preferring a bill to either the Lord Chancellor, the Lord Keeper, or the Lords Commissioners of the Great Seal, as appropriate.⁴ That bill would have to complain of some injury which the person exhibiting it had suffered at the hands of another, and it needed to show that it was ‘the peculiar office of a court of equity to relieve [him from it]’.⁵ Putting this last point another way, Story stated that, to succeed, bills would have to show ‘sufficient ground ... for the interference of a court of Equity’⁶ in relation to the harm they complained of. In modern terms, this meant jurisdiction.

Now, for many years prior to the 18th Century, lawyers understood that “fraud” – or, as it was sometimes referred to, ‘fraud and imposition’⁷ – was one of the three great heads of Equity’s jurisdiction. It was, by then, trite law that, for Equity to be able to intervene in any matter, a claimant would have to show that his case involved at least one of ‘fraud, ... a trust, or some

² See, for example, *Pallant v Morgan* [1953] Ch 43, 48.

³ See *Nocton v Lord Ashburton* [1914] A.C. 932, 954.

⁴ J Mitford, *A Treatise on the Pleadings in Suits in the Court of Chancery by English Bill*, vol 1 (1780) 1.

⁵ *ibid.* 2.

⁶ J Story, *Commentaries on Equity Pleadings and the Incidents Thereto* (A Maxwell 1838) 306.

⁷ See, for example, *Law v Law* (1735) Cas. t. Talb. 140; *Langley v Brown* (1741) 2 Atk. 195; *Baldwin and Alder v Rochford* (1748) 1 Wils. K.B. 229; *Brown v Pring* (1750) 1 Ves. Sen. 407; *Searle v Lord Carpenter* (1754) Amb. 242; *Williams v Duke of Bolton* (1768) Dick. 405; *Barrow v Barrow* (1774) Dick. 504. Nothing turned on the use of this term, rather than just “fraud”, in this context.

accident’.⁸ Establishing “fraud” in its jurisdictional sense was therefore a sufficient but not necessary precondition of obtaining Equity’s aid in relation to any injury suffered.

In the second half of the 17th Century, Lord Nottingham was confident enough to state that Coke’s attribution to More of the couplet:

‘Three things are helped in Conscience,
Fraud, Accident and things of Confidence’,⁹

was evidence of an ‘ancient rule’¹⁰ as to what justified Equity’s intercession in any case.¹¹ Macnair has expressed doubts as to whether that was really the position in the Elizabethan period.¹² However, even if it was not, it does seem to have been true by the mid-17th Century at the latest.¹³

A clear example of 18th Century Equity’s acute concern for jurisdiction comes from *Robertson v St. John*.¹⁴ In this case, the claimants’ assignor had spent money in the expectation that the defendant would confirm a lease previously created by his late father in the assignor’s favour. During his lifetime, the defendant’s father had promised the assignor that, when he came of age, his son would so act. Initially, the defendant seemed to acquiesce with this plan, and even made a promise to confirm the lease in consideration of the money which the assignor had laid out. Yet he later changed his mind and refused to do so. This was even though the assignor, and later the claimants, had spent further sums in reliance on his undertaking. The assignor went bankrupt and his assignees, the claimants, brought a bill, grounded on “fraud”, seeking specific performance of the promise to confirm the lease. Lord Thurlow LC refused to grant that relief.

⁸ *Lord Bath v Sherwin* (1706) Prec. Ch. 261, 261. See, alternatively, *Earl of Bath v Sherwin* (1710) 10 Mod. 1, 1; *Dominus Rex v Hare and Mann* (1718) 1 Str. 146, 151; A Gentleman of the Middle Temple, *A General Abridgment of Cases in Equity*, vol 2 (H Lintot 1756) 242.

⁹ See H Rolle, *Un Abridgement Des Plusieurs Cases et Resolutions Del Common Ley*, vol 1 (A Crooke and others 1669) 374.

¹⁰ DEC Yale, *Lord Nottingham’s ‘Manual of Chancery Practice’ and ‘Prolegomena of Chancery and Equity’* (Cambridge University Press 1965) 191.

¹¹ ‘Things of Confidence’ referred to trusts, see J Story, *Commentaries on Equity Jurisprudence: As Administered in England and America* (Hilliard, Gray & Co 1836) 67.

¹² See M Macnair, ‘Equity and Conscience’ (2007) 27 OJLS 659, 677 fn 72.

¹³ See, for example, Lord Nottingham’s own understanding of the law, and Rolle (n 9), themselves.

¹⁴ *Robertson v St John* (1786) 2 Bro. C.C. 140.

Turning back to procedure briefly, it should be noted that the act of preferring a bill in Chancery would require the person whose conduct was being impugned by it, either to make a defence, ‘or to disclaim all right to the matters in question’.¹⁵ One form of defence was by demurrer. A demurrer admitted the truth of the facts contained in a bill ‘but [insisted] that, [for] some matter of law, [the] person exhibiting [it was] not entitled to the relief [he sought]’.¹⁶ A common basis for demurrer was a ‘want of Equity in the [claimant’s] case’.¹⁷ This was, as Story tells us, a contention that the court had no jurisdiction in relation to the injury complained of.¹⁸

There were thus generally two types of “fraud” cases in which jurisdiction arose as an issue to prevent a claimant from obtaining relief. The first was those in which bills grounded solely on “fraud”, complaining about a wide variety of (sometimes admittedly) sharp practices, were rejected on the basis that the actions complained of did not amount to “fraud”.¹⁹ One of these: *Langley v Brown*,²⁰ will be considered in Section III, below. The second type of case in which jurisdiction was an issue was those in which the defendant successfully raised a defence by way of a demurrer grounded on a want of Equity *viz.* that, whatever had happened,²¹ the court had no jurisdiction over events. *Robertson* was just such a decision.

Problematically, much as it does today,²² the law at the time of the case provided that the defendant’s promise was unenforceable *per se*. As the Lord Chancellor observed, ‘[it] was *nudum pactum*’.²³ a bare one. In modern terms, the claimant’s consideration was past. To try to save themselves, the claimants alleged that, since the assignor (and later they themselves) had detrimentally relied on the defendant’s initial promise to confirm the lease, ‘it would be [an act of] fraud [for the defendant] not to carry it into execution’.²⁴ However, Lord Thurlow LC was unmoved. He allowed the defendant’s demurrer, raised on the basis ‘that there was not any thing in the [the claimants’] bill ... to entitle [them] in a court of equity to the relief prayed,

¹⁵ Mitford (n 4) 3.

¹⁶ *ibid.*

¹⁷ *ibid.* 50.

¹⁸ Story (n 6) 306.

¹⁹ See, for example, *Willis v Jernegan* (1741) 2 Atk. 251; *Cory v Cory* (1747) 1 Ves. Sen. 19; (1747) 1 Ves. Sen. 20; *Cray v Mansfield* (1750) 1 Ves. Sen. 379.

²⁰ *Langley v Brown* (n 7).

²¹ And assuming there was no other reason, such as an accident or the existence of a trust, for the court to intervene.

²² See, for example, *Pao On v Lau Yiu Long* [1980] A.C. 614.

²³ *Robertson v St. John* (n 14).

²⁴ *ibid.*

or to any other relief'.²⁵ He refused to equate what the defendant had allowed to happen: the suffering of detriment in reliance on his promise, with any particular sort of “fraud”, and therefore with “fraud” in its jurisdictional sense. ‘The circumstance of laying out money afterwards’, he said, ‘as it was voluntary, could not vary the nature of the case’.²⁶ If “fraud” was not a head of 18th Century Equity’s jurisdiction, this case would not have been pleaded nor decided in the way it was.

Two final points. The first is that the reason for Equity’s long-term focus on the issues of fraud, accidents, and trusts, appears to have been the deep-rooted procedural flexibility it enjoyed relative to the Common Law. As Lobban has explained, ‘[its courts’] inquisitorial procedure allowed [them] to consider questions often closed to [their] common law [counterparts]’, and thus ‘obtain evidence which [those courts could not]’.²⁷ It was from that special evidence that the fact that a fraud had been committed – or, in other cases, that an accident had occurred etc. – was discoverable. This is a view supported by other modern scholars,²⁸ and by contemporary secondary sources.²⁹ Equity thus became the natural home for those seeking relief from the effects of such occurrences.³⁰

The second point to make is that there are many cases in which more than one possible ground upon which the court could have intervened is identified.³¹ This indicates, perhaps unsurprisingly, that the three great heads of Equity’s jurisdiction were not mutually exclusive. They could both factually coincide and be pleaded together as concurrent reasons for jurisdiction.

III. The Scope of “Fraud”

Cases from across the 18th Century indicate that the concept of “fraud” in its jurisdictional sense was wide enough to cover more than one different ground of intervention. During his

²⁵ *ibid.*

²⁶ *ibid.*

²⁷ M Lobban, ‘Contractual Fraud in Law and Equity, C1750–C1850’ (1997) 17 OJLS 441, 444-445.

²⁸ See, for example, Macnair (n 12) 672-679.

²⁹ See, for example, C Barton, *An Historical Treatise of a Suit in Equity* (W Clarke and Son 1796) 20-21.

³⁰ See Lobban (n 27) generally.

³¹ See, for example, *Saunderson v Glass* (1742) 2 Atk. 296 (“fraud” and the administration of a trust); *Cocking v Pratt* (1750) 1 Ves. Sen. 400 (“fraud” and accident); *Killick v Flexney* (1792) 4 Bro. C.C. 161 (“fraud” and trust).

famous judgment in *Earl of Chesterfield v Janssen*,³² for example, Lord Hardwicke LC referred to (and indeed began to delineate) various ‘species’³³ of such behaviour. The word ‘species’ clearly implies that more than one different legally operative occurrence on the part of defendants would suffice to give a court the ability to intervene in proceedings in the name of “fraud”.

More detail comes from *Woodhouse v Shepley*.³⁴ There Lord Hardwicke LC began his judgment by announcing that he would find in favour of the claimant, whose bill was grounded solely on “fraud”, although there were no ‘circumstances of actual fraud appearing in [the case]’.³⁵ Instead, he said, he would ‘go upon the nature of [the] bonds [in issue]’.³⁶ Because ‘of the great power [their donee] had over [their donor]’,³⁷ they were also the product of “fraud” in its jurisdictional sense.³⁸ These words are significant because, along with indicating that the 18th Century courts of Equity recognised that there was more than one different kind of “fraud” in existence, they also hint at what specific grounds of intervention those categories covered: “actual fraud”, and something connected to the existence of an interpersonal power dynamic, at least.

As Chapters 3 and 4 will explain, this division – between “actual fraud” on the one hand and (what was sometimes described as) “constructive fraud” on the other – was in fact exhaustive of all 18th Century cases of “fraud” in its jurisdictional sense. There was therefore no room within this head of Equity’s jurisdiction unless one had been the victim of at least one of those two grounds of intervention.³⁹

Clear authority for all these points comes from *Langley v Brown*.⁴⁰ In her capacity as her brother’s heir, the claimant brought a bill seeking to be relieved against a number of deeds which he had executed soon before his death. The claimant alleged, amongst other things, that

³² *Earl of Chesterfield v Janssen* (1751) 2 Ves. Sen. 125.

³³ *ibid.* 155-157.

³⁴ *Woodhouse v Shepley* (1742) 2 Atk. 535.

³⁵ *ibid.*

³⁶ *ibid.*

³⁷ *ibid.*

³⁸ The same distinction between these two types of “fraud” was also recognised in *Bosanquett v Dashwood* (1734) Cas. t. Talb. 38; *Smith v Downing* (1737) West t. Hard. 90; and *Baldwin and Alder v Rochford* (n 7).

³⁹ For examples of cases in which both “actual” and “constructive fraud” was established, see *Brown v Pring* (n 7); *Griffin v De Veulle* 3 Wooddeston’s Lect. App. 334.

⁴⁰ *Langley v Brown* (n 7). See, alternatively, *Cray v Mansfield* (n 19).

the deeds had been procured by “fraud” on the part of a woman with whom her brother had been infatuated. It also appears that her brother had been indebted to that woman to the tune of £1,050.

In rejecting the claimant’s bill – and so in holding that, on the facts, there was no ground upon which a court of Equity could come to her aid – Lord Hardwicke LC noted, first, that, as has been said, ‘the claimant ... founded [her claim for] relief in Equity [on] fraud and imposition’.⁴¹ He thus began by identifying the alleged jurisdictional basis of the claim.

Secondly, and crucially, his Lordship then said that this was because there was neither ‘[any] proof of actual fraud’, nor the other type of “fraud”: that which was – in the case before him – capable of being inferred ‘from the internal evidence in the deeds themselves’.⁴² No further option was given, and, in the absence of either of those two grounds of intervention, the Lord Chancellor was forced to conclude that, all other things being equal, whatever happened between the claimant’s brother and the woman he loved ‘[was] not a foundation in a court of equity to set aside [any] deed’.⁴³

This last point is important. It is direct evidence both that the 18th Century courts of Equity’s jurisdiction over cases of “fraud” covered more than one ground of intervention, and that it was limited to covering just two of them. There was “actual fraud” and a second legally operative occurrence capable of being inferred from the terms of the transaction which the claimant in any particular case had entered as a result of the defendant’s conduct. As shall be explained in Chapter 4, this second ground of intervention – the conduct alluded to by Lord Hardwicke LC in *Woodhouse* when he noted the donee’s power over the donor – was “constructive fraud”: what this thesis shall call the abuse of interpersonal power.

Usefully, the judgment in *Langley* also contains more specific information as to the essence of each of the two types of “fraud” it described. It thereby also makes the point that they involved two materially different sorts of activity. ‘Actual fraud’, the Lord Chancellor stated, would only be found where there was ‘proof that [the defendant] used [some] art to ... draw [the

⁴¹ *Langley v Brown* (n 7) 201.

⁴² *ibid.* 202.

⁴³ *ibid.*

claimant's brother] in to [executing a] deed in her favour'.⁴⁴ This suggests that some positive act of deception on the part of defendants, such as the knowing making of a misrepresentation, was a necessary ingredient of such conduct.

In contrast, the second type of "fraud", which Lord Hardwicke LC did not specifically label, was constituted by a different event. In two party cases, the type of "fraud" indicated by the contents of 'the deeds themselves' only occurred in the context of a relationship of power/vulnerability between the parties, and, given that it could be found even when 'there [was] no proof of actual fraud',⁴⁵ it was not necessarily connected to any particular deceptive action on the part of either of them. Indeed, one aspect of this is why his Lordship held that there was no such "fraud" in the case before him. Vulnerability *did* underscore the relationship between the claimant's brother and the woman he had been in love with. However, it was mutual rather than unilateral in its nature. Neither of them had any power over the other. As the judge himself put it:

'That a person puts a groundless and unguarded confidence in another, is not a foundation in a court of equity to set aside a deed; [and] it is plain that [the woman in this case] had an equal confidence at least, for it appears ... that she trusted him for a long time with £1050 of her money, without taking ... any ... security whatever'.⁴⁶

Sewing the points made in this Section together, it becomes apparent that, as a matter of 18th Century Equity, it would have been perfectly sensible to describe an event as fraudulent even though it did not involve the making of a misrepresentation, let alone a knowingly made one. Constructively fraudulent actions were, in a jurisdictional sense, just as fraudulent as actually fraudulent ones. In the absence of a trust or an accident, both could, on their own, properly ground proceedings in Equity. Reciprocally, to describe a case as involving "fraud" was not *per se* to make any sort of specific claim about its fact pattern (or, by implication, the moral status of a defendant's conduct). More information would be needed before that would be the case.

⁴⁴ *ibid.* 201-202.

⁴⁵ *ibid.* 202.

⁴⁶ *ibid.*

IV. Conclusion

This Chapter had two purposes. The first was to establish what was meant by “fraud” in its jurisdictional sense as a matter of 18th Century Equity. The second was to make clear that that label covered more than one distinct ground of intervention. Both these points are important because of what is contained in the next two Chapters of this thesis.

Chapter 3 will explain what was understood, at the same time, by “actual fraud”, something which cannot easily be done without first appreciating what constituted “fraud” in its jurisdictional sense. The need to appreciate what constituted “actual fraud” stems from the need to understand what amounted, simultaneously, to “constructive fraud”. That is something explained in Chapter 4. Knowing what was meant in the 18th Century by “constructive fraud” is important to this thesis’ argument in general. As shall be explained in Chapters 5, 6, and 7, the modern law of undue influence and the modern law of fiduciaries are both materially shaped by the 18th and early 19th Century law of “constructive fraud”.

As regards what it meant to say that, throughout the 18th Century, “fraud” had a jurisdictional sense, this Chapter has demonstrated that it concerned whether, all other things being equal, a court of Equity could intervene in any particular case. In the absence of a trust or an accident, unless a defendant’s conduct amounted to some type of “fraud”, then, however badly a claimant had been treated, Equity would not be able to protect him. Bills brought seeking relief would be refused, or demurrers for want of Equity would be allowed, depending on when a lack of jurisdiction was raised as a point in any litigation. One major implication of this is that “fraud” – and, within it, “constructive fraud” – must have been limited in scope, and therefore a definable concept.

When it comes to the idea that “fraud” covered more than one different legally operative occurrence, this Chapter has shown that the cases readily support that contention. Regardless of what specific events each particular type of “fraud” involved, and regardless of their inherent moral statuses, the term fraudulent could be applied properly to all of them. Without more, all that label was doing in any case was making a jurisdictional claim.

1700-1800

“Actual Fraud”

I. Introduction

This Chapter will identify what the 18th Century Courts of Equity referred to as “actual fraud”, and what they did in response to it. Its main reason for doing so is to provide a context for the description and analysis of the same courts’ much more mysterious jurisdiction over “constructive fraud” contained in Chapter 4.

As Chapter 2 explained, throughout that time, “actual fraud” was one of the two grounds capable of giving Equity jurisdiction to intervene in any case, even in the absence of a trust or an accident. It was therefore one species of “fraud” in its jurisdictional sense. “Constructive fraud” was the other. As Chapter 5 will demonstrate, in the first half of the 19th Century, both the law of fiduciaries and the law of undue influence emerged to replace different aspects of Equity’s then-settled jurisdiction over “constructive fraud”. Given that those doctrines are this thesis’ two main subjects, knowing what constituted “constructive fraud” is of considerable importance.

Chapter 4 will contain a positive definition of what the 18th Century courts of Equity understood to constitute “constructive fraud”. However, as stated in this thesis’ Introduction, one negative definition of that term is as that legally operative occurrence which entitled an 18th Century Court of Equity to exercise jurisdiction over a dispute on the ground of “fraud”, even though no “actual fraud” had occurred (and no statute gave it authority to intervene). Consequently, by defining what amounted to “actual fraud” in the same period, this Chapter should contribute to the understanding of “constructive fraud” by articulating a fundamental part of its scope. On a more granular level, it should also prove useful to establish the consequences of “actual fraud” so that they can be referred to, by way of comparison, as this thesis advances.

II. The Meaning of “Actual Fraud”

In rejecting *in toto* bills grounded on alleged “fraud”, there are many 18th Century Equity decisions which demonstrate, by implication, that various forms of potentially objectionable conduct did not constitute “actual fraud” in any sense.¹ There are also several cases in which a positive definition of that term is advanced. Together these two sets of reports show that the label “actual fraud” referred only to all knowingly made and reckless misrepresentations, and all failures to disclose information made in breach of a duty to do so.

A memorable example of the second type of authority is *How v Weldon and Edwards*.² The case concerned a privateer’s sale of his share of certain prize money generated by the capture of two French treasure ships. Sometime afterwards, the man sought to have that transaction set aside on the basis that it had been procured by “fraud”. Clarke MR readily agreed to this.

The Master of the Rolls began his judgment by breaking down the court’s jurisdiction over ‘fraud and imposition’³ into two parts: ‘actual ... fraud’,⁴ and that ‘head of equity arising partly from the person with whom the transaction was, and [partly from] the value of the thing purchased’.⁵ He then stated that “actual fraud” was ‘[charged] in the bill [before him as both] *suggestio falsi* [and] *suppressio veri*’, and was ‘made out by evidence’.⁶ More detail as to what that involved was provided later when his Lordship observed that both ‘the circumstances and situation of the [claimant’s interest] and of the [claimant himself] when he made the [impugned] sale ... were greatly misrepresented [to him by the buyer]’.⁷

These remarks are instructive. At their narrowest, they demonstrate that there was a strong link between the act of misrepresentation and the commission of “actual fraud”. Indeed, this

¹ See, for example, *Whitton v Russell* (1739) 1 Atk. 448 (failure to perform promise to confer a benefit on a third party not “fraud” on the third party); *Robinson v Cox* (1741) 9 Mod. 263 (receiving gift not act of “actual fraud” by donee); *Willis v Jernegan* (1741) 2 Atk. 251 (contracting with someone of great financial imprudence not act of “fraud” by contractor); *Nichols v Gould* (1752) 2 Ves. Sen. 422 (entering into transaction at undervalue not act of “fraud”); *Lewis v Pead* (1789) 1 Ves. Jr. 19 (contracting with very old person not act of “fraud”).

² *How v Weldon and Edwards* (1754) 2 Ves. Sen. 516.

³ *ibid.* 517-518.

⁴ *ibid.* 518.

⁵ *ibid.*

⁶ *ibid.*

⁷ *ibid.*

position is specifically supported by many contemporaneous authorities, including the related case of *Baldwin and Alder v Rochford*,⁸ and Lord Thurlow LC's decisions in *Neville v Wilkinson*⁹ and *Lowndes v Lane*.¹⁰ However, more generally, in linking "actual fraud" to both *suggestio falsi* and *suppressio veri*, Clarke MR's words are useful in providing a more complete definition of that term.

Right at the start of the 18th Century, Lord Harcourt LC set out specific descriptions of both *suggestio falsi* and *suppressio veri*. In *Broderick v Broderick*,¹¹ he set aside the release in issue before him which had been signed by an heir in response to various acts of "actual fraud" on the part of a putative legatee. The legatee had informed the heir that the testator's will, under which the legatee had just taken property, had been duly executed. In fact, he knew it had not been. It was therefore the heir who was entitled to everything. 'Either *suppressio veri* or *suggestio falsi* is a good reason to set aside any release or conveyance', the Lord Chancellor noted, '[and] both circumstances concur [in this case]':¹²

'To recite ... that [a] will was duly executed, when it was not, is *suggestio falsi*, and to conceal from [an] heir ... that [a] will was not duly executed is *suppressio veri*.'¹³

These words underline two important points about "actual fraud". The first is that, if *suggestio falsi* related to positive misrepresentations and *suppressio veri* concerned suppressions of the truth, then both lies and concealments were potentially covered by that label. The second is that either was sufficient, and neither was necessary, to ground the court's intervention in any case. As many later decisions would emphasise, misrepresentation and concealment were two alternative and equally effective acts of "actual fraud".¹⁴

⁸ *Baldwin and Alder v Rochford* (1748) 1 Wils. K.B. 229, 231.

⁹ *Neville v Wilkinson* (1782) 1 Bro. C.C. 543, 546.

¹⁰ *Lowndes v Lane* (1789) 2 Cox Eq. Cas. 363. In this case, at 363-364, the Lord Chancellor equated misrepresentation and 'deceit'. However, as shall be explained below, as a matter of 18th Century Equity, 'deceit' and 'actual fraud' were synonyms.

¹¹ *Broderick v Broderick* (1713) 1 P. Wms. 239.

¹² *ibid.* 240.

¹³ *ibid.*

¹⁴ See, for example, *Baugh v Price* (1752) 1 Wils. K.B. 320; *Merry v Ryves* (1757) 1 Eden 1; *Salkeld v Vernon* (1758) 1 Eden 64.

In contrast to *Broderick*, the defendant in *Young v Peachy*¹⁵ seems only to have committed a misrepresentation. As its report's headnote states: 'A father obtained an absolute conveyance [of an interest in land] from [his] daughter, in order to answer one particular purpose, and afterwards [made] use of it for another'.¹⁶ Lord Hardwicke LC allowed a bill, grounded on "fraud", seeking to have that transaction set aside. 'Practice of this sort', he stated – referring to the misrepresentations used by the father to cheat his daughter out of her property – is 'deceit and fraud which this court ought to relieve against, ... it is *dolus malus*'.¹⁷

It is true that his Lordship did not specifically use the term "actual fraud" in his judgment. However, bearing in mind that in other cases he *did* directly equate that behaviour with '*dolus malus*',¹⁸ the Lord Chancellor cannot sensibly be understood as referring to anything else. It is also true that, less than a decade before, Lord Hardwicke LC's immediate predecessor used the term 'deceit'¹⁹ to distinguish "actual fraud" from its "constructive" variant. In *Young*, then, his Lordship was using the term '*dolus malus*' in a particular interpretive context.

*De Costa v Scandret*²⁰ only involved a concealment. A merchant had become concerned as to the safety of his ship. He therefore insured it. Yet he did so without disclosing the specific facts that had caused him alarm. After the insurers discovered that his vessel had been in peril when they agreed to cover it, they brought a bill in Equity seeking relief. Importantly, although there had been no positive misrepresentation on the merchant's part, Lord Macclesfield LC allowed this request. Everything the merchant had said to the insurers had been true, but he had omitted to say the whole truth, and this 'concealing of ... intelligence' was 'fraud'.²¹

Of course, it was not the case that, as a matter of 18th Century Equity, every lie and every concealment constituted "actual fraud". There were, in fact, clear boundaries to the law. With respect to misstatements, the line was drawn at innocent communications. Both wholly innocent and merely negligent misstatements were incapable of constituting deceit. Specific

¹⁵ *Young v Peachy* (1741) 2 Atk. 254.

¹⁶ *ibid.*

¹⁷ *ibid.* 257. Lord Hardwicke LC also equated misrepresentations and *dolus malus* in *Le Neve v Le Neve* (1747) Amb. 436, 446; (1747) 3 Atk. 646, 654-655.

¹⁸ See, for example, *Earl of Chesterfield v Janssen* (1751) 2 Ves. Sen. 125, 155.

¹⁹ *Bosanquett v Dashwood* (1734) Cas. t. Talb. 38, 40.

²⁰ *De Costa v Scandret* (1723) 2 P. Wms. 170.

²¹ *ibid.*

authority for this proposition, at least in relation to wholly innocent misrepresentations, comes from both *Whitton v Russell*,²² and *Merewether v Shaw*.²³ In *Merewether*, Lord Thurlow LC specifically contrasted innocent misrepresentations with fraudulent ones. He also made the following wider statement of principle:

‘I know of no case either in law or equity where a man making an honest representation, when called upon to give an account of the circumstances of another, has been made liable in ... respect [of] what he ... represented’.²⁴

If a man makes ‘a false representation’ with malicious intent, he added, ‘he should [be] charged for such fraud; but there is no such ground as that to go upon here’.²⁵

These words are doubly helpful. Along with being broad enough to cover wholly innocent misstatements, they are also capable of covering negligent ones. What distinguishes a speaker’s negligent behaviour from fraud or recklessness is a lack of dishonesty on his part. He might only be speaking innocently because of his carelessness, but he is speaking innocently nonetheless. Indeed, just as it still is,²⁶ this is why it was settled law that, although negligence on the part of a misrepresenter could be evidence of “actual fraud” on his part, it did not, in and of itself, constitute it. As Eyre CB said in *Plumb v Fluitt*:²⁷

‘[There is no case] that goes the length of saying that a failure of the utmost circumspection [on the part of a speaker] shall have the same effect ... as if [he] were guilty of fraud’.²⁸

Knowingly made misstatements, such as those in *Young and Broderick*, were certainly actually fraudulent, as indeed were reckless ones. In *Griffin v De Veulle*,²⁹ for example, Lord Thurlow LC rejected the defendant’s argument that ‘there was no ... *suggestio falsi*’³⁰ because, when he

²² *Whitton v Russell* (n 1).

²³ *Merewether v Shaw* (1789) 2 Cox Eq. Cas. 124.

²⁴ *ibid.* 134-135.

²⁵ *ibid.* 134.

²⁶ See, for example, *Derry v Peek* (1889) 14 App. Cas. 337.

²⁷ *Plumb v Fluitt* (1791) 2 Anst. 432.

²⁸ *ibid.* 440.

²⁹ *Griffin v De Veulle* 3 Wooddeston’s Lect. App. 334.

³⁰ *ibid.* 336.

spoke, ‘he did not know’³¹ the reality of the situation to which he was referring. The Lord Chancellor stated that, although the defendant was ignorant of the truth, he was aware that ‘he ... did not know [it], *and yet hazarded the representation [anyway]*’.³² It was as a consequence of this that his Lordship concluded that ‘the circumstances of the case [show] that the [claimant] was deceived’.³³ He therefore held that the deed in issue before him was ‘void’ – in the sense that it had henceforth been set aside – ‘as being obtained by fraud’.³⁴

When it comes to what concealments amounted to “actual fraud”, the law was, in some senses, more restrictive. Rather than the defendant’s state of mind, an external factor defined the scope of possible claims. As a result, on its own, a knowingly made concealment was not necessarily an act of “actual fraud”.³⁵ Reciprocally, in the right circumstances, a negligent concealment could be deceit.³⁶ The clearest explanation of the law comes from *Fox v Mackreth*.³⁷ There, Lord Thurlow LC refused to endorse the proposition that: ‘where an advantage has been taken in a contract, which a man of delicacy would not have taken, [that contract] must be set aside’.³⁸ Instead, he said, there was a more restrictive ‘definition of fraud’³⁹ in such cases:

‘Suppose ... that A, knowing there to be a mine in the estate of B [and] of which he knew B was ignorant, should enter into a contract to purchase the estate of B for the price of the estate, without considering the mine, could the court set it aside? Why not, since B was not apprised of the mine and A was? Because [A], as the buyer, was not obliged ... to make the discovery.

It is ... essentially necessary, in order to set aside [a] transaction, not only that a great advantage should be taken, but [that it arises] from some obligation ... to make the discovery’.⁴⁰

³¹ *ibid.*

³² *ibid.* (emphasis added).

³³ *ibid.*

³⁴ *ibid.*

³⁵ See, for example, *Ibbottson v Rhodes* (1706) 2 Vern. 554.

³⁶ See, for example, *Mocatta v Murgatroyd* (1717) 1 P. Wms. 393.

³⁷ *Fox v Mackreth* (1788) 2 Bro. C.C. 400.

³⁸ *ibid.* 420.

³⁹ *ibid.*

⁴⁰ *ibid.*

The proposition that what mattered was whether a concealment was made in breach of a duty of disclosure is supported by many other authorities, not least *De Costa*.⁴¹ It was central to Lord Macclesfield LC's reasoning in that case, for example, that:

‘The insured [had] not dealt fairly with the insurers [because] he *ought* to have disclosed to them what intelligence he had of the ship's being in danger’.⁴²

To summarise: as a matter of 18th Century Equity, the term “actual fraud” referred to all knowingly made and reckless misrepresentations, and all failures to disclose information made in breach of a duty to do so.

III. Equity's Concurrent Jurisdiction

Before turning to the issue of how the 18th Century courts of Equity responded to “actual fraud”, a word or two should be said about the general nature of their jurisdiction over that conduct. It is best described as ‘concurrent’.⁴³ Subject to the decision of the House of Lords in *Andrews v Powys*⁴⁴ – which held that they had no jurisdiction at all over disputes concerning the creation of wills – the 18th Century courts of Equity could intervene in any case, even though it may have been actionable at Law simultaneously.⁴⁵ Consequently, defendants in “actual fraud” cases could not raise demurrers on the basis that their victims had yet to exhaust all of their potential Legal remedies.⁴⁶

Furthermore, for most of the 18th Century, far from being conterminous, the scope of Equity's jurisdiction over actually fraudulent behaviour went beyond the Common Law's. Until the decision of the Court of the Kings Bench in *Pasley v Freeman*,⁴⁷ actions on the case for deceit could not be brought in three-party situations.⁴⁸ Damages could only be recovered where a

⁴¹ See, alternatively, *Meade v Webb* (1744) 1 Bro. P.C. 308; *Countess of Strathmore v Bowes* (1788) 2 Cox Eq. Cas. 28; also reported (1788) 2 Bro. C.C. 345; *Sowerby v Warder* (1791) 2 Cox Eq. Cas. 268.

⁴² *De Costa v Scandret* (n 20) 170 (emphasis added).

⁴³ *Colt v Woollaston* (1723) 2 P. Wms. 154, 156. See, alternatively, *Stent v Bailis* (1724) 2 P. Wms. 217, 220; J Fonblanque, *A Treatise of Equity* (1793) 61; H Maddock, *A Treatise on the Principles and Practice of the High Court of Chancery*, vol 1 (1815) 206.

⁴⁴ *Andrews v Powys* (1723) 2 Bro. P.C. 504.

⁴⁵ See C Barton, *An Historical Treatise of a Suit in Equity* (W Clarke and Son 1796) 21.

⁴⁶ See, for example, *Colt v Woollaston* (n 43) 156; *Sowerby v Warder* (n 41) 270.

⁴⁷ *Pasley v Freeman* (1789) 3 Term Rep. 51.

⁴⁸ See, for example, *Harvey v Young* (1601) Yel. 21.

claimant had suffered a loss by way of a transaction entered into with the defendant themselves. Where a claimant suffered damage by entering a transaction with an innocent bystander, there could be no relief. As the following Section shall demonstrate, contemporary Equity did not make such a distinction.

Indeed, for this reason, and because of the deep-rooted procedural flexibility which the courts of Equity enjoyed relative to the courts of Common Law,⁴⁹ and because the remedies it made available – discussed in Section IV below – were in many respects more flexible than an award of damages, Equity was the natural home for those seeking relief from the effects of “actual fraud”. As Lord Mansfield CJ noted in *Bright v Eynon*:⁵⁰

‘[Although] Courts of Equity and Courts of Law have a concurrent jurisdiction to suppress and relieve against fraud ... the interposition of the former is often necessary for the better investigating truth, and to give more compleat [*sic*] redress [to its victims]’.⁵¹

IV. How “Actual Fraud” was Remedied

i. Equity’s Primary Response

In the 1700s, it was not enough for a claimant to show that he had been the victim of either a knowingly made or reckless misrepresentation, or a failure to disclose information made in breach of a duty to do so. In order to obtain relief, he would also have to demonstrate that there was a causal link between that behaviour and his entry into the particular transaction from which he was seeking relief.⁵² However, if such a link existed, then, even before any litigation, 18th Century Equity’s immediate response to an act of “actual fraud” was to impose a liability (as against his victim) on the party who committed it and grant a power (as against the fraudster) in favour of his victim. Indeed, as powers and liabilities were – and are – correlatives, the same was true *vice versa*; the creation of a power in favour of a victim of “actual fraud” necessarily involved the generation of a liability on the perpetrator. All this is evident from the

⁴⁹ On which see Chapter 2, Section II.

⁵⁰ *Bright v Eynon* (1757) 1 Burr. 390.

⁵¹ *ibid.* 396.

⁵² See, for example, *Broderick v Broderick* (n 11); *De Costa v Scandret* (n 20); *Whitton v Russell* (n 1).

specific language of the cases, and from the wider remedial context described throughout this Section.

When it comes to the cases, consider, first, part of the judgment in *Garth v Cotton*.⁵³ One of the questions for Lord Hardwicke LC was whether a fraudster’s executor could be sued, in his official capacity, by a victim of the deceased’s “actual fraud”. His Lordship answered in the affirmative. In all cases of “fraud” in its jurisdictional sense, he stated:

‘The remedy doth not die with the person [who committed it.] The same relief shall be had against an executor out of the assets of his testator, as ought to have been given against the testator himself. ... Equity disclaims the maxim that a personal remedy dies with the person, wherever the demand is proper for that jurisdiction; this Court will follow the estate of the party liable to [a] demand, and out of that, decree satisfaction’.⁵⁴

Lots of terms are important here, not least ‘liable’ when referring to a defendant’s position, and both ‘remedy’ and ‘relief’ in referring to a claimant’s.

‘Liable’, a word which is repeated across a range of contemporary cases,⁵⁵ refers unmistakably to the existence of a liability in the sense of an encumbrance correlating to a power on the part of another. As Lord Hardwicke LC himself pointed out, in *Arnot v Biscoe*,⁵⁶ to say that a defendant was under a liability was to indicate that ‘a remedy [lay] against him in a court of equity’.⁵⁷ If a man is under a liability (as against another) he is vulnerable to having his legal relations (with that other) changed. What is more, as the next Subsection will explain, if a claimant succeeded in an 18th Century “actual fraud” case, what would be changed is that a defendant would come under a new court-ordered encumbrance to relieve his victim from the effects of his conduct.⁵⁸

⁵³ *Garth v Cotton* (1753) Dick. 183.

⁵⁴ *ibid.* 217-281.

⁵⁵ See, for example, *Lowther v Carleton* (1736) Cas. t. Talb. 187; *Arnot v Biscoe* (1743) 1 Ves. Sen. 95; *Taner v Ivie* (1752) 2 Ves. Sen. 466; *Meadbury v Eisdale* (1755) Amb. 812, 817; *Merewether v Shaw* (n 23).

⁵⁶ *Arnot v Biscoe* (n 55).

⁵⁷ *ibid.* 96. The liability under consideration must therefore be distinguished from the various liabilities to be sued (either rightly or wrongly), which all individuals might be under. On the latter, see, for example, JCP Goldberg and BC Zipursky, *Recognizing Wrongs* (Belknap Press 2020) 162-163.

⁵⁸ Although this thesis makes no wider claims about the nature of remedies for any other cause of action (either historically or as a matter of modern law), this understanding clearly mirrors that put forward in S Smith, ‘Duties, Liabilities, and Damages’ (2012) 125 Harv L Rev 1727.

‘Relief’ and ‘remedy’ are also instructive terms, not least because they are used instead of ‘right’. As a matter of 18th Century Equity, it was not the case that, *ab initio*, a victim of “actual fraud” had a right, as against the fraudster, that the fraudster engage in any specific action. Instead, he merely had an entitlement to some type of to-be-ordered response. In *Scott v Scott*,⁵⁹ Eyre CB described a victim of “actual fraud” as having ‘an interest ... as to entitle him to sue’.⁶⁰ Hotham B used essentially identical terms.⁶¹ The Chief Baron did also use the term ‘right’, but only when describing what he clearly understood to be an option to bring proceedings. ‘The right to support a suit’⁶² given to the victim of “fraud”, he stated, meant only that he ‘*might* bring suit’⁶³ to obtain some form of curial assistance.

Ultimately, if a person guilty of committing “actual fraud” was immediately placed under any sort of duty, as against his victim, it is likely that more potent language would have been used to describe that victim’s position. The modest words present are more consistent with the idea that, at the start, a fraudster was merely vulnerable to having his legal relations changed.

Another part of Lord Hardwicke LC’s judgment in *Garth* accounts for this situation in more detail. The fact is that, as a matter of 18th Century Equity, the courts had an active role in shaping the satisfaction a victim of “actual fraud” would receive, and this is why nothing in particular was available to him as of right, from the off. The occurrence of “actual fraud”, his Lordship stated:

‘Obliges [the] Court to pursue its known maxims in laying hold of it, either by restraining the act before it be completed, or decreeing satisfaction for it afterwards. ... In all cases where a legal right is acquired or exercised by fraud ... contrary to conscience, it is the office of this Court to enjoin it, or decree a compensation’.⁶⁴

Thus, while there was a sense in which, from the moment that it occurred, a victim of “actual fraud” had a real and important legal interest, as against the fraudster, that his position would

⁵⁹ *Scott v Scott* (1787) 1 Cox Eq. Cas. 366.

⁶⁰ *ibid.* 371.

⁶¹ *ibid.* 372.

⁶² *ibid.* 371.

⁶³ *ibid.* (emphasis added).

⁶⁴ *Garth v Cotton* (n 53) 204.

be remedied, that interest cannot be described more highly than as a power to obtain that relief by bringing legal proceedings. Furthermore, in both olden and modern terms, “actual fraud” can thus also be described as a cause of action. It was a factual situation ‘the existence of which [entitled] one person to obtain from the court a remedy against another’.⁶⁵ Accordingly, when appropriate, this thesis will do so.

ii. *Equity’s Secondary Response*

Notwithstanding the fact that, to fully remedy a claimant’s position, a defendant’s liability had to be realised by way of a court order into some more specific type of encumbrance, nothing in the previous Section should be taken to suggest that an 18th Century court of Equity could simply refuse to protect a proven victim of “actual fraud”. Although the process of making an order to give effect to a defendant’s liability was one which involved the exercise of judicial discretion, that discretion did not extend to whether the court could intervene at all. As the authorities make clear, the judges were obliged to do so.

In *Manaton v Molesworth*,⁶⁶ Henley LK said that where “actual fraud” was proven, ‘the court, *ex debito justitiae*, must give [a claimant] relief’.⁶⁷ *Ex debito justitiae* means out of an obligation of justice. In *Palmer v Mure*,⁶⁸ Sewell MR stated that ‘the bill [in this case] is ... to be relieved against fraud, to which a [claimant] is in all cases entitled, if he makes it out’.⁶⁹ These words show that, all other things being equal, a claimant who chose to exercise his power and bring (successful) legal proceedings against a fraudster was entitled to relief *as of right*.⁷⁰ The court’s role in aiding the victims of “actual fraud” was thus limited to deciding how best to rectify their situations.

Moreover, even with respect to those matters which *were* properly within the scope of the court’s discretion, the way in which that discretion could be exercised was not unlimited. It is an observable fact that, in crystallising a defendant’s liability into a more specific encumbrance

⁶⁵ *Letang v Cooper* [1965] 1 Q.B. 232, 243-244. For an 18th Century equitable example of the term being used in this way, see *Anon* (1743) 3 Atk. 70.

⁶⁶ *Manaton v Molesworth* (1757) 1 Eden 18.

⁶⁷ *ibid.* 26-27.

⁶⁸ *Palmer v Mure* (1773) Dick. 489.

⁶⁹ *ibid.* 489.

⁷⁰ See, also, *Scott v Scott* (n 59) 371.

(owed to the claimant) by way of court order, the judges in ‘actual fraud’ cases were limited to pursuing one of just two alternative remedial goals. The first was the wiping out (or rescission) of any transaction which the claimant had entered as a result of the defendant’s conduct. As Eyre CB put it in *Scott*: a victim ‘might bring [a] suit to get rid of [a] bond’.⁷¹ The second was the making good (or perfection) of the defendant’s representation. In Lord Thurlow LC’s words: ‘a man [guilty of] transacting [“fraudulently” can] be bound to make good what he ... represented’.⁷²

As in any other case, in the normal course of events, it was open to a claimant to request which remedial goal the court should aim for. Thus, as Mitford recorded, in addition to that which was compulsory, among the many things which a bill alleging “actual fraud” may have prayed for was ‘the relief or assistance ... which [his] case [entitled] him to’.⁷³ Having said that, the ultimate decision over what goal to pursue, and how to best pursue it, was the court’s. In Story’s words: it was a matter of fundamental principle that, in each case, ‘the Court [would] grant such relief only, as [it found] the case stated [would] justify’.⁷⁴ Indeed, this is why, after any ‘special prayer for the particular relief to which he [thought] himself entitled’, a claimant would normally ‘conclude [his bill] with a prayer of general relief at the discretion of the Court’.⁷⁵

a. Rescission

In the 18th Century, the principle underlying rescission – at least insofar as it was pursued in “actual fraud” cases – was that any and all transactions procured by such conduct had to be undone. In *Young v Peachy*, for example, Lord Hardwicke LC stated that “actual fraud” was not just so gross a form of conduct that the courts of Equity ‘ought to relieve against [it]’,⁷⁶ it was also such a transgression that they ‘[would] never suffer a deed [produced by it] to stand’.⁷⁷ These absolute terms echo those used by the same judge in *Garth*,⁷⁸ and underline the fact that rescission was essentially backwards-looking or retrospective. The claimant was to be put in

⁷¹ *ibid.*

⁷² *Merewether v Shaw* (n 23) 134.

⁷³ J Mitford, *A Treatise on the Pleadings in Suits in the Court of Chancery by English Bill*, vol 1 (1780) 15.

⁷⁴ J Story, *Commentaries on Equity Pleadings and the Incidents Thereto* (A Maxwell 1838) 35.

⁷⁵ *ibid.* 33.

⁷⁶ *Young v Peachy* (n 15) 257.

⁷⁷ *ibid.* 257.

⁷⁸ *Garth v Cotton* (n 53) 204.

the same position he would have been in had the defendant never spoken/concealed facts at all. Its aim was therefore analogous to that of compensatory damages in tort.⁷⁹

Rescission was affected by a variety of different means. What mattered in each case were the nature of the transaction which the “actual fraud” had procured, and the events which followed it. Everything had to be properly unwound.

Remedially, *Young* was a simple case. On false pretences, a father obtained an absolute conveyance of an interest in land from his daughter. The only thing required was therefore a direct reversal of that transaction. The court’s determination that the claimant ‘ought to be relieved against the [conveyance]’⁸⁰ she had entered into, was given effect to by an order ‘that the [defendant] do convey to the [claimant]’⁸¹ the same interest she had given him.

This order was manifestly duty-imposing. It not only told the defendant that he had to do something, but it itself was the source of that encumbrance. It was not affirming the existence of a duty which arose before the court came to its decision as to whether the impugned transaction was the product of “actual fraud”, or whether it had to be wiped out. Indeed, it could not sensibly have done so. The duty’s existence depended on both the ability of the claimant to actually prove that she had been the victim of “actual fraud”, and on the court acquiescing with her request that it pursue rescission. Its content depended on the court choosing to wipe away the transfer in issue in the precise way it did. As Stephen Smith has pointed out (albeit in a different context), these are all events which would have occurred towards the end of the legal process.⁸²

From the moment the court’s order was made – and not before – the defendant in *Young* was therefore duty-bound to act in a certain way. Equally, from that point onwards – but only from that point onwards – it would have made sense to say that the claimant had a right to the reconveyance. The court’s making of its order was therefore not just an event which crystallised the defendant’s liability into a more specific encumbrance (owed to the claimant), or an event

⁷⁹ See *Livingstone v Rawyards Coal Co* (1880) 5 App. Cas. 25, 39.

⁸⁰ *Young v Peachy* (n 15) 259.

⁸¹ *ibid.*

⁸² Smith (n 58) 1743-1744.

which created new rights and duties. It was both. A court's making of its order was itself Equity's second, and distinct, response to an act of "actual fraud".

De Costa provides a good example of a court making a more complex order. Recall that a merchant insured his ship without disclosing that it was in particular peril. This was in breach of a duty which applied to him as someone seeking to form an insurance contract,⁸³ and so constituted "actual fraud". When the insurers discovered the truth, they sought relief in Equity.

The judgment in *Young* was designed to wipe out a transaction under which a proprietary interest passed. In contrast, in *De Costa*, the judgment aimed to unpick an agreement under which the parties gave each other personal rights. It was also the case that the claimants had gained some distinct benefit from their dealings with the defendant. They had received the defendant's first premium. The Lord Chancellor ordered that 'the [defendant's] policy ... be delivered up [to the claimants], with costs'.⁸⁴ Thus, rather than having – in any sense – to retransfer any of the rights he gained under the contract, the defendant's liability was realised in such a way as to place him under a duty to actually hand back his policy so it could be destroyed. On top of this, Lord Macclesfield LC also directed that the defendant's 'premium ... be paid back'⁸⁵ to him. This was a recognition that, in the right case, in order for rescission to be achieved, counter-restitution may have been necessary. Where the facts required it, for a transaction to be fully unwound, a defendant would have to have his money back too.

Of course, one consequence of the law being structured in this way was that, subject to an immunity from suit enjoyed by the victim,⁸⁶ until a court made an order setting aside a transaction on the basis of deceit, that transaction subsisted. The victim merely had a power, and the fraudster was merely under a liability, and everything else was as it would have been had no "actual fraud" occurred. Indeed, it was open to the victim to affirm the contract and push ahead with their own performance.⁸⁷ In modern terms, then, the effect of "actual fraud" in 18th Century Equity was to render the transactions it procured voidable.

⁸³ The most famous contemporary authority for which was *Carter v Boehm* (1766) 3 Burr. 1905.

⁸⁴ *De Costa v Scandret* (n 20) 171.

⁸⁵ *ibid.*

⁸⁶ AL Corbin, *Corbin on Contracts* (One Volume Edition, West Publishing Co 1952) 10.

⁸⁷ *ibid.*

A case in which, when it came to wiping out the parties' transaction, voidability complicated matters, was *Meade v Webb*.⁸⁸ During the course of negotiations over the letting of his land, the appellant failed, in breach of duty, to disclose information which, had it been known, would have reduced the amount that the respondent would have been willing to pay in rent. The problem was that, in-between the time of the concealment and the decision of the House of Lords in the respondent's favour, the respondent had been working the appellant's land. The lease had subsisted and liabilities had accrued and been discharged under it.

Ultimately, while the respondent's request 'to be released from the [lease]'⁸⁹ as if he never entered into it, was accepted, the House of Lords had to order, not just that the lease itself was to be formally surrendered, but also that 'the respondent [must] surrender [his possession of the land] to the appellant'.⁹⁰ In addition, the appellant was ordered to 'account'⁹¹ to the respondent for any rent received during the period of the lease, subject to deductions for the rent that the respondent would have paid had he leased the land for the period he did, albeit at a fair rate. Thus, as part of the process of realising the nature and extent of his liability, the appellant was subject, by way of court order, to a duty to pay the respondent a certain sum. The respondent was thereby granted a right, as against the appellant, that he be paid that amount.

b. Perfection

In some cases, it might not have been desirable for a victim of "actual fraud" to ask a court to aim backwards when realising his entitlement to relief. In others, such as where the defendant's behaviour had caused the claimant to enter a transaction with a *bona fide* third-party purchaser, rescission was simply unavailable.⁹² In either event, it was open to a court to look forward, and to give effect to a fraudster's liability in such a way as to make good – or perfect – his conduct, instead. Perfection was thus a second and alternative remedial goal.

A perfectionary order was designed to put the claimant in the position he would have been in had either the content of the defendant's misrepresentation been true, or had the defendant

⁸⁸ *Meade v Webb* (n 41).

⁸⁹ *ibid.* 310.

⁹⁰ *ibid.* 313.

⁹¹ *ibid.*

⁹² See, for example, *How v Weldon and Edwards* (n 2).

spoken the truth rather than concealed it.⁹³ As Lord Eldon LC put it in relation to misrepresentations just after the period under this Chapter's consideration:

‘If a person was induced to advance his money by ... a misrepresentation, a Court of Equity ... held that the mouth of the person who made that misrepresentation was shut; that he should never utter a contradiction to what he had so asserted’.⁹⁴

A good example of a court making just this sort of order comes from *Colt v Woollaston*.⁹⁵ In that case the defendant claimed to have invented a method for extracting oil from radishes. He had even managed to obtain a patent in respect of it. After knowingly making false representations about the viability of the project, the defendant sold shares in his patent for £20 each. That was the market value he falsely claimed they had. In time, the project was revealed to be a scam. The defendant's claimed invention did not work; no radishes were ever even grown. The shares he had sold were worthless.

Rather than seeking rescission, the claimant – who had bought 12 shares in total – brought a bill in Equity, grounded on “fraud”, asking that the defendant be ordered to pay him £240. He was content enough for the contract he had entered in to subsist, such that he would retain his (worthless) shares. Instead, he wanted the defendant to be ordered to make good his representation that their value, when they were bought, was £20 pounds each.

Jekyll MR acquiesced with this request. He agreed that, in making the representations he did, the defendant was guilty of ‘fraud’.⁹⁶ The fact that the defendant had obtained a patent changed nothing. They too, he noted, ‘may be obtained by ... false suggestions’.⁹⁷ He therefore ordered that the defendant pay the claimant a sum equal to the amount of money he had invested.

Thus, rather than having their transaction wiped out, the parties were put in the position they would have been in had the content of the defendant's representations been accurate. The

⁹³ There is therefore a limited functional analogy with awards of damages for breach of contract. These are designed to put claimants into the position they would have been had the defendant performed their duties. See *Robinson v Harman* (1848) 1 Ex. 850, 855; *Morris-Garner v One Step (Support) Ltd* [2018] UKSC 20, [31]-[32].

⁹⁴ *Ex Parte Carr* (1814) 3 V. & B. 108, 111.

⁹⁵ *Colt v Woollaston* (n 43). See, alternatively, *Spackman v Woollaston* (1723) 2 P. Wms. 154, 157.

⁹⁶ *Colt v Woollaston* (n 43) 156.

⁹⁷ *ibid.*

claimant in *Colt* had 12 shares, and, at the end of the litigation, he also had a right to £240 (which is what those shares were said to have been worth). His position was the same as it would have been had there been, in a prospective sense, no fraud. Conversely, the defendant had the claimant's £240, something which would also have been the case had his comments been accurate. It is true that, in substance, this form of relief had the same effect as an order pursuing rescission would have, but for classificatory purposes that is incidental. What matters is what the claimant asked for, and what the court agreed to.

Perfection was also possible in three-party cases. The best example of this is provided by *Arnot v Biscoe*.⁹⁸ The claimant was interested in buying a plot of land and enquired of its owner, and of the defendant (the owner's associate), as to the quality of its title. However, according to the claimant, neither the would-be vendor, nor the defendant, disclosed the fact that the land was subject to a mortgage on which there had been a decree of foreclosure. Instead, both positively declared that the title was good. It was thus only after he had acquired the land that the claimant discovered he faced a substantial loss. The foreclosure had reduced its value to nil.

The claimant brought a bill, grounded on "fraud", seeking an order that the defendant make good his representation about his associates' land by paying him £500. £500 was the amount of money the claimant had paid for the land in the first place: its market value, had title to it been, as it was said to be, unencumbered. He therefore wanted to be put in the position he would have been in had the defendant's representation been true.

Lord Hardwicke LC was unequivocal that, in principle, he could award such a remedy. He stated that, although it '[was] not *in specie* a common Equity',⁹⁹ it was a 'general rule',¹⁰⁰ 'true with regard to all persons having [an] interest in the estate',¹⁰¹ that 'in transacting a purchase or bargain, wherever [a] buyer [was] drawn in by misrepresentation or concealment ... so as to be injured thereby, and that [conduct constituted] fraud, he [was] intitled to satisfaction'.¹⁰² The fraudster, reciprocally, as a 'participant in the transaction',¹⁰³ would be 'liable to make

⁹⁸ *Arnot v Biscoe* (n 55).

⁹⁹ *ibid.* 95.

¹⁰⁰ *ibid.* 96.

¹⁰¹ *ibid.*

¹⁰² *ibid.* 95.

¹⁰³ *ibid.* 96.

satisfaction'.¹⁰⁴ Later in his judgment the Lord Chancellor made the same point in more specific terms:

‘If [either a third party] or [the] vendor of an estate, knowing of incumbrances thereon, treats ... in the sale thereof without disclosing them to the purchaser, ... knowing him a stranger thereto, [and] represents it so as to induce the buyer to trust his money upon it, a remedy lies against him in a court of equity’.¹⁰⁵

It did not matter that the victim’s loss had not been sustained as the result of a transaction with the fraudster.

Incidentally, while the *quanta* of the awards in both *Colt* and *Arnot* were equal in size to the loss suffered by the claimants, this does not mean that, in either case, they were, in fact, damages for “actual fraud”. For reasons of principle the 18th Century courts of Equity routinely disclaimed any power to grant such a remedy.¹⁰⁶ In *Lord Hardwicke v Vernon*,¹⁰⁷ for example, Lord Loughborough LC agreed with counsel’s contention that it would be ‘a new equity to ask [for] damages against the [defendant] in respect of a loss arising from ... a fraud’.¹⁰⁸ He sharply distinguished ‘an action, sounding in damages’¹⁰⁹ and ‘the ground of jurisdiction in equity’¹¹⁰ arising on the same facts. In *Ex parte Carr*,¹¹¹ Lord Eldon LC did much the same, contrasting the ‘recovery of damages to compensate what they call a fraud ... at Law’,¹¹² and the ‘very delicate Equity’¹¹³ centred on making representations good.

With respect to how perfection was achieved in practice, the overriding point to note is that, as with rescission, the courts had considerable latitude in shaping their orders. In simple cases, like *Colt* and *Arnot*, they could merely impose a duty on the defendant to pay the claimant a sum of money. In *Colt*, because the defendant represented that the shares in his patent had a

¹⁰⁴ *ibid.*

¹⁰⁵ *ibid.*

¹⁰⁶ See J Gilbert, *The History and Practice of the High Court of Chancery* (H Lintot 1758) 218-219.

¹⁰⁷ *Lord Hardwicke v Vernon* (1799) 4 Ves. Jr. 411.

¹⁰⁸ *ibid.* 418.

¹⁰⁹ *ibid.*

¹¹⁰ *ibid.*

¹¹¹ *Ex Parte Carr* (n 94).

¹¹² *ibid.* 110.

¹¹³ *ibid.* 111.

market value of £20 each, he was directed to provide the claimant, who had bought 12 of them, with £240. In *Arnot*, the defendant was alleged to have represented that his associate's title to the land in issue was unencumbered, whereas, in fact, it was subject to a foreclosed mortgage and therefore worthless. Lord Hardwicke LC was clear that, if and when "actual fraud" was proven, he would order the defendant to pay the claimant the whole value which the land was represented to have (£500).

There were also cases in which perfection could not have been achieved by making an order imposing a duty on the defendant to pay money to the claimant. Consider, for example, *Neville v Wilkinson*,¹¹⁴ a three-party case. A young man, desirous of marrying the claimant's daughter, persuaded his lawyer to help conceal the fact that he owed the lawyer a large sum of money. The young man was concerned that his intended's father would not consent to their union – and, in doing so, undertake to pay off the young man's debts – if he knew how large those debts really were. In accordance with the young man's wishes, the lawyer prepared only a partial statement of his financial liabilities. On the faith of that document, the father consented to the marriage.

After the father made the expected undertaking, the young man's lawyer sought to claim the whole of the amount he was owed: more than the statement he had drafted suggested he was entitled to. The father brought a bill in Equity, grounded on "fraud", seeking to stop him. He sought an order that the lawyer make good his representation about the degree of the young man's indebtedness to him. Lord Thurlow LC allowed the claim.

At the start of his judgment, the Lord Chancellor confirmed that the case before him involved 'actual fraud'.¹¹⁵ 'Misrepresentation of circumstances is admitted', he stated, 'and there [was] positively a deception [by the lawyer]'.¹¹⁶ It followed from this that '[the father] himself was entitled to relief'.¹¹⁷ His Lordship then decided that the remedial goal of perfection should be the one he pursued in discharging his duty to relieve the father, saying:

¹¹⁴ *Neville v Wilkinson* (n 9). See, alternatively, *Huning v Ferrers* (1711) Gilb. Ch. 85; *Berrysford v Millward* (1740) Barn. Ch. 101.

¹¹⁵ *Neville v Wilkinson* (n 9) 546.

¹¹⁶ *ibid.*

¹¹⁷ *ibid.* 548.

‘The father of a child, in such a case [as this], [has] an interest to see that the property of the husband was such as it had been represented to be’.¹¹⁸

Moreover, it was because of this that Lord Thurlow LC was ‘of [the] opinion that an injunction should be awarded to restrain the defendant from proceeding to recover any [of the hidden] debt due before the marriage’.¹¹⁹ By issuing a court order effectively cancelling the excess (at least as against the father), the judge therefore made the defendant’s actually fraudulent misrepresentation true (at least insofar as the father was concerned). From that point onwards, ‘the defendant could not ever recover that debt against [him]’.¹²⁰

Ultimately, *Neville* was not a case in which granting the claimant any monetary relief would have helped pursue the remedial goal of perfection in a meaningful way. The father had not suffered a loss as a result of the lawyer’s misrepresentation. He might have, if his guarantee had been successfully enforced. However, that had not yet occurred. What was in dispute before the Lord Chancellor was the amount of the young man’s indebtedness, and the veracity of the defendant’s representation on that issue could not itself be ensured by ordering him to pay the claimant any money.

V. Conclusion

This Chapter was designed to identify what the 18th Century Courts of Equity referred to as “actual fraud”, and what they did in response to it. As has been identified, one way of defining “constructive fraud” is as that legally operative occurrence which entitled 18th Century Equity to exercise jurisdiction over a dispute on the ground of “fraud”, even though no “actual fraud” had been committed (and no statute gave it authority to intervene). As a result, whatever actually amounted to “constructive fraud”, it cannot have been either the utterance of a knowingly made or reckless misrepresentation, or the failure to disclose information in breach of a duty to do so, *per se*. As Chapter 4 shall demonstrate, it concerned a second and materially distinct ground of intervention.

¹¹⁸ *ibid.*

¹¹⁹ *ibid.* 548-549.

¹²⁰ *ibid.* 549.

When it comes to how “constructive fraud” was remedied, the contents of this Chapter should also be instructive. This is because, as Chapter 4 will explain, the courts of the time responded to “constructive fraud” in much the same way that they did to “actual fraud”. *Ab initio*, a liability was imposed upon a fraudster, and a power was generated in favour of his victim. Like “actual fraud”, then, “constructive fraud” was an 18th Century equitable cause of action. When it came to actually relieving a claimant, just as in a case of “actual fraud”, the courts were obliged to intervene. What is more, in the same way that they did when faced with an actionable misrepresentation or concealment, the judges in “constructive fraud” cases issued court orders aimed at pursuing one of two alternative remedial goals.

Nevertheless, the law in relation to these two heads of “fraud” was not wholly identical. As shall be explained, whereas the two remedial goals available in “actual fraud” cases were rescission and perfection, in “constructive fraud” cases, while the former was available, the latter was not. A different end: disgorgement, was instead an option. Indeed, appreciating this particular point of dissimilarity is of wider importance. As Chapter 4 shall demonstrate, the reason why “constructive fraud” was properly labelled “constructive” at all is because the ground of intervention that term related to was treated *as if it was “actual fraud”*, at least for the purpose of extending the availability of rescission from cases of the latter into cases only involving the former.

1700-1800

“Constructive Fraud”

I. Introduction

Now it has established what the 18th Century courts of Equity understood by the term “actual fraud”, and what they did in response to it, this thesis can turn to what was known contemporaneously as “constructive fraud”. It will therefore consider what constituted that head of “fraud” and how the courts remedied it. As was explained in Chapter 2, throughout the period under consideration, “actual fraud” and “constructive fraud” were the only two types of “fraud” in its jurisdictional sense.

Understanding the nature of “constructive fraud”, and how the law relieved the victims of it, is important to understanding this thesis’ arguments about the nature and function of each of the modern law of fiduciaries and the modern law of undue influence. As Chapter 5 will explain, in the middle of the 19th Century, those two doctrines emerged to replace parts of what was by then a long-settled jurisdiction over “constructive fraud”. What is more, as they did so, each appropriated the underlying theory which animated Equity’s intervention in such cases. The initial structures of both the law of fiduciaries and the law of undue influence were thus materially similar to that of the 18th and early 19th Century law of “constructive fraud”.

In Chapters 6 and 7, this thesis will argue that while, over time, parts of both the law of fiduciaries and the law of undue influence have engaged with alternative conceptual underpinnings, this has not been to the total exclusion of their original principles. Their current structures are still partially defined by their origins. To properly comprehend the nature of either of them, it is therefore necessary to have some appreciation of the ideas on which they were first grounded. Indeed, even if one were to take the view that either or both doctrines

should move away from their original bases entirely, those bases would still leave some trace in their attendant case law, such that it should still be useful to understand them.

This Chapter has six main Sections. Section II contains two more general observations about the nature of 18th Century Equity's jurisdiction over "constructive fraud". It should thereby form a bridge between the contents of Chapters 2 and 3 and what is to come in this Chapter.

Sections III and IV should be taken together. Both deal – in different ways – with the question of what the 18th Century courts of Equity understood by the term "constructive fraud". Between them they posit a precise and historically accurate definition of that phenomenon as it subsisted across the whole of that period. In other words, these two Sections will make a claim that the substance of the law on "constructive fraud" remained consistent throughout the relevant time. Section III contains an account of the legally operative occurrence which fell under that label. Contrary to several other views,¹ it argues that it related to just one identifiable ground of intervention: the abuse of interpersonal power. In my view, then, "constructive fraud" was both a limited and unitary cause of action. Unlike how it is used today,² the term was not a catch-all covering a variety of different grounds of intervention. Section IV shows how my analysis not only fits with, but is also actively supported by, the general mass of "constructive fraud" cases decided at the time.

Section V involves a short reflection on the rules of proof that applied to "constructive fraud", and specifically those which governed what evidence could show that it had in fact occurred. As shall be explained, one significant way in which the abuse of interpersonal power was distinguished from deceit was that the existence of one aspect of it could be established with purely circumstantial evidence (*viz.* 'evidence from which some other fact may be inferred').³

Section VI deals with how the 18th Century courts of Equity responded to "constructive fraud" once it had been established. Major points of similarity and difference between those rules and the contemporaneous rules on remedying "actual fraud" will be set out. Perhaps the most

¹ See, for example, C Croft, 'Lord Hardwicke's Use of Precedent in Equity', *Legal Record and Historical Reality: Proceedings of the Eighth British Legal History Conference* (Hambledon Continuum 1989) 129; *Hart v O'Connor* [1985] A.C. 1000, 1024, discussed in Section III, Subsection *iv*, below.

² See, for example, *Barnsley v Noble* [2016] EWCA Civ 799, [62].

³ *Myers v DPP* [1965] A.C. 1001, 1048.

important similarity was the availability of rescission. Indeed, considering this, Section VII argues that the abuse of interpersonal power *was* “constructive fraud” in the sense that, even in the absence of deceit, its presence provided a reason for a court to set aside a transaction as if “actual fraud” had occurred.

II. Two Preliminary Points

Before identifying what the 18th Century courts of Equity understood by the term “constructive fraud”, two more general points about this part of Equity’s wider jurisdiction over “fraud” should be made. Recall that “fraud” in its jurisdictional sense was broad enough to cover two grounds of intervention: “actual fraud” and “constructive fraud”. However, that does not mean that both legally operative occurrences were treated in the same way for all purposes, or that one might only be found to the exclusion of the other.

i. An Exclusive Jurisdiction

In Chapter 3, Section III, the 18th Century courts of Equity and of Common Law were described as having concurrent jurisdiction over “actual fraud”. It was open to the victims of deceit to choose which forum in which to initiate proceedings. It was widely acknowledged that there were various practical advantages to litigating in Equity. Nevertheless, as a matter of principle, defendants could not object to being sued at Law on the basis that they might have been pursued in Equity, and *vice versa*.⁴

One consequence of this position was that there was a high degree of substantive harmonisation between the Legal and equitable regulation of deceit. The definition of “actual fraud”, for example, was essentially the same as it was at Common Law.⁵ Likewise, many of the rules of proof were the same on either side of the jurisdictional divide. As Jekyll MR noted in *Trenchard and Ippsley v Wanley*:⁶

⁴ *Colt v Woollaston* (1723) 2 P. Wms. 154, 156; *Sowerby v Warder* (1791) 2 Cox Eq. Cas. 268, 270.

⁵ See, for example, *Scott v Lara* (1794) Peake 296 (on misrepresentations); *Carter v Boehm* (1766) 3 Burr. 1905 (on concealments). See, generally, CM Reed, ‘Derry v Peek and Negligence’ (1987) 8 JLH 64, 65-71.

⁶ *Trenchard and Ippsley v Wanley* (1723) 2 P. Wms. 166.

‘The rule of law as to fraud is also a good rule in equity, viz. that fraud is never to be presumed’.⁷

Yet when it came to “constructive fraud” things were different. That cause of action had no analogue at Common Law, such that, in a word, Equity’s jurisdiction over it was ‘exclusive’.⁸ As the judge in *Trenchard* put it: ‘but it is true, that [something] may be a fraud in equity, which is not so at law’.⁹

Indeed, it was for this reason that, in relation to this kind of “fraud”, the courts of Equity did not see themselves as wedded to the need to maintain any particular consistency between their practices and any other rules. In Lobban’s words:

‘Treating things as fraud which would not be regarded in that light at common law, ... Chancery lawyers were willing to look far to root it out’.¹⁰

A good example of this mindset in action comes from the relevant rules of proof. As Lord Hardwicke LC explained: Equity went ‘farther than the ... Law’ and provided that those acts of “fraud” over which it alone had jurisdiction ‘may be presumed from the circumstances and condition of the parties contracting [rather than specifically proved]’.¹¹ As Section V, below, shall demonstrate, this was a reference to the fact that, unlike with deceit, one element of “constructive fraud” could be established by circumstantial rather than direct evidence (*viz.* evidence which itself demonstrates the existence of a certain fact).

Thus, even though they were both parts of Equity’s general jurisdiction over “fraud”, as this Chapter lays out its definition of “constructive fraud”, it will not necessarily be looking for consistency between the rules which applied to that ground of intervention and those relating to “actual fraud”. The two areas of law were associated but fundamentally separate entities.

⁷ *ibid.* 167.

⁸ J Fonblanque, *A Treatise of Equity* (1793) 10.

⁹ *Trenchard and Ippsley v Wanley* (n 6) 167.

¹⁰ M Lobban, ‘Contractual Fraud in Law and Equity, C1750–C1850’ (1997) 17 OJLS 441, 448.

¹¹ *Earl of Chesterfield v Janssen* (1751) 2 Ves. Sen. 125, 155.

ii. *Concurrent Causes of Action*

The fundamental distinctiveness of both “constructive fraud” and its “actual” counterpart is also evident from the fact that it was possible for a claimant to plead both in relation to the same set of facts.¹² They were not alternative causes of action. Indeed, judges throughout the period under consideration were also content, on the right facts, to find that both types of “fraud” has been committed. A claimant could therefore have two separate grounds for relief.¹³

Consider *Griffin v De Veulle*,¹⁴ a case involving a reckless misrepresentation referred to in Chapter 3.¹⁵ The claimant was a young man entitled to property in Jamaica. He was also living in the care of the defendant’s family. The defendant asked the claimant to create an annuity in his favour. He stated that the claimant’s land was worth between £3,000 and £3,500 a year – an overestimate – and, on this basis, the claimant gave him a right to – an unduly large – £300 *per annum*. When the claimant fell behind on paying the defendant, the defendant brought an action at Law for the arrears. The claimant filed a bill in Equity, grounded on ‘fraud’, praying an injunction, and that the annuity in issue should be delivered up to be cancelled.

Lord Thurlow LC allowed the claimant’s bill. As was said in Chapter 3, one reason for this was that the defendant was guilty of deceit. However, a separate reason was that he had also committed “constructive fraud”. As the Lord Chancellor put it:

‘This court [will] not set aside the voluntary deed of a weak man, who is not absolutely *non compos*, nor any deed of improvidence or profuseness, for these reasons merely, where no fraud appears; ... but ... from these ingredients there might be made out and evidenced an inference of fact that there was fraud ... used’.¹⁶

¹² See, for example, *Baldwin and Alder v Rochford* (1748) 1 Wils. K.B. 229; *Taylor v Rochford* (1751) 2 Ves. Sen. 281; *How v Weldon and Edwards* (1754) 2 Ves. Sen. 516.

¹³ In addition to the cases mentioned in fn. 12, see, for example, *Brown v Pring* (1750) 1 Ves. Sen. 407; *Alden v Gregory* (1764) 2 Eden 280; *Fox v Mackreth* (1788) 2 Bro. C.C. 400.

¹⁴ *Griffin v De Veulle* 3 Wooddeston’s Lect. App. 334.

¹⁵ See Chapter 3, Section II.

¹⁶ *Griffin v De Veulle* (n 14) 335.

Given that “constructive fraud” was the only type of “fraud” any part of which could be inferred from other facts, that must have been the “fraud” his Lordship was referring to. It was his final conclusion that:

‘[Both] the circumstances of this case, and the situation of the parties, collectively, [show] that the [claimant] was deceived, [and] abused, [such that] the deed [he executed] would be set aside and was henceforth] void as being obtained by fraud’.¹⁷

Chapter 3 established that deceit was a synonym for “actual fraud”, and that is what Lord Thurlow LC thought was evident from the circumstances of the case in general. Furthermore, his Lordship’s reference to abuse fits well with the notion of the abuse of interpersonal power developed in Sections III and IV, below.

The fact that “actual fraud” and “constructive fraud” could be concurrent causes of action indicates something else important about the nature of the court’s jurisdiction over the latter. It is that a claimant alleging that he had been the victim of “constructive fraud” was not pretending that the defendant was guilty of an actionable lie or concealment whereas in fact he was not. If that were the case, such claims would only have been available when “actual fraud” claims could not have been made out. Building on this point, in Section VII, this Chapter will identify what was really “constructive” about “constructive fraud”.

III. The Meaning of “Constructive Fraud”

It is my argument that, when the 18th Century courts of Equity thought of “constructive fraud”, they were conceiving of only one thing: what this thesis calls the “abuse of interpersonal power”. The abuse of interpersonal power is my phrase. It is not my contention that those words themselves appear in any of the 18th Century cases which are properly understood to involve “constructive fraud”. Rather, it is my view that, whatever the specific language used, phrases consistent with that concept persistently appear within the authorities.

It is also my thesis that the abuse of interpersonal power was a limited concept with a definable scope. Thus, 18th Century Equity’s jurisdiction over “fraud” had just two distinct parts. The

¹⁷ *ibid.* 336.

first covered acts of deceit: all knowingly made and reckless misrepresentations, and all failures to disclose information made in breach of a duty to do so. The second covered abuses of interpersonal power. Indeed, more specifically, this is why “actual fraud” and “constructive fraud” were two fundamentally different grounds of intervention.

Note that, in saying this, I am consciously making two different but connected claims. The first – a historical claim – is as to how 18th Century Equity judges were actually thinking about the cases before them. The second – an interpretive claim – is as to what is now the best way of understanding the general body of decisions they handed down. In my view, the strength of my interpretive claim follows from the strength of my historical claim. Unless one bases one’s explanation of the best way to understand the cases on what was actually said by the judges deciding them, one cannot ensure an accurate understanding of what was really going on. Instead, one will produce what Butterfield described as ‘a gigantic optical illusion’:¹⁸ an account which, though it may be able to predict the results of any number of cases, bears no relevance to the decision-making processes behind their disposal. Such an unhistorical understanding of the law would be of no use to the project this thesis is undertaking.

i. A Tripartite Phenomenon

Beginning with my historical claim, it is my view that the judges deciding 18th Century “constructive fraud” cases thought that cause of action involved no more and no less than the abuse of interpersonal power. In addition, it is my argument that an abuse of interpersonal power occurred when:

- 1) One party (D) had a power – either legal or factual – over another (C),
- 2) C entered a “one-sided transaction” with either D or a third party (TP),
and
- 3) There was a causal link between an exercise of D’s power and C’s entry into that transaction.

All other things being equal, then, if C entered a “one-sided transaction” because of D’s exercise of his power, an 18th Century court of Equity would have jurisdiction to intervene on

¹⁸ H Butterfield, *The Whig Interpretation of History* (W W Norton & Company 1965) 29.

the basis of “fraud”. The remainder of this Section will be focused on substantiating these propositions. Section IV, below, will deal with my interpretive claim: that this analysis is the best way of appreciating the law in this area.

The strongest evidence in support of my historical claim is provided by three leading cases from the second half of the 18th Century: *Ward v Hartpole*,¹⁹ *Heathcote v Paignon*,²⁰ and *Griffith v Spratley*.²¹ In each one, each of the three elements just identified is more or less specifically set out. As a whole, the tripartite analysis therefore shares a high degree of consistency with not just the outcomes of, but also the reasoning in, various leading authorities.

Perhaps the clearest evidence of all comes from *Ward v Hartpole*. There Lord Mansfield, sitting in the House of Lords, identified three requirements for relief in a case of ‘fraud’,²² absent any ‘evidence of [a] misrepresentation’.²³ On the facts of the case itself, he noted, the first was satisfied by the fact the alleged victim’s ‘[legal] affairs were exceedingly embarrassed’.²⁴ Because of this he was under his then-attorney’s power. ‘In this situation’, his Lordship said, ‘one [is] very apt to give, and the other [is] too ready to take, a good bargain’.²⁵

Lord Mansfield then linked the existence of that power with the transaction in issue before him by focusing on whether that transaction had been procured by an exercise of it. The existence of such a transaction, and the existence of a causal link, were the second and third requirements he stated. The operative part of his speech is as follows:

‘The [transaction] in question was [entered into] for a consideration grossly inadequate; [the victim] knew it, but his distress compelled him to give way. [The defendant] availed himself of the advantage of his situation, and thus obtained it at an undervalue. [It is] upon the ground of undervalue, coupled with the other circumstances which I

¹⁹ *Ward v Hartpole* (1776) 3 Bli. 470.

²⁰ *Heathcote v Paignon* (1787) 2 Bro. C.C. 167.

²¹ *Griffith v Spratley* (1787) 1 Cox Eq. Cas. 383.

²² *Ward v Hartpole* (n 19) 464.

²³ *ibid.* 487.

²⁴ *ibid.* 488.

²⁵ *ibid.* 488.

have stated, [that] the [transaction] is void as to the [defendant], and ... should be set aside'.²⁶

Heathcote v Paignon is also informative. In answer to the question of whether (what he described as) inadequate bargains could be set aside for “fraud”, Lord Thurlow LC said:

‘If [such a] transaction [involves] over-reaching on one side and imbecility on the other it puts [a burden on the defendant] to shew that it could not have taken place without [his use of] superior powers ... over the other’.²⁷

These words touch upon all three elements of the abuse of interpersonal power listed above. To start with, the inadequate bargain obliquely referred to is what has been described as a “one-sided transaction”. Secondly, the ‘over-reaching on one side, and imbecility on the other’ points to the existence of a power on the part of the transferee and a correlative vulnerability on the part of the transferor. As the Lord Chancellor noted: what was required was that ‘[a] person did not understand the bargain he made, or was so oppressed that he was glad to make it, knowing its inadequacy’.²⁸ Lastly, putting aside any questions about the burden of proof, the idea that the defendant would have to disprove the fact that the bargain in issue ‘could not have taken place without’ his use of power is manifestly a causal one.

In the 18th Century, the court of Chancery was not the only court with an original Equity jurisdiction. So too had the Court of Exchequer.²⁹ One decision from what was called the ‘English side’ of the Exchequer is *Griffith v Spratley*. The claimant brought a bill seeking the rescission of a deed. While short of money, he had conveyed his interests in several properties to the defendant. The transfer had been made at something of an undervalue and so constituted a bad bargain from his perspective. The claimant alleged that he had been the victim of “fraud”. However, by the time of trial, the parties were agreed that there was no “actual fraud” in issue. As Cox’s report notes, this meant that, to win, the claimant would have to ‘rest his case on

²⁶ *ibid.* 489.

²⁷ *Heathcote v Paignon* (n 20) 175.

²⁸ *ibid.*

²⁹ See, generally, W Bryson, *The Equity Side of the Exchequer* (Cambridge University Press 1975).

[either] the ... ground of inadequacy of consideration, or the fraud [that was] to be presumed from [it]':³⁰ viz. "constructive fraud".

The court unanimously dismissed the action. It rejected out of hand the idea that the mere 'inadequacy of consideration [was] of itself a distinct principle of relief in equity'.³¹ As Eyre CB put it: 'I know of no such principle: the common law knows no such [either]'.³² On the issue of "constructive fraud", the court made clear that, although the claimant *had* been somewhat necessitous at the time he entered the transaction, 'the consideration [he received] more or less [supported] the contract'.³³ Consequently, he could not be said to have been a victim of that behaviour. The Chief Baron stated:

'When you see distress on ... one side and money on the other and a wish on ... one side to press that distress into a submission [on certain] terms, inadequacy of price goes a great way in warranting the court to infer ... that some sort of fraud was used to draw the other party into the bargain; [but it is only in such cases that] the Court [can] presume more than is in actual proof'.³⁴

These comments encapsulate the tripartite nature of "constructive fraud" and the fact that, at heart, it involved the abuse of interpersonal power. They also explain why, as a matter of principle, the claim in *Griffith* failed. As Hotham B stated:

'Inadequacy of value can never be sufficient, when naked and unattended with other circumstances, to set aside a contract'.³⁵

By limiting the scope of their comments to that type of "fraud" which could in some way be inferred from other evidence, both these judges can only have been referring to "constructive fraud". As Section V, below, explains, of the two types of "fraud" in its jurisdictional sense known to 18th Century Equity, only "constructive fraud" could be proven by so-called presumption.

³⁰ *Griffith v Spratley* (n 21) 386.

³¹ *ibid.* 388.

³² *ibid.*

³³ *ibid.*

³⁴ *ibid.* 389.

³⁵ *ibid.* 391.

More widely, both judgments demonstrate that the claimant in *Griffith* might well have been subject to a (factual) power on the part of the defendant. Indeed, generally speaking, the 18th Century courts of Equity were prepared to assume that, ‘[where a] borrower [was] under some necessities, [he was] therefore in the power of [a] lender’.³⁶ Nevertheless, his claim failed because he could not establish that such a power had been abused. Even if the claimant could demonstrate that he only entered the transaction he did because of an exercise of power by the defendant – something the Chief Baron doubted anyway – the transaction was not “one-sided”. All three things had to be shown for him to succeed.

Two brief points might now be made. The first is that, while it is not my argument that the term “abuse of interpersonal power” itself appears in any of the relevant 18th Century authorities, some judges from that period did speak in comparable terms. In *Kinchant v Kinchant*,³⁷ for example, Gould J dismissed a son’s bill, grounded on his father’s alleged “fraud”, seeking to have a family settlement he had entered set aside. His Lordship stated:

‘Suppose the father *had* exercised some paternal authority, it would not have been sufficient to set the transaction aside. If the father *had* exercised his authority in this case, it would seem to have been very happily applied. There is no reason to suppose *he abused his power* [and so] there is no ground to set the deed aside’.³⁸

Kinchant was a case like those explored in Subsection *ii*, below, where the claimant could not prove that he had entered a “one-sided transaction”. On its face, it is also a case which supports the tripartite abuse of interpersonal power analysis set out above.

Another example of the use of words like “abuse of interpersonal power” comes from *Gartside v Isherwood*.³⁹ There, referring to the “fraud” case of *Filmer v Gott*,⁴⁰ Lord Thurlow LC said:

³⁶ *Ord v Smith* (1725) Sel. Cas. Ch. 9, 10. Of course, the claimant in *Griffith* was not seeking a loan *per se*, but instead hoped to realise the value an asset by transacting with someone solvent.

³⁷ *Kinchant v Kinchant* (1784) 1 Bro. C.C. 369.

³⁸ *ibid.* 374 (emphasis added).

³⁹ *Gartside v Isherwood* (1783) 1 Bro. C.C. 558.

⁴⁰ *Filmer v Gott* (1774) 4 Bro. P.C. 230.

‘The only principle upon which [that decision can] be supported [is] that if a confidence is reposed, and that confidence is abused, a court of equity shall give relief’.⁴¹

As in other judgments he gave,⁴² the words ‘confidence’ and ‘power’ are used interchangeably throughout the Lord Chancellor’s decision.⁴³ At that time, confidence had yet to become a term of art in the way it is today, when it describes – amongst other things – the relationship of vulnerability/power between one who informs another of otherwise secret information and their confidant.⁴⁴

The second point worth making is that the phrase “one-sided transaction” is also of this thesis’ creation. It is not a label which was used in the cases. As the Chief Baron’s words in *Griffith* demonstrate, ‘inadequacy of price’⁴⁵ was a phrase used to describe the transactional disparity involved in “constructive fraud” cases, but so too was ‘inadequacy of consideration’,⁴⁶ ‘inadequacy of ... value’,⁴⁷ and ‘some unfair advantage’.⁴⁸ Indeed, it is tolerably clear that Equity’s jurisdiction over “constructive fraud” was also wide enough to apply to cases involving wholly gratuitous transactions.⁴⁹ Thus, provided one distinguishes between what was actually said in the cases from the substantive idea consistently invoked within them, it should be convenient to use a catch-all term like “one-sided” to describe any transaction capable of satisfying the second limb of my tripartite definition.

ii. *The Use and Abuse of Interpersonal Power*

More specific support for my historical claim comes from the fact that the three requirements of “constructive fraud” set out above can account for the sharp distinction between the use and the abuse of interpersonal power drawn in several cases. As a matter of 18th Century Equity,

⁴¹ *Gartside v Isherwood* (n 39) 560.

⁴² See, for example, *Welles v Middleton* (1784) 1 Cox Eq. Cas. 112, 125.

⁴³ For examples of other 18th Century Equity judges doing the same, see *Pawlet v Delaval* (1755) 2 Ves. Sen. 663, 667; *Dickenson v Lockyer* (1798) 4 Ves. Jr. 36, 43.

⁴⁴ See, for example, *Coco v AN Clark (Engineers) Ltd* [1968] F.S.R. 415. Indeed, in *Osmond v Fitzroy* (1731) 3 P. Wms. 129, 131; *Pearce v Waring* (1737) West t. Hard. 148, 153-154; and *Saunderson v Glass* (1742) 2 Atk. 296, 299, the word confidence - in the power sense - is used interchangeably with the word trust.

⁴⁵ *Griffith v Spratley* (n 21) 389.

⁴⁶ *Gartside v Isherwood* (n 39) 563.

⁴⁷ *Heathcote v Paignon* (n 20) 175.

⁴⁸ *Cory v Cory* (1747) 1 Ves. Sen. 19, 19.

⁴⁹ See, for example, *Ward v Hartpole* (n 19) 488; *Bridgeman v Green* (1757) Wilm. 58, 61.

not every use, in the sense that a power existed and was exercised, constituted an abuse (and therefore “fraud”). Just as my scheme suggests, the fact that an interpersonal power had been exercised was a necessary but insufficient precondition for relief.

Consider *Cory v Cory*.⁵⁰ The question in that case was whether an agreement between a father and son to settle a family’s internal financial disputes could be set aside for “fraud”. Lord Hardwicke LC answered in the negative. His Lordship was prepared to accept that the father – the defendant – had a factual power over his son, and that such ‘paternal authority [may have been] exerted’.⁵¹ However, he was also clear that, in order for the son’s action to succeed, something more – the taking of ‘some unfair advantage’⁵² – must be established. As it was, the judge added, such a transaction ‘did not appear [on the facts of the] case’.⁵³ Before him was simply ‘a reasonable agreement ... to settle disputes’.⁵⁴

The power used – but not abused – in *Cory* was a factual power arising out of a relationship between the two parties which pre-existed the impugned transaction. Yet, as the first limb of the tripartite definition accepts, the scope of the law of “constructive fraud” was not limited to such cases. It also covered the use – and abuse – of legal powers arising out of pre-existing legal relationships.

In *Fox v Mackreth*,⁵⁵ a trustee’s exercise of a power of sale in his own favour was questioned by his beneficiary. With respect to the claimant’s case, ‘merely as it [stood] on the [impugned] transaction’,⁵⁶ Lord Thurlow LC stated:

‘In the first place, I must find the value of the estate [acquired by the trustee] to be [£50,000]; for it will be in vain to argue that there was any ... fraud committed by him, if no loss accrued to [his beneficiary by virtue of his conduct]. If the value of the estate be that which [the trustee] gave [for it i.e. £39,500], it would ... put an end to the

⁵⁰ *Cory v Cory* (n 48). See, alternatively, *Oldin v Samborn* (1737) 2 Atk. 15; *Kinchant v Kinchant* (n 37).

⁵¹ *Cory v Cory* (n 48).

⁵² *ibid.*

⁵³ *ibid.*

⁵⁴ *ibid.*

⁵⁵ *Fox v Mackreth* (n 13).

⁵⁶ *ibid.* 420.

dispute. If the value be [£50,000], that does not make an end of the matter, unless the advantage was procured by [one] of those frauds which the Court has taken notice of'.⁵⁷

Like the judgement in *Cory*, these words also demonstrate that, as a matter of 18th Century Equity, it was not the use of interpersonal power *per se* which was objectionable. It was only when that use procured another's entry into a "one-sided transaction" that it was. That was when such behaviour became abuse and, all other things being equal, activated the courts' jurisdiction. As my tripartite definition of "constructive fraud" makes plain, one person's exercise of a power so as to procure another's entry into a transaction was not, in and of itself, "fraud".

Indeed, for this reason, the old law of "constructive fraud" differs from the modern law of fiduciaries. In the mid-19th Century, the law of fiduciaries replaced aspects of the law of "constructive fraud", including that part which governed disputes like that in *Fox*. As a result, the so-called "self-dealing rule" would nowadays apply to them. It provides that:

'If a trustee sells ... trust property to himself, the sale is voidable by any beneficiary *ex debito justitiae*, however fair the transaction'.⁵⁸

If an identical case were to arise today, the transaction in issue in *Fox* could thus be set aside regardless of whether it constituted a good deal for the beneficiary. In this context at least, the need to prove that there was a "one-sided transaction", once so necessary, has been abandoned.

iii. *The Distinction between Bad and Abusive Bargains*

A second more specific reason to support my claim about how 18th Century Equity judges actually understood the law is that it is capable of explaining the difference between what they identified, in substance, as bad and abusive bargains. These two terms, which are not drawn from any specific authority, can be used to describe the transactions in proceedings where the main question was not whether there was a "one-sided transaction", but whether the defendant had a power over the claimant.

⁵⁷ *ibid.* 420-421.

⁵⁸ *Tito v Waddell (No 2)* [1977] Ch. 106, 241.

There were in fact many decisions in which the courts denied relief for “fraud” to parties who entered into “one-sided” transactions for a reason other than the exercise of a power over them. All other things being equal, and consistently with the three requirements identified above, they were instead told to live with the consequences of their actions. As Lord Thurlow LC put it in *Fox v Mackreth*, the finding of a “one-sided transaction” “[did] not make an end of the matter”.⁵⁹

In *Smith v Downing*,⁶⁰ the claimant alleged that various conveyances made by her deceased mother were liable to be set aside. Her first argument was that her mother had been the victim of “actual fraud” on the part of the defendant, but the judge rejected it. Her second argument was that there were ‘sufficient grounds for relief ... in the circumstances arising out of the condition of the parties, and of the deeds executed between them’.⁶¹ As Section IV, below, shall make clear, this was surely a reference to “constructive fraud”. What is more, as Lord Hardwicke LC identified, everything rested on whether at the time she entered the impugned transactions the claimant’s mother ‘was actually in the power of the defendant’.⁶²

The claimant’s main contention was that an existence of a power could ‘be inferred from [the fact that] her [mother was] residing in [the defendant’s] house’,⁶³ but the Lord Chancellor disagreed. As a matter of fact, he noted, ‘she did not go to reside with the defendant until after all the conveyances [in issue] were executed’.⁶⁴ Consequently, she could not be said to have been under his control at the relevant time. Even if the transaction her mother entered was “one-sided” – and so even if, objectively speaking, it constituted a bad bargain – the claimant was therefore not entitled to relief. ‘No fraud appears [on the facts of this case]’,⁶⁵ the judge added. If she was not in the defendant’s power, her mother’s actions could not have been the consequence of an abuse of power.

⁵⁹ *Fox v Mackreth* (n 13) 421.

⁶⁰ *Smith v Downing* (1737) West t. Hard. 90. See, alternatively, *Tendril v Smith* (1740) 2 Atk. 85.

⁶¹ *Smith v Downing* (n 60) 92.

⁶² *ibid.* 93.

⁶³ *ibid.*

⁶⁴ *ibid.*

⁶⁵ *ibid.*

A second case which underlines the fact that an individual's entry into a "one-sided transaction" was a necessary but insufficient condition for his relief is *Osmond v Fitzroy*.⁶⁶ There a father had entrusted the care of his infant son – the defendant – to the claimant. Soon after he came of age, the defendant executed a bond in the claimant's favour. When the claimant sued on the bond, the defendant filed a cross bill asking that it be set aside. The claimant did not dispute that the bond constituted a "one-sided transaction". However, he contended that, although he may once have had a power over the defendant, that power ended when the defendant had reached the age of maturity. As a result, the claimant argued, the bond could not have been procured by an exercise of authority on his part. It represented a bad but not abusive bargain.

Jekyll MR disagreed. He held that the bond had been procured by 'the greatest fraud'⁶⁷ and found in favour of the defendant. The operative part of his judgment was as follows:

'As to what is objected, that [the defendant] was only to take care of the [claimant] whilst an infant, [I say as follows: his charge] continued so long as [he] remained in the [claimant's father's] service. [It would be] remarkable [if] during his infancy the law took care of this young Lord, ... but [held that] he was out of [its] protection ... by being of age, [although] then he stood most in need of the [defendant's] care'.⁶⁸

'This case, though a new one', he added, 'comes within the rules that [are] observed in equity'.⁶⁹

Narrowly these words indicate that, as a matter of 18th Century Equity, a guardian's abuse of his ward was not something which could be excused on the basis of a formalistic distinction between minority and majority. Just like parental power,⁷⁰ a guardian's power over his ward extended until such time as his charge actually ended. More broadly, *Osmond* demonstrates that, in a "constructive fraud" case, one thing which mattered was the substantive issue of whether, at any time, a defendant had (and had used) a power over the defendant. If he did, any

⁶⁶ *Osmond v Fitzroy* (n 44).

⁶⁷ *ibid.* 131.

⁶⁸ *ibid.*

⁶⁹ *ibid.*

⁷⁰ See, for example, *Cory v Cory* (n 48); *Kinchant v Kinchant* (n 37).

“one-sided transaction” it procured would be abusive. If he did not, it would have been unimpeachable as merely unwise.

iv. *The Strength of the Concept*

Despite its conformity with the aforementioned cases, my definition of “constructive fraud” is no doubt a controversial one. This Subsection therefore defends the reasoning behind it.

a. *“Constructive Fraud” was a Limited and Definable Construct*

If one accepts that the general body of cases were, in substance, decided by reference to the concept of the abuse of interpersonal power, then, as it is a limited construct, one must reject the idea that “constructive fraud” was an unlimited concept. Indeed, even if one refuses to agree that it was the abuse of interpersonal power that underpinned this area of law, there are still good reasons for thinking that it was grounded on a different, but also limited notion.

To start with, as was noted in Chapter 2, Section II, and Chapter 3, Section II, there are cases from across the 18th Century in which the courts refused to relieve claimants from the effects of (sometimes unambiguously) sharp practice on the basis that it did not amount to “fraud”, either “actual” or “constructive”.⁷¹ Indeed, *Griffith v Spratley* and *Smith v Downing* are also authorities to this effect. As Lord Commissioner Wilmot put it in *Bridgeman v Green*:⁷²

‘[It] is the law with us [that] every man may give a part, or all of his fortune to the most worthless object in the creation; and this Court never did, nor ever will rescind or annul donations *merely because ... a man of very nice honour would not have accepted*’.⁷³

If the notion of “constructive fraud” really was of unlimited scope, one would not expect this to have been the case.

⁷¹ See, for example, the discussion of *Langley v Brown* (1741) 2 Atk. 195 in Chapter 2, and the cases listed in fn. 1 of Chapter 3.

⁷² *Bridgeman v Green* (n 49).

⁷³ *ibid.* 61 (emphasis added).

There were also decisions where, despite identifying various types of ‘unreasonable [or] shameful [behaviour]’⁷⁴ on the part of claimants seeking the specific performance of a transaction their conduct had procured, the judges would not set aside those transactions. Following both a holistic examination of a claimant’s conduct, and the exercise of a high-level discretion,⁷⁵ the courts sometimes invoked the nascent doctrine of ‘clean hands’ and refused to grant such a remedy.⁷⁶ However, even then, they consistently made clear that it was open to those claimants to bring actions at Law seeking damages for non-performance.⁷⁷ Again, if the concept underpinning the law of “constructive fraud” was unlimited, one might have expected things to have been different.

Admittedly, there is some evidence which may point the other way. What is more, that has led some commentators to premise their analyses of other aspects of 18th Century Equity on the basis that “constructive fraud” was a term without a fixed limit. Croft, for example, grounded part of his general account of Lord Hardwicke LC’s use of precedent on just such material.⁷⁸

The leading source is not, in fact, a judgment, but part of a letter written by Lord Hardwicke to Lord Kames.⁷⁹ Responding to the question of ‘whether a court of Equity ought to be governed by any general rules?’⁸⁰ and with respect, in particular, to the giving of ‘relief against frauds’,⁸¹ the then former Lord Chancellor stated:

‘No invariable rules can be established. Fraud is infinite, and were a court of Equity ... to lay down rules [saying] how far they would go ... in extending their relief against it, or to define strictly the species ... of it, the jurisdiction would be cramped, and

⁷⁴ *Young v Clerk* (1720) Prec. Ch. 538, 540.

⁷⁵ See *Bromley v Jeffereys* (1700) Prec. Ch. 138, 139; *Savage v Taylor* (1736) Cas. t. Talb. 234, 236.

⁷⁶ See, for example, *Young v Clerk* (n 74); *Savage v Taylor* (n 75); *Bell v Howard* (1741) 9 Mod. 302; *Cory v Cory* (1747) 1 Ves. Sen. 20.

⁷⁷ Of course, as noted in *Hick v Phillips* (1721) Prec. Ch. 575, 575-576, were a jury to learn about the claimant’s behaviour, they might moderate the amount of damages they awarded him. Indeed, this is Barton’s explanation of *James v Morgan* (1662) 1 Lev. 111, a case discussed in Section IV, below. See J Barton, ‘The Enforcement of Hard Bargains’ (1987) 103 LQR 118, 120-121.

⁷⁸ See C Croft, ‘Lord Hardwicke’s Use of Precedent in Equity’, *Legal Record and Historical Reality: Proceedings of the Eighth British Legal History Conference* (Hambledon Continuum 1989) 128-153.

⁷⁹ See AF Tytler, *Memoirs of the Life and Writings of the Honourable Henry Home, Lord Kames*, vol 1 (2nd edn, 1814) 329-345. See, alternatively, *Lawley v Hooper* (1745) 3 Atk. 278, 279.

⁸⁰ Tytler (n 79) 338.

⁸¹ *ibid.* 341.

perpetually eluded by new schemes which the fertility of man's invention would contrive'.⁸²

Croft's interpretation of this passage is that 'there were no rules laid down in relation to [any kind of] fraud for fear of assisting its perpetrators'.⁸³ However, in my view, this is incorrect.⁸⁴ It is not, as Swain has argued,⁸⁵ that Lord Hardwicke's comments were simply erroneous. Instead, it is that his words are in fact consistent with a claim that the 18th Century courts of Equity's jurisdiction over "constructive fraud" was limited to dealing with misconduct falling within the scope of the three requirements set out above.

Everything turns on the following. If one accepts that "constructive fraud" only covered the abuse of interpersonal power, the Hardwicke-Kames letter can be read as referring to the *form* of such an event. It should not be thought to go to the *substance* of the matter. "Fraud" was not infinite in the sense that any conduct could count as "constructive fraud". Only the abuse of interpersonal power could. However, as it included *ad hoc* factual powers, "constructive fraud" was infinite in the sense that there was no inherent limit on the types of interpersonal power which could exist. It was also infinite in the sense that there was no inherent limit to the ways in which powers could, as a matter of fact, be abused. As Fonblanque's contemporary treatise noted:

'Even in cases of fraud, which from their nature must be almost infinitely various in their circumstances, courts of equity constantly proceed upon some clear and established principle, sufficiently comprehensive to meet the circumstances of the particular case to which it is applied, and not upon a vague ... and indefinite power'.⁸⁶

⁸² *ibid.* (emphasis added).

⁸³ Croft (n 78) 129.

⁸⁴ Note the modern relevance of this. Henry Smith's account of equity relies on, amongst other sources, Lord Hardwicke's words to support the notion that 'the theme of equity ... is the fight against opportunism'. This is because 'opportunism poses a special problem that requires equity to be at least somewhat open-ended within its domain'. See HE Smith, 'Why Fiduciary Law Is Equitable' in AS Gold and PB Miller (eds), *Philosophical Foundations of Fiduciary Law* (Oxford University Press 2014) 265-269. See, also, HE Smith, 'Equity as Meta-Law' (2021) 130 Yale LJ 1050, 1076-1081. Insofar as Smith's analysis is built on an incorrect interpretation of the letter, it is necessarily open to question.

⁸⁵ See W Swain, *The Law of Contract 1670-1870* (Cambridge University Press 2015) 167.

⁸⁶ Fonblanque (n 8) 24.

b. *The Abuse of Interpersonal Power is a Precise and Historically Sound Term*

Those who accept that the law of “constructive fraud” was grounded on at least one limited and definable construct, but who deny that construct was the abuse of interpersonal power, generally fall into two camps. The first is constituted by those who believe that the jurisdiction was grounded on more than one underlying principle. The second is made up of those who agree it was grounded on one principle, but who think that principle was not the abuse of interpersonal power.

A good example of the second type of view comes from Lord Brightman’s judgment in *Hart v O’Connor*:⁸⁷

‘Historically a court of equity did not restrain a suit at law on the ground of “unfairness” unless the conscience of the [claimant] was in some way affected. This might be because of actual fraud ... or constructive fraud, i.e. conduct which falls below the standards demanded by equity’.⁸⁸

The problem with explanations like this is that they are stated at such a high level of generality that they disclose no coherent basis for Equity’s intervention at all. Indeed, this is not just an issue for those hoping to understand the law, but also for those seeking its protection. As Bigelow noted: ‘Some definite meaning [of fraud] must be observed, in the mind at least, in order to [allow] any consistent adjudication touching the subject’.⁸⁹

In contrast to all this, my explanation of what constituted “constructive fraud” is specific enough to make clear the precise basis upon which the 18th Century courts of Equity would intervene in any case. It thus brings a measure of conceptual coherence to our understanding of the law. It also allows us to distinguish this ground of intervention from all those others which could also have given a court jurisdiction over a dispute.

⁸⁷ *Hart v O’Connor* (n 1). See, alternatively, *Kitchen v Royal Air Force Association* [1958] 1 W.L.R. 563, 572-573.

⁸⁸ *Hart v O’Connor* (n 1) 1024.

⁸⁹ M Bigelow, ‘Definition of Fraud’ (1887) 3 LQR 419, 419.

Turning to the views which deny that the law of “constructive fraud” was grounded on just one underlying principle, I can, for now, be brief. Section IV, below, will look at two well-developed analyses which fit this description and explain their shortcomings. The point to make here is only that such views appear to be the result of scholars undertaking anachronistic sub-classifications of the cases, such that their findings do not accurately represent what the judges deciding them thought to be the law. In the 18th Century, the courts of Equity consistently stated that “constructive fraud” was underpinned by one general principle, and that their decisions could not be sub-categorised in a substantively meaningful way.⁹⁰ It is because my position accepts this that, unlike its rivals, it does not inevitably fail, in some way or other, to adequately account for at least some of the cases.

IV. Understanding the Cases

Having posited an explanation of how the judges who administered the 18th Century law of “constructive fraud” understood it to function, this Chapter can begin to substantiate my interpretive claim. Thus, in this Section, it shall argue that the concept of the abuse of interpersonal power remains the best way of appreciating the general body of cases which formed the jurisdiction.

i. Earl of Chesterfield v Janssen

Lord Hardwicke LC’s judgment in *Earl of Chesterfield v Janssen*⁹¹ has long been identified as the seminal authority on what constituted “constructive fraud” in the 18th Century. In the 1780s, for example, counsel for the appellant in *Heathcote v Paignon* cited it, ‘in point of principle’,⁹² as the leading statement of what ‘[the] courts of equity ... will treat as fraud’.⁹³ In the mid-19th Century, the first edition of *White and Tudor* described it as:

⁹⁰ See, for example, the cases discussed in Section IV, Subsection *iv*, c.

⁹¹ *Earl of Chesterfield v Janssen* (n 11).

⁹² *Heathcote v Paignon* (n 20) 173.

⁹³ *ibid.* 174.

‘A case of very frequent reference, celebrated ... above all for the learned judgment of Lord Hardwicke ... in which he ... so admirably classified the different species of fraud against which Equity [would] give relief’.⁹⁴

In 1906, Upjohn KC referred the House of Lords to the Lord Chancellor’s decision as the ‘leading authority [on] the doctrine of “constructive fraud”’,⁹⁵ and, in *Nocton v Lord Ashburton*,⁹⁶ Viscount Haldane LC endorsed the same proposition.⁹⁷ In 1957, Sheridan used it as the starting point of his own treatment of that subject.⁹⁸

Nevertheless, nothing should be taken to suggest that the law immediately before 1751 was necessarily any different to the law after it. Lord Hardwicke LC’s judgement contained a statement of the law, not a refashioning of it. Indeed, this is why this Chapter has so far considered cases from across the 18th Century. My thesis about the nature of “constructive fraud” is directed at the law spanning that entire period.

At its heart, *Earl of Chesterfield* concerned the validity of a *post-obit* bond used to facilitate an allegedly usurious loan. The defendant, Janssen, was a money lender. The claimant was one of the executors of a recently deceased young man: Spencer. Before his death, while he was short of money, the defendant had paid Spencer £5,000 in return for a bond under which he promised to pay Janssen £10,000 at (or within a short time of) the death of the Duchess of Marlborough. (Spencer had the legitimate expectation of inheriting a substantial amount of money from her.) If Spencer predeceased the Duchess, his debt to Janssen would be extinguished. However, if he did not, but then failed to pay Janssen, the bond provided that Spencer must hand over £20,000 instead.

Ultimately, Spencer survived the Duchess, but only by a year and eight months. Upon her death he did not pay Janssen anything but, after discussions, executed a new bond promising to pay £20,000 within six months, unless he paid the £10,000 due under the original arrangement first. By the time he passed away, Spencer had only made two £1,000 payments to Janssen. His

⁹⁴ F White and O Tudor, *A Selection of Leading Cases in Equity*, vol 1 (W Maxwell 1849) 410.

⁹⁵ See *Samuel v Newbold* [1906] A.C. 461, 462.

⁹⁶ *Nocton v Lord Ashburton* [1914] A.C. 932.

⁹⁷ See *ibid.* 952.

⁹⁸ LA Sheridan, *Fraud in Equity: A Study in English and Irish Law* (Pitman Publishing 1957) 7.

executors filed a bill in Equity, grounded on “fraud”, seeking an order that both bonds be set aside.

The first question for the court – which consisted not just of the Lord Chancellor, but also of Strange MR, Lee CJ, Willes CJCP, and Burnet J – was whether the initial *post-obit* arrangement between Spencer and Janssen was valid at all. It answered in the affirmative. The bond’s provisions did not contravene the terms of the subsisting usury laws. As the Master of the Rolls explained, those rules applied to agreements ‘to give and receive an allowance of profit in the meantime for the money hired [where that allowance was] in a greater proportion than [that] allowed’.⁹⁹ However, in this case, not only did ‘the repayment of the money advanced [depend] on a contingency, which, if it happened one way, [would have allowed] the whole [to be] totally lost’,¹⁰⁰ but also, ‘during the pendency of [the arrangement,] no interest or profit [accrued] to the defendant’.¹⁰¹

As Lord Hardwicke LC noted, intuitively the next question should have been whether, notwithstanding its validity, the bond was ‘contrary to conscience, and [therefore ripe] to be relieved against [in] Equity?’¹⁰² Yet in light of other matters that was not something which needed to be formally decided. Thinking prospectively, the judges determined that the third question they would have considered would have been whether Spencer and Janssen’s later interaction amounted to a confirmation of their first arrangement, and that their answers would be yes. Any “fraud” exercised by Janssen in relation to the first arrangement had therefore been rendered nugatory. Consequently, as the Lord Chancellor observed: ‘[no] direct and conclusive opinion’¹⁰³ on the issue of “fraud” was necessary. Nevertheless, he felt that it was still appropriate ‘to say something’¹⁰⁴ on the issue. This is what he is reported as stating:

‘This court has an undoubted jurisdiction to relieve against every species of fraud.

1. Then fraud, which is *dolus malus*, may be actual, arising from facts and circumstances of imposition; which is the plainest case.

⁹⁹ *Earl of Chesterfield v Janssen* (n 11) 147.

¹⁰⁰ *ibid.*

¹⁰¹ *ibid.* 147.

¹⁰² *ibid.* 155.

¹⁰³ *ibid.*

¹⁰⁴ *ibid.*

2. It may be apparent from the intrinsic nature and subject of the bargain itself; such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other; which are unequitable and unconscientious bargains; and of such even the Common Law has taken notice; for which, if it would not look a little ludicrous, might be cited ... *James v Morgan*.

A 3rd kind of fraud is, which may be presumed from the circumstances and condition of the parties contracting: and this goes farther than the rule of law; which is, that it must be proved, not presumed; but it is wisely established in this court to prevent taking surreptitious advantage of the weakness or necessity of another: which knowingly to do is equally against the conscience as to take advantage of his ignorance: a person is equally unable to judge for himself in one as the other.

A 4th kind of fraud may be collected or inferred in the consideration of this court from the nature and circumstances of the transaction, as being an imposition and deceit on the other persons not parties to the fraudulent agreement. It may sound odd, that an agreement may be infected by being a deceit on others not parties: but such there are, against such there has been relief.

Of this kind have been marriage-brocage contracts; neither of the parties herein being deceived: but they tend necessarily to the deceit on one party to the marriage, or of the parent, or of the friend. ...

The last head of fraud, on which there has been relief, is that, which infects catching bargains with heirs, reversioners, or expectants, in the life of the father, etc., against which relief always extended.¹⁰⁵

These have been generally mixed cases, compounded of all or several species of fraud; there being sometimes proof of actual fraud, which is always decisive. There is always fraud presumed or inferred from the circumstances or conditions of the parties

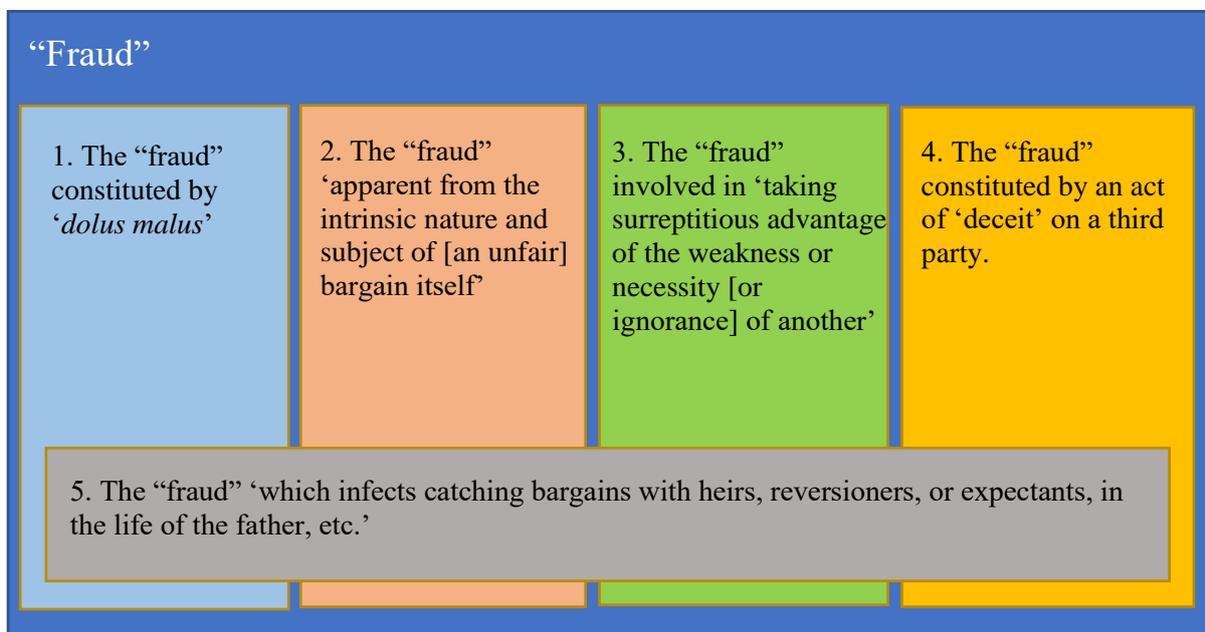
¹⁰⁵ 'Catching bargain' was not a term of art, but a label commonly used to refer to the sort of extortionate *post-obit* bond in *Earl of Chesterfield* itself. See, for example, *Matthews v Lewis* (1792) 1 Anst. 7.

contracting: weakness on one side, usury on the other, or extortion or advantage taken of that weakness. There has been always an appearance of “fraud” from the nature of the bargain; ...

In most of these cases have concurred deceit and illusion on other persons not privy to the fraudulent agreement: the father, ancestor, or relation, from whom was the expectation of the estate, has been kept in the dark: the heir or expectant has been kept from disclosing his circumstances ... which might have tended to his relief and also reformation. This misleads the ancestor; who has been seduced to leave his estate not to his heir or family, but to a set of artful persons, who have divided the spoil beforehand’.¹⁰⁶

ii. *Preliminary Observations*

Before fully unpacking these remarks, five preliminary points should be made. The first is that *prima facie* his Lordship’s description of the 18th Century law of “fraud” can be visually represented as follows:



The second point is that, by beginning his statement of law with the words: ‘this court’, Lord Hardwicke LC was emphasising that, in general, he was speaking only about Equity. Aside

¹⁰⁶ *Earl of Chesterfield v Janssen* (n 11) 155-157.

from when he specifically says otherwise, then, none of his observations should be taken to apply to the Common Law of the same time.

The third point is that the Lord Chancellor's words demonstrably concern more than just the law of "constructive fraud". By referring to different 'kinds' or 'species' of "fraud" his Lordship must have intended that the fraud mentioned in the very first sentence quoted above was the whole of his court's jurisdiction over that conduct. Indeed, it was established in Chapter 2 that, in the 18th Century, "fraud" in its jurisdictional sense was wide enough to cover more than one different ground of intervention. Thus, to work out exactly what was meant by the term "constructive fraud" (as opposed to "fraud" more generally, including "actual fraud"), a process of selection vis-à-vis the entirety of the judge's remarks will be necessary.

The first step in the process is to weed out Lord Hardwicke LC's first type of "fraud" ('type one "fraud"'). It is "actual fraud" in the sense discussed in Chapter 3. Omitting its subordinate clause, the main sentence of the first section quoted above reads as follows: 'fraud ... may be actual, arising from [the] facts and circumstances of imposition'.¹⁰⁷ What it was about those facts and circumstances which made the "fraud" 'actual' is not said, but those terms are wide enough to cover the making of knowingly made and reckless misrepresentations, and failures to disclose information made in breach of a duty to do so. Furthermore, even if it is a little opaque, his Lordship's reference to '*dolus malus*' in the subordinate clause suggests that this is the correct view. As was said in Chapter 3, Section II, as a matter of 18th Century Equity, *dolus malus* was a synonym for "actual fraud".

Turning to the Lord Chancellor's fourth type of "fraud" ('type four "fraud"') – that which 'may be collected or inferred ... from the nature and circumstances of the transaction, as being [a] deceit on [third] parties'¹⁰⁸ – it is my view that it involved no more than certain fact-specific instances of "actual fraud": "actual fraud" against third parties. The legally operative occurrence in issue in each case was therefore the same as that in type one "fraud" authorities. One clue comes from his Lordship's repeated use of the term 'deceit'. As was said in Chapter 3, Section II, at the time, deceit was an alternative name for "actual fraud". What is more, Lord Hardwicke LC's own *draft* judgment confirms this point. In it, he wrote that this category of

¹⁰⁷ *ibid.* 155.

¹⁰⁸ *ibid.* 156.

cases covered ‘*dolus malus* in respect of other persons who stand in such a relation to either of the parties as that they may be affected by the contract or the direct consequences of it’.¹⁰⁹

Ultimately, then, given that Lord Hardwicke LC’s first and fourth species of “fraud” constituted “actual fraud”, when it comes to testing whether my interpretive claim is correct by reference to his judgment, this Section must ask only if the concept of the abuse of interpersonal power provides the best way of describing the contents of the second, third, and fifth categories he set out.

The next preliminary point to make is that, even though no judge may have posited quite such an account before,¹¹³ in delineating the various different types of “fraud” that he did, Lord Hardwicke LC was not attempting to introduce any hard and fast taxonomy of that behaviour. His judgment should therefore not be read as doing so. Its terms were meant to be descriptive, rather than definitive. His Lordship was providing guidance on how to view the subsisting cases, not drafting sections of a statute. Why else would his Lordship have specifically caveated his remarks by saying that he was not ‘giving any direct and conclusive opinion’¹¹⁴ on the law? Why else would some of the categories he set out be self-confessedly mixed ones?

On this second point, think back to what the Lord Chancellor said about the type of “fraud” which infected ‘catching bargains [made] with heirs, reversioners, or expectants, in the life of the father, etc.’¹¹⁵ (‘type five “fraud”’). Disputes involving such transactions, he observed:

‘[Were] generally mixed cases, compounded of all or several species of fraud; there being sometimes proof of actual fraud. ... There is always fraud presumed or inferred from the circumstances or conditions of the parties contracting [and] there [is] always an appearance of fraud from the nature of the bargain. [In addition,] in most of these cases have concurred deceit ... on other persons not privy to the fraudulent agreement’.¹¹⁶

¹⁰⁹ See G Harris, *The Life of Lord Chancellor Hardwicke*, vol 2 (E Moxon 1847) 429.

¹¹³ See W Holdsworth, *A History of English Law*, vol 12 (Sweet & Maxwell 1922) 262.

¹¹⁴ *Earl of Chesterfield v Janssen* (n 11) 155.

¹¹⁵ *ibid.* 157.

¹¹⁶ *ibid.*

These words demonstrate that type five “fraud” cases did not constitute a substantively separate head of the wider jurisdiction then under the judge’s contemplation. In every case there was always some other already-classified type of “fraud” in existence. Sometimes this was type one and/or type four “fraud” (*viz.* “actual fraud”), but, even if that was not present, there was always both type two and type three “fraud”.¹¹⁷

As shall be explained below,¹¹⁸ Lord Hardwicke LC did sometimes acquiesce in the grouping together of factually similar authorities. However, this was usually only to provide analogies as to what was occurring in the particular case before him. As Croft’s general examination of his Lordship’s use of precedent demonstrates, in cases of “fraud”, what mattered to him more than anything were broad principles of Equity.¹¹⁹ Thus, insofar as this part of the Lord Chancellor’s judgment involves such behaviour, his sequestration of cases involving so-called catching bargains should be seen as no more than an instance of his habit in operation. Indeed, it is worth recalling that *Earl of Chesterfield* itself involved just such a transaction.

Lord Hardwicke LC’s words are also useful because they indicate how best to treat those decisions which might otherwise be thought to fall into a fifth distinct category of “fraud”. Bearing in mind the point made in Section II, Subsection *ii* – that, as a matter of 18th Century Equity, “actual fraud” and “constructive fraud” were concurrent causes of action – unless their facts *also* disclose instances of deceit, these authorities should always be treated *only* as cases involving *both* type two *and* type three “fraud”. Where there was *also* an actionable misrepresentation or concealment, type five “fraud” cases should, of course, be thought of as simultaneously involving either type one or type four “fraud”. However, as “actual fraud” was a fundamentally distinct ground of intervention from any other type of “fraud”, the occasional acts of deceit the Lord Chancellor referred to must have operated in addition to, not as a component of, the “fraud” always present within them. Type five “fraud” cases are thus best understood as a sub-category of at least one other kind of that behaviour.

In the end, the importance of Lord Hardwicke LC’s decision in *Earl of Chesterfield* lies not in its content *per se* but in the fact that it can be construed consistently with what a wider survey

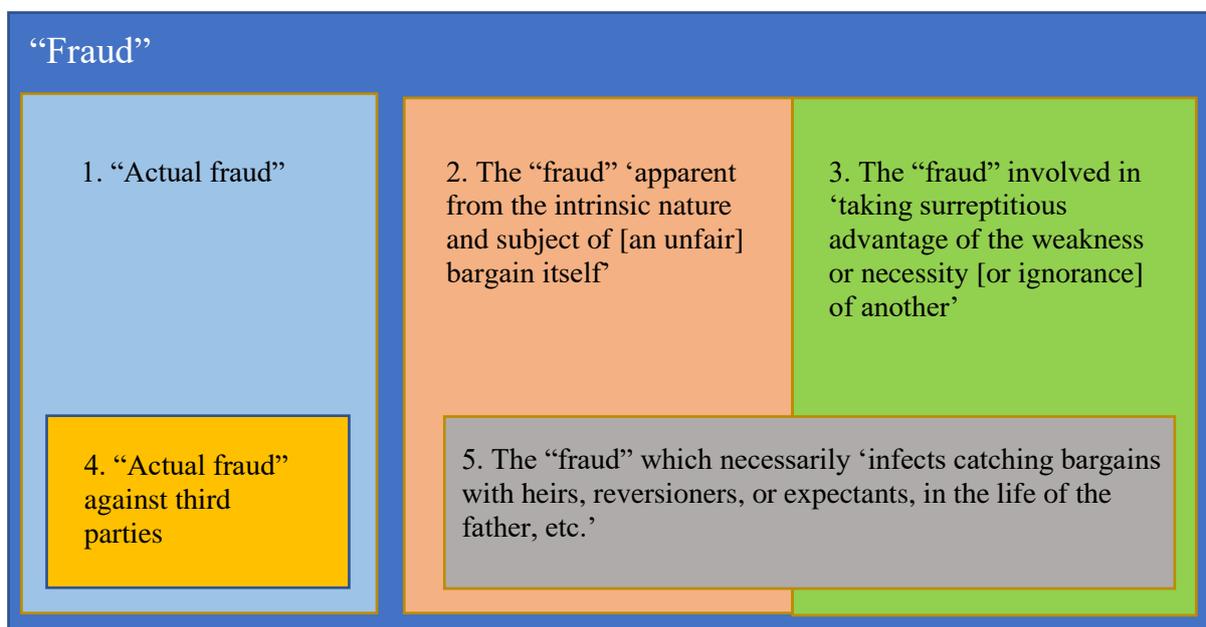
¹¹⁷ See also *Bosanquet v Earl of Westmoreland* (1738) West t. Hard. 598, 605; *Barnardiston v Lingood* (1740) 2 Atk. 133, 135.

¹¹⁸ See Section IV, Subsection *iv*, c.

¹¹⁹ Croft (n 78) 145-149.

of the law of “fraud” indicates was true at that time. The Lord Chancellor’s categories are useful insofar as it is helpful to know what style of case to consider when thinking of how to dispose of a new dispute. Yet unlike categories in a modern classification they do nothing on their own to suggest that the ground of intervention in any particular category of case was necessarily different to that in any other.

The final preliminary point to make is that, considering what has been said, and omitting for clarity’s sake type five “fraud” cases which also involved “actual fraud”, the contents of 18th Century Equity’s jurisdiction over “fraud” can be more accurately represented as follows:



iii. The “Fraud” Apparent from the Intrinsic Nature and Subject of a Bargain Itself

Assuming Lord Hardwicke LC’s judgment in *Earl of Chesterfield* entailed an exhaustive account of the scope of 18th Century Equity’s jurisdiction over “fraud”, the preliminary points made above mean that the law of “constructive fraud” subsisting at that time could only have been constituted by cases falling within three of the five species he described. “Actual fraud” authorities – whether they involved two or three parties – were, by definition, outside of its bounds. Moreover, as type five “fraud” cases formed no substantively separate category to both type two and type three cases, to test my thesis that the law of “constructive fraud” was premised solely on the concept of the abuse of interpersonal power, it is to those two groups of decisions that this Section must now turn. The key question to be asked in relation to them is: what particular legally operative occurrence did each concern?

I start with the second type of “fraud” Lord Hardwicke LC identified: that which may have been ‘apparent from the intrinsic nature and subject of [a] bargain itself’.¹²⁰ Exactly what that involved has been the subject of debate.

a. *The Irrelevance of James v Morgan*

One way of interpreting Lord Hardwicke LC’s words is that the act of entering a “one-sided transaction” was, in and of itself, “fraud” (by the party getting the better of it). This, for example, is how Sheridan read them.¹²¹ The problem is that this is neither the best construction of the words used, nor is it consistent with most 18th Century authorities.

The only case which the Lord Chancellor referred to when substantiating his description of type two “fraud” was the late 17th Century Common Law decision of *James v Morgan*.¹²² There the defendant agreed to exchange a horse for ‘a barley-corn a nail, doubling it every nail’.¹²³ A barley-corn was a unit of grain and the horse had 32 nails in its shoes. In total, then, the defendant owed the claimant 500 quarters of barley (an amount worth 12 times more than the market value of the horse). The defendant refused to perform his side of the bargain and the claimant brought an action for *assumpsit*. Hyde J directed the jury to award the claimant only the value of the horse.

Some have interpreted *James* as a case in which the mere fact of entering a “one-sided transaction” was held sufficient to render a would-be contract void.¹²⁴ Yet it is by no means certain that this is correct. The report of the decision is too brief to be determinative. All that is clear is that, if enforced, the method of price calculation the buyer agreed to would have left him handing over a disproportionately large measure of grain to the seller. Indeed, for this reason, Swain has argued that *James* is merely a decision which reflected a judge’s ability to

¹²⁰ *Earl of Chesterfield v Janssen* (n 11) 155.

¹²¹ Sheridan (n 98) 125. This is not to say he thought that position was correct, see, for example, 127-128 or 167.

¹²² *James v Morgan* (n 77).

¹²³ *ibid*.

¹²⁴ See, for example, S Harrison, *A Treatise on the Law of Vendors and Purchasers of Personal Property* (2nd edn, 1826) 214.

pick which measure of damages to instruct a jury to adopt in an action for *indebitatus assumpsit* based on a contract.¹²⁵

However, even if it is true that *James* stands as authority for the proposition that, in some cases, the early-modern Common Law held that the act of entering into a “one-sided transaction” was sufficient to invalidate an otherwise-binding agreement, it could simply have been wrongly decided. Sheridan, for example, describes the case as ‘isolated’¹²⁶ as a matter of authority, and otherwise unsupportable on what was then subsisting Legal principle. In *Keen v Stuckely*,¹²⁷ an appeal from a decision to order the specific performance of a contract which entailed a substantial inequality of consideration, the House of Lords was split over what the law was. The report states:

‘On the one side ’twas argued that if a bargain ... was unconscionable the person who had got such a bargain was not to demand a performance of it in a Court of Equity, but he could only demand damages for [non-performance at] Law. On the other side ’twas said, that a man was obliged in conscience to perform a bargain, though it was a hard one’.¹²⁸

Crucially, whatever their view, all their Lordships appear to have been working on the basis that the contract between the two sides was valid. The idea that it may have been so “one-sided” as to render it void was not considered. If *James* was indicative of general Legal principle at the time, one would have expected the opposite to have been true.

What is more, even if *James* was rightly decided, and so even if it was true that, at Common Law, one-sidedness was sometimes sufficient to prevent a contract from being formed, that was not the position in Equity. There are a number of cases – including ones decided by Lord Hardwicke LC himself – in which that point was made explicitly.¹²⁹ In addition, writing in 1793, Fonblanque stated that he ‘[had] not been able to find a single case’¹³⁰ which suggested

¹²⁵ See Swain (n 85) 101-104.

¹²⁶ Sheridan (n 98) 168.

¹²⁷ *Keen v Stuckely* (1718) Gilb. Ch. 155.

¹²⁸ *ibid.* 155-156.

¹²⁹ See, for example, *Wood v Fenwick* (1702) Prec. Ch. 206; *Willis v Jernegan* (1741) 2 Atk. 251; *Nichols v Gould* (1752) 2 Ves. Sen. 422; *Heathcote v Paignon* (n 20); *Griffith v Spratley* (n 21).

¹³⁰ Fonblanque (n 8) 116.

otherwise. Indeed, in *Keen* itself the debate was not whether the parties' transaction was capable of being, or ought to have been, set aside. Instead, it was whether it was capable of being specifically enforced. All other things being equal, if the contract in that case was voidable, it is hard to see why this would have been an issue.

b. *The Best Construction of the Lord Chancellor's Words*

To my mind, the best interpretation of Lord Hardwicke LC's description of type two "fraud" is that the legally operative event in issue was that which could, in some cases, be inferred from, amongst other things, the fact of a "one-sided transaction". It therefore covered what has been referred to as the abuse of interpersonal power. Unlike the view just discussed, my construction has the advantage of being more consistent with the words that his Lordship actually used, as well as fitting with several leading authorities.

Once again, the first thing to consider are the judge's words. Lord Hardwicke LC described the type of "fraud" in issue as that which 'may be apparent from the intrinsic nature and subject of [a] bargain'.¹³¹ The word apparent is significant. "Fraud" which is apparent from something else is "fraud" which can be inferred from it. It is not constituted by the thing under consideration in and of itself. One who takes the view that entering a "one-sided transaction" was, in and of itself, an act of "fraud" leaves no room for the idea that that conduct requires some interpretation. In contrast, my understanding of this part of the Lord Chancellor's judgment takes that into account. It is thus a more complete reading of his words.

The second thing to keep in mind is the welter of cases decided both before and after *Earl of Chesterfield* which are consistent with this view. Think back, for instance, to *Griffith v Spratley*, a decision referred to in Section II, above.¹³² Early on in that case it was recognised that, as there had been no "actual fraud", if the claimant was to succeed in getting the deed in issue set aside, he would have to 'rest his case on the ... ground of inadequacy of consideration, or the fraud to be presumed from [it]'.¹³³ Ultimately, the Court of Exchequer dismissed his claim. The claimant's necessity may well have meant that the wealthy defendant had a factual

¹³¹ *Earl of Chesterfield v Janssen* (n 11) 155.

¹³² See, alternatively, *Arglas v Muschampe* (1684) Rep. Ch. 266; *Gartside v Isherwood* (n 39); *Heathcote v Paignon* (n 20); *Speed v Philips* (1795) 3 Anst. 732.

¹³³ *Griffith v Spratley* (n 21) 386 (emphasis added).

power over him, but ‘the consideration [he received] more or less [supported] the contract’.¹³⁴
As the Lord Chief Baron stated:

‘[While an] inadequacy of price goes a great way in warranting the court to infer ... that some sort of fraud was used to draw the other party into the bargain; it [is only when it is combined with other circumstances that] the Court [can] presume more than is in actual proof’.¹³⁵

A similar point was made by Lord Thurlow LC in *Fox v Mackreth*.¹³⁶ He said:

‘It will be in vain to argue that there was any ... fraud committed by [the defendant] if no loss accrued to [his claimant]. [However], that does not make an end of the matter, unless the [claimant’s loss] was procured by [one] of those frauds which the Court has taken notice of’.¹³⁷

Both these cases therefore stand as authorities for the proposition that, in the absence of deceit, a bill grounded on “fraud” could still succeed if “fraud” was inferred from, amongst other things, the fact of a “one-sided transaction”.

iv. *The “Fraud” Involved in Taking Surreptitious Advantage of Another*

When it comes to ascertaining what amounted to type three “fraud”, the first problem is that Lord Hardwicke LC’s words are not just often misreported by the secondary sources, they are misreported to such an extent that they become so incoherent as to be useless. Consider, for example, Hovenden’s proposition that the third category of “fraud” mentioned in *Earl of Chesterfield* was that “fraud” which may be ‘presumed from the circumstances and condition of the parties contracting’.¹³⁸ Writing much more recently, Barton expressed the same view.¹³⁹

¹³⁴ *ibid.* 388.

¹³⁵ *ibid.* 389.

¹³⁶ *Fox v Mackreth* (n 13).

¹³⁷ *ibid.* 420-421.

¹³⁸ J Hovenden, *A General Treatise on the Principles and Practice by Which Courts of Equity Are Guided as to the Prevention or Remedial Correction of Fraud* (1825) 18.

¹³⁹ See Barton (n 77) 136.

The issue here is that, aside from raising as many questions as it answers – what circumstances? what conditions? – this interpretation elides the contents of the start of a main clause and the entirety of a subordinate clause so as to produce a corrupt statement of what was really said. It omits the end of the main clause, which actually provides substance to the description of the particular type of “fraud” under the Lord Chancellor’s consideration, and replaces it with words which make a purely procedural point. Thus, rather than being told what was covered by this type of “fraud” – something one could then begin to interpret – one is merely, and incongruously, told of one way in which it could be proven.

Taking into account all of the contents of the main clause, it is my thesis that the third species of “fraud” identified in *Earl of Chesterfield* was, in fact, the ‘taking [of a] surreptitious advantage of the weakness or necessity [or ignorance] of another’.¹⁴⁰ As shall be explained, here the question is whether this sort of “fraud” was, in substance, any different from the sort of “fraud” which could be inferred from, amongst other things, the fact of a “one-sided transaction”. In my view, the legally operative event involved in both cases was no more and no less than the abuse of interpersonal power.

Of course, as has already been seen – and as shall be discussed further in Section V, below – it is perfectly true that, as a matter of 18th Century Equity, some aspects of the abuse of interpersonal power could be inferred from other evidence. This is what was being contemplated in cases like *Griffith*, for example.¹⁴¹ Lord Hardwicke LC was therefore entitled to contrast the rules of proof relating to the taking advantage of another’s weakness, necessity, or ignorance with the rules of proof relating to deceit. However, if the abuse of interpersonal power underpinned more than one of Lord Hardwicke LC’s other species of “fraud” – which I believe it did – then the fact that the surreptitious taking of an advantage could be proven, in part, by inference from other evidence was not a defining feature of it. Lord Hardwicke LC’s observations on that matter should thus be understood as made in addition to, not in lieu of, a substantive description of what legally operative occurrence type three “fraud” involved.

¹⁴⁰ *Earl of Chesterfield v Janssen* (n 11) 156.

¹⁴¹ For an example of a type five “fraud” case in which an inference was made see *How v Weldon and Edwards* (n 12).

a. *Alternative Analyses*

Various attempts have been made to sub-categorise the mass of cases which fall to be considered under Lord Hardwicke LC's third head of "fraud". In doing so, each one suggests – contrary to my position – that they were not all underpinned by the same principle.

Sheridan, for example, devised what was formally a three-part scheme. He viewed the authorities as concerning either 'undue influence', 'breach of fiduciary duty', or the 'taking [of an] advantage of weakness [or] necessity'.¹⁴² In his mind, his last category was characterised by the fact that, in the cases which fell within it, 'there [had been] no [pre-existing] relation between the parties apart from the transaction impeached'.¹⁴³ The first and second groups both concerned actions which occurred between people who shared relationships predating events.¹⁴⁴ The specific distinction between 'undue influence' and 'breach of fiduciary duty' is harder to pin down, as Sheridan himself admitted. The former, he stated, was no more a subtype of the latter, limited to certain factually distinct acts of 'abuse of confidence'.¹⁴⁵ The latter covered all those 'remaining kinds of breach of fiduciary duty which [were] termed fraudulent'.¹⁴⁶ In substance, then, they were the same and so for present purposes can be evaluated together.

Ashburner's analysis is premised on a sharp distinction between cases of 'fraud'¹⁴⁷ on the one hand, and cases of what he calls 'undue influence'¹⁴⁸ and 'conflict of interest and duty'¹⁴⁹ on the other. What is more, he ascribes different and independent juridical bases to each of these concepts. Thus, while he thought that Lord Hardwicke LC's judgment in *Earl of Chesterfield* covered 'fraud', he did not think that it touched either cases of undue influence or conflict of interest. As it happens, within his treatment of 'fraud', Ashburner *did* correctly consider that 'the second and third heads under which Lord Hardwicke LC arranged cases [were] properly considered together'.¹⁵⁰ However, his discussion of both of those two kinds of "fraud" only

¹⁴² Sheridan (n 98) 71.

¹⁴³ *ibid.*

¹⁴⁴ *ibid.* 87.

¹⁴⁵ *ibid.*

¹⁴⁶ *ibid.* 107.

¹⁴⁷ W Ashburner, *Principles of Equity* (Butterworth & Co 1902) 396.

¹⁴⁸ *ibid.* 411

¹⁴⁹ *ibid.* 421.

¹⁵⁰ *ibid.* 404.

refers to cases in which the court's focus was on whether there was a "one-sided transaction". No true cases of type three "fraud" are actually mentioned. When they *are* finally considered, type three "fraud" authorities are all said to involve either undue influence or a conflict of interest (and are therefore ascribed some other legal basis).

It is my thesis that, for two reasons, both these attempted classifications should be rejected. The first is that, properly understood, the cases which they purport to explain do not, in fact, conform to them. The second is that the same cases also indicate that the judges took exactly the opposite approach. They actively eschewed the sub-categorisation of cases, instead preferring to focus on the underlying questions of principle before them. Indeed, in my view, these authorities thereby also add weight to my own analysis of type three "fraud" cases. The only principle the courts seem, in substance, to refer to is the abuse of interpersonal power.

b. Unsatisfactory Explanations

My first reason for thinking that the taking advantage of another's weakness, necessity, or ignorance, was no more than the abuse of interpersonal power, is that attempts to substantively sub-categorise the cases which involved it have failed to produce a convincing account of the law. Indeed, tellingly, even Lord Hardwicke LC's own terms are unable to satisfactorily cover all the cases they might do. In my view, the reason for this is that the true principle upon which each of them was decided was that which proscribed the abuse of interpersonal power. Consequently, no further coherent division of them is possible.

Let me start with Ashburner's analysis. As has been noted, he explained all those cases concerning type three "fraud" on the basis of something substantively different to that which he said underpinned type two cases. To his mind, type three cases each involved either 'undue influence' or 'conflict of interest and duty'. The problem is that these definitions are inconsistent with the authorities. The concepts they rest upon were not ones recognised by the judges.

Consider, for example, *Norton v Relly*.¹⁵¹ In my view, it is a classic type three "fraud" case involving the taking of a surreptitious advantage of another's weakness. However, Ashburner

¹⁵¹ *Norton v Relly* (1764) 2 Eden 286.

did not think it was what he called a ‘fraud’ authority at all. Instead, he regarded it as one involving ‘undue influence’ and said it was decided according to the principle that:

‘If A obtains any benefit from B, ... by exerting an influence over B, which ... prevents B from exercising an independent judgment in the matter in question, B can set aside the [transaction]’.¹⁵²

Unfortunately, not only is it indisputable that the claimant in this case based her bill on “fraud”, but it is also clear that it was the fact of at least one genuine sort of “fraud” on the part of the defendant which grounded the judge’s decision in her favour. Ashburner’s explanation is therefore neither necessary nor sufficient to account for its outcome.

The facts of *Norton* were as follows. The claimant was an unmarried wealthy woman from Leeds. The defendant was an itinerant preacher. They largely communicated by way of letter. Over time, the defendant convinced the claimant to join his congregation, and, for some years thereafter, the claimant made several gifts in his favour. Chief amongst these was an annuity worth £50. Eventually, the claimant came to regret her actions and sought relief.

Lord Northington LC decreed that the defendant ‘execute a release ... of [his] annuity, and deliver up the deed [which created] it’.¹⁵³ He stated unequivocally that it ‘was obtained [in] circumstances of the greatest fraud [and] imposition ... that could be’.¹⁵⁴ What is more, this was not just because the defendant had committed “actual fraud” – there *was* evidence of knowingly made misrepresentations – but because he was guilty of committing what this Chapter has labelled an abuse of interpersonal power too. His Lordship’s reasoning on this second point was as follows:

- 1) Before the claimant and the defendant met, the claimant was a great religious ‘enthusiast’, but, although ‘she was far gone’, she was ‘not gone far enough for [the defendant’s] purpose’.¹⁵⁵

¹⁵² Ashburner (n 147) 411.

¹⁵³ *Norton v Relly* (n 151) 291.

¹⁵⁴ *ibid.*

¹⁵⁵ *ibid.* 289, 909.

- 2) When the defendant wrote, as he did in one letter, that ‘your former pastor has ... excommunicated you; but let not these things discourage you, ... put yourself in my congregation, wherein dwells the fulness of God’,¹⁵⁶ this was the start of a deliberate attempt to establish power over the claimant.
- 3) This process was ‘advanced step by step, and [she] imbibed his doctrines till she became quite intoxicated ... with his madness and enthusiasm’.¹⁵⁷
- 4) The claimant then started making what were sometimes expressly solicited gifts in favour of the defendant. Indeed, at least once, the defendant wrote that they were accepted ‘in the name of [the] Saviour’.¹⁵⁸
- 5) The defendant was thus ‘a subtle sectary, who [preyed] upon his deluded hearers, and [robbed] them under the mask of religion’.¹⁵⁹

This is, in substance, a classic abuse of interpersonal power analysis. Before they met, the claimant, though to some degree naturally vulnerable, was not under the defendant’s control. The defendant then initiated a process of establishing power over her. When that process was complete the claimant was rendered vulnerable to him. There was direct evidence from the defendant’s own letters that he exercised his power in his own favour at various times; he procured her entry into a string of “one-sided” transactions that she would otherwise not have engaged in.

Of course, in being a case in which the court did not have to infer the fact that there was a causal link between the transaction in issue and the defendant’s use of his power, *Norton* was something of an unusual decision.¹⁶⁰ Indeed, this must be why, more than a little anachronistically, Ashburner described *Norton* as a case of ‘actual undue influence’.¹⁶¹ In most

¹⁵⁶ *ibid.*

¹⁵⁷ *ibid.*

¹⁵⁸ *ibid.* 290.

¹⁵⁹ *ibid.* 289.

¹⁶⁰ See, alternatively, *Hylton v Hylton* (1754) 2 Ves. Sen. 547.

¹⁶¹ Ashburner (n 147) 413 (emphasis added).

cases of type three “fraud”, causation needed to be inferred from the facts that the claimant was the subject of a power and that he had entered into a “one-sided transaction”.¹⁶²

A second case for which Ashburner cannot properly account is *Whitackre v Whitackre*.¹⁶³ To my mind, it was a case of type three “fraud”: an idiosyncratic instance of a defendant knowingly taking advantage of another’s (legal) weakness (and therefore also of the abuse of interpersonal power). Ashburner did not think it involved ‘fraud’ at all. Instead, he considered it to have turned on the application of a wholly different principle: ‘The desire to prevent a person from burdening his [own] conscience by the acquisition of property to which in conscience he has no right’.¹⁶⁴

The defendant was the claimants’ agent, tasked with selling their stock. He arranged to sell it to a third party, but then exercised his power of disposal in his own favour for £600 less. He later passed on the stock to the third party for the price he had originally agreed with them, thereby making a £600 profit on the transaction. The claimants brought a bill seeking an account, and Lord King LC allowed it. He stated:

‘No trustee, or any person acting [in a similar capacity *viz.* an agent,] can ever be a purchaser in this Court, on account of the great inlet to fraud’.¹⁶⁵

What really mattered in this case was that, by virtue of being an agent, the defendant had a (legal) power over the claimant to enter them into contracts. In exercising that power in his own favour, and therefore by locking the claimants into a contract for £600 less than he might have, the defendant caused them to enter a “one-sided transaction”. He was thus guilty of a textbook abuse of interpersonal power.

Sheridan’s view on this material is similarly limited. The key distinction on which it rests: that between cases involving the taking advantage of weakness or necessity and cases involving a so-called breach of fiduciary duty, also fails to reflect the reasoning employed in the cases and so cannot adequately account for their results. Put simply, it does not appear that the fact that

¹⁶² See, for example, *Griffin v De Veulle* (n 14).

¹⁶³ *Whitackre v Whitackre* (1725) Sel. Cas. Ch. 13.

¹⁶⁴ Ashburner (n 147) 421.

¹⁶⁵ *Whitackre v Whitackre* (n 163) 15.

there was a pre-existing relationship between a claimant and a defendant was in any way relevant to the disposal of a genuine type three “fraud” case. Consider, for example, *Bennet v Vade*,¹⁶⁶ which Sheridan cited as an example of the ‘taking advantage of mental weakness’, and *Clarkson v Hanway*,¹⁶⁷ said to involve ‘undue influence’. As a matter of law, it is hard to see a meaningful difference between them.

In *Bennet*, there was no pre-existing relationship between the parties. However, the court was happy to cast the defendant’s conduct as ‘undue influence’.¹⁶⁸ Indeed, that action is consistent with various other contemporary decisions,¹⁶⁹ such that one might think that, at the time, that term was used only to describe certain factually similar instances of “constructive fraud”. In substance, the case was decided solely on abuse of interpersonal power terms. Lord Hardwicke LC held that the claimant entered the “one-sided transaction” in issue because of ‘the power [the defendant] had over him’.¹⁷⁰

Conversely, in *Clarkson*, although one of the defendants was the victim’s brother, it is not clear that their pre-existing relationship had any particular impact on the judge’s reasoning. In setting aside the transaction in issue, Jekyll MR focused on the fact that there was ‘proof that [the victim] was a weak man and easily to be imposed upon’.¹⁷¹ Furthermore, it was for this reason that he found not just against the victim’s brother but also a second defendant whom the victim had never previously met. Though potentially relevant for factual classificatory purposes, the fact there was a pre-existing relationship between the victim and one of the defendants seems to have been thought irrelevant as a matter of substance.

An important indicator about the unworkability of any form of substantive sub-classification is the fact that even Lord Hardwicke’s LC own description of the cases which made up his third species of “fraud” does not cover all the decisions it should have. Where, for example, does *Duke of Hamilton v Lord Mohun*¹⁷² fall within its terms? The claimant in that case married Lord Gerrard’s daughter. One of the conditions upon which Lord Gerrard consented to that

¹⁶⁶ *Bennet v Vade* (1742) 2 Atk. 324.

¹⁶⁷ *Clarkson v Hanway* (1723) 2 P. Wms. 203.

¹⁶⁸ *Bennet v Vade* (n 166) 327.

¹⁶⁹ See, for example, *Morris v Burroughs* (1737) 1 Atk. 399; *Cocking v Pratt* (1750) 1 Ves. Sen. 400.

¹⁷⁰ *Bennet v Vade* (n 166) 327.

¹⁷¹ *Clarkson v Hanway* (n 167) 204.

¹⁷² *Duke of Hamilton v Lord Mohun* (1710) 1 P. Wms. 118.

union was that, within two days of the wedding, the claimant would grant a release in favour of Lady Gerrard in respect of any monies she might have owed her daughter. Indeed, this was something upon which Lady Gerrard herself was insistent. The claimant agreed to Lord Gerrard's request and secured his undertaking to that effect by issuing a £10,000 bond in Lady Gerrard's favour. When the claimant failed to grant the release, Lady Gerrard brought proceedings against him at Law. In response, the claimant brought a bill in Equity, grounded on "fraud", seeking to be relieved against his bond. Lord Cowper LC found in his favour.

Now, as the Lord Chancellor noted, this was not a case of "actual fraud", for 'there had been no concealment of the matters to be accounted for'.¹⁷³ Nonetheless, he also held that the bond 'to make [the] release ought to be set aside'.¹⁷⁴ 'It [was] extorted from the Duke', he said, 'by one who had a power over the young lady courted by him, [and therefore over him,] which ought not to have been made use of in this manner'.¹⁷⁵ 'It was as if the mother [said], you shall not have my daughter, unless you will release all accounts'.¹⁷⁶

The challenge here is that it is hard to view this case as involving the taking advantage of any weakness, necessity, or ignorance. There was certainly no evidence that the claimant was a weak-minded man or that he was penurious. He was in some state of desperation, but only to marry Lady Gerrard's daughter. It was also not a case of 'surprise' in which the defendant took advantage of the claimant's ignorance.¹⁷⁷ As the judge noted, the bond in issue was 'agreed upon [only] after great deliberation, and advice of counsel on both sides'.¹⁷⁸

In the end, if one reads Lord Hardwicke LC's judgment in *Earl of Chesterfield* as containing an exhaustive categorisation of type three "fraud" authorities, the result in *Hamilton* appears problematic. However, if one takes his Lordship at his word and accepts that he was positing only a broad-brush, factual classification, it is of no concern. Like every other type three "fraud" decision so far considered, it turned as a matter of law on the abuse of interpersonal power.

¹⁷³ *ibid.* 119.

¹⁷⁴ *ibid.* 119-120.

¹⁷⁵ *ibid.* 120.

¹⁷⁶ *ibid.*

¹⁷⁷ See, for example, *Evans v Llewellyn* (1787) 1 Cox Eq. Cas. 333.

¹⁷⁸ *Duke of Hamilton v Lord Mohun* (n 172) 119.

c. *The Judges' Own Views*

My second reason for rejecting any attempt to sub-categorise type three “fraud” cases – and thereby explain some or all of them on the basis of a principle other than the abuse of interpersonal power – is that, along with failing to conform to any other analyses, many cases positively eschew them. There are therefore authorities which provide both negative and positive reasons for rejecting views like Ashburner and Sheridan’s. Ultimately, the judges had little regard for anything beyond the underlying question of principle in each case. They routinely spurned the chance to engage in any form of substantive sub-categorisation. Indeed, it is in this light that one can make sense of Lord Hardwicke LC’s otherwise puzzling comment, in *Thornhill v Evans*,¹⁷⁹ that:

‘Where there is an act of extortion, this court will decree a refunding without inquiring into the particular circumstances of imposition’.¹⁸⁰

Moreover, it is my view that the relevant cases are doubly instructive because they also directly support my own analysis of type three “fraud” cases. In substance, the single principle the judges return to again and again is the abuse of interpersonal power.

Of course, none of this is to say that previous decisions were never cited to – or even occasionally analysed by – the courts. They were. However, even then, the judges usually resisted the temptation to go farther. A clear example of this comes from Lord Hardwicke LC’s judgment in *Barnardiston v Lingood*.¹⁸¹ During the course of argument several allegedly analogous cases were cited, but, although he referred to them, it seems that the Lord Chancellor did so only out of courtesy to the counsel who raised them. In substance, his focus was on the question of principle, not precedent. In addition, it seems plain that he was interested in whether the facts of the case before him disclosed an abuse of interpersonal power. Consider, for example, the following passage:

‘Without doubt, there are all the material ingredients in this case, as well as in those which have been cited: ... *Comes Arglasse [v] Muschamp*, ... *Berney [v] Pitt* ... and

¹⁷⁹ *Thornhill v Evans* (1742) 2 Atk. 330.

¹⁸⁰ *ibid.* 331.

¹⁸¹ *Barnardiston v Lingood* (n 117).

Knot [v] Johnson and Graham, ... to set aside this agreement as a catching bargain, against a necessitous and improvident heir. The very advancing [of] money in such small sums as has been done in the present case, [shows] the [claimant] to be in the utmost distress. ... *But what the Court is guided by in all these cases is the taking an undue advantage of an heir's being in distressed and necessitous circumstances; and this is the principal ground of these decrees*'.¹⁸²

As Croft has noted, the decisions the Lord Chancellor cited were 'neither essential to, nor used as authorities for, any proposition [which formed] part of [his] reasoning process; they were merely [used to provide] analogies'.¹⁸³

A second good example comes from *Walmesley v Booth*.¹⁸⁴ In that case, a range of different authorities were cited, supporting many different analyses of the legally operative occurrence in issue, yet the judge treated them all in the same way. As the following remarks demonstrate, Lord Hardwicke LC looked through the facts of each supposed line of case law to find the underlying principle. He did not regard himself as bound to follow anything else but that:

'The next case to which [this dispute] has been compared [is that] of mortgages, as where a person takes the advantage of another's necessities, and secures to himself an exorbitant interest; in which instance, the court will set it aside if he gets any unjust [*sic*] gain to himself. ...

What is the general rule the court goes upon? Why, the person's being in such circumstances that any body might have taken the advantage of him, and here the court will not allow A any more than B to get an illegal benefit to himself.

So, in this case, [the victim of "fraud", who was] under very severe prosecutions, for very heinous offences, and [so] was obliged to call in [some] attorney to his assistance ... was [preyed upon by] defendant as his attorney'.¹⁸⁵

¹⁸² *ibid.* 135 (emphasis added).

¹⁸³ Croft (n 78) 145.

¹⁸⁴ *Walmesley v Booth* (1739) 2 Atk. 25.

¹⁸⁵ *ibid.* 29.

Helpfully, along with rejecting the need for any fact-based sub-classification, these remarks also serve to underline that true type three “fraud” cases of whatever variety were all just instances of the abuse of interpersonal power. They each turned on the same one cause of action.

There *are* a handful of cases which point the other way. In them, when considering a mass of authorities, the judges occasionally referred to certain similar types of decision by reference to the factual nature of the abuse of interpersonal power within them. Indeed, as was hinted at while discussing *Bennet v Vade*, above, it seems that this is how the term ‘undue influence’ first came into being. A second example of this is some lawyers’ use of the term ‘awe’ to describe what was in play in abuse of interpersonal power cases involving two relatives, such as a parent and their child.¹⁸⁶

However, notwithstanding this behaviour, it must be recognised that even then the judges did not engage in any substantive sub-classifications of the law. Even if they could be sorted into certain factual types, the same legally operative occurrence occurred in them as in any other type three “fraud” case. In *Blunden v Hester*,¹⁸⁷ for example, Lord Parker LC specifically rejected counsel’s attempt to sub-categorise the proceedings as necessarily involving ‘the awe [a child] was presumed to have of his parent’.¹⁸⁸ Instead, he insisted on applying what were, in substance, abuse of interpersonal power rules. ‘I do not see the argument from the father’s power over the child to be of any weight’, he stated, ‘for if it should ever appear that this power has been abused, a court of equity would certainly set aside the [transaction in issue]’.¹⁸⁹

This approach fits in well with the general nature of all the reasons given for rejecting bills brought on the basis of “constructive fraud” discussed so far. They were not formalistic – “the facts of this case are not those of a typical undue influence case etc.” – but substantive. They were consistently focussed on the fact that, whatever the circumstances of the case, there was no abuse of interpersonal power by the defendant.

¹⁸⁶ See, for example, *Duke of Hamilton v Lord Mohun* (n 172) 121.

¹⁸⁷ *Blunden v Hester* (1720) 1 P. Wms. 634.

¹⁸⁸ *ibid.* 639.

¹⁸⁹ *ibid.* 639-640.

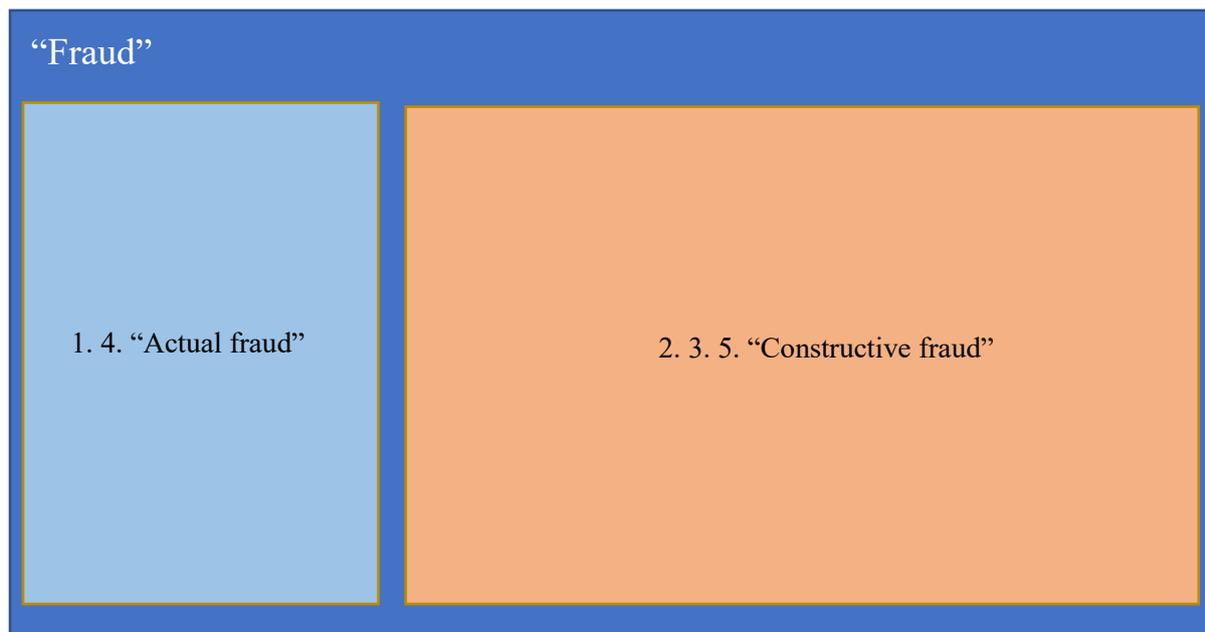
v. *Conclusions*

In its search for consistency between the three suggested elements of “constructive fraud” and the mass of 18th Century authorities generally understood to constitute the law relating to it, this Section focused on cases of (what Lord Hardwicke LC labelled) type two and type three “fraud”. This was because, properly understood, type one and type four “fraud” cases were all instances of “actual fraud”, and therefore made up a separate head of Equity’s general “fraud” jurisdiction. Similarly, there was nothing substantively unique about type five “fraud” cases. While they would occasionally involve instances of either type one or type four “fraud”, even in the absence of deceit, they always entailed a context specific act of both type two and type three “fraud”.

Upon examination, both type two and type three “fraud” cases concerned the same one ground of intervention, and, in substance, that ground of intervention was the abuse of interpersonal power. Indeed, there is simply no other coherent way of accounting for either of them. It therefore makes sense to describe both those species of “fraud”, plus all type five “fraud” cases (except insofar as any may also have concerned deceit), as constituting the law of “constructive fraud”.

Cases of type two “fraud” *did* differ from those of type three “fraud”. In the latter, the courts focused more on whether the defendant had a power over the claimant, and less on whether there was a “one-sided transaction”. In the former, the emphasis of its inquiry was reversed. Nonetheless, properly understood, all the authorities seem to show that, in the absence of “actual fraud”, in order to obtain relief, a claimant had to establish a causal link between an exercise of a power on the part of the defendant and his own entry into a “one-sided transaction”.

Once again omitting type five “fraud” cases which also involved “actual fraud”, the second diagram set out above can thus be reworked as follows:



V. Proving "Constructive Fraud"

At various stages, this Chapter has identified that one distinguishing characteristic of the 18th Century law of "constructive fraud" was the relative liberality of the rules on how it could be proved. While both at Common Law and in Equity every element of deceit had to be established with direct evidence (*viz.* by reference to facts which themselves demonstrated the existence of each aspect of the cause of action), one element of an abuse of interpersonal power could – but need not be – inferred from other (relevant) facts. In part, it was open to proof by circumstantial evidence.

In general, there was commonality between the rules governing how both "actual" and "constructive fraud" had to be shown. Just as with deceit, for example, as a matter of 18th Century Equity, the burden of proof in a case of "constructive fraud" was on the party seeking to pray in aid the court's jurisdiction.¹⁹⁰ Likewise, the law on what information was admissible in such proceedings was the same for both grounds of intervention.¹⁹¹ It was only when it came to the more specific issue of how a claimant could demonstrate that each element of his cause of action had, in fact, occurred that the two jurisdictions diverged.

¹⁹⁰ See *Cray v Mansfield* (1750) 1 Ves. Sen. 379, 383.

¹⁹¹ See *Man v Ward* (1741) 2 Atk. 228.

As was hinted at in Section II, Subsection *i*, above, when it came to deceit, 18th Century Equity took a strict approach, in lockstep with the Common Law. The clearest authority for this is *Trenchard and Ippsley v Wanley*,¹⁹² where Jekyll MR stated:

‘The rule of law as to fraud is also a good rule in equity, viz. that fraud is never to be presumed’.¹⁹³

A claimant seeking to establish that he had been the victim either of a knowingly made or reckless misrepresentation, or a failure to disclose information made in breach of a duty to do so, had therefore to prove, with direct evidence, not just each aspect of that cause of action, but also that there was a causal link between it and his entry into the particular transaction he was seeking relief from.

An illustration of this point comes from *Townsend v Lowfield*.¹⁹⁴ The claimant was the personal representative of a deceased bankrupt. The defendant purported to be one of that man’s creditors. Before his death, the defendant had brought a bill in Equity seeking an account against the deceased and had successfully established that he had made him various loans. The claimant later sought to dispute the extent of the deceased’s liability on the basis that the defendant had rendered a false account. He therefore accused the defendant of “actual fraud”. He sought an order that the defendant would not be allowed to claim any sums, save ‘what he [could] produce receipts for, or [prove] by [calling] witnesses who were present at the time they were advanced’.¹⁹⁵

Lord Hardwicke LC refused to grant such relief. ‘No actual fraud has been proved’, he noted, ‘and circumstances of suspicion are not sufficient for this court to ground [the desired] decree upon’.¹⁹⁶ For the bill to have succeeded, he added, the claimant would have to have provided the court with some ‘positive proof of [the alleged] fraud’.¹⁹⁷

¹⁹² *Trenchard and Ippsley v Wanley* (n 6).

¹⁹³ *ibid.* 167.

¹⁹⁴ *Townsend v Lowfield* (1747) 3 Atk. 536. See, alternatively, *Aston v Aston* (1749) 1 Ves. Sen. 264. See (1747) 1 Ves. Sen. 35 for an alternative but ultimately consistent report of *Townsend*.

¹⁹⁵ *Townsend v Lowfield* (n 194) 536.

¹⁹⁶ *ibid.* 536-537.

¹⁹⁷ *ibid.* 537.

In contrast, as it was part of their exclusive jurisdiction, with respect to “constructive fraud” the 18th Century courts of Equity did not feel the need to limit themselves in the same way. As has been demonstrated,¹⁹⁸ when it came to establishing an abuse of interpersonal power, they held that the fact that there was a causal link between D’s exercise of power and C’s entry into a “one-sided transaction” could be inferred from the existence of other (relevant) facts. Recall, for example, that, in *Earl of Chesterfield v Janssen*,¹⁹⁹ in relation to type three “fraud”, Lord Hardwicke LC said:

‘[It] may be presumed from the circumstances and condition of the parties contracting: and [in holding this, Equity] goes farther than the rule of law; which is that [fraud] must be proved, not presumed’.²⁰⁰

One should not be misled by the Lord Chancellor’s use of the word ‘presumed’. It was not a reference to any sort of mandatory evidential presumption, the like of which is familiar to modern lawyers through their study of the law of resulting trusts.²⁰¹ To start with, it is not at all clear that such presumptions formed any part of the law of proof in 18th Century Equity, at least insofar as it related to “fraud” in its jurisdictional sense. As Macnair has observed, in early modern Equity, presumptions were ‘primarily treated as items of proof, rather than as legal rules reversing the burden of proof’.²⁰² There therefore ‘does not appear to [have been] a clear distinction between presumptions [and] circumstantial evidence’,²⁰³ either in the late 17th Century, or for some time thereafter.

In addition, throughout the operative part of his judgment in *Earl of Chesterfield*, Lord Hardwicke LC used permissive not obligatory terms to describe how “constructive fraud” could be established: *may* presume rather than *must*. That language is inconsistent with the existence of a genuinely mandatory technical presumption. There are also occasions, not least when his Lordship set out descriptions of both type three and type four “fraud”, when the term “infer” is used in coordination with, and so as a synonym for, “presume”. Again, that indicates that the existence of a causal link between the use of a power and the subject of that power’s

¹⁹⁸ See Section IV, Subsections *iii-iv*.

¹⁹⁹ *Earl of Chesterfield v Janssen* (n 11).

²⁰⁰ *ibid* 155. See, alternatively, *Baldwin and Alder v Rochford* (n 12) 229-230.

²⁰¹ On which see W Swadling, ‘Explaining Resulting Trusts’ (2008) 124 LQR 72.

²⁰² M Macnair, *The Law of Proof in Early Modern Equity* (Duncker & Humblot GmbH 1999) 271.

²⁰³ *ibid*.

entry into a “one-sided transaction” was an allowable conclusion rather than a necessary albeit rebuttable one.

Of course, as identified in Section IV, Subsection *iv*, above, the possibility of inferring causation in abuse of interpersonal power cases did not mean that it could not be specifically proven. In *Norton v Relly*,²⁰⁴ Lord Northington LC did not hold that the defendant was guilty of “constructive fraud” because causation could be inferred. Instead, it was because the evidence before him directly showed that a causal link existed. The defendant’s letters to the claimant were themselves the means by which he exercised his power over her.²⁰⁵

VI. How “Constructive Fraud” was Remedied

An 18th Century victim of “constructive fraud” was immediately entitled, as of right, to some form of court ordered relief. As Lord Hardwicke LC hinted as part of his judgment in *Cole v Gibson*:²⁰⁶

‘In a court of equity, a man having *a right of action or suit to be relieved in equity*, and knowing the whole of the case, may ... release that, on whatever consideration it arises, so far as regards himself’.²⁰⁷

In *Bridgeman v Green*,²⁰⁸ Lord Commissioner Wilmot made a comment which supports the same idea, albeit in different terms:

‘This Court will look upon [certain gifts] with a very jealous eye, and very strictly examine the conduct and behaviour of the persons in whose favour it is made: [and] if there be the least scintilla of fraud ... *this Court will and ought to interpose*’.²⁰⁹

²⁰⁴ *Norton v Relly* (n 151).

²⁰⁵ See *ibid.* 290.

²⁰⁶ *Cole v Gibson* (1750) 1 Ves. Sen. 503.

²⁰⁷ *ibid.* 507 (emphasis added).

²⁰⁸ *Bridgeman v Green* (n 49).

²⁰⁹ *ibid.* 61 (emphasis added). See, alternatively, *Attorney General v Sothon* (1705) 2 Vern. 497; *Blunden v Hester* (n 187) 639-640.

Quite what form of relief a claimant was entitled to was a matter of the courts' discretion. As in any other case, it was open to claimants to make requests on this point, but the final decision was the judge's. Authority for this proposition comes from Strange MR's judgment in *Cray v Mansfield*.²¹⁰ By focusing on the power of the court, the Master of the Rolls emphasised that it was he, and not the claimant, who would decide. He had 'no doubt', he stated, 'that if on the evidence, the court was satisfied there was ... imposition upon the [claimant], the power of the court would be very properly exercised in setting aside [any] deed [it had procured]'.²¹¹

As a result, the structure of 18th Century Equity's response to the abuse of interpersonal power was the same as that of its response to "actual fraud". There were two stages: an initial change in the relative legal relations of both the fraudster and his victim, and a later one, coming at the end of successful legal proceedings. At that time, pursuing one of several alternative remedial goals, the court would crystallise, by way of an order, the nature and extent of the defendant's new legal encumbrance.

Two points follow from this. The first is that, like "actual fraud", "constructive fraud" can be accurately described as an 18th Century equitable cause of action. The second is that the best way of understanding a claimant's initial 'right' to relief is as a power, as against the fraudster, to obtain the remedy he was entitled to by way of legal proceedings. The law's immediate treatment of the fraudster himself was to impose a liability, as against his victim, to have a new encumbrance imposed upon him by way of court order.²¹²

i. Regulating the Courts' Remedial Discretion

The remedial discretion referred to in *Cray* was not wholly unfettered. As the term 'a right ... to be relieved'²¹³ implies, it did not extend to the question of whether, all other things being equal, an otherwise deserving claimant could be denied any remedy at all. If it *did*, one would expect to find language such as "right to *seek* relief" instead. Moreover, when exercising their

²¹⁰ *Cray v Mansfield* (n 190).

²¹¹ *ibid.* 381.

²¹² Again, the power/liability relationship under consideration here must be distinguished from the various power/liability relationships with respect to being sued (whether rightly or wrongly) which all individuals might be part of. On the later, see, for example, JCP Goldberg and BC Zipursky, *Recognizing Wrongs* (Belknap Press 2020) 162-163.

²¹³ *Cole v Gibson* (n 206) 507.

powers to relieve the victims of “constructive fraud”, the courts could only issue orders in pursuance of a limited number of remedial goals.

The most invoked remedial goal was the wiping out (or ‘rescission’) of any transaction which the claimant entered because of the defendant’s “fraud”. However, in contrast to contemporaneous cases of deceit, the ‘making good’ (or ‘perfection’) of the defendant’s fraudulent behaviour was not available. In its place was the stripping away (or ‘disgorgement’) of any benefit which the defendant’s abuse of interpersonal power caused him to acquire. Indeed, this remedial goal was not open to the courts in cases of “actual fraud”. Within Equity’s wider jurisdiction over “fraud” it was limited to cases of the abuse of interpersonal power.²¹⁴

a. Rescission

Starting with rescission, everything said in Chapter 3 about this remedial goal in general also applied, *mutatis mutandis*, to “constructive fraud”. To avoid repetition, this Subsection can therefore turn straight to the cases.

*Lamplugh v Lamplugh*²¹⁵ was a simple case. The claimant was a necessitous man. The defendant, who was aware of that, offered to lend him money on substantially disadvantageous terms. After accepting those terms, but before any money was transferred under them, the claimant brought proceedings seeking to have the whole arrangement set aside. Lord Camden LC acquiesced with his bill. As Dickens’ report states, the Lord Chancellor:

‘Was clearly of [the] opinion ... that the contract ... ought to be set aside, as unconscionable and oppressive, and obtained by [the defendant] by taking advantage of the poverty and distressed circumstances of the [claimant]’.²¹⁶

More specifically, the backwards-looking goal of wiping out the transaction which the claimant had entered because of the defendant’s “fraud” was pursued in the standard way. The judge

²¹⁴ Of course, an account of profits is still not available in cases of deceit today. See *Murad v Al-Saraj* [2005] EWCA Civ 959, [46].

²¹⁵ *Lamplugh v Lamplugh* (1769) Dick. 411.

²¹⁶ *ibid.* 413-414.

‘ordered all the deeds ... be delivered up to be cancelled’.²¹⁷ Thus, at that point, and for the first time since committing an abuse of interpersonal power, the defendant was placed under a duty to the claimant. The claimant was, reciprocally, granted a claim-right.

A second example of rescission in a “constructive fraud” case comes from *Osmond v Fitzroy*.²¹⁸ As said in Section III, Subsection *iii*, above, in substance, the Master of the Rolls held that a bond executed by the defendant in favour of the claimant was procured by an abuse of interpersonal power on the claimant’s part. He therefore allowed the defendant’s request that it be set aside. Matters were complicated by the fact that, at some point prior to judgment, the bond in question had been misplaced. However, undeterred by this, rather than decreeing that it be delivered up to be cancelled – which could not physically happen – Jekyll MR ordered the claimant ‘to release the bond’.²¹⁹ Imposing such a duty achieved the same effect as obliging the claimant to deliver it up. The transaction was undone; the defendant was placed in the position he would have been in had the claimant not abused his power.

*Clarkson v Hanway*²²⁰ – mentioned in Section IV, above – was a more complex case of rescission. Its facts required the court’s order to be more intricately structured than that made in *Lamplugh*. This was because the contract in issue was not purely executory.

By procuring for themselves a conveyance of one of the claimant’s kinsman’s estates, the two defendants abused the factual power over him which his weakness had given them. However, some time had passed between the conveyance and the claimant’s filing of a bill, and the defendants had made money from managing the property in the meantime. In addition, the transaction in question was not a gift. It was made in consideration of an annuity worth (a meagre) £20, some of which had been paid.

Jekyll MR assented to the claimant’s bill, grounded on “fraud”, asking that the transaction in issue be set aside. He also made the following order:

²¹⁷ *ibid.* 414.

²¹⁸ *Osmond v Fitzroy* (n 44).

²¹⁹ *ibid.* 131.

²²⁰ *Clarkson v Hanway* (n 167).

‘Let the defendants ... re-convey the estate [they obtained,] and pay back the rents which they have received from the premises, beyond what they have paid for the annuity’.²²¹

Here then, to fully unpick what had happened, the defendants’ liabilities were, respectively, crystallised into two separate encumbrances. First, there are the new duties that the estate itself be re-conveyed. The Master of the Rolls’ order was thus a duty-imposing order mandating the transfer of a property right from two people to one other. Second, there were the new duties to account for the rents which the defendants received while they were in control of the land, minus the value of the benefit they had given to the claimant’s kinsman under the annuity. Had it not been for the defendants’ abuse of interpersonal power, those rents would have been the claimant’s kinsman’s. Likewise, he would not have received any annuity money. To restore the *status quo ante*, then, that was the position which had, in effect, to be reached.

b. Perfection

While an absence of evidence is not necessarily evidence of an absence, it seems clear that one remedial goal which was not open to the courts in cases of “constructive fraud” was the ‘making good’ (or ‘perfection’) of the defendant’s behaviour. There is no example of it ever even being considered by claimants or judges. Indeed, the idea that it might have been relevant makes little sense.

As was explained in Chapter 3, perfection was a forward-looking remedial goal in pursuance of which the courts made orders designed to put parties in the position they would have been had either the content of the defendant’s misrepresentation been true, or had the defendant spoken the truth rather than concealed it. In the simplest (three-party) case, if A bought B’s land in reliance on C’s knowingly made misrepresentation as to its value, A could sue C for a sum of money equal in size to the difference between the value of the land as it was, and the value it was represented to have.²²² As Lord Eldon LC noted, in cases involving misrepresentations the first step in granting such relief was an understanding that:

²²¹ *ibid.* 206.

²²² See, for example, *Arnot v Bischoe* (1743) 1 Ves. Sen. 95.

‘If a person was induced to advance his money by ... a misrepresentation, a Court of Equity ... held that the mouth of the person who made that misrepresentation was shut; that he should never utter a contradiction to what he had so asserted’.²²³

There was thus a strong affinity between perfection and a defendant’s actionable misrepresentation or concealment.²²⁴

The problem in “constructive fraud” cases is that, being based on the single idea of the abuse of interpersonal power, the fact that the defendant had committed deceit was not a necessary element of a claimant’s cause of action. As Section II, above, demonstrated, some “fraud” cases did involve *both* deceit *and* the abuse of interpersonal power, but that meant that claimants had two alternative grounds for recourse. The fact that there had been “actual fraud” did not affect the quality of their “constructive fraud” claim. Consequently, in most cases of the abuse of interpersonal power, there was nothing by reference to which the defendant’s conduct could have been made good. Consequently, the rules of perfection could not conceivably apply.

c. *Disgorgement*

Within 18th Century Equity’s general jurisdiction over “fraud”, the one remedial goal which was unique to “constructive fraud” was the stripping away (or ‘disgorgement’) of any benefits which the defendant’s abuse of interpersonal power caused him to make. Authority for this proposition comes from *East India Company v Henschman*,²²⁵ a case of an alleged (but ultimately unsubstantiated) abuse of interpersonal power by an agent. There, Lord Thurlow LC remarked:

‘If, being a factor, [a man] buys up goods which he ought to furnish as factor; and, instead of [merely deducting his commission], he takes [unauthorised] profits ... that is a fraud upon which an account is due’.²²⁶

²²³ *Ex Parte Carr* (1814) 3 V. & B. 108, 111.

²²⁴ See, generally, I Davidson, ‘The Equitable Remedy of Compensation’ (1981) 13 MULR 349, 357-362; F Dawson, ‘Making Representations Good’ (1982) 1 Canta LR 329.

²²⁵ *East India Company v Henschman* (1791) 1 Ves. Jr. 287. See, alternatively, *Whitackre v Whitackre* (n 163); *Massey v Davies* (1794) 2 Ves. Jr. 317.

²²⁶ *East India Company v Henschman* (n 225) 289-290.

The most important point to make about disgorgement is that it differed fundamentally from, and was ultimately separate to, rescission. It is true that, in some cases, rather than a substantively different remedial goal, it appears, in substance, to have been merely an adjunct to the wiping away of a transaction. In *Meade v Webb*,²²⁷ for example, a two-party case of “actual fraud” considered in Chapter 3,²²⁸ while the respondent was subject to a duty to surrender the lease which the appellant’s deceit had caused him to enter, the appellant himself was subject to a duty to account, subject to deductions, for the rent he had received under it.

However, while it is true that, in a genuine case of rescission, the facts could sometimes mean that some collateral accounting was required to fully wipe out a transaction, in a case of disgorgement, that is not what the courts were specifically trying to achieve. When ordering a defendant to account for the benefits he received because of his conduct, they were focusing on something materially different. Thus, insofar as a court’s rescission-pursuing order ever had such an effect, that outcome should be regarded as incidental. It simply indicates a partial overlap in the functional scope of each remedial goal.

Ultimately, as the report of Lord King LC’s decision in *Dover v Opey*²²⁹ tells us, the reason why disgorgement was available was that the courts took the view that ‘[a] defendant ... ought [not] to have the advantage of [his] unfair dealing’.²³⁰ Thus, like rescission, disgorgement was a backwards-looking remedial goal, but, unlike rescission, it was defendant-focused. It was concerned with putting a *wrongdoer* back in the position he would have been in had he not committed “fraud”. As established in Chapter 3, rescission was designed to put a *claimant* in the same position he would have been in had the defendant not committed “fraud”. It was a victim-focused remedial goal.

Consider (again) *Whitackre v Whitackre* – discussed in Section IV, above – and *Spencer v Chase*.²³¹ In both cases the defendants acquired the claimant’s property at an undervalue due to an abuse of interpersonal power. They then sold that property, for its market value, to *bona fide* purchasers. When the claimants brought bills in Equity, grounded on

²²⁷ *Meade v Webb* (1744) 1 Bro. P.C. 308.

²²⁸ See Chapter 3, Section IV, Subsection ii, a.

²²⁹ *Dover v Opey* (1744) 2 Eq. Cas. Abr. 4, 7.

²³⁰ *ibid.* (emphasis added).

²³¹ *Spencer v Chase* (1722) 9 Mod. 28.

“fraud”, the judges ordered the defendants to account for the profits they had made on their respective sub-sales.

In my view, these orders cannot be understood as designed to pursue any form of rescission. Even in the 18th Century, it was settled law that rescission was not available where the property which passed under an impugned transaction had come into the hands of a good faith third party who provided value for it.²³² The transactions in issue in both *Whitackre* and *Spencer* could therefore not have been wiped out. Indeed, this is presumably why, in both cases, the claimants did not even ask for anything more than an account. The implications of this for how one understands the nature of the remedy awarded in such cases is considerable. The judges’ orders, which were both manifestly designed *only* to strip the defendants of their profits, must have been made in pursuance of a fundamentally different remedial goal to that followed in cases like *Meade*.

VII. “Constructive Fraud” as a Label

Knowledge of how the 18th Century courts of Equity responded to abuses of interpersonal power should provide an important context for the discussion of the law of fiduciaries and the law of undue influence to come. Moreover, it should also be helpful in demonstrating why “constructive fraud” is a good term to use to refer to that part of Equity’s jurisdiction over “fraud” which did not concern deceit. Of course, that is not to suggest that there was no specific authority for using the label “constructive fraud” in this way: there was.²³³ But it is also true that “constructive fraud” was occasionally used to describe other legally effective occurrences.²³⁴ In addition, as has been demonstrated, a variety of other labels were used by the courts at the time to refer to what was, in substance, the abuse of interpersonal power. In *Earl of Chesterfield*, for example, Lord Hardwicke LC described it as the fraud which may be inferred: ‘from the intrinsic nature and subject of [a] bargain itself’/‘from the circumstances and condition of the parties contracting’.²³⁵ For those seeking to describe and explain the law on this issue, there is therefore a terminological choice to be made.

²³² See, for example, *How v Weldon and Edwards* (n 12) 118-119; *Bridgeman v Green* (n 49) 71; *Hawes v Wyatt* (1790) 2 Cox Eq. Cas. 263, 265.

²³³ See, for example, *Forbes v Ross* (1788) 2 Cox Eq. Cas. 113.

²³⁴ See, for example, *Pearson v Morgan* (1788) 2 Bro. C.C. 388, where Buller J used it to refer to a knowingly made concealment.

²³⁵ *Earl of Chesterfield v Janssen* (n 11) 155. See Chapter 2, Section III, for more examples.

Beyond the existence of the authorities which support its use, it is my view that the term “constructive fraud” should be preferred because, rather than being purely descriptive, it accurately captures two important features of the law on the abuse of interpersonal power. Writing extrajudicially, with specific reference to the term “constructive fraud” as it was used in the mid-18th Century, Megarry said:

““Constructive” is ... an unhappy word in law, [which] seems to mean “It isn’t, but it has been treated as if it were””.²³⁶

This remark is informative, but it reveals less than one might initially think. It does explain, in the abstract, what the term “constructive” meant, but it does not indicate anything in particular about the relationship between the rules of 18th Century Equity which regulated the abuse of interpersonal power and its contemporaneous jurisdiction over “fraud” in general. What matters is for what purposes something which is a “constructive” form of something else is treated – or interpreted *viz.* construed – as that other thing.

Building on Megarry’s comment, Lionel Smith has taken the view that the term “constructive” is an effect-focused one. He examined, amongst other things, ‘constructive knowledge’ – a concept also known to 18th Century Equity²³⁷ – and argued that “constructive” allows lawyers ‘to multiply operative, triggering concepts, even while [they] pretend that [they] are only subdividing them’.²³⁸ He stated:

‘If [a] relevant effect is triggered by genuine knowledge or by closing one’s eyes to the obvious, then genuine knowledge is sufficient but not necessary [to achieve said effect, and there is therefore a sense in which we can] say that what is necessary is ‘knowledge, actual or constructive’’.²³⁹

²³⁶ R Megarry, ‘Historical Development’, *Fiduciary Duties, Law Society of Upper Canada Special Lectures* (De Boo 1990) 5.

²³⁷ See, for example, *How v Weldon and Edwards* (n 12) 530.

²³⁸ L Smith, ‘Constructive Trusts and Constructive Trustees’ (1999) 58 CLJ 294, 296.

²³⁹ *ibid.*

I believe that this is also true of 18th Century Equity's use of the term "constructive" as part of the label "constructive fraud". What is more, this is exactly why using that term to describe the abuse of interpersonal power is appropriate. The law as one finds it displays both characteristics emphasised by Smith's analysis.

To start with, the abuse of interpersonal power really does seem to have been a new triggering concept to an already established legal effect. The courts of Equity were concerned with acts of "actual fraud" for some time before they also came to focus on instances of the abuse of interpersonal power. What is more, as has been seen, rescission was a remedial goal available in both cases. Underneath this, of course, nothing else about those two grounds of intervention was necessarily the same: one concerned the making of either knowingly made or reckless misrepresentations or wrongful concealments, the other covered the abuse of interpersonal power. Indeed, there is no case which suggests that a claimant alleging an abuse of interpersonal power was pretending that any sort of deceit had occurred. They were fundamentally distinct grounds of intervention.

Thus, whether one likes it or not – and, although he was not directly addressing his mind to it, it seems likely that Smith would not²⁴⁰ – it must be conceded that, in and of itself, it is coherent to use the label "constructive fraud" to refer to what it has so far used to describe. The abuse of interpersonal power *was* an act of "constructive fraud" in that it was treated *as if it was an act of "actual fraud"* in order to extend the availability of rescission from cases of deceit into cases which did not involve deceit.

VIII. Conclusion

The main aim of this Chapter was to establish what the 18th Century courts of Equity understood by the term "constructive fraud" and what they did in response to it. This information should be useful because it provides a context in which the arguments about the law of fiduciaries and the law of undue influence contained in Chapters 5, 6, and 7, can be most fully appreciated. As the next Chapter will show, in the middle of the 19th Century, those two areas of law replaced parts of the law of "constructive fraud" but adopted the theory which underpinned it. There was therefore a high degree of structural similarity between both the

²⁴⁰ See *ibid.*

nascent law of fiduciaries and the nascent law of undue influence, and the 18th and early 19th Century law of “constructive fraud”. Moreover, some of this similarity has endured to the present day.

The most important point made was that, as a matter of 18th Century Equity, “actual fraud” and “constructive fraud” – the only two types of “fraud” in its jurisdictional sense – were two fundamentally different grounds of intervention. Whereas “actual fraud” covered all knowingly made and reckless misrepresentations, and all failures to disclose information made in breach of a duty to do so, “constructive fraud” applied to abuses of interpersonal power. As Section II made clear, this is why a victim of both types of “fraud” had two separate causes of action against the perpetrator. It is also why a claimant alleging that he had been the victim of an act of “constructive fraud” was not pretending that the defendant had told an actionable lie or made an actionable concealment even though no such thing had happened.

Sections III and IV contained my definition of the abuse of interpersonal power. It was argued that such an abuse occurred when one party exercised a power over another and thereby caused that other’s entry into a “one-sided transaction”. It was also argued that this view was supported by the general mass of “constructive fraud” cases handed down at the time. As Section V showed, when it came to proving that one had been the victim of “constructive fraud”, the rules of law which governed that process were similar but not identical to those which covered deceit. Whereas every aspect of “actual fraud” had to be proved with direct evidence, when it came to showing a causal link between an exercise of power by the defendant and his own entry into a “one-sided transaction”, a claimant in a “constructive fraud” case could sometimes succeed by pointing to circumstantial facts.

As Section VI explained, when it came to how “constructive fraud” was remedied, Equity’s approach was similar to that described in Chapter 3 in relation to “actual fraud”. At first, the victim of that legally operative occurrence was given a power, as against its perpetrator, and the perpetrator was subject to a liability. After trial, that liability would be transformed, by way of court order, into at least one more specific encumbrance. The major difference between the law on this issue and the equivalent set of rules for deceit was that, while rescission was still an available remedial goal, perfection was not. Instead, the only other option for a claimant was to seek disgorgement.

The last point made, in Section VII, was about the commonality of rescission and, in particular, what that implies about the “constructive” nature of “constructive fraud”. Despite a material dissimilarity with “actual fraud”, there was a sense in which the abuse of interpersonal power was constructively fraudulent behaviour. It was something which could justify the rescission of a transaction as if there had been deceit, even though there had not.

c. 1770-1870

Fission in Equity

I. Introduction

This Chapter will advance three different but connected propositions. The first is that the law of “constructive fraud” worked in the way it did because it was understood to conform to the “good man” theory of Equity. The second is that, starting in the 1820s, over a period of approximately 50 years that area of law was largely replaced by several new and substantively distinct doctrines. Amongst these were early versions of the law of fiduciaries and the law of undue influence.¹ The third proposition is that, despite the fact of this change, both those new doctrines were also initially underpinned by the “good man” theory. They thus operated in an analogous way to that part of Equity they partially supplanted.

Accepting these three propositions is crucial to understanding my thesis as a whole. This is because one cannot properly appreciate the nature of either the modern law of fiduciaries or the modern law of undue influence without some knowledge of the theoretical basis upon which their foundational authorities were decided. As shall be explained in Chapters 6 and 7, while a substantively different way of conceptualising each area of law has since come into being, a number of older precedents are still binding.² To return to the terminology adopted in this thesis’ Introduction, as a matter of underlying principle, both the current law of fiduciaries

¹ There was also a new law of duress and a new law of unconscionable bargains, see, for example, *Parker v Clarke* (1861) 30 Beav. 54; LA Sheridan, *Fraud in Equity: A Study in English and Irish Law* (Pitman Publishing 1957) 132-144.

² See, for example, the invocation of *Allcard v Skinner* (1887) 36 Ch. D. 145 in *Royal Bank of Scotland Plc v Etridge (No 2)* [2002] 2 A.C. 773; and of *Aberdeen Railway Co v Blaikie Brothers* [1843-60] All ER Rep 249 in *Bhullar v Bhullar* [2003] B.C.C. 711.

and the current law of undue influence are therefore in something of a theoretically hybrid state.³

Corresponding to the propositions set out above, this Chapter has three main Sections. The first – Section II – establishes the applicability of the “good man” theory of Equity to the 18th and early 19th Century law of “constructive fraud”. It introduces that theory, then argues that generations of judges ensured that the rules which governed the abuse of interpersonal power conformed to it. It shows that, in that context at least, the “good man” theory of Equity worked by disabling power holders, as against those over whom they held their power, from asserting any rights acquired as a result of abusing that power.⁴

Section III details the gradual process of speciation undergone by the law of “constructive fraud” in the middle of the 19th Century. Over a period of around 50 years, judges abandoned their practice – considered in Chapter 4⁵ – of refusing to turn various formal distinctions between cases into substantive ones. They began to create the sort of legally operative sub-categories which, throughout the 18th Century, they had refused to. Consequently, important differences between the areas of law covering different types of abuse of interpersonal power began to emerge. Rather than being subject to any wider prohibition, for instance, those occupying certain relationships involving *legal* powers and liabilities began to be thought of as under a particular encumbrance not to act in conflict of interest.⁶ Furthermore, the label ‘fiduciary’ started to be used to describe such persons. In this way, part of Equity’s general jurisdiction over abuses of interpersonal power was replaced by the original version of the law of fiduciaries. Section III also provides information about what happened to that part of the law of “constructive fraud” which was not superseded by newer doctrines. As shall be explained, its fate is currently uncertain.

This Chapter’s final main Section – Section IV – makes clear that, despite these doctrinal developments, both the law governing fiduciaries and the law governing undue influence were

³ See Chapter 7, Section II, Subsections *ii*, and *iv*, for a consideration of whether this is exclusionary or overlapping hybridisation.

⁴ As discussed in Section II, Subsection *i*, 5, below, as a matter of 18th and 19th Century Equity, depending on the context, to describe someone as disabled might have meant one of several things. However, that does not mean that each different type of disability cannot be coherently distinguished.

⁵ See Chapter 4, Section IV, Subsection *iv*, c.

⁶ Recall the special sense in which this thesis is using the word encumbrance, set out in Chapter 1, Section IV.

also initially subject to the “good man” theory of Equity. Fiduciaries were thought of as disabled, as against their principals, from asserting any rights acquired by acting in conflict of interest. Those with influence were disabled, as against those over whom they held their influence, from asserting any rights acquired by exercising it. There was thus a high degree of similarity between the nature and function of both those new doctrines and the old law of “constructive fraud”.

II. The Shape of the Law of “Constructive Fraud”

This Section introduces the “good man” theory of Equity and explores six of its most important characteristics. It then shows how judges deciding cases involving the abuse of interpersonal power not only said that the theory applied, but also disposed of proceedings on that basis. Note that, just as in Chapter 4, I am therefore making two different but connected claims. The first – a historical one – is about the way in which the 18th Century courts of Equity understood the law they were applying. The second – an interpretive one – concerns the best way of conceiving of the general body of decisions they handed down. The strength of the second claim depends on the accuracy of the first.

i. Introducing the “Good Man” Theory

In this Chapter, references without qualification to the “good man” theory of Equity are references to a theory with (at least) the following six characteristics:

- 1) It was a theory of Equity.
- 2) It was a theory of 18th and 19th Century Equity.
- 3) It was a general theory of Equity.
- 4) It was a technical theory of Equity.
- 5) It was a theory of Equity which was sometimes put into effect by disabling individuals from asserting, as against certain other individuals, rights acquired as a result of acting in particular ways.
- 6) It was a theory of Equity which could sometimes empower the courts to pursue certain remedial goals.

I will elaborate on each of these in turn.

1) *A Theory of Equity*

The scope of the “good man” theory was limited to equitable doctrine. Consider, for example, Jekyll MR’s statement in *Cowper v Cowper*:⁷

‘[When it comes to what principles the] courts of equity ought to follow ... in their judgments: ... proceedings in equity are ... *secundum discretionem boni viri* [in accordance with the judgement of a good man]. Yet when it is asked, *vir bonus est quis?* [what man is to be called good?], the answer is, *qui consulta partum qui leges juraq servat* [the one who keeps the decrees of the fathers and who maintains the laws and justice]’.⁸

These words, which are of wider importance to the jurisprudence surrounding the “good man” theory, manifestly restrict its terms to solely equitable adjudication. So too do those of Clarke MR in *Burgess v Wheate*.⁹ His Lordship endorsed his predecessor’s remarks and identified them as concerning ‘the province of a court of equity, and the boundaries of its jurisdiction’.¹⁰ They were ‘full and judicious’, he added, and ‘ought to be imprinted on the mind of every judge’.¹¹ The “good man” theory was therefore not understood by Equity judges to require anything of any particular rule of Law.¹²

2) *A Theory of 18th and 19th Century Equity*

For now, it is necessary to restrict the temporal scope of my description of the “good man” theory of Equity. This is to avoid making any unintentional claims as to the nature of that version the theory which presently subsists. A “good man” theory is still occasionally invoked

⁷ *Cowper v Cowper* (1734) 2 P. Wms. 720.

⁸ *ibid.* 753. The second and third Latin phrases are from Horace’s *Epistles* (I.16.40-41).

⁹ *Burgess v Wheate* (1759) 1 Eden 177.

¹⁰ *ibid.* 214.

¹¹ *ibid.*

¹² Indeed, at least some parts of the contemporary Common Law may have worked on the opposite basis, see OW Holmes, ‘The Path of the Law’ (1897) 10 Harv L Rev 457, 462.

to explain the results of modern cases.¹³ Indeed, in *Tribe v Tribe*,¹⁴ Millett LJ referred to it as ‘a mainspring of equitable jurisprudence’.¹⁵ Yet while there is certainly a link between this theory and the theory presently under consideration, it would be dangerous to assume, without more, that they are identical. The story of English law is the story of change over time, and there is no reason to think that certain theories of Equity are immune from that process.

3) *A General Theory of Equity*

The scope of the “good man” theory of Equity was wider than that of any one particular doctrine, not least that of “constructive fraud”. There are thus both primary and secondary sources which show that it also covered Equity’s exclusive jurisdiction over trusts.¹⁶ Furthermore, there are many cases which demonstrate that the “good man” theory applied to Equity’s concurrent jurisdictions over contracts,¹⁷ wills,¹⁸ and defeasible bonds.¹⁹

However, this does not mean that it operated in exactly the same way in relation to each of those different areas of law. As a matter of fact, it did not. The key distinction seems to have been between those issues over which Equity exercised a concurrent jurisdiction and those over which its domain was exclusive.²⁰ It is therefore possible to find the drawing of close parallels between the application of the “good man” theory in cases involving 1) the misapplication of trust property and 2) fiduciary misfeasance²¹ (both grounds of intervention ‘that were the entire creation of Equity’),²² but not between either of those two sets of authority and cases

¹³ See, for example, D Hayton, ‘The Development of Equity and the “Good Person” Philosophy in Common Law Systems’ (2012) 76 *Conv* 263.

¹⁴ *Tribe v Tribe* [1996] Ch 107.

¹⁵ *ibid.* 133.

¹⁶ See, for example, *Scudamore v Scudamore* (1720) Prec. Ch. 543; *Conyngham v Conyngham* (1750) 1 Ves. Sen. 522; *Ex Parte Lacey* (1802) 6 Ves. Jr. 625; *Downes v Grazebrook* (1817) 3 Mer. 200; *Hamilton v Wright* (1842) 9 Cl. & F. 111; *In Re Bloye’s Trust* (1849) 1 Mac. & G. 488; and H Maddock, *A Treatise on the Principles and Practice of the High Court of Chancery*, vol 1 (1815) 91-94; J Story, *Commentaries on Equity Jurisprudence: As Administered in England and America* (2nd edn, CC Little and J Brown 1839) §1210.

¹⁷ See, for example, *Frederick v Frederick* (1721) 1 P. Wms. 710; *Lechmere v Earl of Carlisle* (1733) 3 P. Wms. 211; *Walsh v Lonsdale* (1882) 21 Ch. D. 9.

¹⁸ See, for example, *Banks v Sutton* (1732) 2 P. Wms. 700.

¹⁹ See, for example, *Hobson v Trevor* (1723) 2 P. Wms. 191; *Hardy v Martin* (1783) 1 Cox Eq. Cas. 26.

²⁰ See the explanations of those two concepts in Chapter 3, Section III, and Chapter 4, Section II, *i*, respectively. See M Macnair, ‘Equity and Conscience’ (2007) 27 *OJLS* 659, 664-665 for a brief history of their invocation.

²¹ See, for example, *Aberdeen Town Council v Aberdeen University* (1877) 2 App. Cas. 544, 554-557.

²² L Smith, ‘Law and Equity: Chunk and Permeate?’ in L Smith and H Patrick Glenn (eds), *Law and the New Logics* (CUP 2017) 193.

concerning 3) contractual disputes. There, claimants ‘had some right at common law but sought to invoke Equity’s intervention in order to obtain a desired remedy unavailable at common law’.²³

In cases where Equity and the Common Law had a concurrent jurisdiction, the usual commonality invoked by the judges was ‘that what ought to have been done, shall be taken as done’.²⁴ Indeed, as a result of this, successive editions of Meagher, Gummow & Lehane’s *Equity: Doctrines & Remedies* have identified those decisions as authority for the existence of a separate maxim of Equity, that it “looks on as done that which ought to be done”.²⁵ Yet, in my view, properly understood, these cases represent nothing more than a jurisdiction-specific application of the “good man” theory.

Everything turns on the fact that, in cases where Equity exercised a concurrent jurisdiction, the operation of the “good man” theory was necessarily coloured by the presence of certain Legal rights and duties which were not present in cases where its jurisdiction was exclusive. It was those rights and duties which gave substance to the ‘ought’ in the statements of principle set out above.²⁶

Consider, for example, *Lechmere v Earl of Carlisle*.²⁷ The parties formed a binding agreement which imposed upon them reciprocal Legal duties to do that which each of them had promised. The case came to Equity because one party failed to perform. The question for the court was whether an order for specific performance could be made. Jekyll MR answered in the affirmative. He emphasised, first, that the defendant ‘was bound’²⁸ to act in the way he had failed to, such that his conduct constituted ‘a breach of his covenant’.²⁹ He then made clear that the relief he would grant was premised on the fact that the defendant ‘ought’³⁰ to have behaved

²³ *ibid.* 192-193.

²⁴ *Frederick v Frederick* (n 17) 713 (a contract case). See, also, *Lechmere v Earl of Carlisle* (n 17) 215 (contract); *Banks v Sutton* (n 18) 928 (a will case).

²⁵ See, for example, RP Meagher, WM Gummow and JRF Lehane, *Equity: Doctrines and Remedies* (1st edn, Butterworths 1975) 86; JD Heydon, MJ Leeming and PG Turner, *Meagher, Gummow & Lehane’s Equity: Doctrines & Remedies* (5th edn, LexisNexis Butterworths 2014) 93.

²⁶ For modern authority on the same point, see *Commissioner of State Revenue v Rojoda Pty Ltd* [2020] HCA 7, [47], citing J McGhee (ed), *Snell’s Equity* (34th edn, Sweet & Maxwell 2019) 5-015.

²⁷ *Lechmere v Earl of Carlisle* (n 17).

²⁸ *ibid.* 214.

²⁹ *ibid.* 214.

³⁰ *ibid.*

in that way. ‘The rule in all such cases’, he stated, ‘is that what ought to have been done, shall be taken as done’.³¹

In contrast, in cases falling within Equity’s exclusive jurisdiction, while the parties may well have had some form of subsisting Legal relationship, not least a power/liability relationship, no relevant Legal rights and duties subsisted between them. No ‘ought’ proposition could therefore be derived from the facts of the case. Instead, Equity acted directly by imposing primary disabilities on power holders aimed at deterring them from acting in certain ways.

Nevertheless, for reasons to be explained, this does not mean that, beyond this distinction, the same broad principle did not underpin both sets of cases. I thus agree with Hayton that its ‘[preparedness] to order specific performance of a contract [is] a major example of Equity intervening [on the basis of the] “good man” [theory]’.³²

4) *A Technical Theory of Equity*

The “good man” theory of Equity was a technical theory not in the sense that its terms were particularly intricate, but because it concerned adjudicative technique. It directed judges to treat certain conduct in a certain way. More specifically, it demanded that they ensure that the individuals it was concerned with were treated, as against those to whom they owed their duties/held their powers, as if, at all times, they had performed their Legal duties (whether positive or negative) and exercised their powers (whether Legal or otherwise) properly. That was therefore how the so-called “good man” behaved.

For two reasons, understanding this point is important. The first is that it makes clear how the “good man” theory was capable of accommodating both cases in which Equity’s jurisdiction was concurrent and those in which it was exclusive. The second is that it embodies the normative idea which formed the heart of the “good man” theory and which caused so many rules of Equity to be shaped in the way they were.

³¹ *ibid.* 215.

³² Hayton (n 13) 267.

General authority for the above propositions comes from Jekyll MR's judgment in *Cowper*, quoted above. Both the first sentence, and the word 'proceedings' in the second, draw attention to the fact that the "good man" theory concerned the way in which the courts were to perform their role as adjudicators. Nonetheless, it is also true that his Lordship's words raise almost as many questions as they answer. They fail to provide real guidance as to how the courts were supposed to go about their task. What position vis-à-vis any litigation was the 'good man' meant to be in, for instance, and what did it mean to say that a 'good man' was one who adhered to the law?

More specific authority for the proposition that the "good man" theory of Equity demanded that certain individuals were treated as if, at all times, they had performed their Legal duties is provided by the contract case of *Frederick v Frederick*.³³ It also offers a partial answer to the question of what it meant to say that a good man was one who obeyed the law. In it, Lord Macclesfield LC stated:

'Where one for a valuable consideration agrees to do a thing, such executory contract is to be taken as done; and ... the man who made the agreement shall not be in a better case, *than if he had fairly and honestly performed what he agreed to*'.³⁴

Being a contract case, and therefore one over which Equity had concurrent rather than exclusive jurisdiction, the parties to this dispute necessarily shared pre-existing Legal rights and duties. The "good man" theory's intervention in it was thus subject to the subsistence of those entitlements and encumbrances, and so focussed on the manner of their discharge.

To find support for the proposition that the "good man" theory of Equity demanded that certain individuals were treated as if, at all times, they had exercised their powers (whether Legal or otherwise) properly, one might look to the second edition of Story's famous *Commentaries*. It also provides the rest of the answer to the question of what it meant to say that a good man was one who obeyed the law. One passage, relating to trustees, is enlightening:

³³ *Frederick v Frederick* (n 17). See, alternatively, J Gilbert, *The History and Practice of the High Court of Chancery* (H Lintot 1758) 235-36.

³⁴ *Frederick v Frederick* (n 17) 713 (emphasis added).

‘If a trustee, authorized to purchase lands for his ... beneficiaries, should purchase lands with the trust money, and take the conveyance in his own name, without any declaration of ... trust, a Court of Equity would, in such a case, *deem the property to be held [on] trust for the persons beneficially entitled thereto*. For, in such a case, a Court of Equity will *presume that the party meant to act in pursuance of his trust*, and not in violation of it’.³⁵

What is significant about the trustee in this example is that, while his power to substitute trust property was undoubtedly a Legal one,³⁶ unlike a contracting party, his position was not regulated by the operation of Legal duties. Instead, it fell into the exclusive jurisdiction of the courts of Equity. Consequently, there were no relevant pre-existing Legal duties in relation to his exercise of his power which a court could treat him as having performed. Judicial intervention had to be framed in a different way.

From the text quoted above, the standard appears to have been a certain more general notion of propriety. Not being linked to the existence of any Legal duties, what counted as proper in any one case did not depend on wrongdoing but was wider and touched upon several considerations drawn from the general law. In this context at least, for example, there was a strong principle of Equity that a trustee should not be able to repudiate his position in relation to certain property in order to benefit from it.³⁷ Indeed, the counterfactual which Story asserts the courts would invoke seems to be premised on just that idea. As the next part of this Section will demonstrate, in such cases the way in which the policy of propriety in respect of the exercise of powers was effected was by the imposition of primary equitable disabilities.

Two points should now be made. The first goes to the second question which *Cowper* failed to address: what position vis-à-vis any litigation was the ‘good man’ meant to be in? The answer is that, in mandating a judge to dispose of cases by reference to the actions of a notional good man, the “good man” theory of Equity told that judge to focus on the position of the defendant, and on a good man in the defendant’s place. This is why, for instance, the focus of Story’s

³⁵ Story (n 16) §1210 (emphasis added).

³⁶ And was analogous to the power of an absolute owner to create a trust in the first place, see *Knight v Knight* (1840) 3 Beav. 148, 172-173.

³⁷ See, for example, *Keech v Sandford* (1726) Sel. Cas. Ch. 61; *Conyngham v Conyngham* (n 16). See J Getzler, “‘As If.’ Accountability and Counterfactual Trust” (2011) 91 BUL Rev 973, 982-984, on the particular historical background to this rule.

point is on someone in the shoes of the recalcitrant trustee. Moreover, for this reason, those aspects of modern Equity which direct judges to consider if a party's behaviour '[shocks] the conscience of the court'³⁸ when determining whether certain causes of action can lie can be distinguished from what the "good man" theory required.

The second point is that, in cases raising issues of Equity to which the "good man" theory applied, the process of adjudication involved making reference to what each defendant's personal circumstances required of him, regardless of his actual conduct *viz.* the use of hypotheticals. That was the basis on which the nature and extent of any defendant's liability was determined. As Getzler has put it, a court would make:

'A presumption of honesty [*and generate*] a kind of ... *counterfactual* where the parties [were] taken to choose good faith in the exercise of their rights and duties'.³⁹

It is true that, as a matter of modern law, the term 'good faith' can have '[a] technical sense, to capture the idea that a party must act in a candid, rational, and fair-minded way, and refrain from sharp practice and behaviour that is secretive, capricious, perverse, or misleading'.⁴⁰ Yet it is clear from his remark's wider context that Getzler was not using that phrase in such a way. Instead, his invocation of 'good faith' was consistent with that of Lord Wynford in *Rothschild v Brookman*,⁴¹ discussed in Section IV, below. It was a synonym for compliance with the standards expected by the law.

5) *A Theory Sometimes Put into Effect by Imposing Disabilities*

A third question which the judgment in *Cowper* leaves unanswered is how the "good man" theory it referred to was to be put into effect. If judges were to treat certain individuals as if, at all times, they had performed their Legal duties and exercised their powers properly, how were they to do so?

³⁸ *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [92] (emphasis added).

³⁹ J Getzler, 'Law, Self-Interest, and the Smithian Conscience' in M Del Mar and M Lobban (eds), *Law in Theory and History* (Hart Publishing 2016) 252 (emphasis added).

⁴⁰ C Mitchell, 'Good Faith, Self-Denial and Mandatory Trustee Duties' (2018) 32 TLI 92, 95.

⁴¹ *Rothschild v Brookman* (1831) 2 Dow. & Cl. 188.

As indicated above, in cases which fell into Equity's concurrent jurisdiction, the answer is that the courts could make orders enforcing individuals' compliance with their primary Legal duties. The awarding of specific performance is perhaps the paradigm example of this.

When it came to disputes which fell within Equity's exclusive jurisdiction, the matter was less straightforward. At least as regards cases which involved "constructive fraud" or – later – the law of fiduciaries or the law of undue influence, it is my thesis that the judges had to hold those individuals as disabled, as against those over whom they held their power, from asserting rights acquired as a result of acting in certain ways. Consider, for example, the words of Lord Langdale MR in *Grand Junction Canal Co v Dimes*:⁴²

‘The law of England is a law of jealousy. In many relative positions, a disability to contract is created, not on the ground of impropriety of conduct, but merely in consequence of that relation. ... The positions of guardian and ward, [and] of trustee and *cestui que* trust, are subject to the same rule’.⁴³

Before expanding on this point, it is worth being more specific about what is meant by disability. This is because, notwithstanding the terminology adopted in this thesis' Introduction, as a matter of 18th and 19th Century Equity, to describe someone as disabled might, depending on the context, have meant one of several things.

One particularly potent form of restriction capable of being described as a disability was that imposed upon children, who had no capacity to enter *any* legally effective transactions. In *Hulme v Tenant*,⁴⁴ Lord Thurlow LC distinguished the law covering *femes covert*s from the law covering children on the basis that infants were simply 'incapable of acting' in certain ways.⁴⁵ They could not enter into contracts with or dispose of any property to *anyone* (unless that behaviour was authorised by a relevant legal authority).

However, when it comes to the regulation of adults whose behaviour was covered by areas of law ruled by the "good man" theory of Equity, it would be wrong to say that any of them were

⁴² *Grand Junction Canal Company v Dimes* (1850) 2 H. & Tw. 92.

⁴³ *ibid.* 100.

⁴⁴ *Hulme v Tenant* (1778) 1 Bro. C.C. 16.

⁴⁵ *ibid.* 20.

similarly disabled. In contrast to children, they *did* have the capacity to hold entitlements and owe encumbrances, and they *did* have the power to change other peoples' legal relations. The disability they were subject to worked in a substantively different way.

Though not the easiest to decode, properly understood, the words of Grant MR in *Peacock v Evans*⁴⁶ are instructive. The case involved an (adult) expectant heir and was therefore a case covered – in its own time – by the law of “constructive fraud”. Thinking back to Chapter 4, it concerned what Lord Hardwicke LC would have referred to as type five “fraud”. The judge drew an analogy between the positions of heirs vis-à-vis those with interpersonal power over them and the position of children, but limited it so as to ultimately distinguish the two:

‘This case [is] that of an expectant heir, dealing for his expectancy during his father’s life. To that class of persons this Court [has] extended a degree of protection, approaching nearly to an incapacity to bind themselves by any contract. ...

In this case [the transferee] has obtained a very advantageous bargain. The consequence is that he cannot retain it against [the heir]; though it [would] undoubtedly [have been] lawful for him to take the advantage as against any one who, ... in the consideration of this Court, [was] upon an equal footing with him’.⁴⁷

When reading the first paragraph, weight must be put on the words ‘approaching nearly’. They indicate that while as a matter of law heirs did not in fact lack capacity, the legal protection they were provided with meant that their position was almost as cosseted as if they did. An explanation for this high level of protection is given in the second paragraph when the Master of the Rolls shifts his focus directly onto the position of those dealing with such individuals. It was because *they* were disabled, as against those heirs, from asserting any rights acquired as a result of transacting with them. Thus, while a child’s disability applied as against anyone, the sort of disability under this Chapter’s consideration only applied as between two particular persons.

⁴⁶ *Peacock v Evans* (1809) 16 Ves. Jr. 512. See, alternatively, *Earl of Aldborough v Trye* (1840) 7 Cl. & F. 436, 457-459, and 465.

⁴⁷ *Peacock v Evans* (n 46) 514-515.

A second type of restriction which might be described as a disability was that entailed by rules which, for various policy reasons, forbade people from entering certain kinds of transaction. They rendered void any otherwise enforceable arrangements one tried to create. The most obvious contemporary example of such a provision is that which invalidates contracts to perform criminal acts, recently discussed in *Patel v Mirza*.⁴⁸

As it happens, the modern law on illegal contracts is the direct descendent of an 18th Century rule, effective at both Law and in Equity, to the same effect. An illustration of its operation comes from *Robinson v Cox*.⁴⁹ The claimant's late husband had given the defendant's wife – a prostitute – a promissory note for £1,000, payable on demand. After her husband's death, the claimant brought a bill seeking an order that the note be set aside. Lord Hardwicke LC allowed the bill, stating that, 'where the consideration is criminal', '[Equity] relieves against notes ... entered into [because of a] general policy to destroy the credit of such notes, and to discountenance the offence [they procure]'.⁵⁰

To my mind, there are two ways in which the disabilities imposed on those whose behaviour was covered by the "good man" theory differed from the sort of restriction involved in a case of illegality. The first is that the disabilities imposed by, for example, the law of "constructive fraud", did not adversely affect both parties to an impugned transaction. In contrast, a contract to commit a crime was (and is) not enforceable by either party. As Lord Mansfield CJ observed in *Holman v Johnson*:⁵¹

'The objection that a contract is ... illegal as between [a claimant] and [a] defendant sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that [it] is ever allowed ... it is founded in general principles of policy which the defendant has the advantage of ... as between him and the [claimant], by accident ... If the [parties] were to change sides, and the defendant was to bring his action against the [claimant], the latter would then have the advantage of it'.⁵²

⁴⁸ *Patel v Mirza* [2017] AC 467.

⁴⁹ *Robinson v Cox* (1741) 9 Mod. 263.

⁵⁰ *ibid.* 264.

⁵¹ *Holman v Johnson* (1775) 1 Cowp. 341.

⁵² *ibid.* 343.

The second point of distinction is that where a rule like the rule on illegality applied, the limitation in issue was of universal application, but specific to a type of transaction *viz.* illegal ones. In contrast, a disability imposed on a transacting party by the “good man” theory of Equity was both relationship and (therefore) person specific, yet covered all types of transaction within the scope of that relationship.

The claimant in *Holman* sought to recover the price of goods he had sold to the defendant in Dunkirk, knowing that the defendant intended to smuggle them into England. The defendant sought to resist this claim on the basis that their agreement was unenforceable. The Lord Chief Justice allowed the claim stating that, notwithstanding the claimant’s knowledge, the contract itself was not an illegal one; selling goods to a would-be smuggler was not a crime. By the time any illegality started, ‘the contract [was] complete, and nothing [was] left to be done. ... The interest of the vendor [in in the goods was] totally at an end’.⁵³

Put like this, *Holman* shows us that, all other things being equal, while two parties could not enter a contract specifically for the commission of a criminal offence, they could still do business with one another. It also makes clear that the rule on illegality applied to all contracts of a certain type, regardless of the identities of the parties to it. Neither of these propositions were true for transactions entered into by those disabled under the “good man” theory of Equity, at least insofar as it applied to abuses of interpersonal power or – later – fiduciary misfeasance and acts of undue influence. Unless and until a vulnerable party chose to affirm a particular transaction, no rights acquired by way of *any* transactions falling within the scope of the relevant relationship – whether they were gifts, contracts, or otherwise – could be enforced by the disabled party as against the vulnerable one. Moreover, as Grant MR’s comments in *Peacock* indicate, it was open to disabled parties to enforce rights acquired as a result of their entry into exactly the same sort of transactions that otherwise fell within the scope of their disabilities, so long as they were with parties as against whom they were not disabled. The disabilities they were subject to were not good against the world.

One final type of disability to distinguish is the limitation imposed upon a person against whom an estoppel by representation was established. In the 18th and 19th Century, both at Law and in Equity, where one party to litigation could show that another had made a representation of fact,

⁵³ *ibid.* 344.

which was intended to be acted upon, and which he did in fact (reasonably) act upon, the other party could be prevented from pleading facts which were inconsistent with his representation.⁵⁴ In a sense, then, an estopped party was disabled from asserting the truth of certain situations in court.

This was not the same type of disability as that in play in “constructive fraud” or fiduciary law or undue influence cases when the “good man” theory applied. A “good man” disability went further than an estoppel because, far from simply being precluded from asserting certain facts, individuals were prevented from enforcing rights acquired by acting in a certain way. It was therefore substantive rather than merely procedural.⁵⁵ It is also the case that, whereas estoppel by representation would only apply in cases where a party had made a misrepresentation, a disability imposed by the “good man” theory of Equity applied whether or not there had been a misstatement by its subject.

Distinguished from these three situations, the nature of the disability in operation in exclusive jurisdiction cases to which the “good man” theory of Equity applied becomes clearer. Nonetheless, two particular points from my positive account should now be emphasised. The first is as to the personal nature of the disability in issue. Like a private law duty, it applied as between two individuals, and the rest of the world were not privy to it. Indeed, this explains the point made in the second paragraph from *Peacock* quoted above. Just because A was disabled as against B did not mean he was disabled as against C from asserting rights acquired by way of a transaction upon which his disability against B could otherwise bite. As the specific power/liability relationship which the disability existed to regulate was limited to two people, so was the disability itself.

Authority in support of these propositions comes from *Taylor v Salmon*.⁵⁶ In that case, the defendant acquired a lease and the claimant argued that this acquisition was a consequence of the fact that the defendant was his agent. During his judgment, in which he found in favour of the claimant, Lord Cottenham LC said:

⁵⁴ See, for example, *Jorden v Money* (1854) 5 H.L. Cas. 185, 212-216.

⁵⁵ See, also, *Eastern Distributors Ltd v Goldring* [1957] 2 Q.B. 600, 611.

⁵⁶ *Taylor v Salmon* (1838) 4 My. & C. 134.

‘The question is ... whether the defendant ... has made out a title to have the lease made to himself in preference to the [claimants]. ... If [the defendant], at the time when he entered into the agreement with [the grantor of the lease], was acting as the agent for the [claimant] in negotiating [*sic*] for the lease, it is not material whether ... he intended that the agreement should be for the benefit of the [claimant] or for his own; ... in either case the [claimant] would be entitled, *as against him*, to the benefit of the contract’.⁵⁷

There is also *Bowes v City of Toronto*,⁵⁸ in which Knight-Bruce LJ stated:

‘The appellant [was] an agent ... who, while acting in the agency, ... acquired for himself, by contract, without the knowledge of the persons for whom he was agent, ... an interest in the subject of [his] agency. [He] is accordingly incapable of retaining *from them* the benefit ... of the acquisition’.⁵⁹

Both these passages also support the second point worth emphasising: that the sort of disability imposed by the “good man” theory related to a power holder’s ability to assert rights he had acquired because of a particular transaction.⁶⁰ It is true that sometimes, as in *Dimes*, the judges expressed the disability in issue before them to be one which precluded its subject from actually acting in certain ways. In *In Re Bloye’s Trust*,⁶¹ for example, the Lord Chancellor asserted:

‘A trustee for sale [is] affected with all the disability *of purchasing* which any other trustee would be under’.⁶²

However, in my view, the best interpretation of such comments is that they represent no more than a shorthand way of expressing a subtler idea. The result in *Whitackre v Whitackre*,⁶³ previously discussed in Chapter 4,⁶⁴ is instructive in this regard. The defendant was the

⁵⁷ *ibid.* 138-139 (emphasis added).

⁵⁸ *Bowes v City of Toronto* (1858) 11 Moo. P.C. 463.

⁵⁹ *ibid.* 517-518 (emphasis added).

⁶⁰ See, alternatively, *Talleyrand v Boulanger* (1797) 3 Ves. Jr. 447, 499; *Lady Ormond v Hutchinson* (1806) 13 Ves. Jr. 47, 51.

⁶¹ *In Re Bloye’s Trust* (n 16). See, alternatively, *Carter v Palmer* (1842) 8 Cl. & F. 657, 706-707; *Hamilton v Wright* (n 16) 123; *McPherson v Watt* (1877) 3 App. Cas. 254, 266.

⁶² *In Re Bloye’s Trust* (n 16) 495 (emphasis added).

⁶³ *Whitackre v Whitackre* (1725) Sel. Cas. Ch. 13.

⁶⁴ See Chapter 4, Section IV, Subsection *iv*, b.

claimants' agent, tasked with selling their stock. He arranged to sell it to a third party, but then bought it himself for £600 less. He later passed on the stock to the third party for the price they had originally agreed, thereby making £600 profit on the transaction. The claimants brought a bill for an account of that sum. Lord King LC allowed it.

The exact words used by the judge were that 'no trustee, or any person acting [in a similar capacity *viz.* an agent,] can ever be a purchaser in this Court'.⁶⁵ Yet if it was really true that an agent had no capacity to enter into a contract with his principal, it is hard to see how the Lord Chancellor could have decided the case in the way he did. By ordering the defendant to account, his Lordship instead seems to have acknowledged the fact that he acquired title to the stock from the claimants, and that he had the capacity *vis-à-vis* third parties to validly dispose of it.

As was noted in Chapter 4,⁶⁶ the reason why the claimant in *Whitackre* sought and was awarded an account rather than rescission was because, due to the defendant's actions in selling the stock to a *bona fide* purchaser, rescission was unavailable. But if the defendant was truly disabled from transacting with the claimant, that should not have been the case. The contract between the claimants and the defendant would have been void. Good title would not have passed under it, with all the consequences, including for third parties, that would have entailed.⁶⁷

6) *A Theory which Required the Availability of Certain Remedial Goals*

When the "good man" theory of Equity applied to a particular case of "constructive fraud" or fiduciary misfeasance or undue influence, certain types of remedy had to be available when a claimant succeeded in establishing an entitlement to relief. Without such remedies, its aim of ensuring that certain individuals were treated as if, at all times, they had performed their Legal duties and exercised their powers properly could not be adequately supported. Continuing with the power/liability analysis adopted in Chapters 3 and 4, and with the idea of remedial goals appurtenant to it, it is my thesis that, in at least some cases which fell within Equity's exclusive

⁶⁵ *Whitackre v Whitackre* (n 63) 15.

⁶⁶ See Chapter 4, Section VI, Subsection *i*, c.

⁶⁷ For an illustration of these in an analogous context, see *Farquharson Brothers & Co v King & Co* [1902] A.C. 325, 329-330.

jurisdiction, the “good man” theory required that both rescission and disgorgement be potentially in play.

Consider the following:

- 1) If the aim of the “good man” theory was to ensure that certain individuals were treated as if, at all times, they had exercised their powers properly, and
- 2) If, as a matter of fact, such an individual did not do so, and acquired rights as a result, then
- 3) The only way the law could return that individual to the position he was in before he acted inconsistently with its aim would be to undo, in substance, the consequences of his acquisition.

In Getzler’s terms, the effects of a person’s misconduct had to be ‘reversed, not priced, else the market for fraud [would] be flooded with sellers’.⁶⁸

What was required, then, were remedial goals which, when pursued, would result in the retrospective enforcement of a defendant’s disability. If they were not available – and so if, for example, the law merely ordered an individual who acted inconsistently with its aim to pay compensation to make good any loss suffered because of his conduct – it would in some way be accepting the fact of that individual’s transgression. In distinguishing compensation for loss and the remedies available when the law sought to prevent a defendant from relying on the fact of his own misconduct, Lord Wynford’s observation in *Bulkley v Wilford*⁶⁹ supports these points:

‘This is not a case to recover compensation for a wrong done; ... what your Lordships are called upon to say is, whether you will allow [the defendant] to take advantage of the wrong he has done [through] fraud’.⁷⁰

In *Bulkley*, the court decided that the defendant held the property he had received on trust for the claimant. It thus sanctioned a proprietary disgorgement-focused remedy expressly designed

⁶⁸ J Getzler, “‘As If.’ Accountability and Counterfactual Trust’ (2011) 91 BUL Rev 973, 974.

⁶⁹ *Bulkley v Wilford* (1834) 2 Cl. & F. 102.

⁷⁰ *ibid.* 185.

to prevent him from taking any advantage of his bad behaviour. The reciprocal connection between awarding compensation and in some sense allowing a party to keep the fruits of his unlawful conduct is implicit but also unmistakable.

ii. *The “Good Man” Theory in Action*

Having established what is meant by the “good man” theory of Equity, this Section can move on to show that one doctrine to which it applied was the 18th and early 19th Century law of “constructive fraud”. The primary sources demonstrate this in two different ways. Firstly, they show that, when faced with disputes raising issues of “constructive fraud”, the judges themselves purported to dispose of them as if they were bound by the “good man” theory. Secondly, they make clear that the general shape of the law governing how abuses of interpersonal power were remedied conformed to that theory’s requirements.

a. *The Words of the Judges*

The best direct evidence that the “good man” theory of Equity applied to the law of “constructive fraud” comes from the House of Lords’ decision in *York Buildings Co v Mackenzie*.⁷¹ Nowadays, and somewhat anachronistically, it is said to be an early example of a case of ‘breach of fiduciary duty’.⁷² However, the word ‘fiduciary’ is not used in any of the judgments. What is more, neither the leading speech of Lord Thurlow, nor the concurring speech of Lord Loughborough LC, was premised on the fact of any breach of duty, fiduciary or otherwise.

Of course, in light what was said in Chapter 4, this should not be surprising. At the time that *York Buildings* was decided there was no law of fiduciaries to speak of. There was only

⁷¹ *York Buildings Co v Mackenzie* (1795) 3 Paton 378. See, alternatively, the judgment of Leach VC in *Fawcett v Whitehouse* (1829) 1 Russ. & M. 132; *Hichens v Congreve* (1831) 4 Sim. 420. There are also many cases in which, although the “good man” theory was not explicitly invoked, it was, in substance, applied. See, for example, *Welles v Middleton* (1784) 1 Cox Eq. Cas. 112, 124-125; *Newman v Payne* (1793) 2 Ves. Jr. 199, 201-203; *Talleyrand v Boulanger* (n 60) 499; *Lady Ormond v Hutchinson* (n 60) 51; *Dent v Bennett* (1835) 7 Sim. 539.

⁷² See, for example, DJ Carr, *Ideas of Equity* (Edinburgh Legal Education Trust 2017) 193-197; J Getzler, ‘Rumford Market and the Genesis of Fiduciary Obligations’ in A Burrows and A Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks* (Oxford University Press 2006) 588-589.

Equity's unitary jurisdiction over "constructive fraud", covering abuses of both legal and factual powers, and including abuses of interpersonal power on the part of agents.⁷³

The facts of the case were as follows. The claimant company had previously been insolvent and had undergone a (now defunct) Scottish legal process known as a 'ranking and sale'. A 'ranking and sale' involved the court-appointment of a 'common agent' who would work to realise the value of an insolvent's landed estate. That money would then be distributed amongst his creditors. The only part of the process which the 'common agent' did not himself execute was the sale itself. That was done by way of a public auction, supervised by a judge.

The 'common agent' in *York Buildings* was the defendant: Mackenzie. The claimant sued him after he purported to buy the claimant's land for himself at the auction he organised. The Court of Session went back and forth on the question of whether the defendant's purchase should be set aside. Eventually, the House of Lords reversed that court's third decision on the issue and held that it should be rescinded.

Lord Thurlow's speech was saturated with "good man" reasoning. The operative part is as follows:

'It is said [that] the situation in which [the defendant] stood ... put him under no circumstances peculiar or distinct from those which a mere stranger would have stood in, and that he [was therefore] at liberty to take any species of advantage, and carry them to every extent, [as] a stranger might have done. But ... to take such advantages, which, even in the case of a stranger, would have been regarded as sharp, [is something] which, in the case of a common agent, the general principles of law will not allow.

... From the manner in which this estate was purchased, and under the circumstances of the case, in point of equity, he ought to be compelled to do that which is right upon the subject.

... It is exceedingly manifest that, [in this case, a] common agent did take upon himself the employment of carrying on [a] sale to the utmost advantage [of] those who were

⁷³ See, for example, *Whitackre v Whitackre* (n 63).

entitled to it. All ... admit that this was his duty, and taking it to be so, [the claimant can say]: that being your situation, it is utterly impossible for you to maintain [your position] in such a manner as to derive an advantage to yourself.

This seems to be a principle so exceedingly plain, that it is in its own nature indisputable, for there can be no confidence placed, unless men will do the duty they owe to [those who confide in them], or [are] considered to be faithfully executing it, if you apply a contrary rule.

The common agent has, in point of fact, gained an advantage by it. I take it to be sufficient to support this ground of equity, that he had such a duty, and that, in the execution of it, he did gain an advantage, and that advantage he so gained was to the prejudice of those [on] whose behalf he [was acting]. It seems to be enough to prove, in point of conscience, he ought to be compelled to set that matter right'.⁷⁴

Three points must be made. The first, which will be returned to in more detail below, is that whether or not he used that specific term, Lord Thurlow thought that the case before him was one of “constructive fraud”. The second is that, as a result, he considered that the “good man” theory of Equity applied to it. Both these points are supported by, amongst other things, the fourth paragraph quoted above. In it, his Lordship justified making the second point by asserting the first. Unless the “good man” theory applied to the law regulating the abuse of interpersonal power, he reasoned, confidence – which at that time was a synonym for power⁷⁵ – could not be placed in others. Indeed, the very fact that such arrangements existed, and potentially had such potent effects, demanded that the forms of protection which the “good man” theory provided for were available. Individuals like the defendant could not be allowed to occupy positions of power unless it was guaranteed that they could, if necessary, be ‘considered to be faithfully executing it’.⁷⁶

In my view, this reference to faithful execution is an allusion to the fact that, in cases which fell within Equity’s exclusive jurisdiction – including those of “constructive fraud” – the second limb of the “good man” theory applied. It is a reference to the courts’ ability to treat

⁷⁴ *York Buildings Co. v Mackenzie* (n 71) 392-393.

⁷⁵ See the discussion of *Gartside v Isherwood* (1783) 1 Bro. C.C. 558; in Chapter 4, Section III, Subsection *i*.

⁷⁶ *York Buildings Co. v Mackenzie* (n 71) 393.

individuals as if, at all times, they had exercised their powers properly. So too are the judge's words, in the second paragraph quoted above, about 'doing that which is right upon the subject'.⁷⁷ These match with the very last of his remarks, in which he concluded that, on the facts of the case, the defendant 'ought to be compelled to set that matter right'.⁷⁸

And there should be no doubt that *York Buildings* really was a case of "constructive fraud". According to the tripartite definition introduced in Chapter 4, an abuse of interpersonal power occurred when:

- 4) One party (D) had a power – either legal or factual – over another (C),
- 5) C entered a "one-sided transaction" with either D or a third party (TP),
and
- 6) There was a causal link between an exercise of D's power and C's entry into that transaction.

As Lord Thurlow himself noted, being an agent for the 'ranking and sale' of the claimant's land, the defendant before him had various legal powers. These did not include an ability to actually dispose of it – that was for the judge at the auction – but they did allow the defendant to facilitate that process. It was his role, for instance, to set the starting price at which the property was to be offered, and to drum up interest in its purchase.

In addition, the evidence was that the defendant was guilty of an extremely deficient exercise of his powers. Rather than engaging with as many potential buyers as possible, he did almost nothing. Many potentially interested parties were not informed about the sale, and those that were, were given only the briefest information. The result of this was that, when it came to the auction, the defendant was in the room 'without any competitor'.⁷⁹ He was able to make a modest bid for the land which, for want of any others, was inevitably accepted.

Thus, not only did the case involve a substantially "one-sided transaction" – as Lord Thurlow noted in the last paragraph quoted above, the land in issue was bought for such a small sum

⁷⁷ *ibid.*

⁷⁸ *ibid.*

⁷⁹ These are the words of the Lord Justice Clark from the first hearing in the Court of Session, reported in the footnotes of the House of Lords report. See *ibid.* 368.

that the defendant gained an advantage – it was also one in which the defendant had exercised a power over the claimant. This was not a *specific* power to sell the claimant’s land, but, by misusing what *ancillary* powers he had, the defendant usurped the judge’s role and caused a sale to himself. As Lord Swinton observed in the Court of Session: because of the defendant’s conduct the auction which occurred was, in substance, ‘not a public [one]’⁸⁰ at all.

With respect to causation, we know from Chapter 4 that, even in the absence of direct evidence, when both the fact of a power and the fact of a “one-sided transaction” were established, it was open to a court to infer that there was a link between an exercise of that power and its subject’s entry into that “one-sided transaction”. Nevertheless, in this case, that may not have been necessary. It seems plain that, as a matter of fact, but for the defendant’s deficient discharge of his responsibilities, he would not have contracted with the claimant as he did.

The third point to take away from Lord Thurlow’s speech is the fact that, as a result of being an interpersonal power holder, and so as a consequence of the application of the “good man” theory of Equity, the defendant was disabled, as against the claimant, from enforcing the rights he acquired by exercising his powers. He could therefore not defend the claim which had been brought against him on the basis that he had good title to the property.

Consider the contrast drawn in the first paragraph quoted above, between the relative positions of 1) a ‘mere stranger’ to the claimant and the claimant itself, and 2) ‘the situation in which [the defendant] stood’⁸¹ as against the claimant. The judge stated that, vis-à-vis the claimant, a mere stranger would have been ‘at liberty to take any species of advantage [from it], *and carry them to every extent*’.⁸² In contrast, when it came to the defendant, ‘the general principles of law [would] not allow [that]’.⁸³ In the third paragraph quoted above, Lord Thurlow added that, in the case of a ‘common agent’, ‘it [was] utterly impossible for [him] to maintain [his position] in such a manner as to derive an advantage [for himself]’.⁸⁴ His Lordship was thus identifying that the legal relation between an agent and their principal was fundamentally different to that between two strangers. In the former, there was a disability/immunity dynamic in place. Indeed,

⁸⁰ *ibid.* 389, fn.

⁸¹ *ibid.* 392.

⁸² *ibid.* (emphasis added).

⁸³ *ibid.*

⁸⁴ *ibid.* 393.

at another point in his speech, his Lordship used the term ‘legal disability’⁸⁵ to describe the defendant’s position.

One final point. Lest there be doubt over the nature of the disability Lord Thurlow thought the defendant was under – viz. in case it is thought to have been general rather than specific – notice should be taken of the fact that the former Lord Chancellor linked the relative positions of the parties to the fact that the defendant had undertaken to do a particular task for the claimant. That undertaking was undeniably the source of the defendant’s powers and it was not one to which third parties were privy. It follows from this that the scope of the defendant’s disability was similarly restricted: it was only against the claimant.

b. The Shape of the Law

Indirect evidence that the “good man” theory of Equity applied to the law of “constructive fraud” comes from the fact that the general structure of the rules governing how abuses of interpersonal power were remedied conformed closely to its requirements. As said above, it is my thesis that at least in respect of some cases which fell into Equity’s exclusive jurisdiction, one characteristic of the “good man” theory was that it required the courts to make sure that certain remedial goals – rescission and disgorgement – were available. That was the only way to achieve its aim of ensuring that the relevant parties were treated as if, at all times, they had exercised their powers properly.

It was argued in Chapter 4, Section VI, that a claimant who had been the victim of an abuse of interpersonal power was entitled, as of right, to some form of relief. Quite what that would entail was a matter for the court’s discretion, although, in his bill, the claimant could make a suggestion. In addition, and notwithstanding the existence of that discretion, in a case of “constructive fraud” the 18th Century courts of Equity could only issue orders so as to pursue one of two remedial goals. One was the wiping out (or rescission) of a transaction which the claimant had entered into as a result of the defendant’s conduct,⁸⁶ the other was the stripping away (or disgorgement) of any benefit which the defendant’s actions caused him to make.⁸⁷

⁸⁵ *ibid.*

⁸⁶ See, for example, *Clarkson v Hanway* (1723) 2 P. Wms. 203; *Lamplugh v Lamplugh* (1769) Dick. 411.

⁸⁷ See, for example, *Dover v Opey* (1744) 2 Eq. Cas. Abr. 4, 7; *East India Company v Henchman* (1791) 1 Ves. Jr. 287.

There was thus a high degree of consistency between what was required under the terms of the “good man” theory and what the 18th and early 19th Century law of “constructive fraud” provided for in practice.

Indeed, even the judges’ own explanations of this state of affairs were consistent with the idea that the law of “constructive fraud” was something to which the “good man” theory applied. This is evident from Lord Thurlow’s speech in *York Buildings*, and also cases like *Lamplugh v Lamplugh*,⁸⁸ discussed in Chapter 4. There Lord Camden LC justified his decision to set aside the contract in issue on the basis that it was ‘unconscionable’.⁸⁹ The reason for that description, he added, was that it was ‘obtained by [the defendant], by taking advantage of the poverty and distressed circumstances of [the claimant]’.⁹⁰ The focus of this censorious language is not just on the relationship between the two parties, nor the transfer of rights between them. It is on the improper exercise of power by the defendant. As has been explained, in cases which fell within Equity’s exclusive jurisdiction, the aim of the “good man” theory was to ensure the proper exercise of powers. The Lord Chancellor’s act of linking the reason for his decision with the defendant’s misuse of power is thus informative.

The same point comes out of *Talleyrand v Boulanger*.⁹¹ In that case, one party procured the other’s entry into a series of transactions by unlawfully imprisoning him. Lord Loughborough LC had no hesitation in setting each of those transactions aside:

‘The [defendant’s conduct] has been extremely oppressive and immoral. ... I will not allow [him] to avail himself of an advantage got by duress. ... It is against all conscience and humanity that [he] should ... be enabled to hold [the claimant] in durance’.⁹²

Aside from the point about the defendant being prevented from availing himself of an advantage – a reference to the sort of disability described above – what matters here is the link between the reason for granting relief and the defendant’s abuse of power. The situation before

⁸⁸ *Lamplugh v Lamplugh* (n 86).

⁸⁹ *ibid.* 414.

⁹⁰ *ibid.*

⁹¹ *Talleyrand v Boulanger* (n 60).

⁹² *ibid.* 449-1100.

the court was unconscionable because, in “good man” theory terms, the defendant had exercised his powers improperly.

III. The Changing Nature of Equity’s Regulation of the Abuse of Interpersonal Power

Having introduced the “good man” theory of Equity and having established that it applied to the law of “constructive fraud”, I can turn to this Chapter’s second main proposition. The idea is that, beginning in the 1820s, over a period of approximately 50 years, that area of law was largely replaced by several new and distinct doctrines. These included early versions of the law of fiduciaries and the law of undue influence.⁹³

Note that it is not my thesis that the law of “constructive fraud” simply disintegrated. Instead, it is that, over time, when faced with disputes that involved the abuse of an interpersonal power, judges abandoned their 18th Century practice of refusing to turn various formal distinctions between cases into substantive ones. They began to create the sort of legally operative sub-categories which they had previously refused to.⁹⁴ One consequence of this was that substantive differences between the rules thought to apply to each particular group of authorities began to emerge.

Of course, the label “constructive fraud” has not entirely disappeared from English legal discourse. Along with “equitable fraud”, a synonymous term, it is still occasionally invoked by the courts.⁹⁵ Nevertheless, the meaning of that phrase is now materially different. Rather than referring to a unitary jurisdiction over all cases involving the abuse of interpersonal power, it is a catch-all covering ‘breach of fiduciary duty, undue influence, abuse of confidence, unconscionable bargains and frauds on powers’.⁹⁶ It is not a term capable of generating any new liabilities beyond those arising under each of those doctrines. The origin of this usage of

⁹³ As said above, there was also a new law of duress and a new law of unconscionable bargains. The former was assimilated into the law of undue influence in *Williams v Bayley* (1866) L.R. 1 H.L. 200 and ceased to have any independent presence within English Equity. A version of the latter still exists today, see J McGhee (ed), *Snell’s Equity* (34th edn, Sweet & Maxwell 2019) 8-040-8-045.

⁹⁴ See, for example, *Blunden v Hester* (1720) 1 P. Wms. 634; *Walmesley v Booth* (1739) 2 Atk. 25; *Barnardiston v Lingood* (1740) 2 Atk. 133.

⁹⁵ See, for example, *Armitage v Nurse* [1998] Ch. 241, 250; *Pitt v Holt* [2012] Ch. 132, [165]; *Barnsley v Noble* [2016] EWCA Civ 799, [62].

⁹⁶ *Armitage v Nurse* (n 96) 250.

the term “constructive fraud” is relatively recent: Viscount Haldane LC’s speech in *Nocton v Lord Ashburton*.⁹⁷

i. A New Law of Fiduciaries

One area of law which replaced (part of) Equity’s general jurisdiction over the abuse of interpersonal power was the law of fiduciaries. The term ‘fiduciary’ was first applied to legal power holders such as trustees, company directors, and agents in the 1840s.⁹⁸ The underlying principle was the same as under the old law, that where it applied a fiduciary was guilty of committing ‘an ... abuse of power’.⁹⁹ However, the courts’ idea of what this behaviour entailed became considerably more specific than it had previously been.

Consider the words of Lord Cottenham LC in *Wood v Rowcliffe*:¹⁰⁰

‘Where a fiduciary relation subsists between the parties, whether it be the case of an agent, or a trustee, or a broker, or whether the subject matter be stock, or cargoes, or chattels of whatever description, the Court will interfere to prevent a sale [to] the party entrusted with the goods’.¹⁰¹

This remark evidences the fact that, at its inception, the scope of the law of fiduciaries was limited to the misuse of *legal* as opposed to *factual* powers.¹⁰² That is not to suggest that it was restricted solely to agents, trustees, and brokers, of course, but to recognise what each of those positions had – and still have – in common. Moreover, it is also true that all those other categories of fiduciaries recognised at approximately the same time: promoters,¹⁰³ directors,¹⁰⁴

⁹⁷ *Nocton v Lord Ashburton* [1914] A.C. 932, 945.

⁹⁸ See, for example, *Portlock v Gardner* (1842) 1 Hare 594, 602-603; *York and North-Midland Railway Company v Hudson* (1845) 16 Beav. 485, 500; *Wood v Rowcliffe* (1847) 2 Ph. 382, 383. Before then, the term ‘fiduciary’ usually applied ‘to the duties owed by a tenant in possession to the holder of a reversion or remainder’: see A Televantos, ‘Losing the Fiduciary Requirement for Equitable Tracing Claims’ (2017) 133 LQR 492, 501.

⁹⁹ *Wood v Rowcliffe* (n 98) 383. See, alternatively, and in substance, *Barker v Harrison* (1846) 2 Coll. 546.

¹⁰⁰ *Wood v Rowcliffe* (n 98).

¹⁰¹ *ibid.* 383.

¹⁰² The law may since have developed to cover the misuse of (some) factual powers. See, for example, L Smith, ‘Parenthood Is a Fiduciary Relationship’ (2020) 70 U Toronto L J 395. However, for present purposes, that is not relevant.

¹⁰³ See, for example, *Foss v Harbottle* (1843) 2 Hare 461, 489.

¹⁰⁴ See, for example, *York and North-Midland Railway Company v Hudson* (n 98) 500.

and partners,¹⁰⁵ were also all legal power holders. The nascent law of fiduciaries can thereby be contrasted with the older law of “constructive fraud”. As was explained in Chapter 4, it saw nothing exceptional in the fact that an allegedly abused power was legal as opposed to factual, nor in the fact that it arose out of a pre-existing relationship between the parties. When applying that doctrine, the courts were usually content to make broad statements of law capable of covering all cases.

Another shift away from the more general approach taken in the 18th Century involved thinking about legal power holders as subject, not merely to a general bar against the abuse of interpersonal power, but to a more particular prohibition against placing themselves in a position where their personal interests conflicted (or might have conflicted) with those of their principals. In *Aberdeen Railway Co v Blaikie Brothers*,¹⁰⁶ for example, Lord Cranworth LC said:

‘An agent [is] a fiduciary ... and it is a rule of universal application that no one, [being in such a position,] shall be allowed to enter into engagements in which he has ... a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect’.¹⁰⁷

In my view there was no fundamental difference between the 18th and mid-19th Century positions. The latter was no more than a context specific version of the former. Where a fiduciary, having both a legal power to change his principal’s position and an encumbrance imposed by the “good man” theory of Equity to ensure its proper exercise, abused his power by using it in his own favour, a conflict of interest would necessarily occur. As Wigram VC observed in *Edwards v Meyrick*,¹¹⁰ in such a situation ‘[a power holder’s] duties and his interests are directly opposed to each other’.¹¹¹ The same point was made by Lord Langdale MR in *Gillett v Peppercorne*:¹¹²

¹⁰⁵ See, for example, *Lees v Laforest* (1851) 14 Beav. 250, 257.

¹⁰⁶ *Aberdeen Railway Co. v Blaikie Brothers* (n 2). See, alternatively, *Oliver v Court* (1820) 8 Price 127, 160-161; *Gillett v Peppercorne* (1840) 3 Beav. 78, 84-85; *Bentley v Craven* (1853) 18 Beav. 75, 76-77; *Bowes v City of Toronto* (n 58) 519.

¹⁰⁷ *Aberdeen Railway Co. v Blaikie Brothers* (n 2) 252.

¹¹⁰ *Edwards v Meyrick* (1842) 2 Hare 60.

¹¹¹ *ibid.* 70.

¹¹² *Gillett v Peppercorne* (n 106).

‘If a person employed as agent ... is to have, in the very same transaction, an interest directly opposite to that of his employer, ... the relation between the parties then becomes of such a nature as must inevitably lead to continued disappointment, if not to the ... practice of fraud’.¹¹³

Crucially, though, not all of this would have been true for those mid-19th Century power holders who were not fiduciaries. This change in regulatory approach thus reflects the extent of the particularisation which occurred in relation to this set of cases.¹¹⁴

Note two points. The first is that one interesting consequence of the two aforementioned developments was the advent of what might be described as “status-based reasoning”. As the most common instances in which one person had a legal power over another were becoming well-known, judges could decide whether a transaction should be set aside, etc., without engaging in the sort of detailed factual enquiry which was the hallmark of “constructive fraud” cases. If the defendant occupied a certain status vis-à-vis the claimant, and had acted in a self-interested way, a certain result could easily be held to follow. As Wigram VC pithily stated: ‘Where a person in a fiduciary character makes a profit, ... he shall account for the profits he has made’.¹¹⁵

An example of this sort of reasoning in action comes from *Bowes v City of Toronto*.¹¹⁶ Giving the opinion of the Privy Council, Knight-Bruce LJ said:

‘If the appellant stood in the relation of agent ... towards the Corporation ... of Toronto, the decree [in question] has charged [him] rightly’.¹¹⁷

As the respondent’s mayor, the appellant may not have been an agent ‘within the ... popular acceptance of [that] term, but he was so substantially’.¹¹⁸ That sufficed to put him ‘within the

¹¹³ *ibid.* 84.

¹¹⁴ For a further example, consider the development of the so-called “self-dealing rule” considered in contrast to *Fox v Mackreth* (1788) 2 Bro. C.C. 400 in Chapter 4, Section III, Subsection *ii*.

¹¹⁵ *Portlock v Gardner* (n 98) 603.

¹¹⁶ *Bowes v City of Toronto* (n 58). See, alternatively, *Gillett v Peppercorne* (n 106); *Maddock* (n 16) 91-94.

¹¹⁷ *Bowes v City of Toronto* (n 58) 518.

¹¹⁸ *ibid.*

reach of [the] principle of civil jurisprudence, adopted for the purpose of securing, so far as possible, the fidelity of those ... entrusted with the power of acting in the affairs of others'.¹¹⁹ By purchasing debentures which he had caused the city to issue, the appellant had obviously placed himself in a position in which, 'while retaining [his] office, ... he [had] a private interest that might be opposed to the unbiased performance of his official [responsibilities]'.¹²⁰ The proper exercise of his power would have involved raising as much money as possible for his principal.

The second point to note is that, while there is now some debate over whether fiduciaries are subject to *both* a prohibition against acting in conflict of interest *and* a prohibition against making unauthorised profits *even in the absence of a conflict of interest*,¹²¹ the appearance of the latter rule – if it occurred at all – would have been, at the earliest, in the mid-20th Century.¹²² Until the 1930s, when the (separate) no-conflict-of-duty-and-duty rule first arose,¹²³ fiduciaries were not thought to be subject to more than one limitation: that covering conflicts of interest. Occasionally, as in *Bray v Ford*,¹²⁴ the no-conflict-of-interest rule was stated alternatively in terms of the making of unauthorised profits.¹²⁵ However, there was clear authority against the proposition that profits derived from non-conflicted conduct could be impugned.¹²⁶ Indeed, even in the modern period, although some judges purport to decided cases on the basis that an unauthorised profit was made, most if not all of those disputes appear to involve conflicts of interest anyway.¹²⁷ Consequently, until Chapter 7, nothing more will be said about the disability-based analysis of fiduciary law as it applies, or could apply, to *pure* unauthorised profit cases.

¹¹⁹ *ibid.* 518.

¹²⁰ *ibid.* 519.

¹²¹ See, for example, M Conaglen, *Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary Duties* (Hart Publishing 2011) 113-125.

¹²² *Boardman v Phipps* [1967] 2 A.C. 46, 101-103, 105, and 118.

¹²³ See Conaglen (n 121) Chapter 6.

¹²⁴ *Bray v Ford* [1896] A.C. 44.

¹²⁵ *ibid.* 51.

¹²⁶ *Aas v Benham* [1891] 2 Ch. 244.

¹²⁷ See, for example, *Regal (Hastings) Ltd v Gulliver* [1967] 2 A.C. 134; *Don King Productions Inc v Warren* [2000] Ch. 291.

ii. *A New Law of Undue Influence*

A second doctrine to emerge out of the law of “constructive fraud” was that of undue influence.¹²⁸ A useful statement of its principles can be found in the judgment of Romilly MR in *Cooke v Lamotte*.¹²⁹ When considering whether to set aside a gift made by an aunt to her nephew, he said:

‘The rule in cases of this description is this: where those relations exist, by means of which a person is able to exercise a dominion over another, the Court will annul a transaction under which a person possessing that power takes a benefit, unless he can shew that the transaction was ... righteous.

It is very difficult to lay down with precision what is meant by ... “relation in which dominion may be exercised by one person over another”. That relation exists in the cases of parent, of guardian, of solicitor, of spiritual adviser, and of medical attendant, and may be said to apply to every case in which two persons are so situated that one may obtain considerable influence over the other. The rule of the Court, however, is not confined to such cases’.¹³⁰

Two points stand out. The first is that these words indicate that, unlike the early law of fiduciaries, the early law of undue influence was not “status-based”. The Master of the Rolls could not have been clearer that the application of the rule under his consideration not only cut across the different relationships he listed but went beyond them. Support for this position comes from two cases. The first is the early decision of *Cane v Lord Allen*.¹³¹ There, the House of Lords reversed the Irish Court of Exchequer’s dismissal of a bill for specific performance. Lord Eldon LC made clear that, as the facts disclosed no ‘[un]reasonable use of ... confidence’,¹³² the fact that the litigation concerned a transaction between a solicitor and his client was not, in and of itself, a reason for rescission.

¹²⁸ For an early example, see *Goddard v Carlisle* (1821) 9 Price 169.

¹²⁹ *Cooke v Lamotte* (1851) 15 Beav. 234.

¹³⁰ *ibid.* 239-240.

¹³¹ *Cane v Lord Allen* (1814) 2 Dow 289.

¹³² *ibid.* 299.

There is also the decision of the House of Lords in *Smith v Kay*.¹³³ Two of the four judges who heard the appeal expressly supported the same point as that made in *Cooke*. In Lord Cranworth's words, the case before him turned 'upon the ordinary principle ... which protects [any] person who is, from the relations which have subsisted between him and another, ... under the influence ... of that other'.¹³⁴ 'The familiar cases of the influence of a parent over his child, of a guardian over his ward, [and] of an attorney over his client, [were] but instances [of that] principle', he added, and it '[was] not confined to [them]'.¹³⁵ Lord Kingsdown made similar remarks.¹³⁶

The second point evident from *Cooke* concerns *why* the nascent law of undue influence was not "status-based". The answer is because its focus was on the fact-specific question of whether the two relevant parties shared a relationship of influence. Authority for this proposition can also be found in Lord Kingsdown's speech in *Smith v Kay*,¹³⁷ and, here, in Stuart VC's judgment in *Re Holmes' Estate*:¹³⁸

'The relation of solicitor and client is one of such high confidence on the part of the client that the solicitor is considered to have an amount of influence over [him].

[But] that relation is only looked at as creating the influence; and, as soon as circumstances ... are introduced which remove all effect of the influence, whether the relation subsists or not, ... there is no incapacity on the part of the solicitor to become the object of his client's bounty. [Any receipt] from his client ... will be valid ... in Equity'.¹³⁹

These words demonstrate that, although a relationship of influence/vulnerability may have grown out of a "status-based" relationship, such a relationship's existence was not a precondition of liability. What mattered was the factual question of whether one party had influence over the other. Consequently, what distinguished the scope of the new law of undue

¹³³ *Smith v Kay* (1859) 7 H.L. Cas. 750.

¹³⁴ *ibid.* 770.

¹³⁵ *ibid.* 771.

¹³⁶ *ibid.* 778-779.

¹³⁷ *ibid.* 779.

¹³⁸ *Re Holmes' Estate* (1861) 3 Giff. 337.

¹³⁹ *ibid.* 345-346.

influence from that of the old law of “constructive fraud” was that the former applied only to cases concerning the misuse of factual powers arising out of pre-existing relationships. As said above, like the development of the law of fiduciaries, the evolution of the law of undue influence was caused by judges turning various (previously inoperative) formal distinctions between cases involving the abuse of interpersonal power into substantive (and legally effective) ones.

One point which the judgment in *Cooke* does not explain is the nature of the encumbrance which those in positions of influence were subject to. However, other cases make that clear. While the early law of undue influence *was* founded on the idea that parties with influence should not abuse the power their influence gave them, the nature of the disability Equity imposed on them was more specific than that which subsisted under the law of “constructive fraud”. They were disabled, as against those over whom they held their influence, from asserting rights acquired as a result of exercising it. Turner LJ’s judgment in *Holman v Loynes*¹⁴⁰ is particularly enlightening on this issue. In it, he stated:

‘If [the transactions impugned in this case] had taken place between [the claimant] and any person not standing in a confidential relation towards him, they could not have been successfully impeached. . . . A mere stranger having thus dealt with [the claimant] would have been entitled to retain to himself the benefits derived from these purchases’.¹⁴¹

By emphasising that, in a two-party case, the existence of a power dynamic between the claimant and the defendant was an essential precondition of the law’s intervention, his Lordship made plain that the doctrine of undue influence was fundamentally preoccupied with the same type of misconduct as the law of “constructive fraud”.¹⁴² By describing how, in the absence of a power/liability relationship, a party to whom the claimant had transferred property could have enjoyed the rights he acquired, his Lordship was hinting at the existence of an equitable disability.¹⁴³

¹⁴⁰ *Holman v Loynes* (1854) 4 De G.M. & G. 270.

¹⁴¹ *ibid.* 279.

¹⁴² See, also, *Billage v Southee* (1852) 9 Hare 534, 540.

¹⁴³ See, also, *Holman v Loynes* (n 140) 271-272.

Further support for this second idea can be found in *Savery v King*.¹⁴⁴ There, a father was held to have exercised undue influence over his 21-year-old son. The House of Lords affirmed a decree by Stuart VC that certain transactions ‘were invalid so far as they purported to create [any rights in favour of the father]; [such] that [the son] was entitled to have [them], so far as they affected [him], set aside’.¹⁴⁵ In Lord Cranworth LC’s terms: ‘the circumstances attending [the claimant’s entry into the impugned transactions] were such as entitle him to treat what was done as ... not binding *on him*’.¹⁴⁶ This appears to be a reference to an immunity as against the defendant. Furthermore, as said in this thesis’ Introduction, in private law immunities and disabilities correspond with one another as a matter of fundamental principle.

iii. *Impersistent Fragments*

For a time, some parts of the law of “constructive fraud” continued to be applied alongside the new doctrines of undue influence and fiduciaries. In *Blachford v Christian*,¹⁴⁷ for example, there was an exploitation of (mental) weakness (falling short of lunacy). Lord Wynford eschewed any particular “status-based reasoning” and did not look for a pre-existing relationship between the parties. Instead, he compared the case to *Clarkson v Hanway*,¹⁴⁸ a “constructive fraud” authority examined in Chapter 4, and focused on whether the claimant suffered from a ‘weakness of intellect [which, when] coupled with other circumstances, [viz. a “one-sided transaction”, would suffice to] show that [he] had been taken advantage of’.¹⁴⁹ If the answer was yes, he added, the court would set aside any deed which the claimant had executed in favour of the defendant. Thus, rather than appealing to any more specific set of principles, this judgment was based on the general idea of an (*ad hoc*) abuse of interpersonal power.

However, the present-day status of this line of case law is uncertain. In reliance on decisions such as *Alec Lobb Garages Ltd v Total Oil Great Britain Ltd*,¹⁵⁰ the editors of *Goff and Jones*

¹⁴⁴ *Savery v King* (1856) 5 H.L. Cas. 627. See, also, *Re Holmes’ Estate* (n 138).

¹⁴⁵ *Savery v King* (n 144) 649.

¹⁴⁶ *ibid.* 655 (emphasis added).

¹⁴⁷ *Blachford v Christian* (1829) 1 Kn. 73. See, alternatively, *Baker v Monk* (1864) 33 Beav. 419; *Clark v Malpas* (1862) 31 Beav. 80; *Summers v Griffiths* (1865) 35 Beav. 27.

¹⁴⁸ *Clarkson v Hanway* (n 86).

¹⁴⁹ *Blachford v Christian* (n 147) 78.

¹⁵⁰ *Alec Lobb Garages Ltd v Total Oil Great Britain Ltd* [1983] 1 W.L.R. 87.

consider it to have been absorbed into the law of unconscionable bargains.¹⁵¹ Yet it is hard to believe that that doctrine currently reflects the full potential of the old cases. One might have thought, for example, that they could have been held to apply in *Saunders v Anglia Building Society*¹⁵² – a decision famous for the fact that the defence of *non est factum* was held not to apply – but no such argument was even attempted.

Indeed, when *Alec Lobb* was heard in the Court of Appeal, Dillon LJ said that the doctrine of unconscionable bargains only mandated the courts to interfere in ‘exceptional cases’.¹⁵³ This stands in sharp contrast to the enthusiastic attitude of the judges in the mid-19th Century cases. In *Baker v Monk*,¹⁵⁴ Knight-Bruce and Turner LJ both took a robust view of the scope of the law. The former added that it existed for ‘the general good of society’.¹⁵⁵ It is therefore as if some of the rules stemming from the old authorities have been forgotten.¹⁵⁶

IV. The “Good Man” Theory Retained

Notwithstanding the developments just described, in their infancy both the law of fiduciaries and the law of undue influence were underpinned by the “good man” theory of Equity. Their respective conceptual foundations were thus the same as that of the old law of “constructive fraud”. In addition, the structures of the specific rules which constituted each of them were, accordingly, analogous. As shall be demonstrated, from the beginning, fiduciaries were thought of as disabled, as against their principals, from asserting any rights acquired by way of acting in conflict of interest. Moreover, as has already been established, those with influence were disabled, as against those over whom they held their influence, from asserting any rights acquired as a result of exercising it.

¹⁵¹ See C Mitchell, P Mitchell and S Watterson, *Goff & Jones: The Law of Unjust Enrichment* (9th edn, Sweet & Maxwell 2016) 11-59-11-65.

¹⁵² *Saunders v Anglia Building Society* [1971] A.C. 1004.

¹⁵³ *Alec Lobb Garages Ltd v Total Oil Great Britain Ltd* [1985] 1 W.L.R. 173, 183.

¹⁵⁴ *Baker v Monk* (1864) 4 De G.J. & S. 388.

¹⁵⁵ *ibid.* 389.

¹⁵⁶ For contrasting views on the effect of Equity forgetting a different albeit distantly related line of case law, see KR Handley, ‘The Law of Proprietary Estoppel (Publication Review)’ (2016) 73 CLJ 432, 434.

i. *The “Good Man” Theory and the Law of Fiduciaries*

Starting with the law of fiduciaries, only two cases must be considered in detail. Together they are more than capable of elucidating the points required. In *Rothschild v Brookman*,¹⁵⁷ the appellant, a stockbroker, was previously engaged by the respondent. It was his job to buy and sell shares on the respondent’s behalf and he was entitled to a commission on each transaction. On various occasions, when charged with buying or selling particular shares, the appellant did not go into the market, but instead concluded the respondent’s business by buying/selling the relevant number of securities from/to himself. When the respondent discovered this, he brought a bill in Equity, grounded on “fraud”, seeking to have each of those transactions set aside. He also sought an order that the appellant account for all the profits he had made. The House of Lords affirmed a decision of the Court of Chancery in the respondent’s favour.

On appeal, the only speech was given by Lord Wynford. His Lordship made it clear that there was ‘no ground ... for accusing the appellant of any actual fraud’,¹⁵⁸ but still held that the respondent’s bill should be allowed. Equity, he stated, ‘[would] not allow any man to be trusted with power to take advantage of the weakness ... of others’.¹⁵⁹ Consistently with what has been said in Section III, above, it is my thesis that this indicates that, at base, the law at issue in *Rothschild* covered (at least some) abuses of interpersonal power.

Significantly, Lord Wynford added that the case before him also turned on the fact that the respondent ‘trusted [the appellant] *as his agent*’.¹⁶⁰ He did not use the term fiduciary itself, but he did confine his remarks to situations involving parties with specific legal powers to enter others into transactions.¹⁶¹ He then put forward a version of the rule against conflicts of interest. The applicable law, he said, was that which applied ‘when men come to persons in the situation of [the] appellant for advice on subjects with which they are most intimately acquainted’.¹⁶² In such cases, he added, the problem was that an agent ‘has ... the opportunity [to] take advantage

¹⁵⁷ *Rothschild v Brookman* (n 41). See, alternatively, *York and North-Midland Railway Company v Hudson* (n 98) 499-500; *Sugden v Crossland* (1856) 3 Sm. & G. 192; *Oliver v Court* (n 106).

¹⁵⁸ *Rothschild v Brookman* (n 41) 194.

¹⁵⁹ *ibid.* 194-195.

¹⁶⁰ *ibid.* 194; (emphasis added).

¹⁶¹ As said above, agents were expressly recognised as fiduciaries by 1847. Within that category, stockbrokers were specifically identified as fiduciaries by 1848, see *Wilson v Short* (1848) 6 Hare 366, 383. Agents were recognised as fiduciaries, in substance, in the 1830s. See, for example, *Reed v Norris* (1837) 2 My. & C. 361.

¹⁶² *Rothschild v Brookman* (n 41) 194.

of [their position] to their own benefit, at the cost of those who [engage them]'.¹⁶³ It was therefore Equity's rule that 'he shall not put himself in a situation where he [could do so]'.¹⁶⁴

All this stands in sharp contrast to the custom of the courts in the 18th Century. Unlike the judges whose decisions were described in Chapter 4, Lord Wynford did not view the issue before him as merely the abuse of interpersonal power. Instead, by virtue of the appellant's status, it involved a more specific cause of action.

Summing up his findings, Lord Wynford said:

'In these transactions of trust and confidence there must be, on the part of the person trusted, that most marked integrity, that *uberrima fides*, which cannot leave a doubt as to the fairness of the transaction.

I do not accuse the appellant of having acted [in] bad faith [but] the rule which I have ... mentioned ... will not allow any man to [exercise] a power that he may possibly use to take advantage of another [and it applies] here'.¹⁶⁵

In my view this is a statement of the "good man" theory of Equity. It is therefore evidence that, as the law of fiduciaries came into existence, the courts thought that theory applied to it. There is good reason to suppose that Lord Wynford thought that the 'integrity' to which he referred – that utmost good faith – entailed acting as a "good man" would.¹⁶⁶ To start with, the rule he invoked was specifically focused on precluding the possibility that a defendant might abuse his power. As said in Section II, Subsection *i*, above, when it came to at least some cases falling within its exclusive jurisdiction, the aim of the "good man" theory was to ensure that certain individuals were treated as if, at all times, they had exercised their powers properly.

What is more, when applying the rule to the case before him, his Lordship was concerned not only with how the appellant had actually acted, but also with what the proper exercise of his

¹⁶³ *ibid.*

¹⁶⁴ *ibid.* 195.

¹⁶⁵ *ibid.* 198.

¹⁶⁶ In other cases it was described as 'honest', or thorough and entire, performance, see *Oliver v Court* (n 106) 160-161; *York and North-Midland Railway Company v Hudson* (n 98) 500.

powers should have involved. This counterfactual reasoning was a distinct (albeit not exclusive) feature of “good man” theory based adjudication.¹⁶⁷ For example, with respect to one particular transaction: the buying of ‘rentes in Paris’,¹⁶⁸ Lord Wynford decided that the appellant’s purchase of his own rentes should be set aside because (1) he ‘ought to have gone into the market at Paris, and have got [those] rentes fairly transferred to the name of the respondent’,¹⁶⁹ and (2) he did not do so. It was the policy of the law, he observed, ‘that when men come to persons in the situation of [the appellant] for advice on subjects with which they are most intimately acquainted, they [should not] take advantage of that circumstance to give advice that can only tend to their own benefit, at the cost of those who apply to them for it’.¹⁷⁰

This meant that, although he himself owned rentes, unless the respondent gave his informed consent to a transaction between them, the only way the appellant could have properly exercised his power and acquired some for the respondent was to buy them on the open market. The appellant’s labour, the judge stated, ‘ought to have been rendered in such a manner as not to raise the slightest suspicion of self-interest on [his] part’.¹⁷¹

The second case to consider is *Aberdeen Railway Co v Blaikie Brothers*.¹⁷² One of the respondents, Thomas Blaikie – formerly the chairman of the appellant railway company – had caused it to enter into a contract to purchase ‘chairs’¹⁷³ from a firm of iron founders in which he was a partner. The company received a proportion of the chairs due under the contract, then refused to accept delivery of the rest. In his capacity as a partner, Blaikie brought proceedings against the company seeking an order for specific performance or damages. The company sought to resist the claim on various grounds, including the fact that, at the time it contracted with the respondents, Blaikie was one of its directors. The House of Lords agreed that this provided a sound basis for a defence.

The leading speech was given by Lord Cranworth LC. It is necessary to quote it at length:

¹⁶⁷ See Section II, Subsection *i*, 4.

¹⁶⁸ *Rothschild v Brookman* (n 41) 197.

¹⁶⁹ *ibid.*

¹⁷⁰ *ibid.* 194.

¹⁷¹ *ibid.* 198.

¹⁷² *Aberdeen Railway Co. v Blaikie Brothers* (n 2).

¹⁷³ Components used for fastening rails to sleepers.

‘If, on general principles of law, the contract was one incapable of being enforced, there is sufficient on the pleadings to enable [this House] to decide in conformity with those principles. This, therefore, brings us to the general question [of] whether a director of a ... company is ... precluded from dealing on behalf of the company with himself or with a firm in which he is a partner.

... Directors are a body to whom is delegated the duty of managing the general affairs of the company. A corporate body can only act by agents, and it is, of course, the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such an agent [also] has duties to discharge of a fiduciary character towards his principal, and it is a rule of universal application that no one having such duties to discharge shall be allowed to enter into engagements in which he has or can have a personal interest conflicting or which possibly may conflict with the interests of those whom he is bound to protect. ... The inability to contract depends not on the subject-matter of the agreement, but on the fiduciary character of the contracting party.

... Was, then, [Blaikie] so acting in the case now before us? [The question] must obviously be answered in the affirmative. [He] was not only a director, but ... the chairman of the directors’.¹⁷⁴

Notwithstanding his Lordship’s jarring use of the term ‘duty’ to describe the nature of a fiduciary’s encumbrance, it is my view that, short of expressly referring to it, these words could not be more consistent with the idea that the “good man” theory of Equity regulated the law in issue. At every turn they indicate, by inference, that precisely the sort of disability described in Section II, above, was in play.

In the first instance, Lord Cranworth LC identified that the question was whether the impugned contract was incapable of being enforced. There is no denial or attempted denial of reality here. There was no question that Blaikie had the capacity to act as he did. Whatever some infelicities in his language concerning the content of a fiduciary’s encumbrance might suggest, it is generally clear that the Lord Chancellor accepted that the appellant and the respondent *did* enter what would otherwise have been a legally binding arrangement. The substance of his

¹⁷⁴ *Aberdeen Railway Co. v Blaikie Brothers* (n 2) 252-253.

observation that: ‘while he filled that character, Blaikie entered into a contract on behalf of the company with his own firm’,¹⁷⁵ is incompatible with any other interpretation. As his Lordship then rightly stated, the only other question was whether something which arose out of the parties’ “status-based” relationship precluded the respondent from enforcing that transaction as against the appellant.

In addition, in saying that the alleged ‘inability [depended] not on the subject-matter of the agreement, but on the fiduciary character of the contracting party’,¹⁷⁶ Lord Cranworth LC distinguished the sort of disability which might be said to be entailed by, for instance, the rule on illegality. As has been explained,¹⁷⁷ that area of law prevented people from entering certain types of transaction *with anyone else*. That is the opposite to the rule being described here, which was avowedly relation-specific, and which was therefore consistent with the nature of the disabilities imposed by the “good man” theory.

Turning back, for a moment, to the Lord Chancellor’s use of the word ‘duty’ to describe the nature of a fiduciary’s encumbrance, the best construction of it may be that it was not deliberately invoked as a term of art. Flannigan has engaged in a close reading of Lord Cranworth LC’s speech and accounts for the term’s presence by reference to its particular place within it. It was used ‘to describe the proscription against self-interest’¹⁷⁸ just after his Lordship detailed a director’s genuine (and non-fiduciary) duty to promote the best interests of his company.¹⁷⁹ In Flannigan’s view, by setting out these two directorial encumbrances in that way, it was all too easy for the judge to make an inadvertent linguistic elision between them.

Of course, even if this is incorrect, it is possible that rather than using it in a technical sense the Lord Chancellor’s conscious decision to employ the term ‘duty’ was merely to provide some guidance to company directors on how a good man in their place would act. Indeed, this would be consistent with that fact that no other part of Lord Cranworth LC’s speech, including what he said about relief, supports the operation of a duty-based view.

¹⁷⁵ *ibid.* 253.

¹⁷⁶ *ibid.*

¹⁷⁷ See Section II, Subsection *i*, 5.

¹⁷⁸ R Flannigan, ‘The Adulteration of Fiduciary Doctrine in Corporate Law’ (2006) 122 LQR 449, 453.

¹⁷⁹ Nowadays this duty has a statutory footing, see s. 172, Companies Act 2006.

ii. The “Good Man” Theory and the Law of Undue Influence

Turning to the law of undue influence, less needs to be said. Section III, Subsection *ii*, above, referred to several authorities which support the disability-based analysis of a party with influence’s encumbrance.¹⁸⁰ It is hard to find decisions in which the “good man” theory itself is expressly referred to. However, to my mind, the disability-consistent language present in each of the aforementioned cases consistently, albeit impliedly, supports its relevance.

In *Billage v Southee*,¹⁸¹ a patient entered a highly disadvantageous transaction with his medical attendant. Turner VC was quick to hold that it was the result of an exercise of undue influence on the latter’s part. ‘I see no evidence in this case ... of the absence of influence’,¹⁸² he stated, ‘there can be no doubt that a relation of confidence subsisted, and ... that advantage has been taken of [it]’.¹⁸³ The specific question for the court was whether the attendant could be restrained from enforcing at Law the impugned transaction against the patient. The Vice-Chancellor replied in the affirmative. He did not seek to question whether the transaction had actually been entered into, but instead issued ‘an injunction to restrain ... proceedings ... upon it’.¹⁸⁴ The court’s order was thus specifically designed to prevent the defendant from enforcing, as against the claimant, rights acquired as a result of exercising his influence. This is exactly what one would expect if the law of undue influence in existence at the time the case was decided was underpinned by the “good man” theory.

V. Conclusion

This Chapter sought to establish the veracity of three different but connected propositions about Equity’s 18th and 19th Century regulation of abuses of interpersonal power. The first was that the law of “constructive fraud” worked in the way it did because it was understood to conform to the “good man” theory of Equity. The second was that, starting in the 1820s, over a period of approximately 50 years that area of law was largely replaced by several new and substantively distinct doctrines. The third was that at least two of those new doctrines – the

¹⁸⁰ See *Holman v Loynes* (n 140); *Savery v King* (n 144); *Re Holmes’ Estate* (n 138).

¹⁸¹ *Billage v Southee* (n 142).

¹⁸² *ibid.* 540.

¹⁸³ *ibid.*

¹⁸⁴ *ibid.* 532.

original version of the law of fiduciaries and the original version of the law of undue influence – were also underpinned by the “good man” theory. They therefore operated in an analogous way to that part of Equity they partially supplanted.

Accepting these three propositions is an important precondition of understanding my thesis as a whole. As shall be explained in Chapters 6 and 7, while a substantively different way of conceptualising both the law of fiduciaries and the law of undue influence has since come into being, many of their older authorities are still binding. Both doctrines are thus currently in something of a theoretically hybrid state. An appreciation of the “good man” theory of Equity, and its early and fundamental impact on both those doctrines, is therefore essential to properly understanding either of them.

The four key points to take away from this Chapter are follows. First, in the 18th and 19th Century, when it came to those areas of law over which Equity’s jurisdiction was exclusive, if the “good man” theory of Equity applied, individuals in positions of power were disabled from asserting, as against those over whom they held their power, any rights acquired as a result of abusing it. Second, this meant that, once the law of fiduciaries had arisen, legal power holders in certain “status-based” relationships were thought of as disabled, as against their principals, from asserting rights acquired as a result of acting in conflict of interest.¹⁸⁵ Third, those with influence were disabled, as against those over whom they held their influence, from asserting any rights acquired by exercising it. Fourth, one consequence of all this was that remedies which, when awarded, would result in the retrospective enforcement of a defendant’s disability, were not only required by, but were also actually a part of, each doctrine.

¹⁸⁵ As said in Section III, Subsection *i*, there was no independent no-profit rule in existence at the time.

1870-1930

A Parting of the Ways

I. Introduction

This Chapter will demonstrate that, between the 1870s and the 1920s, there began a significant conceptual divergence between the law of fiduciaries and the law of undue influence. It was by no means total, but, as shall be explained in Chapter 7, it has since been consolidated and so started to have major practical effects.

What happened was as follows. When deciding cases concerning fiduciaries, some judges abandoned the idea that the relevant law was grounded simply on the “good man” theory of Equity. Instead of just treating them as disabled, as against their principals, from asserting rights acquired by occupying a position where their responsibilities conflicted (or may have conflicted) with their own interests, they began to conceive them as subject to a duty, as against their principals, not to act in conflict of interest.¹ This invited – albeit initially on a small scale – awards of equitable compensation following the breach of those duties. These were payments designed to make good losses caused by such conduct.

In contrast, when applying the doctrine of undue influence, in the period under consideration the courts adhered faithfully to a “good man” theory-style disability-based view. Individuals with influence were merely said to be disabled, as against those over whom they held their influence, from asserting rights acquired by way of exercising it. Compensatory remedies, the existence of which were incompatible with the fundamental aims of the “good man” theory (at least insofar as they were manifested in the disability-based view), were not available. Only

¹ As said in Chapter 5, Section III, Subsection *i*, an independent no-unauthorised-profit rule, if one exists at all, did not arise until the middle of the 20th Century.

those types of relief capable of retrospectively enforcing a party with influence's disability could be awarded. The result of these two processes was that the theoretical and doctrinal consistency which the law of fiduciaries and the law of undue influence had, until then, shared was lost.

There are two good reasons to rehearse this story. The first is that, as shall be explained in Chapter 7, a more pronounced (and complex) version of the same split still characterises the relationship between the law of fiduciaries and the law of undue influence today. The best way to appreciate its significance, and the surest way to avoid the confusion it can otherwise cause, is to understand its origins. The second reason is to properly introduce the theory which justified the courts' new way of conceiving of a fiduciary's encumbrance. From this point onwards, what will be called "the wrongs-based view" shall play an ever-increasing role in this thesis' account of each of the doctrines under consideration. Understanding the challenges this theory raised when it was first introduced to one of them should make it easier to comprehend the depth of its impact now.

Section II deals with the law of fiduciaries. It does not just track the order of the cases, showing how and explaining why some late 19th and early 20th Century courts moved beyond the "good man" theory. If nothing else, there are too many decisions in which the judges simply adhered to the disability-based view for that to be an efficient way of proceeding. Instead, this Section will advance this Chapter's goals by considering two cases in which there was an unmistakable departure from orthodoxy. Together, they show that, from time to time, for certain context-specific reasons of remedial necessity, a duty-based conception of a fiduciary's encumbrance was preferred to a disability-based one. As shall be explained, the main practical consequence of this was that, if a fiduciary acted in conflict of interest, he was, by virtue of his breach of duty, treated analogously to other civil wrongdoers, not least those guilty of negligence.

Section III is about the law of undue influence. It reinforces my argument about conceptual divergence by demonstrating what stayed the same. In the period under consideration, whilst the law of fiduciaries was characterised by theoretical development, the law of undue influence was underscored by theoretical continuity. Properly understood, the authorities disclose no true deviations from the disability-based view.

II. Change Comes to the Law of Fiduciaries

i. Preliminary Points

Before examining the two cases which constitute the core of this Section's argument, two preliminary points should be made. The first is that almost all the fiduciary law cases decided between the start of the 1870s and the end of the 1920s were dealt with in the same way as they would have been *before* that period. The judges who heard them consistently conformed to the "good man" theory of Equity. Again and again, trustees, agents, and other legal power holders (including directors) were regarded as disabled, as against their principals, from asserting rights acquired by way of acting in conflict of interest.² Thus, when assessing the impact of the following decisions, it should be remembered that the advent of the new way of thinking they both evidence was not part of a widespread departure from the established approach.³ The theoretical shift which this Section will describe was radical but, initially, small-scale. As Chapter 7 will explain, it was only sometime after the 1920s that the wrongs-based view would take hold more widely.

The second preliminary point is that the explanations advanced in this Chapter as to why the courts moved beyond the "good man" theory of Equity when seised with certain fiduciary disputes are not necessarily the only ones it is possible to identify.⁴ The central purpose of this Chapter is to illustrate the fact of a change, something that does not require all its causes to be accounted for. Consequently, the claims about remedial necessity which follow should not be

² See, for example, *Franks v Bollans* (1867-68) L.R. 3 Ch. App. 717; *Parker v McKenna* (1874-75) L.R. 10 Ch. App. 96; *In Re Caerphilly Colliery Company* (1877) 5 Ch. D. 336; *McPherson v Watt* (1877) 3 App. Cas. 254; *Boswell v Coaks* (1883) 23 Ch. D. 302; *Coaks v Boswell* (1886) 11 App. Cas. 232; *Eden v Ridsdales Railway Lamp and Lighting Co Ltd* (1889) 23 Q.B.D. 368; *Bray v Ford* [1896] A.C. 44; *Re Biss* [1903] 2 Ch. 40; *Transvaal Lands Co v New Belgium (Transvaal) Land & Development Co* [1914] 2 Ch. 488; *Taylor v Davies* [1920] A.C. 636; *Wright v Morgan* [1926] A.C. 788.

³ Of course, that does not mean that they were the only cases in which some reference was made to a fiduciary 'duty'. See, for example, *Boston Deep Sea Fishing & Ice Co v Ansell* (1888) 39 Ch. D. 339; *Rhodes v Macalister* (1923) 29 Com Cas 19.

⁴ See, for example, C Mitchell, 'Causation, Remoteness, and Fiduciary Gains' (2006) 17 KCLJ 325, 330-331, suggesting, amongst other things, that *Donoghue v Stevenson* [1932] A.C. 562 may have been responsible for causing 'lawyers to [conceptualise] every case of bad behaviour in terms of duty and breach'.

understood to imply that there were definitely no other influences on the law's development.⁵ Nonetheless, it is my thesis that this phenomenon was at least an important contributing factor.

ii. *Cavendish Bentinck v Fenn*

The first of the two cases to be considered is the denouement of the Cape Breton Coal Company litigation: *Cavendish Bentinck v Fenn*.⁶ It is my thesis that it shows unequivocally that, to make up for a perceived deficiency within fiduciary law itself, the House of Lords committed, where necessary, to look past the "good man" theory of Equity and embrace an alternative underlying approach.⁷ That approach was the wrongs-based view. This entailed treating a fiduciary as subject to a duty, as against his principal, not to act in conflict of interest.

The facts of the case were as follows. In 1871, the defendant, along with five others, acquired three coal areas in Nova Scotia for £5,500. In 1873, the Cape Breton Coal Company was formed, and the defendant was made a director of it. Later, in the sole name of one of their other owners, the three coal areas were sold to the Company for £42,000. In 1875, the Company was ordered to be wound up and, in 1880, its liquidator sold the areas to a third party for £14,500. In 1882, one of the Company's creditors brought an application under section 165 of the Companies Act 1862. He sought to have the defendant declared liable to make a contribution to the company's assets on the basis of some 'misfeasance or breach of trust in relation to the company [on his part]'.⁸ In particular, he claimed that the defendant 'ought to [account] for ... the profit which he gained upon the [sale:] the difference between the sum which the coal areas originally cost [him], and the amount [of money] which the company gave [him] for them'.⁹

⁵ See *Re West of England and South Wales District Bank* (1879) 11 Ch. D. 772 (analogy between fiduciary misfeasance and a wrongs-based analysis of the misapplication of trust property); *Boston Deep Sea Fishing & Ice Co v Ansell* (n 3) (analogy between acting in conflict of interest and breach of (an employment) contract).

⁶ *Cavendish Bentinck v Fenn* (1887) 12 App. Cas. 652.

⁷ I therefore agree with Conaglen and disagree with the editors of *Meagher, Gummow & Lehane*, see M Conaglen, 'Equitable Compensation for Breach of Fiduciary Dealing Rules' (2003) 119 LQR 246, 256-258; JD Heydon, MJ Leeming and PG Turner, *Meagher, Gummow & Lehane's Equity: Doctrines & Remedies* (5th edn, LexisNexis Butterworths 2014) 811-814.

⁸ *Re Cape Breton Co* (1884) 26 Ch. D. 221, 223.

⁹ *ibid.* 229.

Section 165 was an innovative provision which, in the context of a company's winding up, made it possible for the encumbrances of, amongst other people, its directors to be enforced by parties to whom they were not owed. As was said in Chapter 5, by the mid-19th Century it had been established that directors were fiduciaries.¹⁰ However, the fiduciary relationship they were part of was with their company.¹¹ As a matter of principle, then, a director's fiduciary encumbrance was only enforceable by that company.¹²

In its own terms, section 165 gave certain third parties – including ‘any creditor ... of [an insolvent] company’ – the right to apply to court and ask that it ‘examine into the conduct of [a certain] director’. Pursuant to that investigation, and as the section continued, the court could ‘compel [that director] to repay any monies ... for which he [had] become liable, ... or to contribute such sums ... to the assets of the company by way of compensation [for any] misfeasance or breach of trust [he had committed] as the court [thought] just’. The provision thus created no new causes of action but provided a mechanism under which encumbrances already owed to and enforceable by another, *viz.* a relevant company, could be prosecuted by those who came to have an interest in doing so.¹³

a. At First Instance

At first instance, Pearson J rejected the creditor's application. He recognised that the nub of his allegation was that, by using a proxy seller, ‘[the defendant] sold ... coal areas to the company [of which he was then a director] without disclosing the fact that he was interested in them’.¹⁴ He also held that, in so doing, while not committing ‘legal fraud’¹⁵ *viz.* deceit, the defendant had acted ‘in error’.¹⁶ However, his Lordship insisted that, ‘upon the authorities, [the type of liability alleged was] not the [sort] which the Court [could] give [effect to] in a case of this kind’.¹⁷

¹⁰ See, for example, *York and North-Midland Railway Company v Hudson* (1845) 16 Beav. 485, 500.

¹¹ See, for example, *Aberdeen Railway Co v Blaikie Brothers* [1843-60] All ER Rep 249, 252.

¹² See *Foss v Harbottle* (1843) 2 Hare 461.

¹³ See F Odiah, ‘Misfeasance Proceedings Against Company Directors’ [1992] LMCLQ 207, 208.

¹⁴ *Re Cape Breton Co.* (n 8) 228.

¹⁵ *ibid.*

¹⁶ *ibid.* 229.

¹⁷ *ibid.*

The most important decision referred to was *Erlanger v New Sombrero Phosphate Co.*¹⁸ In that case, Lord Cairns LC said that where a fiduciary sold property to his principal without disclosing his interest in it, if the contract between them could not be or was not set aside, the principal could only have a claim to an account of his fiduciary's profits if his fiduciary had acquired the property he sold *after* assuming his fiduciary position. If the fiduciary had acquired it *before* that time, no account would be available.¹⁹

The implications of these propositions for the case before Pearson J were stark. Although, by allowing the company to enter the contract that it did, the defendant had obviously acted in conflict of interest (and so inconsistently with his fiduciary disability), he had to hold that the creditor's application failed. It was seeking the enforcement of a non-existent liability. In cases like this, his Lordship noted, 'the [only] relief which the Court will give [a principal, or a party suing to enforce a liability owed to that principal,] is [the power] to rescind the contract'.²⁰ Of course, as the Cape Breton Coal Company's liquidators had previously sold the coal areas, exercising such a power in this case was impossible.

b. In the Court of Appeal

The creditor appealed. However, a majority of the Court of Appeal came to the same conclusion as the High Court. Cotton LJ also felt bound by *Erlanger* but added that even in its absence he would have found against the creditor as a matter of principle.²¹ Fry LJ thought that there was no prior decision on point, yet also came down against the creditor on more general grounds.²² Here are Cotton LJ's three reasons for his conclusion on the issue of principle. The third of these was taken by Fry LJ too.

- 1) What was being claimed was (a proportion of) the difference between the value of the property at the time the purchase was made by the company, and the price which the company actually gave for it. However, the only mode of ascertaining the

¹⁸ *Erlanger v New Sombrero Phosphate Co* (1878) 3 App. Cas. 1218.

¹⁹ See *ibid.* 1235.

²⁰ *Re Cape Breton Co.* (n 8) 229.

²¹ *Re Cape Breton Co* (1885) 29 Ch. D. 795, 805.

²² *ibid.* 811.

property's true value was to find how much a purchaser would have given for it at the time.²³

- 2) If a court were to enter into the question of what the value of the property was, it would do so with all the knowledge which had subsequently been acquired of it, and so would be making an entirely new bargain between the parties.²⁴
- 3) Although it may have been entitled to set aside the agreement, as the company, with knowledge of all the facts, elected to retain the property transferred under that agreement, it would be wrong to require the fiduciary to hand over the only consideration upon which he agreed to sell it.²⁵

Bowen LJ dissented. In the course of argument, counsel for the creditor had asked if it was really 'possible that there [could be such] a grave breach of duty resulting in heavy loss [but] no remedy?'.²⁶ His Lordship responded in the negative. 'Here is a case', he began, 'in which it is conceded ... that a [fiduciary] has acted improperly, and has gained a benefit at the expense of his [principal], and it seems to me a serious matter if ... Equity can afford no relief'.²⁷ He rejected each one of Cotton LJ's three points, and cast doubt upon the general propriety of the rule in *Erlanger*.

On Cotton LJ's first point, Bowen LJ said that not only was it not a principled objection, but also that as a practical one it was entirely unconvincing. '[Although] a considerable amount of evidence would be required', he stated, 'the difficulty of ascertaining the amount of relief [is] no reason for refusing [it]'.²⁸ It would, after all, be arbitrary to allow recovery in a case of shares, '[but not] in the case of articles which have [no] market value'.²⁹ 'The only difficulty in dealing with such a case', he added, 'is the difficulty of assessment, and that is [something]

²³ *ibid.* 805.

²⁴ *ibid.*

²⁵ *ibid.*

²⁶ *ibid.* 797.

²⁷ *ibid.* 807.

²⁸ *ibid.* 810.

²⁹ *ibid.*

dealt with every day in every branch of the High Court [by calling on] the evidence of experts'.³⁰

With respect to Cotton LJ's second point, Bowen LJ advanced a more detailed critique. In his view, arguing that, 'by electing to keep the article sold and at the same time insisting upon a return of the profits made the [company] would be altering [its] contract [and] endeavouring to keep the property ... at [a] different price', involved a 'fallacy'.³¹ This was because a principal who sought 'to keep the thing [he] purchased, [but] nevertheless [demanded the payment of a] profit improperly made, [did] not claim to be recouped part of the price *as price*, nor attempt in any way to vary the contract'.³² As a matter of law, he said, 'the [fiduciary] who made the contract ... ought to have known that it was an incident of equity ... attaching to such a contract that [he would be] liable ... to hand back any profit clandestinely made'.³³ 'Making a vendor return something which he ought not to have [was] not altering the contract [but was] only insisting upon an incident which equity attaches to it'.³⁴

As regards Cotton LJ's third point, Bowen LJ argued:

'The right of [a] principal ... to claim a profit made by [his fiduciary is] wholly independent of [his] right to rescind the contract [from which that profit was derived]. ... I [therefore] cannot see why the right of the principal to claim [a] profit fraudulently made ... should be lost simply because he elects to keep the subject-matter or is unable to determine the contract'.³⁵

To his mind, Cotton LJ had confused the concept of affirming a contract produced by a conflict of interest with waiving that conflict of interest, and its effects, altogether. Indeed, as Bowen LJ then pointed out, beyond the issue of principle, there was a good practical reason for maintaining the distinction between the two entitlements: a principal's 'right to recover [a]

³⁰ *ibid.*

³¹ *ibid.* 809.

³² *ibid.* (emphasis added).

³³ *ibid.*

³⁴ *ibid.*

³⁵ *ibid.* 808-809.

secret profit [from his fiduciary is] chiefly valuable in a case where the contract [they share] cannot be rescinded'.³⁶

Many modern commentators support Bowen LJ's judgment wholeheartedly. The 34th Edition of *Snell's Equity*, for example, calls it 'powerful',³⁷ while Finn describes it as 'forceful',³⁸ and O'Sullivan, Elliott, and Zakrzewski as 'difficult to improve upon'.³⁹ I take the same view. Bowen LJ's three points were – and still are – correct, and the majority's decision was inconsistent with equitable principle.⁴⁰

It should not for a moment be doubted that, in failing to disclose his interest in the property acquired by the Company, the defendant acted inconsistently with the disability imposed on him *viz.* in conflict of interest.⁴¹ It is true that, at the time he first acquired it, the defendant was not a fiduciary, but that does not mean (as Pearson J thought) that he later 'had a right to deal with [the property] in any way [he] pleased'.⁴² It is also true that the defendant was not a trustee of his interest (in favour of the Company), meaning that it *was* open to him to sell it to any other party he could find, for whatever amount he liked.

Nevertheless, by trying to sell the coal areas in which he had an interest to the company of which he was a director, the defendant brought his property within the scope of his fiduciary disability. As Bowen LJ noted, the relevant rule of Equity was – as it still is – that 'in all cases where a person is [a fiduciary], all profits made by him [by acting in conflict of interest] without the knowledge of his [principal] must [be handed] over'.⁴³ The fact that the property he sold to make the profit was acquired *before* the defendant became a fiduciary does not mean that profit was not one made by him, as a fiduciary and in conflict of interest, at the time he disposed of

³⁶ *ibid.* 809.

³⁷ J McGhee (ed), *Snell's Equity* (34th edn, Sweet & Maxwell 2019) 20-047.

³⁸ PD Finn, *Fiduciary Obligations* (The Law Book Company Ltd 1977) 225.

³⁹ D O'Sullivan, S Elliott and R Zakrzewski, *The Law of Rescission* (2nd edn, Oxford University Press 2014) 40.

⁴⁰ So too were the subsequent decisions of the House of Lords and the Privy Council which affirmed it. See *Burland v Earle* [1902] A.C. 83; *Jacobus Marler Estates Ltd v Marler* (1913) 85 L.J. P.C. 167n; *Cook v Deeks* [1916] 1 A.C. 554.

⁴¹ Indeed, this conclusion was reached on materially similar facts in *Re Lady Forrest (Murchison) Gold Mine Ltd* [1901] 1 Ch. 582.

⁴² *Re Cape Breton Co.* (n 8) 231.

⁴³ *Re Cape Breton Co.* (n 21) 808.

it.⁴⁴ Thus, for the same reason a director who sold his company property which he acquired *after* he had assumed his role was accountable for his profit regardless of whether the underlying contract of sale had been set aside,⁴⁵ a fiduciary like the defendant in *Cavendish Bentinck* should have also been liable to account. In both cases, the fact that rescission was not sought or was not available is, following Bowen LJ's third point, irrelevant.

c. *The Wider Context*

Of course, everything just said in favour of Bowen LJ's views is incidental. His Lordship's judgment was a minority one and, overall, the Court of Appeal rejected the creditor's application. Nevertheless, it is important to go through the initial stages of the Cape Breton Coal Company litigation in order to properly frame the central issue facing the House of Lords when it came to consider the same case. On the one hand, it was bound by Lord Cairns LC's statement in *Erlanger* which meant that it should reject the appeal. On the other, it was acutely aware – in Conaglen's words – of 'the manifestly problematic result' that a principal in the same position as the company (and any creditor claiming through him) 'was left without any remedy'.⁴⁶

Yet this pressure to change the law (and so grant the remedy which was sought) was not purely a consequence of a perceived asymmetry within the contemporary law of fiduciaries. The remedial necessity which Bowen LJ appreciated did not stem solely from a desire to treat like cases alike. Instead, there were wider issues in play. Consider the socio-legal context in which this litigation arose. The seemingly arbitrary distinction drawn in *Erlanger* did not exist in a vacuum.

In the second half of the 19th Century, there was an extraordinary increase in the number of companies being formed,⁴⁷ and a corresponding rise in the number of problems their operations generated. What is more, for a time, various parts of private law struggled to keep pace.

⁴⁴ Indeed, for this reason, the 19th Century courts occasionally awarded *proprietary* relief in cases with materially similar fact patterns. See, for example, *Hichens v Congreve* (1831) 4 Sim. 420; *Bank of London v Tyrrell* (1859) 27 Beav. 273; rev'd in *Tyrrell v Bank of London* (1862) 10 H.L. Cas. 26, but later aff'd in *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45.

⁴⁵ See, for example, *Benson v Heathorn* (1842) 1 Y. & C. Ch. 326; *Bentley v Craven* (1853) 18 Beav. 75.

⁴⁶ Conaglen (n 7) 251.

⁴⁷ See R Harris, 'The Private Origins of the Private Company: Britain 1862–1907' (2013) 33 OJLS 339.

Directorial misfeasance was the subject of claims based on deceit,⁴⁸ negligence,⁴⁹ and breach of contract,⁵⁰ but none of these causes of action proved to be a consistently satisfactory basis upon which to regulate such individuals' behaviour. Claimants were continuously bringing proceedings indicating a real need for relief from the effects of certain types of directorial conduct, yet there was no predictable form of recovery open to them. The law, as it was then structured, was failing to protect their interests.

It is my thesis that *Cavendish Bentinck* constituted one occasion on which the courts directly responded to this situation. As shall be explained, the House of Lords found a way out of the *Erlanger*/no-recovery dilemma, and so fixed the problem caused, until then, by that area of law. Equity thereby provided an escape route from some of the practical problems created, in part, by the arrangement of various other aspects of private law. For my purposes, this fact, and more particularly *how* their Lordships achieved what they did, is what must be understood: a majority of the judges changed the way in which the law of fiduciaries functions.

d. In the House of Lords

The best way to appreciate the decision of the House of Lords is to distinguish between how it disposed of the appeal with which it was seised and how it treated that part of fiduciary law more generally in issue before it. This is because, although the court did move to resolve the tension between the case law and the demands of justice just described, it also held that its resolution could not help the creditor in *Cavendish Bentinck* itself. In contrast to both Pearson J and the Court of Appeal, the judges unanimously dismissed the creditor's application on the basis that he could not establish that the defendant had acted in conflict of interest. There was no evidence, they stated, that the director had failed to disclose his interest in the property,⁵¹ nor was it clear that its value was any less than that which the company gave for it.⁵²

⁴⁸ See, for example, *Derry v Peek* (1889) 14 App. Cas. 337.

⁴⁹ See, for example, *Turquand v Marshall* (1868-69) L.R. 4 Ch. App. 376.

⁵⁰ See, for example, *In Re Forest of Dean Coal Mining Company* (1878) 10 Ch. D. 450 (no implied term that a director must devote any particular time to company matters); *London and Mashonaland Exploration Co Ltd v New Mashonaland Exploration Co Ltd* [1891] WN 165 (no implied term that a director cannot also act as director of rival company).

⁵¹ *Cavendish Bentinck v Fenn* (n 6) 661, 666, 667, and 671.

⁵² *ibid.* 660, 666, 667-668, and 671.

Ultimately, it is not necessary for me to take a view as to the propriety of the House of Lords' decision on the facts. This is because it did not stop it from going on to consider what should happen in the case of a principal in a similar position to that of the company who *was* the victim of a conflict of interest. On that issue, it is my thesis that, while doing so, their Lordships gave their imprimatur to a move beyond the "good man" theory of Equity. They thereby opened the door to a new and substantively distinct way of characterising a fiduciary's encumbrance.

I have three reasons for saying this. The first is that it is tolerably clear that, though aware of its effects, the House of Lords was not in favour of departing from the rule in *Erlanger*.⁵³ Lord Herschell, for instance, said that he was 'by no means prepared to say that the [idea of doing so was] well founded'.⁵⁴ Likewise, when delineating the different types of personal claim a principal (in such a situation as was allegedly in issue before him) might have brought against his fiduciary, Lord Watson omitted to include the sort of liability to account Bowen LJ envisioned. The court therefore declined the opportunity to redeem the apparent deficiency within contemporary fiduciary law in the simplest way it might have. All other things being equal, it left unfilled a substantial lacuna in protection. If things were going to change, something else would have to give.

My second reason is that a majority of the House of Lords said that, if they were able to establish that they *had* been the victim of a conflict of interest, principals in the position of the company in *Cavendish Bentinck* could claim equitable compensation to make good losses suffered as a 'but for' consequence. Crucially, this would give them a claim equal in size to the difference between the value of the property they had acquired (at the time it was sold to them) and the amount they had paid for it. In substance, it would fill any gap in recovery.

Thus, the fix came from within fiduciary law itself, albeit in a less direct manner than it might have. Consider, for example, these words of Lord Herschell:

'The case may be put in another way, that there was here at all events a breach of duty, and that in respect of that breach of duty a claim may be made under the 165th section,

⁵³ Indeed, as intimated in fn 40, above, no panel of the House of Lords or the Privy Council has sought to do so since.

⁵⁴ *Cavendish Bentinck v Fenn* (n 6) 659.

the breach of duty [being that which resulted from the defendant's] omission to make full disclosure.

Here, again, I have only to repeat that I fail to see the evidence that there was any such breach of duty committed. ... I think that in order to establish a claim to relief it would be necessary not only to shew a breach of duty but to shew a breach of duty which resulted in pecuniary loss to the company.

It [is] perfectly true, [however,] that where there is a duty, whether arising out of a contract or otherwise, by one person to another, an action will lie in respect of a breach of that duty [and] a breach of duty such as is suggested [by the creditor in this case might] be a misfeasance giving rise to an application under the 165th section'.⁵⁵

Lord Macnaghten made similar albeit briefer remarks.⁵⁶ Lord Watson opined that, had both non-disclosure on the part of the defendant, and a discrepancy between the value of the property sold and the amount of money the company gave for it been made out, the creditor *may* have succeeded, but only if he could also show that '[the defendant], having originally concealed his true position, [had,] by deliberate acts, ... prevented ... knowledge of that position reaching the company'.⁵⁷ This is a reference to deceit, and the sum recovered – an amount equal in value to the difference between what was paid for the coal areas and what they were actually worth at that time – would have been damages. The difficulty here is that, while this was in and of itself correct, a claim in deceit was not the only claim the rest of the judges thought could be brought. As Lord FitzGerald put it: 'if [a director] did not disclose the fact that he himself had a large pecuniary interest in [a] purchase', he would have been 'guilty of a breach of duty'⁵⁸ regardless of his intention.

The final reason for my view is that argumentation like that just set out is only possible if one looks beyond the "good man" theory of Equity and the disability-based analysis it entails and takes a fiduciary to be subject to a duty, as against his principal, not to act in conflict of interest. Indeed, this is why the majority's decision in *Cavendish Bentinck* appears to involve both a

⁵⁵ *ibid.* 661-662.

⁵⁶ *ibid.* 669.

⁵⁷ *ibid.* 666.

⁵⁸ *ibid.* 667.

departure from orthodoxy and an engagement with the wrongs-based view. The fact that the scope of this conceptual development seems initially to have been limited to cases in which the fact pattern gave rise to remedial difficulties is not of fundamental relevance to this point. Consequently, it was always capable of being taken on and applied more widely.

By the 1880s, it was trite law that thinking of a fiduciary as merely disabled, as against his principal, from asserting rights acquired as a result of acting in conflict of interest, precluded the award of a compensatory remedy in the event that he did behave in that way. Instead, the only relief available was rescission or disgorgement. As Lord Blackburn noted in *Erlanger*: ‘A Court of Equity [cannot] give damages, [so], unless it can rescind [a] contract, can give no relief’.⁵⁹ Similarly, in *Bentley v Craven*,⁶⁰ a case which fell on the other side of the *Erlanger* principle, Romilly MR said:

‘An agent employed to purchase cannot legally buy his own goods for his principal; neither can an agent employed to sell, himself purchase the goods of his principal. If he should do so and thereby make a profit, his principal may either repudiate the transaction altogether or, adopting it, may claim for himself the benefit made by his agent’.⁶¹

As Chapter 5, Section II explained, the reason for this state of affairs was the same as the reason why a fiduciary was thought to be subject to a disability in the first place: the “good man” theory of Equity. As was established, the “good man” theory required the courts to treat certain individuals as if they had, at all times, performed their Legal duties and exercised their powers properly. In addition, when it came to those areas of law – including the law of fiduciaries – which fell within Equity’s exclusive jurisdiction, the judges gave effect to that aim by imposing primary disabilities.

Being designed to discourage power holders from acting in certain ways vis-à-vis those over whom they held their power, these disabilities worked by rendering the fruits of that conduct unenforceable as against the same people. This was because, if a power holder behaved inconsistently with the “good man” theory’s general aim, and if he gained rights as a result, he

⁵⁹ *Erlanger v New Sombrero Phosphate Co.* (n 18) 1278.

⁶⁰ *Bentley v Craven* (n 45).

⁶¹ *ibid.* 76.

had to be returned, as against the party over who he held his power, to the position he had been in before he abused it. The consequences of his acquisition had, in substance, to be undone. His disability was in this sense retrospectively enforced. In *In Re Caerphilly Colliery Company*,⁶² Jessel MR described much of this in the following terms:

‘Can [a man] be allowed to say [that], having received a present of part of the purchase-money, and being ... in the position of agent ... for the purchasers, [he] can retain that present as against the actual purchasers? It appears to me that, upon the plainest principles of equity, ... he cannot. ... He cannot, in the fiduciary position he occupied, retain for himself any benefit ... that he obtained under such circumstances.

He must be deemed to have obtained it under circumstances which made him liable ... to account either for the value at the time of the present he was receiving, or ... for the thing itself and its proceeds if it had increased in value’.⁶³

In contrast, even where one party (A’s) loss directly corresponds with another party (B’s) gain, money paid by B to make good a loss suffered by A as a result of B’s acting inconsistently with an encumbrance B owed to A is not money paid in order to retrospectively enforce B’s encumbrance.⁶⁴ It is therefore not an award which supports the central tenet of the “good man” theory of Equity, nor is it consistent with viewing that encumbrance as merely a disability. By focusing on A’s position, and by seeking to repair it as best it can notwithstanding B’s conduct, the law is not just admitting that B has in fact acted inconsistently with his encumbrance, but also that he will not do what was expected of him, retrospectively or otherwise. Indeed, that is why A can be viewed as having suffered any sort of compensable loss in the first place. Consequently, in cases where a compensatory remedy is granted, it is impossible to think that the “good man” theory of Equity applies. A different way of conceiving the law must be in play.

⁶² *In Re Caerphilly Colliery Company* (n 2).

⁶³ *ibid.* 340-341.

⁶⁴ I note Gardner’s ‘continuity thesis’, see J Gardner, ‘What Is Tort Law For? Part 1: The Place of Corrective Justice’ (2011) 30 *Law & Phil* 1, 33-34. However, there is a difference in type or kind between remedies designed to make up *in some measure* for a person’s failure to perform a duty and remedies designed to ensure *actual* compliance with a disability, albeit after its subject has acted inconsistently with it.

This is where the wrongs-based view comes in. If one looks past the notion that certain individuals should be treated as if, at all times, they have performed their Legal duties and exercised their powers properly, one may take them to be entirely capable of failing to act as they should, with all the real-world consequences that might entail.⁶⁵ This opens the door to awards of compensation in cases where, by not acting in accordance with what is expected of them, those individuals cause another to suffer a loss. Indeed, the correct categorisation of the initial rule imposed on those individuals would therefore be as an (inherently breachable) requirement to do (or not do) something: a duty. As Salmond put it: ‘A duty is the absence of liberty. A disability is the absence of power’.⁶⁶

From this position, the jump to wrongdoing is easy to make. As a matter of late 19th Century Equity, the breach of any legal duty was correctly labelled a ‘wrong’.⁶⁷ Indeed, in *Eden v Ridsdale Railway Lamp and Lighting Co Ltd*,⁶⁸ Lord Esher MR said:

‘[If A’s] duty ... to [B] does not permit [A] to [act in a certain way], and if [A] does so, he commits a wrong against [B]’.⁶⁹

*Ferguson v Wilson*⁷⁰ also provides general authority for the propositions just set out. In it, Cairns LJ contrasted the principles underpinning a shareholder’s claim for an injunction against a company, with those underlying his claim for compensation after an act of misfeasance by one of its directors. The former claim was like a claim for specific performance – discussed in Chapter 5, Section II – and was governed by the first limb of the “good man” theory of Equity. As they still are, injunctions were designed to enforce an individual’s compliance with his primary encumbrances. The latter claim was not. It involved accepting that a director had, in fact, failed to perform one of his duties. Here is the operative part of his Lordship’s judgment:

‘When a [shareholder] comes [to] the Court of Chancery to restrain the doing of an unlawful act by a company [he must] make the directors parties to his bill. ... The company must act through the directors, and the injunction will operate upon [their]

⁶⁵ See the discussion on this point in Chapter 1, Section IV.

⁶⁶ JW Salmond, *Jurisprudence or The Theory of Law* (Stevens & Haynes 1902) 236.

⁶⁷ See, for example *Phosphate Sewage Company v Hartmont* (1877) 5 Ch. D. 394, 440-441.

⁶⁸ *Eden v Ridsdales Railway Lamp and Lighting Co Ltd*. (n 2).

⁶⁹ *ibid.* 371.

⁷⁰ *Ferguson v Wilson* (1866-67) L.R. 2 Ch. App. 77.

consciences. ... But it is altogether a different matter where the cause comes to the hearing, and it is no longer a question of injunction, but a question what liability has been incurred by [each director by] reason of [their breaches of duty].

Again, we must distinguish the present case ... from those cases ... where a shareholder files a bill against the company and against the directors ... seeking redress against them for a breach of [duty]. That kind of case is ... the converse of the present. [Here] the shareholders who file the bill, in point of fact allege that the company has done no wrong whatever, ... and [that] they – the shareholders – file the bill to protect, as it were, the company from the unlawful acts of the directors'.⁷¹

There is thus also a strong analogy between the wrongs-based view of fiduciary law, and the theoretical underpinnings of both the modern law of breach of contract,⁷² and parts of the modern law of tort.⁷³

e. Impact

The House of Lords' decision to introduce the possibility of a compensatory remedy in at least some cases where a fiduciary acted in conflict of interest started to become entrenched within the period under consideration. On a small scale, then, the rise of the duty-based conception of a fiduciary's encumbrance which *Cavendish Bentinck* entailed soon became a settled part of the law.

Consider, for example, the first case in which an English court unambiguously awarded equitable compensation for a so-called breach of fiduciary duty: *Re Leeds and Hanley Theatres of Varieties Ltd.*⁷⁴ In my view, the principles set out in *Cavendish Bentinck* were obviously applied. A group of men purchased two music halls with a view to selling them to a company they would then promote. When it finally happened, the sale was between a disclosed agent for the company and an undisclosed agent for the promoters. The fact of the men's interests in the properties was therefore kept secret. The promoters made a profit on the sale. When the

⁷¹ *ibid.*

⁷² See, for example, *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827, 848-849.

⁷³ See, for example, *The Aliakmon* [1986] A.C. 785; *Hunter v Canary Wharf Ltd* [1997] A.C. 655.

⁷⁴ *Re Leeds and Hanley Theatres of Varieties Ltd* [1902] 2 Ch. 809.

company went into liquidation, the music halls were sold to a third party, rendering rescission of the initial transaction impossible. Having discovered the fact of the promoters' secret profit, the liquidators sought an account of it.

At first instance, Wright J made precisely that award. However, in the Court of Appeal, although all three judges thought that the promoters would have to pay the liquidators a sum of money equal in size to that of their profit, they refused to hold that the promoters were liable to account. *Erlanger* had been cited and so, as Vaughan Williams LJ noted, it was difficult to accept that '[a] remedy by way of an account of profits [was available]'.⁷⁵

Romer LJ thought that case involved 'actual' fraud,⁷⁶ but he was alone in this view. The other two judges held that the promoters were liable to pay equitable compensation for breach of fiduciary duty. When it came to deciding whether the mere fact of non-disclosure on the part of the promoters ensured a conflict of interest, Stirling LJ referred to *Cavendish Bentinck* in support of his conclusion that it was. It is therefore certain that the relevant law was in his mind at the time he disposed of the directors' appeal. Moreover, it was because of that holding that his Lordship reached the 'inevitable' conclusion that 'the promoters [were] guilty of a misfeasance in the nature of a breach of trust'.⁷⁷ 'The only question which [remained]', he added, was 'whether it [had] been shewn [*sic*] that the [company had] been damaged by the misfeasance',⁷⁸ something he thought was definitely the case.⁷⁹

Vaughan Williams LJ did not cite any particular cases in reaching his conclusion that, 'there being [a] breach of duty, ... a remedy in the nature of damages [was available]'.⁸⁰ However, he is likely to have been thinking of *Cavendish Bentinck* when he did. Speaking about 'the authorities' – and along with *Erlanger*, *Cavendish Bentinck* had been cited – he stated:

⁷⁵ *ibid.* 825.

⁷⁶ *ibid.* 827-828.

⁷⁷ *ibid.* 833.

⁷⁸ *ibid.*

⁷⁹ Indeed, the fact that his Lordship emphasised the need for loss to be established underlines the duty-based nature of his conceptualisation of the law. It was not necessary for a principal to show that he had suffered a loss when seeking to invoke the disability-based nature of his fiduciary's position.

⁸⁰ *Re Leeds and Hanley Theatres of Varieties Ltd.* (n 74) 825.

‘To put it in a short common law form, I am not sure that the ... company can, in reference to this breach of fiduciary duty, ... maintain an action in the nature of an action for money had and received. [But] whether there is such a remedy or not, ... there is a remedy in the shape of damages’.⁸¹

iii. *Nocton v Lord Ashburton*

The second of the two cases to consider is *Nocton v Lord Ashburton*.⁸² In my view, it stands as authority for the proposition that to make up for a perceived deficiency in the general level of protection provided to those who suffered loss in reliance on another’s misstatement, the House of Lords again committed, in limited circumstances, to move beyond the “good man” theory of Equity. It thereby also represents the start of a second distinct line of decisions in which a fiduciary was said to be subject to a duty, as against his principal, not to act in conflict of interest.

a. *The Wider Context*

The key to understanding *Nocton* is to start with the general condition of the law on misstatements at the time. To my mind, it was a combination of that, and the fact that the early 19th Century was a period when, for various policy reasons, the courts began to increase their regulation of solicitors,⁸³ which caused the House of Lords to decide the case in the way it did. The judges wanted to give a remedy to Lord Ashburton but were constrained in how they could do so. Necessity became the mother of invention.

In the 1910s, the overall level of protection provided to the victims of misstatements was not high. There was no one distinct law of misrepresentation, but instead, as today, an amalgam of different causes of action which could come into play depending on the facts of a case. The problem was that in the second half of the 19th Century, the constituent parts of that mixture had undergone a process of substantial collective regression.

⁸¹ *ibid.*

⁸² *Nocton v Lord Ashburton* [1914] A.C. 932.

⁸³ See G Virgo, ‘Re Hallett’s Estate’ in C Mitchell and P Mitchell (eds), *Landmark Cases in Equity* (Hart Publishing 2014) 358-362

Even as compared to that in the 18th Century, something considered in Chapter 3, the degree of protection afforded to those who detrimentally relied on knowingly made or reckless misrepresentations had diminished.⁸⁴ If one could not argue that a statement made to him had been incorporated into a contract to which he and the statement maker were parties,⁸⁵ while it was once possible for a court of Equity to make a monetary award ‘making good’ a defendant’s representation,⁸⁶ and also for claimants – in Equity at least – to seek pecuniary redress for the consequences of negligent misstatements,⁸⁷ neither of these points remained true. The House of Lords’ decision in *Derry v Peek*⁸⁸ was interpreted in cases like *Low v Bouverie*⁸⁹ as restricting the victims of misrepresentations to bringing claims for deceit, and as cutting down the extent of Equity’s concurrent jurisdiction over that conduct.⁹⁰ The possibility of a court of Equity making an order that a defendant make good his representation was thought to be lost; ‘the [scope of its] compensatory jurisdiction [over any] misrepresentation ... limited to [the rules] relieving against Common Law fraud’.⁹¹ As Lindley LJ put it, in *Low*:

‘[Since *Derry*,] there is no equitable, as distinguished from legal, obligation to answer ... inquiries [correctly]. If a [man] gives an honest answer [*viz.* one which is not actually fraudulent] he discharges the only obligation which he is under’.⁹²

An important practical result of this was a dramatic reduction in the number of cases in which claimants successfully sought pecuniary redress for the effects of a misrepresentation. Under *Derry*, the rule of law vis-à-vis the commission of ‘actual fraud’ was that ‘a man who [made] a representation with the view of its being acted upon, in the honest belief that it [was] true, [committed no] fraud’.⁹³ This meant that unless a claimant could prove that a defendant had

⁸⁴ For a detailed account, see PD Finn, ‘Equitable Estoppel’ in PD Finn (ed), *Essays in Equity* (Law Book Company Ltd 1985) 62-65; PD Finn, ‘Equity as Tort?’ in K Barker, R Grantham and W Swain (eds), *The Law of Misstatements: 50 Years on from Hedley Byrne v Heller* (Hart Publishing 2015) 139-144.

⁸⁵ See, for example, *Maunsell v Hedges* (1854) 4 H.L. Cas. 1039.

⁸⁶ See, for example, *Loffus v Maw* (1862) 3 Giff. 592; F Dawson, ‘Making Representations Good’ (1982) 1 *Canta LR* 329; I Davidson, ‘The Equitable Remedy of Compensation’ (1981) 13 *MULR* 349, 357-362.

⁸⁷ See, for example, *Burrowes v Lock* (1805) 10 Ves. Jr. 470; *Slim v Croucher* (1860) 1 De G.F. & J. 518. It is possible that the same was also true at Law, see J Edelman, ‘Nocton v Lord Ashburton’ in C Mitchell and P Mitchell (eds), *Landmark Cases in Equity* (Hart Publishing 2014) 479.

⁸⁸ *Derry v Peek* (n 48).

⁸⁹ *Low v Bouverie* [1891] 3 Ch. 82.

⁹⁰ Rescission remained *prima facie* available in all cases. See, for example, *Redgrave v Hurd* (1881) 20 Ch. D. 1.

⁹¹ Finn, ‘Equity as Tort?’ (n 84) 143.

⁹² *Low v Bouverie* (n 89) 100-101.

⁹³ *Derry v Peek* (n 48) 345.

made a false representation ‘(1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false’,⁹⁴ he would not obtain a remedy. A few claimants did succeed in proving deceit,⁹⁵ but most, like the investor in *Derry* itself, did not.⁹⁶

b. The Road to the House of Lords

Considered in their context, the facts of *Nocton* were not extraordinary.⁹⁷ The appellant was a solicitor. The respondent had been his client. In the course of his employment, Nocton had advised Lord Ashburton to release a particular plot of land: “Block A”, from the scope of a security interest held over a much larger estate. Crucially, as part of his guidance, Nocton said that even after that release the value of the land which would remain subject to Lord Ashburton’s security would be enough to ensure that all of the money he had previously lent its owners could be repaid. That was incorrect.

A collateral effect of Lord Ashburton’s release was to turn a second security interest held over “Block A” from a second mortgage into a first one. That mortgage was jointly owned by Nocton and Lord Ashburton’s brother. Together, they had financed the landowners’ initial purchase of the site.

In time, the landowners defaulted on their debts and their creditors looked to their security interests to recover what they were owed. Nocton received his share of the sum which he and Lord Ashburton’s brother had lent in full. From his point of view then, given the interim interest payments which had been made, the entire venture was a success. However, Lord Ashburton only got back a proportion of what he had advanced. He therefore suffered a substantial loss. In due course, Lord Ashburton brought proceedings against his former solicitor, seeking, amongst other things, ‘a declaration that, [because of his advice,] Nocton was liable to indemnify [him] in respect of the said transactions’.⁹⁸

⁹⁴ *ibid.* 374.

⁹⁵ See, for example, *Edgington v Fitzmaurice* (1885) 29 Ch. D. 459; *Aaron’s Reefs Ltd v Twiss* [1896] A.C. 273.

⁹⁶ See, for example, *Low v Bouverie* (n 89); *Angus v Clifford* [1891] 2 Ch. 449; *Elkington & Co v Hurter* [1892] 2 Ch. 452; *Le Lievre v Gould* [1893] 1 Q.B. 491.

⁹⁷ See *Virgo* (n 83) 358-362.

⁹⁸ *Nocton v Lord Ashburton* (n 82) 939.

At first instance, Neville J rejected this claim. He construed Lord Ashburton's pleadings as alleging only 'actual fraud' and held that Nocton's advice did not amount to such conduct. Although his actions 'fell far short of [those required by] the duty which he was under as [a] solicitor',⁹⁹ and although he would probably have given different advice had he not been personally interested in the result, Nocton did not intend to defraud his client, a point determinative of the issue. There might have been grounds, his Lordship added, for Lord Ashburton to bring a claim for breach of a contractual duty of care, but that had not been sufficiently pleaded.

In part, the Court of Appeal disagreed. It held that on the evidence Neville J should have found Nocton guilty of 'actual fraud' and that an action for deceit could lie. It thus found in Lord Ashburton's favour, and directed an inquiry as to 'what damages (if any) [he] had ... sustained ... by reason of [his] release'.¹⁰⁰ In due course, the figure of £21,000 was arrived at. If the action had been one for contractual negligence, the court stated, it would have been essentially undefended. However, just like the trial judge, the judges there thought that 'it would [have been] wrong to allow a case based solely on serious charges of fraud to be turned into a comparatively harmless case based on negligence'.¹⁰¹

c. A Third Cause of Action Comes to the Fore

Nocton appealed to the House of Lords. Unfortunately for him, while all five of the judges who heard his case held that the Court of Appeal was not justified in reversing Neville J's decision as regards 'actual fraud', they still found for the respondent. On different grounds to those favoured by the Master of the Rolls et al., they all agreed that Lord Ashburton was entitled to recover the same amount of money which had then been awarded to him.

For a majority of the judges – Viscount Haldane LC, Lord Dunedin, and Lord Atkinson¹⁰² – this was not because a claim in contractual negligence could lie.¹⁰³ As the Lord Chancellor noted, at that time 'a demurrer for want of equity would ... have lain to a bill which did no

⁹⁹ *ibid.* 944.

¹⁰⁰ *ibid.* 940.

¹⁰¹ *ibid.* 945.

¹⁰² Who simply agreed with the Lord Chancellor's speech.

¹⁰³ Lord Shaw and Lord Parmoor thought otherwise and were content to dispose of the appeal on that basis.

more than seek to enforce a claim for damages for [contractual] negligence against a solicitor'.¹⁰⁴ Instead, it was because, properly construed, the respondent's pleadings alleged a different cause of action which entitled him to a compensatory remedy and to which the appellant had no answer. It is my thesis that this third cause of action was based on Nocton's acting in conflict of interest.¹⁰⁵ It is also my thesis that those judges were conceptualising that behaviour as constituting a breach of a duty giving rise to a secondary duty to pay compensation.¹⁰⁶ My argument in support of these two propositions is in three parts.

Firstly, consider the following part of Viscount Haldane LC's speech:

'I cannot ... treat [Lord Ashburton's] case, so far as [it is] based on intention to deceive, as made out. But where I differ from the learned judges in the Courts below is as to their view that, if they did not regard deceit as proved, the only alternative was to [dismiss the action]. ... They were [not] shut up within the dilemma they supposed. There is a third form of procedure to which the statement of claim approximated very closely, and that is the old bill in Chancery to enforce compensation for breach of a fiduciary obligation'.¹⁰⁷

This shows that his Lordship perceived that the solution to the proceedings before him lay in an application of fiduciary law. There is nothing to suggest that his words should be taken at anything other than face value. It is frustrating that the Lord Chancellor chose not to cite any examples of the 'old bill' he referred to actually being brought. Indeed, considering what has been said, above, it is probably true that, other than *Re Leeds and Hanley*, he would have been unable to do so. However, that is irrelevant. What matters is what law the judge thought he was applying, not whether there was authority for his doing so.

¹⁰⁴ *Nocton v Lord Ashburton* (n 82) 956.

¹⁰⁵ I therefore disagree with those who see the case as resting ultimately on negligence. See, for example, J Edelman, 'Nocton v Lord Ashburton' in C Mitchell and P Mitchell (eds), *Landmark Cases in Equity* (Hart Publishing 2014) 483-484; Conaglen (n 7) 256.

¹⁰⁶ I therefore agree with the editors of *Meagher, Gummow & Lehane*, see Heydon, Leeming and Turner (n 7) 810-811.

¹⁰⁷ *Nocton v Lord Ashburton* (n 82) 945-946.

Lord Dunedin's concurring judgment can also only be read in this way. Contrasting what would have been the case 'if [Lord Ashburton's] action had been brought at law',¹⁰⁸ namely that it would have to have been based 'either (1.) on fraud, or (2.) on negligence',¹⁰⁹ he said:

'Turning now to equity ... there [is] a jurisdiction ... to keep persons in a fiduciary capacity up to their duty'.¹¹⁰

As has been noted, all of the judges in the House of Lords restored Neville J's finding on the issue of 'actual fraud' and a majority, including Lord Dunedin, held that a claim for contractual negligence on its own would not lie. This means that his Lordship's decision could only have rested upon the fact that independently Lord Ashburton was entitled to 'a remedy in equity'.¹¹¹

The second part of my argument is that an application of contemporary fiduciary law *could* genuinely have played a role in the disposal of the case. It is true that the connection between that area of law and the legal regulation of misstatements is not immediately intuitive. Yet as the Lord Chancellor said at the start of his speech, it is all a matter of perspective. 'When the real character of the litigation [is] made plain', he stated, 'the difficulties which have attended the giving of relief appear to have been concerned with form and not with substance'.¹¹²

Viscount Haldane LC's resolution of the controversy before him was premised on a material recharacterisation of the legal relevance of the bad advice which formed the heart of the parties' dispute. While both Neville J and the Court of Appeal treated Lord Ashburton's case as concerning an allegedly actionable misrepresentation *per se*, the Lord Chancellor viewed it as relating first and foremost to a conflict of interest. In and of itself the misrepresentation constituted by Nocton's advice was only incidental to bringing Equity into proceedings.

This is Lord Herschell's famous statement of late 19th Century fiduciary law from *Bray v Ford*:¹¹³

¹⁰⁸ *ibid.* 963.

¹⁰⁹ *ibid.*

¹¹⁰ *ibid.*

¹¹¹ *ibid.* 965.

¹¹² *ibid.* 943.

¹¹³ *Bray v Ford* (n 2).

‘It is an inflexible rule ... of Equity that a person in a fiduciary position ... is not, unless otherwise expressly provided, ... allowed to put himself in a position where his interest and duty conflict’.¹¹⁴

As indicated by the phrase: ‘unless otherwise ... provided’, strictly speaking, a fiduciary was *not* prohibited from acting in conflict of interest. Instead, he was not to act in such a way unless authorised to do so. A fiduciary *could* act in conflict of interest all he liked if he received the informed consent of his principal.¹¹⁵ On that front, all the difference would be made by disclosure and that is where the making of a misrepresentation might come in. As Lord Dunedin noted:

‘[A] fiduciary position imposes on [its occupant] the duty of making a full and not a misleading disclosure of facts known to him when advising his client. [If] he fails to do so[,] Equity will [intervene]’.¹¹⁶

In fact, just as today,¹¹⁷ a fiduciary did not owe his principal a *duty* to disclose the fact of his interest in any particular transaction. Rather, disclosure was a precondition for obtaining his principal’s informed consent to his entry into a transaction which would otherwise be in conflict of interest.¹¹⁸ There is therefore an analogy between the alleged fiduciary “duty” to disclose and both the “duty” to mitigate damages in contract law,¹¹⁹ and an arbitrator’s “duty” to disclose matters which, if they were not known to the parties, may give rise to the appearance of bias on his part.¹²⁰ As Lady Arden said in relation to the latter: ‘It is not ... a duty in the usual sense of the word, but a part of a bigger picture’.¹²¹

In most cases in the period under consideration a fiduciary found himself operating in an unauthorised way simply because he failed to disclose the fact that he would be acting in

¹¹⁴ *ibid.* 51.

¹¹⁵ See, for example, *Lord Selsey v Rhoades* (1824) 2 Sim. & St. 41; *Jones v Linton* (1881) 44 LT 601.

¹¹⁶ *Nocton v Lord Ashburton* (n 82) 965.

¹¹⁷ See McGhee (n 37) 7-019.

¹¹⁸ See, for example, *Bentley v Craven* (n 45); *McPherson v Watt* (n 2). One interpretation of *Item Software (UK) Ltd v Fassihi* [2004] B.C.C. 994, is as introducing a genuine fiduciary duty to disclose the fact that one is acting in conflict of interest. However, even if that is correct – which is doubtful – that was not the law in the period under consideration.

¹¹⁹ See *The Solholt* [1983] 1 Lloyd’s Rep. 605, 608.

¹²⁰ See *Halliburton Company v Chubb Bermuda Insurance Ltd* [2020] UKSC 48, [160].

¹²¹ *ibid.*

conflict of interest.¹²² By pure omission he left his principal uninformed, and so, by precluding the possibility of gaining his informed consent, inevitably contravened the rule against unauthorised conflicts. However, in other cases fiduciaries also made positively misleading remarks. Consider, for instance, Romer LJ's analysis of *Re Leeds and Hanley*:

‘When I look at the [promoters’] prospectus I am satisfied that it ... not only concealed the fact that [they] were the real vendors of the property, but [that] it [also] contained actual misrepresentations. ... I refer in particular to the ... clause in the prospectus [which identified their agent as the owner of the property]. The evidence shews that [in fact he] had no interest whatever’.¹²³

In such circumstances as these, the giving of informed consent to an act which would otherwise be in conflict of interest is rendered impossible for two reasons. First, because the reality of the situation is hidden. Second, because it has actively been made to appear different.

Nocton was exactly this type of case. By advising Lord Ashburton that the release of “Block A” would not render his security inadequate, and in doing so, by failing to advise him that entering into that transaction would benefit his solicitor, Nocton was guilty of having actively made his client believe something other than the truth, and of procuring his client's entry into a transaction which benefited him. He was thus acting in an unauthorised conflict of interest. Here are Viscount Haldane LC's words on the matter:

‘[Here] a solicitor has had financial transactions with his client, and has [got his] client to release from his mortgage a property over which the solicitor, by such release, has obtained further security for a mortgage of his own. ... Equity has always assumed jurisdiction to scrutinize [such an] action. [The solicitor has acted] in breach of a duty which arose out of his confidential relationship [with] the man who had trusted him’.¹²⁴

¹²² See, for example, *Lewis v Hillman* (1852) 3 H.L. Cas. 607; *McPherson v Watt* (n 2).

¹²³ *Re Leeds and Hanley Theatres of Varieties Ltd.* (n 74) 827-828.

¹²⁴ *Nocton v Lord Ashburton* (n 82) 956-957.

Lord Dunedin put it even more directly:

‘Nocton was in a fiduciary position. He was Lord Ashburton’s solicitor, advising him as to the very transaction which he was himself proposing, and his position was ... aggravated by the fact that he himself was interested in the transaction going through’.¹²⁵

Of course, just as Romer LJ thought was the case in *Re Leeds and Hanley*, when a fiduciary disguises his interest by making either an intentional or reckless misrepresentation, in addition to guaranteeing that he will act inconsistently with his fiduciary encumbrance, he will also be guilty of deceit. But that is a separate matter. As Lord Dunedin explained in *Nocton*, unlike liability for misstatements *per se*, a fiduciary’s liability for acting in undisclosed conflict of interest is not ‘based on the [fact of a false] representation alone’.¹²⁶ Instead, it is ‘quite apart [from it]’.¹²⁷ In Viscount Haldane LC’s words, such claims are ‘of an essentially different character’.¹²⁸

But what of the supposed effect of *Derry*? If the prevailing interpretation of its *ratio* was correct, surely it precluded the application of fiduciary law to a case like *Nocton*? The answer is that the House of Lords unanimously, and in my view correctly, held that it did not. Lord Dunedin noted that, ‘in that case there was no fiduciary relationship, and the action [was] based on [a] representation alone’.¹²⁹ As a matter of authority, then, *Derry* could not speak to the rules which applied to cases where there was such a relationship. Both Lord Parmoor and Lord Shaw made substantively identical comments.¹³⁰ So too did the Lord Chancellor,¹³¹ who also approached the issue as a matter of principle. Consistently with what has been said so far in this thesis, he noted the jurisdictional difference between Equity’s role in relation to “actual fraud” and, amongst other things, conflicts of interest:

¹²⁵ *ibid.* 962.

¹²⁶ *ibid.* 965.

¹²⁷ *ibid.*

¹²⁸ *ibid.* 955.

¹²⁹ *ibid.* 965.

¹³⁰ See *ibid.* 978 and 970-971 respectively.

¹³¹ See *ibid.* 947.

‘It [is] settled that nothing short of proof of a fraudulent intention in the strict sense will suffice for an action of deceit. This is so whether a Court of Law or a Court of Equity, in the exercise of [its] concurrent jurisdiction, is dealing with the claim. ... But when fraud is referred to in the wider sense ... used in Chancery [to describe] cases which were within [Equity’s] exclusive jurisdiction, it is a mistake to suppose that an actual intention to cheat must always be proved.

A man may misconceive the extent of the obligation which ... Equity imposes on him. His fault is that he has violated, however innocently, ... an obligation which he must be taken by the Court to have known, and his conduct has in that sense always been called fraudulent. ... It was thus that the expression “constructive fraud” came into existence. ... What it really means in this connection is, not moral fraud, ... but breach of the sort of obligation which is enforced [exclusively] by a Court that [regards] itself as a Court of conscience’.¹³²

Turning to the third part of my argument that, in thinking of *Nocton*’s acting in conflict of interest as relevant, a majority of the House of Lords interpreted that behaviour as a breach of a duty giving rise to a secondary duty to pay compensation, two points should be made. They both follow from what has just been established: that not only did their Lordships think that *Nocton* raised an issue of fiduciary law, but also that they were right to do so. The first point is that, as a matter of principle, the only way in which the relevant judges could have ordered the remedy they did was to have looked past the disability-based approach mandated by the “good man” theory of Equity. The second is that, quite apart from the issue of principle, it is clear from their words that this is what they thought they were doing. Indeed, this is where my argument about remedial necessity comes in. It seems plain that both Viscount Haldane LC and Lord Dunedin acted in the way they did because they wanted to grant Lord Ashburton the relief he sought.

On my first point, a passage from the Lord Chancellor’s speech is relevant. It is focused specifically on what remedy he thought Lord Ashburton was entitled to. Lord Dunedin expressly agreed with it. ‘This action’, he said:

¹³² *ibid.* 953-954.

‘Ought properly to [be] treated as one in which the [claimant has] made out a claim for compensation ... for loss arising from misrepresentation made in breach of fiduciary duty. ... The measure of damages may not always be the same as in an action of deceit or for negligence. But in this case the question is of form only’.¹³³

Given what has been said about *Cavendish Bentinck*, above, little needs to be added. As a matter of early 20th Century Equity, the disability-based view of a fiduciary’s encumbrance could only sustain the awarding of remedies designed to retrospectively enforce it. That included the making of orders that defendants account for any profits made because of their conduct, but such relief cannot be seen to have been awarded in this case. Nocton’s profit amounted to a far smaller sum than that granted to the respondent: £10,000 as opposed to £21,000. In addition, it is not so much that rescission was available but somehow barred, but that the parties did not enter a transaction which could have been set aside at all.¹³⁴

The conceptual model which allowed – as it still allows – the awarding of compensation for loss suffered because of another person’s conduct was that which involved the existence of duties. Thus, if they believed that compensation was available in *Nocton*, a majority of the judges must have viewed the appellant as subject to a duty not to act in conflict of interest. Consequently, in this context at least, there must have been a step beyond the disability-based analysis. Specific support for this final proposition comes from the speech of Lord Dunedin. One passage, which also indicates he decided the case in the way he did because private law as it otherwise stood was unable to offer Lord Ashburton satisfactory relief, is as follows:

‘Now, whenever we come to the idea of breach of duty, we see how nearly the domains of law and equity approach, or perhaps, more strictly speaking, overlap. [In some] class of cases ... equity [is] peculiarly dominant, not ... from any scientific distinction between the classes of duty existing and the breaches thereof, but simply because in certain cases where ... justice demanded a remedy, [and] the common law

¹³³ *ibid.* 958.

¹³⁴ Another possibility, considered but set aside by the Lord Chancellor, was for the court ‘to order ... Nocton to restore to the mortgage security what he had procured to be taken out of it, in addition to making good the amount of interest lost by what he did’. See *ibid.* 958.

had none forthcoming, ... the [judges] (though there is no harder lesson for the stranger jurist to learn) began with the remedy and ended with the right'.¹³⁵

On my second point, I might again begin with the words of the judges. Their language indicates that they *were* viewing the solicitor in the case before them as subject to an inherently breachable duty. Lord Dunedin, for example, referred to Equity's 'jurisdiction ... to keep persons in a fiduciary capacity up to their duty',¹³⁶ and stated that in any case the courts' intervention was based 'upon the existence of a fiduciary relationship, and subsequently [any] breach of duty arising'.¹³⁷ He described acting in conflict of interest as 'wrongful',¹³⁸ and equated it with negligence and a failure to perform one's contractual encumbrances, at least insofar as they both involved 'the idea of breach of duty'.¹³⁹ The remedy available to a victim of a conflict of interest 'would not have been damages' as such, he added, but 'another' compensatory remedy which 'would practically come to much the same'.¹⁴⁰

It is true that the repeated use of the word duty does not on its own guarantee that it is being used a term of art. However, the wider jurisprudential context of his Lordship's speech means that it is likely. By the start of the 20th Century it was settled that, as a matter of principle, both of the two causes of action to which he directly compared acting in conflict of interest concerned civil wrongs which sounded, when appropriate, in damages.¹⁴¹

Viscount Haldane LC compared a fiduciary encumbrance's with 'the general duty of honesty ... the breach of which may give a right to damages [in deceit]'.¹⁴² Both encumbrances, he stated, made up part of 'the field in which liabilities [for misstatements] may arise'.¹⁴³ By the 1910s, it was trite law that an individual's encumbrance not to commit actual fraud took the form of a duty.¹⁴⁴ Consequently, it is again possible to read the drawing of such an analogy as involving an important substantive claim.

¹³⁵ *ibid.* 964.

¹³⁶ *ibid.* 963.

¹³⁷ *ibid.* 964.

¹³⁸ *ibid.* 963.

¹³⁹ *ibid.* 964.

¹⁴⁰ *ibid.* 965.

¹⁴¹ See, for example, *Heaven v Pender* (1883) 11 Q.B.D. 503 (on negligence); *Marzetti v Williams* (1830) 1 B. & Ad. 415 (on breach of contract).

¹⁴² *Nocton v Lord Ashburton* (n 82) 947.

¹⁴³ *ibid.* 945.

¹⁴⁴ See, for example, *Langridge v Levy* (1837) 2 M. & W. 519; *Derry v Peek* (n 48).

Unlike Lord Dunedin, the Lord Chancellor did not expressly account for his motivation for looking past the disability-based view. However, there is a secondary source which, if reliable, suggests that he also acted in response to a desire to compensate claimants in positions like Lord Ashburton's. In one of his letters to Holmes, Pollock claimed to have been told by his Lordship a month before the decision in *Nocton* that, in order to 'minimise its consequences', 'the Lords [were] going to hold that [*Derry v Peek* did] not apply to the situation created by a ... fiduciary duty such as a solicitor's'.¹⁴⁵ 'In other words', he added, they would go as 'near as they dare to saying it was wrong'.¹⁴⁶ Given his holding that *Nocton* did not involve deceit, what could Viscount Haldane LC have been referring to if not the strict limits on recovery that subsequent cases had viewed *Derry* as imposing upon the victims of misrepresentations generally?

Pollock's letter is instructive for a second reason. It supports this Chapter's argument that the initial scope of the development entailed in *Nocton* was limited. By linking the conceptual change the case would involve to a desire to unpick some of the harder edges of *Derry*, its author implies that the duty-based conception of a fiduciary's encumbrance was only applicable insofar as it was required to make up, where it could, for a deficiency in the general level of protection provided to the victims of misstatements. Like *Cavendish Bentinck*, then, *Nocton* itself may not initially have involved the manifestation of a new general principle. Rather, both cases represented the start of narrow and context specific lines of authority. Nevertheless, as said above in relation to *Cavendish Bentinck*, the cause of a legal development does not necessarily provide a fundamental limit to its scope. Consequently, in *Nocton*, the House of Lords sowed more seeds for a wider duty-based view of fiduciaries to be eventually adopted.

III. Continuity Reigns in Undue Influence

In the period under consideration in this Chapter, and in contrast to the law of fiduciaries, the law of undue influence remained faithful to its original underlying theory. Properly understood, there were no decisions analogous to those in *Cavendish Bentinck* and *Nocton* punctuating an

¹⁴⁵ MD Howe (ed), *The Holmes-Pollock Letters: The Correspondence of Mr Justice Holmes and Sir Frederick Pollock, 1874-1932*. (Harvard University Press 1967) 215.

¹⁴⁶ *ibid.*

otherwise congruent line of authorities. The scope of the law did change over time. For example, the equitable doctrine of duress – another of those areas of law which emerged in the middle of the 19th Century to replace part of the law of “constructive fraud” – was absorbed into undue influence in *Williams v Bayley*.¹⁴⁷ But this was not at the expense of any theoretical continuity.

i. A Consistent Record

Chapter 5 argued that by the mid-19th Century those in positions of influence arising out of pre-existing relationships were disabled, as against those over whom they held it, from asserting rights acquired by exercising their influence. It also argued that, at a minimum, these encumbrances were consistent with the law of undue influence’s adherence to the “good man” theory of Equity. This Section shall explain that this remained true until the end of the 1920s. Every relevant case contains language which is, at a minimum, consistent with those two propositions.

In *Rhodes v Bate*,¹⁴⁸ Turner LJ set aside several transactions entered into by a woman in favour of her business adviser on the basis that they had been procured by an exercise of undue influence on the business adviser’s part. The following was his Lordship’s general statement of the law he applied:

‘Persons standing in a confidential relation towards others cannot entitle themselves to hold benefits which those others may have conferred upon them, unless they can shew ... that the persons by whom the benefits have been conferred had competent and independent advice in conferring them’.¹⁴⁹

These words, which plainly countenance the existence of “good man” theory-style disabilities on those in positions of influence, were applied by Lopes LJ in *Liles v Terry*.¹⁵⁰ In that case, all three members of the Court of Appeal justified their decisions to set aside a gift of two leases made by a client to her solicitor on the basis that the solicitor was disabled as against his

¹⁴⁷ *Williams v Bayley* (1866) L.R. 1 H.L. 200.

¹⁴⁸ *Rhodes v Bate* (1865-66) L.R. 1 Ch. App. 252.

¹⁴⁹ *ibid.* 257.

¹⁵⁰ *Liles v Terry* [1895] 2 Q.B. 679.

client from enforcing his new rights. Kay LJ's language was strikingly similar to Turner LJ's. In Equity, he stated:

‘[There is] a rule of ... great importance that, while a person is under the influence ... of another person in consequence of a confidential relation between them, that other person cannot accept from him a gift of any kind, unless it is shewn to have been made [independently]’.¹⁵¹

Lord Esher MR described the claimant's gift as ‘invalid’.¹⁵² However, this should not be taken to mean that, inconsistently with the terms of “good man” theory of Equity, he thought that the law would deny the fact of any particular inappropriately procured transaction. His Lordship's conclusion, that, ‘by virtue of a definite rule of equity, the Court [was] bound to set aside [the gift] executed by the [claimant]’,¹⁵³ suggests that his remark about invalidity must be understood only as an abbreviated way of describing the efficacy of the rights-transfer in issue.

Vaughan Williams LJ spoke in less ambiguous terms in *Wright v Carter*.¹⁵⁴ In allowing a claim brought by a client seeking the rescission of a gift he had made to his solicitor, he said:

‘This deed was executed by [the claimant] under the influence of [the defendant], without fully understanding what was being done, and without competent independent advice. In my judgment, [the defendant] cannot ... enforce that deed. ... It is ... against conscience that [he] should be able to enforce [his new] rights.’¹⁵⁵

The defendant being described was one who was understood to have received the gift the claimant had made him, but who was also unable to assert the benefit of that gift as against that claimant. He must therefore have been subject to the sort of disability that the “good man” theory of Equity imposed. Support for this view comes from Parker J's words in *Allison v Clayhills*.¹⁵⁶ Approaching the matter from the other side, his Lordship noted that, ‘where the relationship of solicitor and client exists, [or where,] although [it] has been discontinued, ...

¹⁵¹ *ibid.* 685.

¹⁵² *ibid.* 683.

¹⁵³ *ibid.*

¹⁵⁴ *Wright v Carter* [1903] 1 Ch. 27.

¹⁵⁵ *ibid.* 56.

¹⁵⁶ *Allison v Clayhills* (1907) 97 L.T. 709.

the confidence naturally arising from such a relationship is proved ... to continue', 'a solicitor is *not* wholly incapacitated from purchasing ... from his client'.¹⁵⁷

In *Re Coomber*,¹⁵⁸ Cozens-Hardy MR used a similar shorthand to the Master of the Rolls in *Liles*. However, again, it should not be read as challenging the general idea that in the 1910s a "good man" theory of Equity-style disability-based view applied to the law of undue influence. Unless we want to take the law to have been hopelessly self-contradictory – simultaneously countenancing the fact of a gift, but also denying its occurrence – we must construe his Lordship's remarks, including the following proposition, in the same way as we did his predecessor's:

'A solicitor cannot ... take a gift from his client in a matter in which he is the solicitor because there is from that relationship in itself a [relationship of] influence'.¹⁵⁹

The tell-tale language of enforceability was returned to by the Privy Council in *Demerara Bauxite Company Ltd v Hubbard*.¹⁶⁰ In that case, the question was as to the efficacy of a sale made pursuant to the exercise of an option to purchase procured by an act of undue influence on the grantee's part. At the time it was issued, the grantee had been the grantor's solicitor. Lord Parmoor found in favour of the vendor and stated his conclusion in these terms: 'The appellant ... cannot succeed in their action to enforce on [the vendor] the terms of the option made between her and [the purchaser]'.¹⁶¹

As before, these words involve no denial of the fact that the two parties had actually created an option. Instead, they indicate that the legally operative issue was whether, as against the vendor, the purchaser was disabled from asserting rights acquired by way of an exercise of undue influence. The same is true of Viscount Haldane's comments in *Daing Soharah v Chabak*:¹⁶²

'[In a case of undue influence] the relief given by a Court of Equity is a secondary consequence of the principle that a person, standing in a relationship [of] influence, ...

¹⁵⁷ *ibid.* 711 (emphasis added).

¹⁵⁸ *Re Coomber* [1911] 1 Ch. 723.

¹⁵⁹ *ibid.* 726-727.

¹⁶⁰ *Demerara Bauxite Co Ltd v Hubbard* [1923] A.C. 673.

¹⁶¹ *ibid.* 681.

¹⁶² *Daing Soharah v Chabak* (1927) AIR 1927 PC 148.

cannot hold a mere gift without making it clear that the intention to make it was not the result of his influence'.¹⁶³

ii. Allcard v Skinner

Perhaps the only obvious omission from this account is the decision of the Court of Appeal in *Allcard v Skinner*.¹⁶⁴ One might think that it constitutes an exception to the rule just set out because part of Cotton LJ's judgment appears to be inconsistent with the terms of the "good man" theory of Equity. Consider, for example, Lord Hobhouse's interpretation of it from *Royal Bank of Scotland Plc v Etridge (No 2)*:¹⁶⁵

'Actual undue influence ... is an equitable wrong committed by [a] dominant party against [a vulnerable one]'.¹⁶⁶

In my view, insofar as he believed that any of the judgments in *Allcard* propagated a wrongs-based conception of the law of undue influence, Lord Hobhouse was mistaken. As shall be explained in Chapter 7,¹⁶⁷ it may be true that some judges have recently started to perceive parts of that doctrine as responding to the wrongs-based view, and therefore that some of those in positions of influence are now subject to duties not to exercise their influence. But that does not mean that the Court of Appeal held such a view in the 1880s. Indeed, the best reading of Cotton LJ's judgment is that, like those of Bowen LJ and Lindley LJ, it conformed with the general theoretical trend underpinning each of the undue influence cases considered above.

The facts of *Allcard* were relatively simple. The claimant was introduced to a sisterhood by a friend. The defendant was its lady superior. The claimant became an associate of the sisterhood and passed through several grades of membership until, to continue, she was required to bind herself to rules of poverty. Accordingly, she transferred substantial amounts of money and stock to the defendant. Many years later, the claimant left the sisterhood and commenced an

¹⁶³ *ibid.* 150.

¹⁶⁴ *Allcard v Skinner* (1887) 36 Ch. D. 145.

¹⁶⁵ *Royal Bank of Scotland Plc v Etridge (No 2)* [2002] 2 A.C. 773.

¹⁶⁶ *ibid.* 820.

¹⁶⁷ See Chapter 7, Section III, Subsection *ii*.

action seeking the return of her property. She alleged that it had only been transferred because of an exercise of undue influence on the defendant's part.

At first instance, Kekewich J said that he would have allowed the claim but for the fact that the defendant could plead laches. A majority of the Court of Appeal agreed with him. Indeed, although they divided over the question of laches, all three appellate judges concurred that the defendant had exercised undue influence over the claimant.

Bowen LJ plainly understood the law of undue influence to be governed by the disability-based view. This is evident from, amongst other things, the following passage:

‘Passing next to the [position] of the [defendant], it seems to me that, although [the] power of perfect disposition remains in the [claimant] under circumstances like the present, ... equity will not allow a person who exercises ... religious influence over another to benefit [from] gifts which the [claimant] makes ... in consequence of such influence, unless it is shewn that the [claimant] was ... exercising an independent will. ... This is not a limitation placed on the action of the donor; it is a fetter placed upon the conscience of the recipient’.¹⁶⁸

Lindley LJ stated the law in similar terms:

‘A gift made [because of an exercise of undue influence] cannot ... be retained by the donee. The equitable title of the donee is imperfect by reason of the influence [he exercised]. [Consequently,] the gifts made to the sisterhood [in this case] cannot be supported’.¹⁶⁹

Both these passages touch on what were two important features of the doctrine of undue influence. The first was that Equity did not try to deny the truth of events and suggest that no transfer by the victim of an exercise of undue influence took place. As has been explained, the “good man” theory of Equity did not involve the use of such fictions. The second feature was that Equity rendered the position of the recipient of the tainted transaction in some way limited.

¹⁶⁸ *Allcard v Skinner* (n 164) 190.

¹⁶⁹ *ibid.* 184.

It prevented him from being able to assert, as against the transferor, the rights that he had acquired.

Rather than speaking solely in terms consistent with the imposition of disabilities, Cotton LJ's language occasionally drifted towards that of a duty-based conception of the law. Consider, for example, the following passage:

‘Does [this] case fall within the principles laid down by ... the Court of Chancery [for] setting aside ... gifts executed by parties who ... were under [another's] influence?’

[The authorities] may be divided into two classes – the first class of cases may be considered as depending on the principle that no one shall be allowed to retain any benefit arising from his own fraud or wrongful act. In the second class of cases the Court interferes, not on the ground that any wrongful act has in fact been committed by the donee, but ... to prevent the relations which existed between the parties and the influence arising therefrom being abused’.¹⁷⁰

The question is whether, in employing the phrase ‘wrongful act’, the judge was using a term of art, or was merely casting opprobrium on the conduct of parties with influence.¹⁷¹ As said above,¹⁷² in the late 19th and early 20th Century, describing conduct inconsistent with an encumbrance as ‘wrongful’ implied that the encumbrance itself was a duty. A wrong was a breach of duty. If that was the idea with which Cotton LJ was engaging when he described the exercise of undue influence as wrongful, his judgment really would have constituted a departure from the then generally understood position.

Ultimately, there are two good reasons to think that his Lordship meant to use the term ‘wrongful’ in a non-technical sense. The first is the equation he made between wrongdoing, ‘fraud’, and the unlawful exercise of influence. This thesis has established categorically that undue influence could only be described as ‘fraud’ if by ‘fraud’ one meant “constructive fraud”: the abuse of interpersonal power. It has also established categorically that Equity's old jurisdiction over the abuse of interpersonal power was not premised on the fact of any

¹⁷⁰ *ibid.* 171.

¹⁷¹ As, for example, Bowen LJ did. See *ibid.* 190-191.

¹⁷² See Section II, Subsection *ii*, d.

wrongdoing by any of the individuals to which it applied.¹⁷³ It involved the imposition of primary disabilities.¹⁷⁴ Thus, by using the word ‘wrongful’ to describe the sort of ‘fraud’ constituted by undue influence, Cotton LJ can be seen as merely expressing disapproval of the legally objectionable behaviour that involved.

My second reason comes from the wider context of his Lordship’s remarks. They formed part of a more general account of the law of undue influence at the time. In the same section of his judgment, for instance, Cotton LJ also described how each of the two categories of case he referred to could be proved. Those premised on wrongdoing, he stated, were those in which ‘the Court [was] satisfied that the gift [in issue] was the result of influence expressly used by the donee for [that] purpose’.¹⁷⁵ In technical terms, they were cases in which the fact of a causal link between the defendant’s exercise of influence and the claimant’s entry into the impugned transaction was directly proven. In contrast to this, that group of decisions in which the court’s intervention did not rest on wrongful behaviour were said to be those ‘where the relations between the donor and donee [were] such as to raise a presumption’ that could only be rebutted by proof ‘that in fact the gift was the spontaneous act of the donor’.¹⁷⁶ In them, then, a causal link between the defendant’s exercise of influence and the claimant’s entry into the impugned transaction did not need to be specifically established for the claimant to succeed.

This linking of the distinction between cases of so-called wrongdoing and cases which did not involve wrongdoing to the issue of how those cases were proved is significant. This is because there is good evidence that before,¹⁷⁸ during,¹⁷⁹ and after¹⁸⁰ the period under consideration, judges generally understood that in substance the ground on which they intervened in any case of undue influence was the same regardless of how its facts were proven.¹⁸¹ Consequently, insofar as they refer to the substantive justification for the courts’ intervention in cases of *presumed* undue influence, Cotton LJ’s words must also have been true for cases of *actual*

¹⁷³ See, for example, *York Buildings Co v Mackenzie* (1795) 3 Paton 378, discussed in Chapter 5, Section II, Subsection *ii*, a.

¹⁷⁴ See Chapter 5, Section II, Subsection *ii*.

¹⁷⁵ *Allcard v Skinner* (n 164) 171.

¹⁷⁶ *ibid.*

¹⁷⁸ See, for example, *Rhodes v Bate* (n 148) 258.

¹⁷⁹ See, for example, *Allcard v Skinner* (n 164) 181.

¹⁸⁰ See, for example, *Morley v Loughman* [1893] 1 Ch. 736, 751-752.

¹⁸¹ Indeed, despite some (relatively) recent confusion, the same is still true today. See K Lewison, ‘Under the Influence’ [2011] RLR 1.

undue influence, and *vice versa*. Given the directly contradictory statements his judgment would involve if one read the term ‘wrongful’ as a term of art requiring a breach of duty, his Lordship’s use of that word is thus best seen as a non-technical one.

IV. Conclusion

This Chapter has demonstrated that, between the 1870s and the 1920s, some judges began to challenge the idea that the law of fiduciaries was only underpinned by the “good man” theory of Equity, or at least the disability-based view it entailed. It has also shown that, at the same time, the law of undue influence avoided such controversy. The result of this was the beginning of a substantial conceptual divergence between those two areas of law.

With respect to the law of fiduciaries, what changed as matter of principle was that, in certain circumstances, and as a response to specific instances of remedial necessity, some judges ceased to think of fiduciaries as simply disabled, as against their principals, from asserting rights acquired as a result of acting in conflict of interest. They began to regard them as owing duties, as against their principals, not to act in that way. Thus, while most cases continued to be treated exclusively in accordance with the “good man” theory of Equity, for various identifiable reasons a few clearly moved beyond it.

The practical impact of this change was no less great. In cases where the courts invoked a wrongs-based view of fiduciary doctrine, they were able to sanction awards of equitable compensation, payments designed to make good losses caused by unlawful conduct. In contrast, in cases in which the disability-based conception of the nature of a fiduciary’s encumbrance remained dominant, such a remedy was firmly closed off.

As has been explained, when it comes to the law of undue influence, no set of cases analogous to *Cavendish Bentinck* or *Nocton* can be found. In the period under this Chapter’s consideration, endless authorities support the idea that a person with influence was merely disabled, as against the party over whom he held it, from asserting rights acquired as a result of exercising his influence. They also make clear that the only remedies available to those bringing a claim based on such behaviour were those designed to retrospectively enforce that disability: principally rescission.

As said in Section I, there are two good reasons for knowing all this. The first is that, as the next Chapter shall explain, a more pronounced (and complex) version of the same split still characterises the relationship between the law of fiduciaries and the law of undue influence today. Now its origins, and indeed its fundamental terms, have been described, it should be easier to properly appreciate its current and more widespread effects. The second reason is that the wrongs-based view shall play an ever-increasing role in this thesis' account of each of the doctrines under its consideration. In particular, as shall be explained in Chapter 7, in the last seven years, and for analogous reasons of remedial necessity, it has started to take hold within the doctrine of undue influence and appears to be operating in the same way. Understanding the challenges raised by the wrongs-based view of fiduciaries when it was a new idea should make it easier to comprehend the depth of its wider impact now.

1940-2020

A Re-Convergence?

I. Introduction

This Chapter concludes the stories of the law of fiduciaries and the law of undue influence started in Chapter 5 and continued in Chapter 6. It does so by mapping their respective theoretical developments from the middle of the 20th Century to the present day. Its main claim is that, in contrast to what happened between the 1870s and the 1920s, there could now be a sense in which parts of both doctrines are re-converging as a matter of underlying principle. On a smaller scale, the same type of conceptual shift which previously occurred within the law of fiduciaries may have started to take place within the law of undue influence.

Section II is focused on the law of fiduciaries. It argues that, in the period under consideration, the wrongs-based view introduced by *Cavendish Bentinck v Fenn*¹ and *Nocton v Lord Ashburton*² has become a more general feature of the doctrine. Despite subsequent developments, not least the decision in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*,³ the idea that a fiduciary is subject to a duty, as against his principal, not to act in conflict of interest, has not been set aside. Instead, it has been consolidated and then expanded upon. There is therefore now a real sense in which acting in conflict of interest is an equitable wrong.⁴

¹ *Cavendish Bentinck v Fenn* (1887) 12 App. Cas. 652.

² *Nocton v Lord Ashburton* [1914] A.C. 932.

³ *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465.

⁴ As said in Chapter 5, Section III, Subsection *i*, it is possible that since the middle of the 20th Century fiduciaries have been subject to a separate rule proscribing the making of unauthorised profits even in the absence of any conflict of interest on their part. See, for example, *Don King Productions Inc v Warren* [2000] Ch. 291 [40]-[43]; *In Plus Group Ltd v Pyke* [2003] B.C.C. 332 [71]. This may be doubted. *Aas v Benham* [1891] 2 Ch. 244 remains good authority, and there are few cases which promulgate a no-unauthorised-profit rule which do not also involve a conflict of interest. However, even if there *is* such a rule, it too would fit, in the first instance, with a “good man”-style disability analysis. Fiduciaries would be disabled, as against their principals, for asserting any rights acquired because of their role. Indeed, that *could* explain the result in *FHR European Ventures LLP v Cedar*

As shall be explained, the detectable results of this process are twofold. First, there has been a proliferation of recent authorities in which equitable compensation for breach of fiduciary duty is awarded. Second, judges have started to identify several seemingly settled questions of law which may need to be reopened because of it. Indeed, both these occurrences also bear out this thesis' more general argument that theoretical change in the law of fiduciaries has had important practical effects.

Section III concerns the law of undue influence. It shows that while, for almost the entire period under consideration, the courts adhered exclusively to a "good man" theory-style disability-based view, in the last seven years this has started to change. The hegemony of that conception of the doctrine has thus ended. For reasons of remedial necessity, some judges have moved beyond the long-settled notion that individuals in positions of influence are merely disabled, as against those over whom they hold their influence, from asserting rights acquired as a result of exercising it. A small number of recent decisions can only be understood on the basis that they have taken a party with influence to be subject to a duty not to exercise his influence and have awarded compensation for loss caused by a breach of that duty.

Significantly, insofar as this is the result of an importation of the wrongs-based view into the theoretical underpinnings of the law of undue influence, there may now be a sense in which the exercise of undue influence is an equitable wrong. In addition, if that is correct, something of a partial conceptual re-convergence between that doctrine and the law of fiduciaries may be underway.

II. The Wrongs-Based View of Fiduciary Law

Starting with the law of fiduciaries, and resuming the narrative in Chapter 6, this Section will make four points. The first is that, since the middle of the 20th Century, the dominance of the disability-based view in relation to that doctrine has waned. The idea that fiduciaries are disabled, as against their principals, from asserting rights acquired by acting in conflict of interest still has a role to play, both in guiding judges on how to determine new disputes and in

Capital Partners LLC [2014] UKSC 45, see L Smith, 'Constructive Trusts and the No-Profit Rule' (2013) 72 CLJ 260.

aiding one's understanding of parts of the subsisting case law. However, relatively speaking, that function has declined. The second point is that, at the same time, the wrongs-based view has become a well-entrenched part of the law. Since its introduction, although not immediately thereafter, the notion that a fiduciary is subject to a duty, as against his principal, not to act in conflict of interest, has been consolidated. The term "breach of fiduciary duty" is now commonplace, as are the particular doctrinal consequences attached to it.

The third point, which is connected to the first two, is that, because of the diminishing prominence of the disability-based view in relation to it, there is a now sense in which acting in conflict of interest is an equitable wrong. Subsection *iii*, below, will show this as a matter of both authority and principle. It will set out a definition of an equitable wrong and explain why breach of fiduciary duty conforms to it. The final point is that due to the rise of the wrongs-based analysis of fiduciary law judges have started to identify several seemingly settled questions which may need to be reopened. Perhaps the most notable example was that of whether a bribe taken by a fiduciary is held on constructive trust for his principal.⁵

i. The "Good Man" Theory's Declining Role

It would be incorrect to say that the idea that fiduciaries were disabled, as against their principals, from asserting rights acquired by way of acting in conflict of interest has become irrelevant to the modern law. On the contrary, particularly in company cases, it still has a role to play.⁶ Nevertheless, since the 1940s, the disability-based analysis has experienced a decline in prominence. Whereas it was once without competition, it is now one of two different theories underpinning the law on conflicts of interest. Moreover, as Subsections *ii* and *iv* will demonstrate, at least insofar as it involves the imposition of primary disabilities, the "good man" theory of Equity is incapable of properly accounting for large parts of modern fiduciary doctrine.

At the start of the period under consideration, reliance was placed on the disability-based view of fiduciaries by a majority of the judges in *Regal (Hastings) Ltd v Gulliver*.⁷ Lord Porter, for instance, said that:

⁵ See Section II, Subsection *iv*, a.

⁶ See, for example, *Movitex Ltd v Bulfield* (1986) 2 B.C.C. 99403; *Guinness Plc v Saunders* (1987) 3 B.C.C. 271.

⁷ *Regal (Hastings) Ltd v Gulliver* [1967] 2 A.C. 134.

‘Directors ... occupy a fiduciary position towards the company whose board they form. Their liability in this respect does not depend upon [a] breach of duty but upon the proposition that a director must not make a profit ... by reason of his relationship to the company of which he is director’.⁸

Lord Russell stated:

‘The rule of equity which insists on those who by use of a fiduciary position make a profit, being liable to account for that profit, in no way depends ... upon such questions [as] whether the profiteer was under a duty ... or whether [his principal] has ... been damaged ... by his action. The liability arises from the mere fact of a profit having ... been made’.⁹

In the 1950s and 60s, similar statements were made in other House of Lords decisions. *Dale v Inland Revenue Commissioners*,¹⁰ *Brown v Inland Revenue Commissioners*,¹¹ and *Boardman v Phipps*,¹² for example, all contain references to equitable disabilities. At the same time, commentators like Vinter and Sealy were also explaining the law in similar terms.¹³

In the 1977 case of *Tito v Waddell (No. 2)*,¹⁴ Megarry VC held that any alleged conflict of interest on the part of the defendants was not a ‘breach of trust’ within the meaning of section 19(2) of the Limitation Act 1939. Consequently, their principal’s claim for an account of profits was not subject to a six-year limitation period. The misfeasance in issue involved contraventions of what had become known as the self-dealing and fair-dealing rules. However, just as now, those rules were merely context-specific manifestations of the general rule against

⁸ *ibid.* 159.

⁹ *ibid.* 144-145. See, also, 137, and 153.

¹⁰ *Dale v Inland Revenue Commissioners* [1954] A.C. 11, 27.

¹¹ *Brown v Inland Revenue Commissioners* [1965] A.C. 244, 256, and 265-266.

¹² *Boardman v Phipps* [1967] 2 A.C. 46, 104, 112, and 116.

¹³ See E Vinter, *A Treatise on the History and Law of Fiduciary Relationship* (3rd edn, Heffer 1955) 2; and LS Sealy, ‘Fiduciary Relationships’ (1962) 20 CLJ 69, 76-77; LS Sealy, ‘Some Principles of Fiduciary Obligation’ (1963) 21 CLJ 119, 122-124; LS Sealy, ‘The Director as Trustee’ (1967) 25 CLJ 83, 97-100, respectively.

¹⁴ *Tito v Waddell (No 2)* [1977] Ch. 106.

conflicts of interest.¹⁵ The gravamen of the Vice-Chancellor’s reasoning, examined in Subsection *iv*, below, was as follows:

‘*Halsbury’s Laws of England* ... includes both the self-dealing rule and the fair-dealing rule under the head of “Disabilities of trustees” and not “Duties of trustees”: and it is this that appears to me to be the true view. ... What equity does is to subject trustees to particular disabilities in cases falling within the [scope of those] rules’.¹⁶

These remarks were endorsed less than a decade later by Vinelott J in *Movitex Ltd v Bulfield*,¹⁷ a company case. In addition, a year after, Browne-Wilkinson VC spoke in theoretically-consistent terms in *Guinness Plc v Saunders*.¹⁸ ‘The director of a company’, he noted, ‘is in a fiduciary position’, and ‘one of the fundamental disabilities of ... a director or anyone else in a fiduciary capacity is that, in the absence of ... authorisation, they cannot make a personal profit from their position’.¹⁹

Thereafter, the trail becomes colder. Some commentators, including judges writing extrajudicially, have persisted in invoking the “good man” theory of Equity and/or “good man” theory-style disabilities in their explanations of fiduciary law.²⁰ However, since Lord Templeman’s opinion in *Attorney General for Hong Kong v Reid*,²¹ it has not played a clear role in the disposal of any new cases.²² One might have imagined that when the Supreme Court decided *FHR European Ventures LLP v Cedar Capital Partners LLC*,²³ any judgments given would be rich in disability-based reasoning. Yet that was not so.

¹⁵ See J Edelman, ‘The Fiduciary “Self Dealing” Rule’ in J Glister and P Ridge (eds), *Fault Lines in Equity* (Hart Publishing 2012).

¹⁶ *Tito v Waddell (No. 2)* (n 14) 248.

¹⁷ *Movitex Ltd. v Bulfield* (n 6) 99432.

¹⁸ *Guinness Plc v Saunders* (n 6).

¹⁹ *ibid.* 287.

²⁰ See, for example, P Millett, ‘Bribes and Secret Commissions’ [1993] RLR 7; D Hayton, ‘No Proprietary Liability for Bribes and Other Secret Profits?’ (2011) 25 TLI 3; D Hayton, ‘Proprietary Liability for Secret Profits’ (2011) 127 LQR 487; D Hayton, ‘The Development of Equity and the “Good Person” Philosophy in Common Law Systems’ (2012) 76 Conv 263; P Millett, ‘Bribes and Secret Commissions Again’ (2012) 71 CLJ 583; Smith, ‘Constructive Trusts and the No-Profit Rule’ (n 4).

²¹ *Attorney General of Hong Kong v Reid* [1994] 1 A.C. 324.

²² See, for example, *Gwembe Valley Development Co Ltd v Koshy* [2003] EWCA Civ 1048, [108]; *Murad v Al-Saraj* [2005] EWCA Civ 959, [49]; *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2011] EWCA Civ 347.

²³ *FHR European Ventures LLP v Cedar Capital Partners LLC* (n 4).

In giving the judgment of the court, Lord Neuberger looked at many authorities which this thesis has identified as conforming to the “good man” theory. But his Lordship was less concerned with their various *rationes* than with ‘the effect of [their] reasoning’.²⁴ He was interested in their outcomes: specifically, whether they held that a profit made by a fiduciary as a result of acting in conflict of interest was held on constructive trust for his principal, not in how those outcomes were reached. This was part of a multifactorial approach, involving considerations of ‘legal principle, [the results of] decided cases, policy considerations, and practicalities’²⁵ which the court adopted.

ii. *The Rise of Breach of Fiduciary Duty*

At least insofar as they both apply to the law of fiduciaries, the decline in prominence of the “good man” theory of Equity has corresponded with an expansion in the role of the wrongs-based view. Since the middle of the 20th Century, the latter has become a well-entrenched part of the law. Consider, for example, Jacob LJ’s words in *Markem Corp v Zipher Ltd*:²⁶

‘[The claimant does] not assert that [the defendant] did anything ... unlawful. ... No case of breach of confidence, breach of contract, breach of fiduciary duty or other wrong is advanced’.²⁷

A comparison with the words of Lord Porter in *Regal (Hastings)*, quoted above, should underline how far things have come. Indeed, in the same case, Lord Macmillan began his speech by saying:

‘[The] question for decision in this appeal [is] not whether the [defendant] directors [have] acted in breach of their duty’.²⁸

²⁴ *ibid.* [15].

²⁵ *ibid.* [12].

²⁶ *Markem Corp v Zipher Ltd* [2005] EWCA Civ 267. See, alternatively, various comments in *Walsh v Deloitte & Touche Inc* [2001] UKPC 58; *In Plus Group Ltd v Pyke* (n 4); *Murad v Al-Saraj* (n 22).

²⁷ *Markem Corp v Zipher Ltd.* (n 26) [15].

²⁸ *Regal (Hastings) Ltd. v Gulliver* (n 7) 153.

In contrast to the decline of the disability-based view, the rise of the duty-based conception of a fiduciary's encumbrance was not nearly as gradual a process. Instead, after a long period of silence, the House of Lords' decision in *Nocton* suddenly started to be cited and applied as authority in many cases. Probably the most important waypoint in this process was *Swindle v Harrison*.²⁹ It was not quite the first judgment in which, following *Nocton*, equitable compensation for breach of fiduciary duty was awarded to a principal who had suffered loss as a consequence of his fiduciary acting in conflict of interest. That was *Mahoney v Purnell*,³⁰ considered in Section III, below. However, it was the first modern Court of Appeal authority in support of doing so. What is more, the judges who heard it engaged in a detailed and subsequently influential attempt to explain the principles underlying the relief they granted.

Of course, none of this should be taken to mean that the phrase 'breach of fiduciary duty', or the idea that a fiduciary was subject to a duty rather than just a disability, were never invoked between the times that *Nocton* and *Swindle* were decided. However, those usages were either incidental to the *rationes* of the cases in which they occurred,³¹ or part of minority or dissenting judgments.³² It was only after the mid-1990s that both the term breach of fiduciary duty, and the particular doctrinal consequences it entails, became commonplace in binding authority.

Incidentally, the reason for the long gap between *Nocton* and those modern cases which apply it is likely to be *Hedley Byrne v Heller*.³³ In that case, the House of Lords held that, in certain circumstances, negligent misstatements could be actionable at Common Law in their own right.³⁴ As was explained in Chapter 6, one way of accounting for *Nocton* is as a response to perceived remedial necessity, not least in the context of professional advisory relationships. Post-*Hedley Byrne*, in a case where his fiduciary had misadvised him but he could not establish deceit, there was no longer a need for a claimant to rely on the *Nocton* workaround in order to claim compensation for loss. It was only in cases where a fiduciary's misstatement was not

²⁹ *Swindle v Harrison* [1997] P.N.L.R. 641.

³⁰ *Mahoney v Purnell* [1996] 3 All E.R. 61.

³¹ See, for example, *New Zealand Netherlands Society 'Oranje' v Kuys* [1973] 1 W.L.R. 1126.

³² See, for example, *Regal (Hastings) Ltd. v Gulliver* (n 7) 155; *Boardman v Phipps* (n 12) 94, and 113.

³³ See J Edelman, 'Nocton v Lord Ashburton' in C Mitchell and P Mitchell (eds), *Landmark Cases in Equity* (Hart Publishing 2014) 495-496.

³⁴ See JA Weir, 'Liability for Syntax' (1963) 21 CLJ 216; D Nolan, 'Assumption of Responsibility: Four Questions' (2019) 72 CLP 123.

careless, or (as in *Swindle*) where there was no misrepresentation at all, that it might still have had a role to play.

The claimant in *Swindle v Harrison* borrowed money from a loan company to buy a hotel. That loan was secured by a charge over her house. However, as she had not borrowed enough, she took a bridging loan from her solicitors. That loan was secured by a charge over the hotel. The claimant's belief was that she would later be able to borrow the same amount of money from a brewery. The litigation arose because, while arranging the bridging loan, the claimant's solicitors failed to disclose the fact that they were making a small profit from the arrangement. They also failed to tell their client that a later loan from a brewery was unlikely. The claimant's business failed, and she defaulted on her debts. The loan company claimed her house, and her solicitors looked to the hotel. The claimant brought proceedings on the basis that a breach of fiduciary duty by her solicitors had caused her to lose her home. She sought compensation to make good that loss.

The Court of Appeal agreed that, in behaving as they did, the defendant solicitors had acted in conflict of interest. What is more, and significantly, each judge held that as a matter of principle, the remedy sought by the claimant was available. *Nocton* was cited as specific authority for the proposition that losses caused by such conduct could be the subject of orders for a remedy akin to damages. Mummery LJ, for example, said:

‘The decision of the House of Lords in *Nocton* ... is the seminal case. ... It is possible to extract from [it] the following principles relevant to this appeal:

[(1)] Liability for breach of fiduciary duty is not dependent on proof of deceit or negligence.

[(2)] The equitable remedies available for breach of fiduciary duty are “more elastic” than the sanction of damages attached to common law fraud and negligence. ... Payment of compensation may be ordered to put the [claimant] “in as good a position pecuniarily as that to which he was in before the injury”.³⁵

³⁵ *Swindle v Harrison* (n 29) 672 (quoting *Nocton*). See, also, 665, and 655.

These observations have been consistently acted upon, expressly and impliedly, in later cases.³⁶ Thus, and notwithstanding the pre-existence of *Mahoney*, in contrast to the absence of any such decisions before *Swindle*, there is now an ever-expanding list of cases in which a principal who has suffered loss as a result of a conflict of interest has recovered equitable compensation from his fiduciary. Indeed, by becoming subsidiary authorities for the same propositions, each of those decisions themselves supports the notion that judges are increasingly embracing the wrongs-based view of fiduciary law.

As it happens, the claimant in *Swindle* was ultimately unable to recover the compensation she sought. She failed to establish that ‘but for’ her solicitor’s lack of disclosure, she would not have gone ahead with her purchase of the hotel. Given that it was the hotel project’s failure which led to her losing her home, there was therefore no relevant causal link between the defendant’s conflict of interest and the loss the claimant sought relief from. As Mummery LJ explained, although ‘equitable compensation *may* be awarded for breach of fiduciary duty’, ‘there is no equitable by-pass of the need to establish causation’:³⁷

‘In considering the extent of liability for breach of fiduciary duty, it is not always necessary to consider ... matters which may be relevant in determining ... liability to pay damages for negligence. Foreseeability and remoteness of damage are, in general, irrelevant. ... The liability is to make good the loss suffered by the [principal].

It is, however, necessary to address the issue of causation. Although equitable compensation ... is not damages, it is still necessary ... to show that the loss suffered has been caused by the relevant breach of fiduciary duty’.³⁸

A similar fate befell the claimant in *Gwembe Valley Development Company Ltd v Koshy*.³⁹ It too was unable to establish that there was a ‘but for’ causal link between the conflict of interest

³⁶ See, for example, *Nationwide Building Society v Balmer Radmore (A Firm)* [1999] P.N.L.R. 606; *Longstaff v Birtles* [2001] EWCA Civ 1219; *Bank of Ireland v Jaffery* [2012] EWHC 1377 (Ch); *Morkot v Watson & Brown Solicitors* [2014] EWHC 3439 (QB); *Breitenfeld UK Ltd v Harrison* [2015] EWHC 399 (Ch); *Interactive Technology Corp Ltd v Ferster* [2017] EWHC 217 (Ch); *Bhullar v Bhullar* [2017] EWHC 407 (Ch); *Re Bowe Watts Clargo Ltd (In Liquidation)* [2017] EWHC 7879 (Ch); *Brewer v Iqbal* [2019] EWHC 182 (Ch).

³⁷ *Swindle v Harrison* (n 29) 674 (emphasis added).

³⁸ *ibid.*

³⁹ *Gwembe Valley Development Co. Ltd. v Koshy* (n 22).

it complained of and the loss it had suffered. Despite this, the judgment in that case is useful because it highlights one major practical difference between viewing a fiduciary as subject to a duty, as against his principal, not to act in conflict of interest, rather than as merely disabled from asserting rights acquired as a result. Compare, for example, the following two statements. In *Koshy*, Mummery LJ said:

‘A company director may be held personally liable to pay equitable compensation to a company where, as a result of a breach of fiduciary duty on his part, the company has suffered loss. ... In such cases the measure of compensation is the [amount of money which the company has lost]. The director may be held liable for the company’s loss, even though he has not himself received any ... misapplied property’.⁴⁰

In *Erlanger v New Sombrero Phosphate Co*,⁴¹ Lord Blackburn stated that, in cases of conflict of interest:

‘A Court of Equity [cannot] give damages, and, unless it can rescind [a] contract, can give no relief’.⁴²

Assuming that in using the term ‘damages’ Lord Blackburn was referring to the same remedy Mummery LJ described as ‘compensation’, these two *dicta* could not on their faces be more contradictory. Indeed, the question therefore becomes: if both *Erlanger* and *Koshy* are valid authorities, how can their contents possibly be reconciled?

To my mind, the two cases must be understood in their respective historical contexts. More specifically, it should be remembered that when *Erlanger* was decided the wrongs-based view had not yet been introduced into fiduciary law. The only way of conceptualising a fiduciary’s encumbrance was as a (primary) disability. In contrast, in *Koshy*, Mummery LJ was speaking after that innovation had occurred. Indeed, as has been said, his own judgment in *Swindle* helped to cement that change. Consequently, when stating the law, it was open to him to look beyond the disability-based view and engage with the duty-based view.

⁴⁰ *ibid.* [142].

⁴¹ *Erlanger v New Sombrero Phosphate Co* (1878) 3 App. Cas. 1218.

⁴² *ibid.* 1278. For a consistent statement of law made outside the context of the troublesome rule in *Erlanger* - on which see Chapter 6, Section II, Subsection *ii* - see *Bentley v Craven* (1853) 18 Beav. 75, 76.

As was said in Chapters 5 and 6, thinking about a person as subject only to a disability, as against another, from asserting rights acquired by way of acting in a certain way precludes the possibility of awarding personal remedies designed to make good losses suffered because of that conduct, if it occurs. The disability imposed is designed to ensure its subject is treated as if, at all times, he has exercised his powers (whether Legal or otherwise) properly. It would be inconsistent with that for either party to argue that, by misusing his powers, the disabled party has caused the other to suffer a loss. That would be to contradict the central premise of the “good man” theory of Equity. As Millett LJ put it in *Tribe v Tribe*:⁴³

‘A man who puts himself in a position where his interest conflicts with his [responsibilities] “cannot be heard to say” that he acted in accordance with his interest; he is treated as having acted in accordance with his [responsibilities]’.⁴⁴

In contrast, thinking about one party as subject to a duty (either solely or in addition to a disability), as against another, not to act in a specified way, does not import that limitation. The duty-bound party *can* act in violation of the prohibition placed on him, and his actions *can* have their real-world consequences attributed to them. All other things being equal, then, provided there is a causal link between his breach of duty and a loss suffered by his counterparty, where a duty-bound party commits a wrong, his victim may be entitled to compensation. As Mummery LJ explained, in *Koshy*:

‘As with a claim for damages for a common law wrong, such as a tort or a breach of contract, the company, in a claim for compensation, ... must first establish that a wrong has been committed.

[But] if the commission of [a] wrong *has* ... caused loss to the company, why should the company [not] be entitled ... to recover compensation[?]’.⁴⁵

There is a second question raised by the apparent inconsistency between *Erlanger* and *Koshy*. If *Koshy* was decided at a time when the wrongs-based view of fiduciary law was in play, what

⁴³ *Tribe v Tribe* [1996] Ch 107.

⁴⁴ *ibid.* 133.

⁴⁵ *Gwembe Valley Development Co. Ltd. v Koshy* (n 22) [146]-[147] (emphasis added).

space is left for the disability-based view in cases where a conflict of interest has caused a principal to suffer a loss? Do both theories apply, such that, subject to the rules on the recovery of inconsistent remedies, both equitable compensation and “good man” theory gains-focused remedies might be available? Or does one apply to the exclusion of the other?

In my view, the answer indicated by *Koshy* is the former. To return to the terminology used in this thesis’ Introduction,⁴⁶ it is therefore an authority which suggests that the law of fiduciaries is currently in a state of overlapping theoretical hybridisation.

Consider the fact that Mummery LJ presented loss-based and gain-based responses to conflicts of interest as alternatives which a claimant was able to choose between. For example, after affirming the possibility that equitable compensation could be awarded in cases where, as a result of a self-interested misapplication of property, a fiduciary caused his company to suffer a loss, his Lordship noted that:

‘In cases in which [the director] has actually received [the] property of the company [himself,] the company is more likely to seek to establish liability as a constructive trustee’.⁴⁷

He later spoke of the need for claimants ‘to elect to recover compensation, as distinct from rescinding [a] transaction and stripping [a] director of the unauthorised profits made by him’.⁴⁸ If, as a matter of authority, company directors were subject to *either* a duty *or* a disability, the choice Mummery LJ repeatedly referred to would not have been possible. Whichever view of the law the relevant precedents indicated applied would subsist to exclusion of the other possible analysis and restrict claimants to one set of remedies.

The Court of Appeal’s decision in *Murad v Al-Saraj*⁴⁹ may also be relevant on this point. It appears to indicate that, in cases where a fiduciary makes a gain as a result of acting in conflict of interest, the availability of *personal* gain-based remedies has in no way been diminished by

⁴⁶ See Chapter 1, Section V.

⁴⁷ *Gwembe Valley Development Co. Ltd. v Koshy* (n 22) [142].

⁴⁸ *ibid.* [147].

⁴⁹ *Murad v Al-Saraj* (n 22).

the rise of the wrongs-based view.⁵⁰ In other words, it could show that the disability-based analysis of fiduciaries still applies, even in the presence of a duty not to act in conflict of interest. It might thereby support the notion that the law of fiduciaries is in a state of overlapping theoretical hybridisation. In *Murad*,⁵¹ Arden LJ said that:

‘It would be [wrong] to [conclude] that in this case the judge took the novel step of awarding the equitable remedy of account for the ... tort of deceit. ... The judge gave a remedy of account because there was a fiduciary relationship. For wrongs in the context of such a relationship, an order for an account of profits is a conventional remedy’.⁵²

She also stated:

‘It has long been the law that equitable remedies for the wrongful conduct of a fiduciary differ from those available at common law. ... Equity recognises that there are legal wrongs for which damages are not the appropriate remedy. In some situations therefore, as in this case, a court of equity instead awards an account of profits’.⁵³

In my view, her Ladyship should not be understood to have conflated the remedies available for the breach of a duty and when an individual acts inconsistent with a disability. As various parts of this thesis have explained, awards based on disabilities are categorically different to responses to wrongs.⁵⁴ Instead, Arden LJ is best considered to be articulating the precise theoretically hybrid nature of a fiduciary’s position. As every fiduciary is subject to *both* a duty *and* a disability, in the case of a conflict of interest, it is possible – albeit perhaps at the risk of clarity – to describe the defendant as a wrongdoer *and* grant disability-mandated relief. Indeed, if this analysis is correct, *Murad* also supports this Subsection’s more general argument that the wrongs-based view has taken hold more widely within fiduciary doctrine.

⁵⁰ See C Mitchell, ‘Causation, Remoteness, and Fiduciary Gains’ (2006) 17 KCLJ 325, 330-331, for alternative examples. See Section II, Subsection *iv*, a, on the position of *proprietary* gain-based relief.

⁵¹ *Murad v Al-Saraj* (n 22). See, alternatively, *Woodfull v Lindsley* [2004] EWCA Civ 165, [25]-[30].

⁵² *Murad v Al-Saraj* (n 22) [46].

⁵³ *ibid.* [56].

⁵⁴ See Chapter 1, Section IV; Chapter 5, Section II, Subsection *i*, 6; Chapter 6, Section II, Subsection *ii*, d.

iii. Acting in Conflict of Interest as an Equitable Wrong

One result of the growth of the wrongs-based view of fiduciary law is that there is a sense in which acting in conflict of interest is now an equitable wrong. It can therefore line up alongside most torts and all breaches of contract as part of what both Burrows and Edelman call the law of ‘civil wrongs’.⁵⁵ This thesis’ Conclusion will outline some of the contentious consequences of this classification. For now, it will concern itself only with demonstrating that, to the extent that the law of fiduciaries really is wrongs-based, this categorisation is valid.

Starting with the authorities, it is possible to find ample support for the proposition that breach of fiduciary duty is an equitable wrong. In *Westdeutsche Landesbank Girozentrale v Islington LBC*,⁵⁶ Lord Browne-Wilkinson described the violation of a fiduciary relationship as an ‘equitable cause of action’.⁵⁷ Likewise, there are a substantial number of cases in which it is directly referred to as an ‘equitable wrong’.⁵⁸

As a matter of principle, an equitable wrong may be defined as an equitable cause of action ‘the remedial consequences of which flow from its characterisation as a breach of duty’.⁵⁹ This definition is derived, in part, from Edelman’s description of a civil wrong⁶⁰ and has three elements.

The first element is that an equitable wrong is an equitable as opposed to Legal cause of action. A cause of action itself may be defined as a factual situation ‘the existence of which entitles one person to obtain from [a] court a remedy against another’.⁶¹

⁵⁵ See A Burrows, *Remedies for Torts, Breach of Contract, and Equitable Wrongs* (4th edn, Oxford University Press 2019) 11-12; and J Edelman, *Gain-Based Damages* (Hart Publishing 2002) 25.

⁵⁶ *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] A.C. 669.

⁵⁷ *ibid.* 718.

⁵⁸ See, for example, *Sphere Drake Insurance Ltd v Euro International Underwriting Ltd (Part I)* [2003] EWHC 1636 (Comm) [85]-[88]; *Murad v Al-Saraj* (n 22) [46] and [50]; *Markel International Insurance Co Ltd v Surety Guarantee Consultants Ltd* [2008] EWHC 3087 (Comm) [23]; *Royal Bank of Scotland Plc v Chandra* [2011] EWCA Civ 192 [24]; *Re Fort Gilkicker Ltd* [2013] EWHC 348 (Ch) [18]; *Gray v Global Energy Horizons Corporation* [2020] EWCA Civ 1668 [126]-[127].

⁵⁹ Edelman, *Gain-Based Damages* (n 55) 25.

⁶⁰ Which, in turn, appears to be based on P Birks, ‘The Concept of a Civil Wrong’ in DG Owen (ed), *The Philosophical Foundations of Tort Law* (OUP 1995) 33-45.

⁶¹ *Letang v Cooper* [1965] 1 Q.B. 232, 243-244.

The second element is that, as a type of civil wrong, every equitable wrong involves the breach of a legal duty (as opposed to, for example, the contravention of a disability). This is consistent with both settled legal theory⁶² and the Court of Appeal's decision in *Letang v Cooper*.⁶³ It was the *ratio* of each of the three judgments in that case that a breach of duty was the basis of all actions genuinely premised on a wrong.⁶⁴

The third element of my definition is that, as a type of wrong, every equitable wrong entails certain definable remedial consequences including, albeit not necessarily involving, the possibility of an unliquidated monetary remedy akin to damages. As Edelman has put it: '[to establish] that a cause of action is capable of being characterised as [a wrong] it is necessary to determine that the remedy granted responds to [it] in its character as a breach of duty'.⁶⁵ Moreover, 'compensation, as reparation for harm, flows logically from [the] characterisation of an event as a breach of duty'.⁶⁶

This part of my definition is important because it distinguishes, amongst other things, *gain-based* unliquidated money remedies, including awards made following successful unjust enrichment claims.⁶⁷ As Mummery LJ has said, a claim in unjust enrichment 'is not a claim for compensation for loss, but for recovery of a benefit unjustly gained ... by the person enriched at the expense of the claimant'.⁶⁸

Another type of unliquidated money award to be distinguished is the personal relief ordered in some cases of proprietary estoppel.⁶⁹ Burrows has identified such payments as equitable compensation for wrongs.⁷⁰ However, there are good reasons to think this is incorrect. Firstly, whether remedies under any part of the law of proprietary estoppel respond to a breach of duty

⁶² See, for example, PH Winfield, *The Province of the Law of Tort* (Cambridge University Press 1931) 32; R Stevens, *Torts and Rights* (OUP 2009) 2; J Gardner, 'Torts and Other Wrongs' (2011) 39 Fla St U L Rev 43, 46.

⁶³ *Letang v Cooper* (n 61).

⁶⁴ See *ibid.* 241, 242, and 245-247.

⁶⁵ Edelman, *Gain-Based Damages* (n 55) 32-33.

⁶⁶ *ibid.* 43.

⁶⁷ See Winfield (n 62) 188.

⁶⁸ *Boake Allen Ltd v Revenue and Customs Commissioners* [2006] EWCA Civ 25, [175].

⁶⁹ See, for example, *Gillett v Holt* [2001] Ch. 210; *Jennings v Rice* [2002] EWCA Civ 159.

⁷⁰ See Burrows (n 55) 511. See, also, YK Liew, 'Reanalysing Institutional and Remedial Constructive Trusts' (2016) 75 CLJ 528, 539, arguing that proprietary estoppel is a wrong capable of generating a constructive trust.

is an open question. There are strong arguments to suggest that they do not.⁷¹ Secondly, as McFarlane has noted, in determining the extent of personal remedies for proprietary estoppel, the courts are not solely motivated by a desire to make good losses caused by the defendant's conduct. Rather, a more complex set of considerations, indicating a wider range of priorities, is in play.⁷² Thirdly, the awards in the relevant authorities themselves are not described as payments of equitable compensation.⁷³ Instead, and consistently with my second point, the judges speak of 'satisfying' a broader 'equity' 'raised' by the facts of the case.⁷⁴

Overall, the definition of an equitable wrong just set out fits with the conception of acting in conflict of interest introduced into English law in the late 19th and early 20th Century. It therefore also corresponds with everything which has been said about those parts of the modern law of fiduciaries which rest on the wrongs-based view. Take just one example, which by virtue of its provenance is representative of every other primary authority one might wish to consider. In *Nocton v Lord Ashburton*, Viscount Haldane LC said that the case before him concerned:

'An action based on the exclusive jurisdiction of a Court of Equity over a defendant in a fiduciary position in respect of matters which at law would also have given a right to damages for negligence'.⁷⁵

The comparison with negligence is key. As was noted in Chapter 6, by the 1910s, it had been authoritatively established that actionable negligence, whether or not it also constituted a breach of contract, always involved the breach of a legal duty.⁷⁶ Indeed, in *Nocton* itself, Lord Dunedin said that, because it was founded on 'the idea of [a] breach of duty', 'there [could] be no negligence unless there [was] a duty'.⁷⁷ Although, as the Lord Chancellor noted, the precise remedy in a case like *Nocton* was not damages but '[equitable] compensation ... for loss arising from [the defendant's] breach of fiduciary duty',⁷⁸ there was, as there still is, an analogy

⁷¹ See, for example, A Robertson, 'Estoppels and Rights-Creating Events: Beyond Wrongs and Promises' in J Neyers, R Bronaugh and S Pitel (eds), *Exploring Contract Law* (Hart Publishing 2009).

⁷² See B McFarlane, *The Law of Proprietary Estoppel* (2nd edn, Oxford University Press 2020) 7.35-7.153.

⁷³ See, for example, *Gillett v Holt* (n 69); *Jennings v Rice* (n 69).

⁷⁴ See, for example, *Gillett v Holt* (n 69) 235-238; *Jennings v Rice* (n 69) *passim*; McFarlane (n 72) 7.01-7-10.

⁷⁵ *Nocton v Lord Ashburton* (n 2) 957.

⁷⁶ See, for example, *Heaven v Pender* (1883) 11 Q.B.D. 503 (on tortious negligence); *Marzetti v Williams* (1830) 1 B. & Ad. 415 (on contractual duties in general).

⁷⁷ *Nocton v Lord Ashburton* (n 2) 964.

⁷⁸ *ibid.* 958.

between both types of relief.⁷⁹ As his Lordship added: ‘in [*Nocton*] the [distinction was] of form only’.⁸⁰ In substance, then, they have the same function.

iv. Reopening Settled Issues

The expanding role of the wrongs-based view of fiduciary doctrine has caused judges to identify several seemingly settled questions which may need to be reopened. Their logic seems to be that, if the theoretical underpinnings of the law have changed, so too might some of the specific doctrines which result from them.

a. Bribes, Secret Commissions, and Constructive Trusts

Perhaps the most practically significant of these questions is that of whether a bribe or secret commission taken by a fiduciary is held on constructive trust for his principal. Before the Court of Appeal’s decision in *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd*,⁸¹ the debate was generally considered to have been ended by the Privy Council in *Attorney General for Hong Kong v Reid*.⁸² In that case, Lord Templeman held that a proprietary remedy was generally available in every case. As Etherton C noted in *FHR European Ventures LLP v Mankarious*:⁸³

‘Prior to the decision in [*Sinclair Investments*] it was generally accepted by trust and equity practitioners and judges ... that *Reid* would be followed’.⁸⁴

Yet, in *Sinclair Investments*, not only was this issue reopened, but it was reopened on the basis that such a position was not justified on a wrongs-based understanding of the law.⁸⁵ Lord

⁷⁹ See, for example, *Swindle v Harrison* (n 29); M Conaglen, ‘Equitable Compensation for Breach of Fiduciary Dealing Rules’ (2003) 119 LQR 246.

⁸⁰ *Nocton v Lord Ashburton* (n 2) 958.

⁸¹ *Sinclair Investments (UK) Ltd. v Versailles Trade Finance Ltd.* (n 22).

⁸² *Attorney General of Hong Kong v Reid* (n 21). See, for example, *Fyffes Group Ltd v Templeman* [2000] 2 Lloyd’s Rep. 643, 668; *Daraydan Holdings Ltd v Solland International Ltd* [2004] EWHC 622 (Ch), [86]; For a dissenting view, see R Goode, ‘Proprietary Restitutionary Claims’ in WR Cornish and others (eds), *Restitution: Past, Present and Future* (Hart Publishing 1998).

⁸³ *FHR European Ventures LLP v Mankarious* [2013] EWCA Civ 17.

⁸⁴ *ibid.* [79].

⁸⁵ See Chapter 1, Section V, Subsection *i*; and compare Hayton, ‘Proprietary Liability for Secret Profits’ (n 20); R Goode, ‘Proprietary Liability for Secret Profits - a Reply’ (2011) 127 LQR 493.

Neuberger MR declined to follow *Reid* and held that, when a fiduciary made an unauthorised profit, the only guaranteed remedy was personal. It was only if the impugned profit ‘[was] beneficially the property of [the principal,] or the [fiduciary] acquired [that profit] by taking advantage of an opportunity ... which was properly that of [his principal]’,⁸⁶ that a proprietary remedy would alternatively be available. Here is the operative part of his Lordship’s reasoning:

‘There is obvious force in the contention that the mere fact that [a] breach of duty enabled [a fiduciary] to make a profit should not, of itself, be enough to give [his principal] a proprietary interest in that profit. Why ... should the fact that a fiduciary is able to make a profit as a result of the breach of his duties, ... without more, give [his principal] a proprietary interest in [that] profit? After all, a proprietary claim is based on property law’.⁸⁷

Lest there be any doubt that the Master of the Rolls used the term ‘breach of duty’ in a technical sense, one might note what he described as the ‘fundamental distinction between (i) a fiduciary enriching himself by depriving [his principal] of an asset and (ii) a fiduciary enriching himself by doing a wrong to [his principal]’.⁸⁸ It was only in the first of those two situations in which his Lordship thought there should be a trust. These words provide a strong indication that Lord Neuberger MR reached his decision by considering what should be the appropriate response to a civil wrong, rather than how best to give effect to a disability. They may therefore also support the notion that the law of fiduciaries is in a state of exclusionary theoretical hybridisation.

As indicated by *Reid*, the rule posited in *Sinclair Investments* is inconsistent with the terms of the disability-based view. Even if the unusual facts of that case itself meant that no constructive trust should have been available,⁸⁹ if the law of fiduciaries was in a general state of overlapping theoretical hybridisation, the Master of the Rolls should not have stated the law in the restrictive way he did. If a fiduciary is disabled, as against his principal, from asserting rights acquired by acting in conflict of interest, it is easy to see why proprietary relief should generally be available if he makes an unauthorised profit. Indeed, it is for essentially the same reason that –

⁸⁶ *Sinclair Investments (UK) Ltd. v Versailles Trade Finance Ltd.* (n 22) [88].

⁸⁷ *ibid.* [52].

⁸⁸ *ibid.* [80].

⁸⁹ See O Sherman, ‘Fine-Tuning FHR’ (2019) 33 TLI 3, 13-14.

uncontroversially – he will be liable, in the alternative, to account for its value. As Lord Millett said, extrajudicially:

‘The rule ... is that a fiduciary must not place himself in a position where his interest may conflict with his duty, ... *and a fiduciary will not be allowed to retain any advantage acquired in violation of the rule.* The object of the law is not compensatory. The principal ... is entitled to recover whether or not he has suffered loss. [He] is given a remedy because this is considered necessary to enforce the high standards which equity demands of a fiduciary. A fiduciary who fails to observe them must be stripped of every advantage which he has obtained thereby’.⁹⁰

The doctrinal uncertainty created by the Court of Appeal in *Sinclair Investments* was resolved by the Supreme Court in *FHR European Ventures LLP v Cedar Capital Partners LLC*.⁹¹ As said in Subsection *i*, above, its judgment was more concerned with the ‘effect of the reasoning’⁹² in the leading authorities than it was with their contents. Indeed, some commentators have identified its resulting failure to engage with the disability-based view as one reason why the court struggles to provide a convincing justification for its conclusions.⁹³ Nonetheless, their Lordships’ holding that in essentially every case ‘a bribe or secret commission accepted by [a fiduciary] is held on trust for his principal’⁹⁴ was tolerably clear. Moreover, the *Sinclair Investments* saga remains a good example of the challenges created by recent changes to the theoretical underpinnings of the modern law of fiduciaries. Notwithstanding the original post-*Reid* settlement, if the wrongs-based view had not been more generally ascendant in relation to it, it is possible that the issue of bribes, secret commissions, and constructive trusts would not have resurfaced. The modern breach of duty analysis is so potent it brings with it a real risk that the courts will overlook the important disability-based view and therefore diminish the level of protection they make available to principals.⁹⁵

⁹⁰ Millett, ‘Bribes and Secret Commissions’ (n 20) 16-17. For an alternative explanation of the same position, see Smith, ‘Constructive Trusts and the No-Profit Rule’ (n 4) 261-263.

⁹¹ *FHR European Ventures LLP v Cedar Capital Partners LLC* (n 4).

⁹² *ibid.* [15].

⁹³ See, for example, W Gummow, ‘Bribes and Constructive Trusts’ (2015) 131 LQR 21; P Millett, ‘The Common Lawyer and the Equity Practitioner’ in D Clarry (ed), *The UK Supreme Court Yearbook, Volume 6: 2014-2015 Legal Year* (Appellate Press 2015).

⁹⁴ *FHR European Ventures LLP v Cedar Capital Partners LLC* (n 4) [46].

⁹⁵ See Chapter 1, Section V, Subsection *iii*, for a discussion of the analogous cases of *Target Holdings Ltd v Redfern (A Firm)* [1996] A.C. 421; *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2015] A.C. 1503.

b. Accounts of Profit and Limitation Periods

A second question which has been reopened is as to the limitation period, if any, for claims seeking accounts of profit brought against fiduciaries who have acted in conflict of interest. The classic position was set out by Megarry VC in *Tito v Waddell*,⁹⁶ considered in Subsection *i*, above. His Lordship held that, as a fiduciary's liability to account for an unauthorised profit was a consequence of him being disabled, he should not be subject, either directly or by analogy, to any statutory limitation rules. Subject to the possibility of laches, he had instead to 'account without limit of time'.⁹⁷

However, more recently, in *Paragon Finance Plc v DB Thakerar & Co*,⁹⁸ Millett LJ said that 'an action for an account brought by a principal against his [fiduciary] is barred by the Statutes of Limitation unless the [fiduciary] is more than a mere agent but is a trustee of the money which he received'.⁹⁹ This was a consequence of his view that 'a claim for an account in equity, absent any trust, has no equitable element'.¹⁰⁰ Where a fiduciary and his principal share a contractual relationship, he stated, any claim for an account of profits is 'based on legal, not equitable rights'¹⁰¹ and is no more than a claim founded on contract. This means that the Limitation Act's six-year limitation period applies.¹⁰² In those cases where there is no contractual relationship between the parties, '[such] that the liability [is] exclusively equitable',¹⁰³ the court will in any case act by analogy with the rule on contract.

In my view, if it is right to take a fiduciary as subject to a duty, as against his principal, not to act in conflict of interest, then this analysis is perfectly coherent (at least insofar as any claim against them is premised on an alleged breach of that duty). However, if it is not, it is inappropriate as a matter of principle. The position in *Tito* is in fact the correct one. When a primary duty is breached, a wrongdoer comes under a secondary duty (or, perhaps, a

⁹⁶ *Tito v Waddell (No. 2)* (n 14).

⁹⁷ *ibid.* 251.

⁹⁸ *Paragon Finance Plc v DB Thakerar & Co* [1999] 1 All E.R. 400.

⁹⁹ *ibid.* 415 (emphasis added).

¹⁰⁰ *ibid.*

¹⁰¹ *ibid.*

¹⁰² See Limitation Act 1980, Section 5.

¹⁰³ *Paragon Finance Plc v DB Thakerar & Co* (n 98) 415.

liability)¹⁰⁴ to pay money to the person to whom he owed the original duty.¹⁰⁵ The fact of his breach and its consequences are recognised, and a “new normal” is established going forward. It is therefore justifiable to place some fixed limit on how long a defendant can be expected to bear the risk of having proceedings brought against him. Indeed, for this reason, there is nothing inherently objectionable with the rule, set by analogy with contract and tort, that the limitation period for claims for equitable compensation for breach of fiduciary duty is six years.¹⁰⁶

In contrast, where a fiduciary is disabled from asserting rights acquired as a result of acting in conflict of interest, it is not clear why the passage of time should have anything to do with whether he must hand over any unauthorised profit. There is no “new normal” to respect, only an ongoing state of affairs which the law is refusing to accept.¹⁰⁷ Moreover, notwithstanding anything said in Section III, below, this is why there has never been a fixed time limit on claims seeking to set aside transactions on the basis of undue influence.¹⁰⁸

In *Koshy*, the Court of Appeal cast doubt on the accuracy of the decision in *Tito*. Yet it did not overrule it. Instead, and consistently with the idea that the law of fiduciaries is in a state of overlapping theoretical hybridisation, it held that the issue of what limitation period applied to a claim for an account of profits was not affected by the precise classification of a fiduciary’s position. Mummery LJ said that, ‘whether viewed as duties or disabilities, all [rules] such [as the self-dealing rule] are aspects of [a] fiduciary’s primary obligation of loyalty’. Consequently, ‘their differing treatments for limitation purposes could not be justified’.¹⁰⁹

Unfortunately, it is hard to see how this decision will constitute the last word on this matter. Given the draconian consequences of failing to start proceedings in time, it will surely come up for consideration again sooner rather than later. If the differences between the disability-based view and the wrong-based view are great enough to justify the existence of two categorically different remedial regimes, they could easily be sufficient to impact the limitation periods which apply to particular claims. In my view, a coherent and reasonable outcome, and

¹⁰⁴ See S Smith, ‘Duties, Liabilities, and Damages’ (2012) 125 Harv L Rev 1727.

¹⁰⁵ See, for example, *Morris-Garner v One Step (Support) Ltd* [2018] UKSC 20, [30]-[35].

¹⁰⁶ See *Cia de Seguros Imperio v Heath (REBX) Ltd* [2001] 1 W.L.R. 112.

¹⁰⁷ See A Televantos, ‘Trusts, Limitation Periods, and Unauthorised Gains’ (2020) 84 Conv 330, 333-333, for the same point in an analogous context.

¹⁰⁸ See, for example, *Hatch v Hatch* (1804) 9 Ves. Jr. 292. Laches, of course, could still apply.

¹⁰⁹ *Gwembe Valley Development Co. Ltd. v Koshy* (n 22) [107]-[108].

one which reconciles the decisions in *Tito* and *Paragon Finance*, could be that there are different limitation periods depending on whether the claimant is basing his claim on the defendant's disability or the defendant's duty.

III. The Wrongs-Based View of Undue Influence

Turning to the law of undue influence, this Section will argue that, within the last seven years, the wrongs-based view has started to gain some ground in relation to it. For the first time, then, some courts may have started to conceive of the exercise of undue influence as an equitable wrong.

This Section has two Subsections. Continuing the account in Chapter 6, the first will demonstrate that, until no more than seven years ago, it remained settled that a "good man" theory-style disability-based view constituted the central theoretical underpinning of the doctrine of undue influence. Properly understood, the courts consistently acted on the basis that, where undue influence was made out, the person with influence was no more than disabled, as against the person over whom he held it, from asserting rights acquired as result of exercising his influence.

The second Subsection will show that, within the last seven years, this situation has begun to change. There have been several cases in which the exercise of undue influence appears to have been identified as a civil wrong. There have also been decisions which can only be explained on the basis that the judges viewed the defendants as subject to duties, as against the claimants, not to exercise their influence. This may be evidence of the start of a potentially fundamental shift in how undue influence is understood to function. This Subsection will also offer an explanation as to why the change it identifies has started to occur at this time.

i. Equity's Long-Settled Position

As Chapter 6 explained, between the 1870s and the 1920s, the law of undue influence experienced a period of distinct theoretical continuity. It is hard to find a single case in which the judge acted on an underlying principle other than the disability-based view. This Subsection will show that the same was true from the middle of the 20th Century until the start of the 2010s.

a. *Before the 2000s*

Beginning in the 1940s, one might note that commentators were writing about the law of undue influence in terms which were consistent with the application of the “good man” theory. Winder, for example, was of the view that ‘[a] Court interposes [in any case] not because the influence of the ascendant party is wrongful in itself, ... but in order to prevent [an exercise] of [that] influence from benefiting him who wields it at the expense of [the party over whom it exists]’.¹¹⁰ These words not only entail a direct repudiation of the idea that wrongdoing was the basis of a party with influence’s liability, but also suggest that such an individual was disabled, as against the party over whom he held his influence.

From the 1950s, there is Morris LJ’s judgment in *Tufton v Sporni*.¹¹¹ In setting aside the claimant’s purchase of a house on the basis that it had been procured by an exercise of undue influence by the vendor, he stated:

‘The [vendor] placed himself in such a position as disentitled him from devising arrangements which were to his own great personal profit at the expense of the [claimant]’.¹¹²

Jenkins LJ made the reciprocal but no less important observation that the possibility of bringing a claim for rescission founded on undue influence constituted:

‘[An] exception to the general rule that a person who ... is capable of managing his own affairs is bound by any disposition he chooses to make, however damaging to himself it may be’.¹¹³

Linking back to the definitions set out in this thesis’ Introduction, it is my view that this is an indirect description of an equitable immunity. An immunity is a ‘freedom from the legal power ... of another as regards some legal relation’.¹¹⁴ It is thus the correlative of a disability.

¹¹⁰ W Winder, ‘Undue Influence in English and Scots Law’ (1940) 56 LQR 97, 98.

¹¹¹ *Tufton v Sporni* [1952] 2 T.L.R. 516.

¹¹² *ibid.* 534.

¹¹³ *ibid.* 526.

¹¹⁴ WN Hohfeld, ‘Some Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (1913) 23 Yale LJ 16, 55.

Remarks consistent with the disability-based view of undue influence can also be found in cases from the 1960s,¹¹⁵ 1970s,¹¹⁶ and 1980s.¹¹⁷ What is more, perhaps the most striking modern example of “good man” theory-style reasoning comes from the mid-1990s decision of *Mahoney v Purnell*.¹¹⁸ The claimant was the defendant’s father-in-law. Together they operated a hotel business, each owning approximately 50% of the company. The defendant wished to run the business by himself and offered the claimant £200,000 for his shares, which was substantially below their market value. The claimant accepted and sometime later the defendant sold the entire company for over £3,000,000. The claimant commenced proceedings alleging that his sale had been procured by an exercise of undue influence. He sought rescission but ultimately left it to the court to decide what relief he should receive.

May J readily accepted that the claimant had been the victim of undue influence by the defendant. However, he also said that the court was limited in what satisfaction it could provide. This was because:

‘[While] the normal remedy [in a case of] undue influence [was] for [a] transaction to be set aside with, in appropriate circumstances, an account of profits, [in the case before the court] the parties [could not] be restored to their former positions’.¹¹⁹

At some point between the initiation of proceedings and the trial, the company had gone into liquidation. There was therefore no way the claimant could have his shares back, let alone in the circumstances which pertained at the time of their sale. In addition, due to an unsuccessful business venture, the defendant had lost the profit he made on his sale of the company through no fault of his own. There was therefore ‘no presently quantifiable profit in [his] hands’.¹²⁰

At one point, a loss-based remedy analogous to that awarded in *Nocton v Lord Ashburton* was suggested, viz. a payment of equitable compensation for undue influence. However, the judge firmly rejected that idea. In cases of undue influence, he stated, the remedy ‘[was] not to leave

¹¹⁵ See, for example, *Zamet v Hyman* [1961] 1 W.L.R. 1442, 1451-1452.

¹¹⁶ See, for example, *Re the Estate of Brocklehurst (Deceased)* [1978] Ch. 14, 31-32.

¹¹⁷ See, for example, *O’Sullivan v Management Agency and Music Ltd* [1985] Q.B. 428, 448.

¹¹⁸ *Mahoney v Purnell* (n 30).

¹¹⁹ *ibid.* 86.

¹²⁰ *ibid.* 88.

the agreement as it [was] and simply compensate the [claimant] for loss',¹²¹ and he cited *O'Sullivan v Management Agency and Music Ltd*¹²² as authority for that proposition. Indeed, as a matter of what was then subsisting principle that was surely correct. As Heydon has pointed out, before *Mahoney* there was simply no 'clear modern example in any jurisdiction of equitable compensation for undue influence [being awarded]'.¹²³ All other things being equal, then, one might have expected the claimant to have left the courtroom empty handed.

Yet history records otherwise. May J confessed that he was aware of the need 'to achieve practical justice between the parties',¹²⁴ and that he was 'loath to reach [the] conclusion ... that [the claimant] was denied [any] commonsense and fair compensation'.¹²⁵ The solution he found was to jump from the law of undue influence into the law of fiduciaries. That, he said, could also apply to the case before him:

'The relationship which existed [between the parties] in this case ... from which undue influence is presumed ... may [also] be described as fiduciary. Although [his] claim is not conventionally framed in the language of breach of duty, [the claimant's] ground for equitable relief is founded on abuse of trust. For present purposes the difference may be seen as semantic only.

In *Nocton* ... the breach of duty was that which lost the property. In this case, the abuse of the fiduciary relationship induced the agreements and the property was lost later. ... This is [not] a distinction material to the search for a remedy, since in each case the [claimant] seeks equitable relief for an abuse of (or breach of) trust'.¹²⁶

It was thus in response to a conflict of interest on the defendant's part that his Lordship felt able to award the claimant 'commonsense and fair compensation ... in equity',¹²⁷ equal in size

¹²¹ *ibid.*

¹²² *O'Sullivan v Management Agency and Music Ltd.* (n 117).

¹²³ JD Heydon, 'Equitable Compensation for Undue Influence' (1997) 113 LQR 8, 9.

¹²⁴ *Mahoney v Purnell* (n 30) 88.

¹²⁵ *ibid.* 89.

¹²⁶ *ibid.* 90-91.

¹²⁷ *ibid.* 89.

to ‘the [real] value of what he surrendered [to the defendant], [minus] what he received [pursuant to its sale]’.¹²⁸

Three points should be made. First, when the judge said that the claimant’s case was founded on an abuse of trust, he should not be understood to have meant that the proceedings before him involved a genuine breach of trust. There is nothing on the facts to suggest that it did. The best interpretation of his words is as referring to a general and non-technical notion of breach of trust wide enough to cover any situation in which one person misuses a power he has over another. Indeed, just as it is now, at the time *Mahoney* was decided it was commonplace to describe both the circumstances in which one person became a fiduciary for another, and the circumstances in which one person came to have influence over another, as involving ‘trust and confidence’.¹²⁹

Second, it was not just May J’s willingness to read the facts of the case as disclosing both an act of undue influence and a conflict of interest that enabled him to award the remedy he did. It was also his citation of *Nocton* as an authority on what relief was available to a victim of a conflict of interest *in any case*. In *Nocton*, the House of Lords viewed a fiduciary as subject to a duty, as against his principal, not to act in conflict of interest. Moreover, it was this characterisation which allowed their Lordships to award equitable compensation to Lord Ashburton. If May J viewed the defendant in *Mahoney* as subject merely to a fiduciary disability, then, for the same reason he thought that equitable compensation for undue influence was not available, he would not have been able to award the claimant such relief. To do so, his Lordship had to find that an equitable wrong had been committed.

The final point to make is that *Mahoney* does not provide authority for the proposition that, in any case of undue influence, a compensatory remedy will be available simply by viewing the pleadings as simultaneously alleging a conflict of interest. In the first instance, this is clear from the judge’s own words. He emphasised that his ability to jump from one part of Equity to another rested on the facts of the case before him. More generally, the lack of a perfect overlap between the scope of the law of undue influence and the scope of the law of fiduciaries is

¹²⁸ *ibid.* 91.

¹²⁹ See, for example, *Bristol & West Building Society v Mothew* [1998] Ch. 1, 18; *Royal Bank of Scotland Plc v Etridge (No 2)* [2002] 2 A.C. 773, 796.

something emphasised in subsequent cases.¹³⁰ In *Derksen v Pillar (No.2)*,¹³¹ for example, in response to an argument that the two areas of law coincided, Hart J said:

‘The proposition that the pleading of a relationship which is sufficient to give rise to ... undue influence is *ipso facto* also a sufficient basis on which to plead fiduciary duties in respect of the breach of which the court may award equitable compensation is ... a novel one’.¹³²

Indeed, as Birks noted, ‘it is not even clear *vice versa* that [the existence of] every fiduciary relationship will support [a] presumption [of undue influence]’.¹³³ There are, for instance, unquestionably fiduciary relationships, such as that between a director and his company, in respect of which it has never been suggested that the law of undue influence applies.¹³⁴

b. In the 2000s

In the 2000s, there were more undue influence cases which demonstrated an ongoing judicial commitment to a “good man” theory of Equity-style disability-based view. In *Agnew v Länsförsäkringsbolagens AB*,¹³⁵ Lord Millett said:

‘Contracts ... depend for their validity on the consent of both parties. The apparent consent of one party, however, may be obtained by duress or undue influence. ... English law does not, generally speaking, regard such circumstances as giving rise to an independent cause of action. Instead it treats them as vitiating consent, and allows the party whose consent was affected to avoid the contract. There is no “obligation” not to exercise undue influence in order to persuade a party to enter into a contract. The party exercising influence incurs no liability’.¹³⁶

¹³⁰ See, also, M Conaglen, *Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary Duties* (Hart Publishing 2011) 236-241.

¹³¹ *Derksen v Pillar (No2)* [2003] EWHC 3050 (Ch).

¹³² *ibid.* [32].

¹³³ P Birks, ‘Unjust Factors and Wrongs: Pecuniary Rescission for Undue Influence’ [1997] RLR 72, 76.

¹³⁴ See, for example, Sealy, ‘The Director as Trustee’ (n 13) 90; J McGhee (ed), *Snell’s Equity* (34th edn, Sweet & Maxwell 2019) 7-066.

¹³⁵ *Agnew v Länsförsäkringsbolagens AB* [2001] 1 A.C. 223.

¹³⁶ *ibid.* 265.

There should be no doubt that in using the term obligation his Lordship was referring to a duty. He went on:

‘There is, of course, a duty to act honestly, and a dishonest misrepresentation may give rise to an action in tort for damages’.¹³⁷

This contrast suggests that Lord Millett perceived the genuine (tortious) duty imposed by the law of deceit to be just the type of encumbrance not involved in the law of undue influence.

Two years after *Agnew*, Birks seized on two Privy Council decisions as indicating that the courts had started to change the way in which they conceptualised the nature of a party with influence’s encumbrance. One of them was *National Commercial Bank (Jamaica) Ltd v Hew*.¹³⁸ There, Lord Millett said that undue influence occurred ‘whenever one party [acted] unconscionably by exploiting the influence to direct the conduct of another which he [had] obtained from the relationship between them’.¹³⁹ The other was *R v Attorney General of England and Wales*,¹⁴⁰ in which Lord Hoffmann said:

‘Undue influence is based upon the principle that a transaction [which] has been obtained by unacceptable means should not be allowed to stand. [It concentrates] upon the unfair exploitation by one party of a relationship which gives him ... influence over the other’.¹⁴¹

To Birks’ mind, the effect of these two cases was ‘to deepen [Equity’s] commitment to the notion of undue influence as a wrong giving rise to a fault-based liability’.¹⁴² The end result of this process, he thought, was that ‘undue influence [would] come in among the equitable torts’.¹⁴³

¹³⁷ *ibid.*

¹³⁸ *National Commercial Bank (Jamaica) Ltd v Hew* [2003] UKPC 51.

¹³⁹ *ibid.* [28].

¹⁴⁰ *R v Attorney-General for England and Wales* [2003] UKPC 22.

¹⁴¹ *ibid.* [21].

¹⁴² P Birks, ‘Undue Influence as Wrongful Exploitation’ (2004) 120 LQR 34, 35.

¹⁴³ *ibid.* 34.

If this analysis is correct, the argument advanced in this Subsection would be open to doubt. This is because I perceive that the wrongs-based view was introduced to the law of undue influence at a materially later point in time. However, there are three reasons to take issue with Birks' account. The first is that it is not wholly clear what he thought the preliminary stage of the process of 'commitment' he referred to was. He cited *Barclays Bank v O'Brien*¹⁴⁴ and *CIBC Mortgages Plc v Pitt*¹⁴⁵ – in both of which undue influence was referred to as wrongdoing – but then correctly identified that 'nothing ... turned on that characterisation'.¹⁴⁶

The second reason relates to Birks' assessment of the substantive impact of both *Hew* and *R v A-G* themselves. At the start of his argument he said that both cases show the courts '[beginning] to draw practical inferences'¹⁴⁷ from their reclassification of undue influence as a wrong. However, he failed to point to a single example of this. He rightly stated that, '[because] a wrong typically gives rise to a right to compensation',¹⁴⁸ the key doctrinal consequence of such a change would be that 'the prospect of damages for consequential loss [was opened up]'.¹⁴⁹ Yet this, on its own, does not advance his position.

Hew involved an unsuccessful attempt to set aside a loan on the basis that it had been procured by an exercise of undue influence. Equitable compensation was not sought and, when the court spoke of *how* it would intervene in such cases, it did so in classical terms. Lord Millett said that 'where a transaction is obtained by undue influence, it must be set aside *ab initio*'.¹⁵⁰ The claimant did also claim damages for negligence, albeit unsuccessfully, but that was rightly treated as a separate issue to whether there had been any undue influence.

R v A-G concerned a claim for an injunction to restrain the publication of an ex-serviceman's book. As part of his unsuccessful defence, the man alleged that a confidentiality agreement he signed with the Crown had been procured by an exercise of undue influence and was therefore liable to be set aside. Just as in *Hew*, there was no suggestion that the court countenanced the possibility of any pecuniary remedy being available. There is therefore nothing in the substance

¹⁴⁴ *Barclays Bank Plc v O'Brien* [1994] 1 A.C. 180.

¹⁴⁵ *CIBC Mortgages Plc v Pitt* [1994] 1 A.C. 200.

¹⁴⁶ Birks (n 142) 34.

¹⁴⁷ *ibid.*

¹⁴⁸ *ibid.* 35.

¹⁴⁹ *ibid.*

¹⁵⁰ *National Commercial Bank (Jamaica) Ltd. v Hew* (n 138) [43].

of either decision to suggest any deepening of any commitment on the part of the courts to recognising undue influence as an equitable wrong.

The final reason to doubt Birks' argument concerns its focus on the passages from *Hew* and *R v A-G* quoted at the start of this discussion. His claim was that 'both affirm that undue influence consists in [the] unconscionable exploitation of influence'.¹⁵¹ 'Undue', he added, 'begins to indicate impropriety, even improbity'.¹⁵²

The problem is that the language of exploitation, just like the language of impropriety and improbity, does not necessarily indicate wrongdoing in the technical sense of a breach of duty. As was noted when discussing *Allcard v Skinner*¹⁵³ in Chapter 6, it is just as consistent with a disability-based view of the law.¹⁵⁴ Indeed, there are various instances, including in *Hew* itself, of judges making equations between a defendant's use of his influence and his abuse of it.¹⁵⁵ These suggest that what matters in any case is the purported exercise of a power in contravention of a disability, not wrongdoing *per se*.¹⁵⁶

It is true that, insofar as any particular exercise of influence is also morally objectionable, it *can* be the subject of censorious language. However, that language does not necessarily indicate anything more as a matter of law. Consider, for example, the words of Lord Shaw in *Poosathurai v Kannappa Chettiar*:¹⁵⁷

'It is a mistake ... to treat undue influence as having been established by ... proof [that] the relations of the parties [were] such that ... one naturally relied upon the other, ... and the other was in a position to dominate the will of the first. [At] that point "influence" alone has been made out. ... More than mere influence must be proved so as to render influence ... "undue". It must be established that the person in a position of domination has *used* that position to obtain unfair advantage for himself.

¹⁵¹ Birks (n 142) 34.

¹⁵² *ibid*.

¹⁵³ *Allcard v Skinner* (1887) 36 Ch. D. 145.

¹⁵⁴ See Chapter 6, Section III, Subsection *ii*.

¹⁵⁵ See, for example, *Re the Estate of Brocklehurst (Deceased)* (n 116) 41; *Royal Bank of Scotland Plc v Etridge (No 2)* (n 129) 796; *National Commercial Bank (Jamaica) Ltd. v Hew* (n 138) [29] and [32].

¹⁵⁶ See *Daing Soharah v Chabak* (1927) AIR 1927 PC 148, 150.

¹⁵⁷ *Poosathurai v Kannappa Chettiar* (1919) LR 47 Ind App 1.

Where the relation of influence ... has been established, and [a] second thing is also made clear, *viz.*, *that the bargain is ... in itself unconscionable*: then the [party with influence] has the burden thrown upon him ... of establishing ... that no domination was practised *so as to bring about the transaction*'.¹⁵⁸

In my view, there is no difference between how Lord Shaw used the word 'unconscionable' and how the same term was used in *Hew*. What is more, if that is the case, then insofar as he thought that an unconscionable transaction was the product of an act of 'exploitation', Lord Millett's invocation of that label cannot indicate anything more than opprobrium. Lord Hoffmann did not use the term 'unconscionable' in *R v A-G*. However, given that Birks read his words as involving such a charge, the same point must also be made with respect to his Lordship's use of phrases like 'unfair exploitation'.

Two last mid-2000s cases are worth noting. Their facts were unspectacular, but both occasioned their judges to expressly reject the notion that the law of undue influence concerned wrongdoing. In *Hammond v Osborn*,¹⁵⁹ Sir Martin Nourse stated that, in cases of undue influence, '[a] court does not interfere on the ground that any wrongful act has in fact been committed'.¹⁶⁰ In *Pesticcio v Huet*,¹⁶¹ Mummery LJ said:

'Although undue influence is sometimes described as an equitable wrong ... the basis of the court's intervention is not the commission of a ... wrongful act by [a] defendant. ... A transaction may be set aside ... even though the actions ... of the person who benefits from it [are] not ... wrongful'.¹⁶²

ii. Change

It is my thesis that, within the last seven years, when deciding some cases of undue influence, the courts have started to engage with the wrongs-based view. It is therefore my argument that,

¹⁵⁸ *ibid.* 2 (emphasis added).

¹⁵⁹ *Hammond v Osborn* [2002] EWCA Civ 885.

¹⁶⁰ *ibid.* [32].

¹⁶¹ *Pesticcio v Huet* [2004] EWCA Civ 372.

¹⁶² *ibid.* [20].

while Birks spoke prematurely, a materially similar analysis to that which he put forward could now fit with at least some of the extant authorities.

In contrast to the position described in *Pesticcio*, it has become possible to find judges referring to the exercise of undue influence as an equitable wrong, not just in formal,¹⁶³ but also in substantive terms. In *Deane v Coutts & Co*,¹⁶⁴ for instance, although Chief Master Marsh did not grant such a remedy on the facts, he did accept that as a matter of principle a claim for equitable compensation for undue influence was available, at least where '[an impugned] transaction is no longer capable of being rescinded'.¹⁶⁵ He also expressly described the exercise of undue influence as 'wrongdoing'.¹⁶⁶

In *UBS AG (London Branch) v Kommunale Wasserwerke Leipzig GMBH*,¹⁶⁷ the Court of Appeal gave its implied support to this position. As part of their joint judgment, Lord Briggs and Hamblen LJ stated that, as a matter of principle:

'Where a *prima facie* right to rescission is demonstrated, [a] court ... retains ... a discretion to refuse it, ... or to afford some other more suitable remedy, such as equitable compensation'.¹⁶⁸

Their Lordships did not directly refer to undue influence, or indeed to any specific cause of action, but as undue influence does give rise to a 'right' to rescission,¹⁶⁹ it must fall within the scope of their statement.

The two most important cases to consider are *Hart v Burbidge*¹⁷⁰ and *Bovingdon v Belcher*.¹⁷¹ Although only first instance decisions, they are significant because, properly understood, they may not just indicate a willingness in principle to view the exercise of undue influence as an

¹⁶³ As in *Hewett v First Plus Financial Group Plc* [2010] EWCA Civ 312, [34]; *Ennis Property Finance Ltd v Thompson* [2018] EWHC 1929 (Ch), [242].

¹⁶⁴ *Deane v Coutts & Co* [2018] EWHC 1657 (Ch).

¹⁶⁵ *ibid.* [125].

¹⁶⁶ *ibid.* [126].

¹⁶⁷ *UBS AG (London Branch) v Kommunale Wasserwerke Leipzig GmbH* [2017] EWCA Civ 1567.

¹⁶⁸ *ibid.* [157].

¹⁶⁹ See, for example, *Agnew v Länsförsäkringsbolagens AB* (n 135) 265.

¹⁷⁰ *Hart v Burbidge* [2013] EWHC 1628 (Ch).

¹⁷¹ *Bovingdon v Belcher* [2014] EWHC 599 (Ch).

equitable wrong; they could also be instances of the courts actually doing so. As shall be explained, on their respective facts, the only coherent explanation for the relief granted in either case is as equitable compensation for a breach of duty. The judges who decided them must therefore have engaged with a duty-based conception of the law of undue influence and rejected the notion that the disability-based view had an exclusive role in relation to it. Both decisions could thus support this Chapter's main argument that the law of undue influence may be experiencing something of a shift in its general theoretical underpinnings.

a. *Hart v Burbidge*

Hart involved two sets of claimants: the deceased's two brothers, and two of the deceased's three children. The defendant was the deceased's third child: her daughter. As Vos LJ would later note,¹⁷² as they were brought on behalf of the deceased's estate, the proceedings in this case should really have been in the deceased's executor's name. However, the point was never taken by the defendant. The claimants alleged that, by way of an exercise of undue influence, the defendant had caused her mother to sell two properties and then pay the proceeds to her, along with an extra £290,000 in cash. The defendant used all that money – £700,000 – to buy a third property, which due to a market fall, she later sold for £600,000.

The claimants argued that the effect of the two impugned sales was to frustrate two specific testamentary gifts in their favour. They also alleged that the effect of the impugned cash transfer was to diminish the size of the deceased's residuary estate, something to which they were, in part, entitled. They sought to have all three transactions set aside so that the deceased's will could take effect as if they had not occurred. The defendant claimed that she had taken a loan from her mother and paid a sum equal to the proceeds of the two original property sales (£410,000) into her estate. The collateral cash transfer, she argued, was a gift.

Sitting as a Deputy Judge of the High Court, Sir William Blackburne found that the defendant had exercised undue influence over her mother. He also said that her mother's estate was therefore *prima facie* entitled to relief. However, his Lordship held that there could be 'no question ... of setting aside ... the [first two] sales [or] the subsequent application of the net sale proceeds ... in the purchase of [the third property] in order to undo the effects of [the

¹⁷² See *Hart v Burbidge* [2014] EWCA Civ 992, [68].

defendant's] undue influence'.¹⁷³ This was because each transaction involved third parties and there were 'no grounds for setting them aside against those persons'.¹⁷⁴

Nonetheless, this did not mean that the claimants were not entitled to any relief, he added. 'The question [became] one of compensating the claimants for loss that they would otherwise suffer'.¹⁷⁵ More specifically, his Lordship stated, the court could put the deceased's estate:

'Into the position in which it would have been if there had been no undue influence so that, even though it may not be possible ... to restore the two properties to the estate, the claimants [would] receive the economic value of those properties in the amounts which would have represented their respective shares in them if they had been sold in the due course of administration ... and the net sale proceeds shared between them as the [deceased's] will provided'.¹⁷⁶

In practice, this meant that, subject to her being given credit for the £410,000 she had returned, the defendant was ordered to pay her mother's estate a sum equal to: 1) the market values of the two properties she had caused her mother to sell *at the date that they would have been sold had they remained in her mother's estate and been administered along with the rest of her assets* (£410,000), and 2) the whole of the collateral cash sum she received (£290,000).

To my mind, this result can only be explained on the basis that Sir William Blackburne moved beyond the traditional conception of the law of undue influence and adopted a wrongs-based view of it. There are two reasons for thinking this. The first is that his Lordship's decision is inexplicable on what was until then settled legal principle. The second is that the only legally coherent way to account for what he did in fact decide is that he took the defendant's behaviour to constitute a breach of duty.

On the first point, one might start with the fact that, in accordance with the disability-based view, the traditional remedy for claimants who successfully establish that they have been the

¹⁷³ *Hart v Burbidge* (n 170) [141].

¹⁷⁴ *ibid.*

¹⁷⁵ *ibid.*

¹⁷⁶ *ibid.*

victim of undue influence is rescission (either in full or, where appropriate, ‘on terms’¹⁷⁷). Indeed, both May J in *Mahoney* and Lord Millett in *Agnew* have been noted in this Chapter as saying just that.¹⁷⁸ Yet, as has already been said, in *Hart*, Sir William Blackburne was unable to order rescission on the basis it was barred by the existence of third-party rights.

When rescission (including rescission ‘on terms’) is impossible, the alternative remedy of “pecuniary rescission” may be available. If it exists outside statute,¹⁷⁹ “pecuniary rescission” should be given effect to by awarding a claimant a sum of money representing the value of the rights he transferred pursuant to the transaction in issue before the court. In Mitchell’s terms, that payment would be ‘made in lieu of rescission’.¹⁸⁰ Its purpose would be to make a defendant ‘pay the money value of the property that he would have been obliged to reconvey to [the claimant] had rescission not been barred’.¹⁸¹ Might this provide an explanation for the remedy in *Hart*?

The answer is no. Even if one can cast aside what should be considerable doubts over whether there is domestic authority in support of making such awards *in any case to which statute does not apply*,¹⁸² the sum awarded by Sir William Blackburne was calculated on a different basis. Giving credit to the defendant for the money she had already paid to her mother’s estate, and following the Australian case of *McKenzie v McDonald*,¹⁸³ had his Lordship wished to effect “pecuniary rescission” he would have ordered the defendant to hand over the value of the first two properties *at the date they were actually sold*, plus the additional cash she received.¹⁸⁴ That would have been ordering the defendant to pay money ‘as a form of substitute performance of [her] duty to return the property *in specie*’.¹⁸⁵

¹⁷⁷ See *O’Sullivan v Management Agency and Music Ltd.* (n 117).

¹⁷⁸ See Section III, Subsection *i*, a and b.

¹⁷⁹ Section 2(2) of the Misrepresentation Act 1967 constitutes *statutory* authority for its operation, albeit in a limited sphere.

¹⁸⁰ C Mitchell, ‘Equitable Compensation for Breach of Fiduciary Duty’ (2013) 66 CLP 307, 317.

¹⁸¹ *ibid.* 318.

¹⁸² *Mahoney v Purnell* is the only authority cited in *Snell*, see McGhee (n 134) 20-056. However, as has been explained in Section III, Subsection *i*, above, that is best understood as a case of equitable compensation for breach of fiduciary duty. Mitchell has identified *Re Leeds and Hanley Theatres of Varieties Ltd* [1902] 2 Ch. 809 as a second authority, see Mitchell (n 180) 317. However, as said in Chapter 6, Section II, Subsection *ii*, that too involved equitable compensation.

¹⁸³ *McKenzie v McDonald* [1927] VLR 134. Note, this was a conflict of interest case, not an undue influence case.

¹⁸⁴ That is what was done, *mutatis mutandis*, in *McKenzie*, see *ibid.* 146-47.

¹⁸⁵ Mitchell (n 180) 318.

As has been said, in quantifying the relief available to the claimants, the judge in *Hart* focused on, amongst other things, the value of the first two properties *at the date they would have been sold had they remained in the deceased's estate until its valid execution*. The remedy he granted was thereby concerned with protecting the position of the deceased's estate, not with reversing any transfer of rights to the defendant *per se*. Indeed, in this respect, his actions were consistent with his words, quoted above. Thus, whatever the specific figures in the case were, the amount awarded was not designed to '[give effect to] restitution ... in money'.¹⁸⁶ Something else was going on.

A second type of relief consistent with viewing defendants as subject to disabilities is the free-standing account of profits. Such an award is measured by reference to 'the profit made by the [defendant as a result of his impugned conduct], not the loss suffered by [the claimant]'.¹⁸⁷ Assuming Sir William Blackburne still thought that the law of undue influence was underpinned solely by the disability-based view, this sort of remedy might provide an explanation for the sum he ordered to be paid in *Hart*.

Unfortunately, even if there was precedent for awarding an account of profit in a case of undue influence – which is doubtful¹⁸⁸ – neither the judge's words nor the substance of his decision are consistent with that having been done. As has been noted, his Lordship described the remedy he granted in victim-focused terms, and as compensatory in nature. He did not say it was responding to the making of a profit by the defendant, nor to any consequent need for that profit to be stripped. Moreover, the sum awarded is simply not referable to any profit made by the defendant.

Like the defendant in *Mahoney*, the defendant in *Hart* was found to be entirely 'unconscious'¹⁸⁹ of the influence she exerted over her mother. Assuming May J's remarks in *Mahoney* were correct, a free-standing account of profits would therefore have taken into account the fact that some of what the deceased transferred to the defendant was lost through no fault of the defendant's own. As has been said, a market fall caused the value of the property the defendant acquired to reduce by £100,000. That being so, and again giving credit to the defendant for the

¹⁸⁶ Birks (n 133) 77.

¹⁸⁷ *Target Holdings Ltd v Redfems (A Firm)* [1996] A.C. 421, 440.

¹⁸⁸ See *Mahoney v Purnell* (n 30) 88.

¹⁸⁹ *Hart v Burbidge* (n 170) [142].

£410,000 she paid back, if an account of profits *had* been ordered against her, it should have been for £190,000 rather than £290,000.

How, then, might one make sense of the judgment? In my view, the answer is as involving an award of equitable compensation for a breach of duty. Sir William Blackburne's decision should therefore stand as authority for the proposition that, in one case at least, a person with influence was said to be subject to a duty, as against the person over whom he held his influence, not to exercise that influence.¹⁹⁰

Returning to the definition advanced in Section II, Subsection *iii*, above, an equitable wrong is an equitable cause of action the remedial consequences of which flow from its characterisation as a breach of duty. The first aspect of this is that the cause of action in issue is equitable. The second is that it is based on a breach of duty. The third is that it entails certain definable remedial consequences, including, albeit not necessarily involving, the possibility of an unliquidated monetary remedy akin to damages. In my view, the way in which the judge in *Hart* cast undue influence satisfies each of these requirements.

To start with, there should be no doubt that his Lordship thought that undue influence was an equitable (as opposed to Legal) cause of action. Indeed, he acknowledged this fact during his judgment.¹⁹¹ In addition, and skipping for a moment the second requirement, it is clear from the words of the judge quoted above that he understood himself to be making an award of compensation. It was an unliquidated personal remedy aimed at making good a loss that the defendant's behaviour had caused the deceased's estate to suffer.¹⁹²

When it comes to the requirement that the cause of action was grounded on a breach of duty, it is true that Sir William Blackburne said nothing which specifically supports the notion that it is satisfied by undue influence. Nevertheless, the fact that he thought that the exercise of undue influence entailed a wrong can be inferred from his openness in ordering 'compensation'.¹⁹³ As Burrows has observed, 'the aim of [an award of compensation] is to put

¹⁹⁰ Of course, given that the defendant was found to have been unconscious of the influence she exercised over her mother, this duty must have been thought to be one of strict liability.

¹⁹¹ See *Hart v Burbidge* (n 170) [45].

¹⁹² See, also, *ibid.* [146].

¹⁹³ *ibid.* [142].

[a] claimant into as good a position as [he] would have been in if no [breach of duty] had been committed'.¹⁹⁴

As said in Section II, Subsection *iii*, above, the availability of a genuinely compensatory monetary remedy is a sufficient, albeit unnecessary, indicator that a non-statutory cause of action is based on a wrong. This is because while other types of remedies – including exemplary damages – are *also* capable of showing that,¹⁹⁵ an unliquidated monetary award akin to damages is *always* able to do so. Indeed, as has been explained, this is one reason why personal remedies in cases of proprietary estoppel are *not* granted in response to wrongs. They are not wholly loss-focused in their aim. However, according to the judge in *Hart*, the remedy he granted was precisely that sort of relief. He stated:

‘I can think of no reason in principle why the court should not be able ... to grant compensation to those injured by the exercise of undue influence’.¹⁹⁶

It follows from this that the cause of action Sir William Blackburne perceived he was making an award in response to involved a breach of duty.

b. Bovingdon v Belcher

Bovingdon had a simpler fact pattern. The claimant was the executrix of a deceased farmer. Towards the end of his life, the farmer had been increasingly incapable of managing his own affairs. For some time before his death, the second defendant had provided the farmer with representation in various business matters. On the farmer’s behalf, the second defendant had negotiated the sale of a parcel of land to a third party. However, the day after contracts were exchanged, the farmer granted various grazing licences over that land to the second defendant’s partner. The result of this was a legal dispute which required the farmer’s estate – for in the meantime he had passed away – to pay the second defendant’s partner £4,162 to surrender the licences.

¹⁹⁴ Burrows (n 55) 38.

¹⁹⁵ See Edelman, *Gain-Based Damages* (n 55) 25.

¹⁹⁶ *Hart v Burbidge* (n 170).

Sitting as a Deputy Judge of the High Court, Simon Monty QC had no difficulty in holding that the grazing licences had only been granted as the result of an ‘exercise of undue influence’.¹⁹⁷ (In contrast to the defendant in *Hart*,) the second defendant had knowingly exploited a person over whom he had assiduously developed control. His Lordship also reached the following conclusion as to a remedy:

‘[The estate’s payment of the release] monies [was] directly caused by [the second defendant] and [so] can properly be ordered to be repaid by [him] as equitable compensation’.¹⁹⁸

Once again, this appears to be an award of equitable compensation in response to a breach of duty. It therefore means that *Bovingdon* is also an authority in support of the proposition that some courts are now viewing the law of undue influence as underpinned, at least in part, by the wrongs-based view. As said above, for a claim to be based on an equitable wrong, three things must be true. It must be founded on an equitable cause of action. It must involve a breach of a duty. It must entail certain definable remedial consequences, including the possibility of unliquidated loss-based monetary relief. To my mind, all three of these requirements are met here.

With respect to the need for a breach of duty, here there are express words one can point to. Consider, for example, the judge’s observation that, in contrast to other issues raised by the facts of the case, the matter of the grazing licences involved ‘[a] question [of] damages for breach of [an] agency duty or [of] equitable compensation for undue influence’.¹⁹⁹ These words entail a clear equation between the exercise of undue influence and various other well-established forms of wrongdoing.

When it comes to the need for certain remedial consequences, the judgment is also clear. As has been noted, Simon Monty QC specifically identified that he was awarding a remedy designed to make good a loss to the deceased’s estate caused by the second defendant’s conduct.

¹⁹⁷ *Bovingdon v Belcher* (n 171) [37].

¹⁹⁸ *ibid.*

¹⁹⁹ *ibid.* [19].

Bovingdon highlights what may become one of the major practical consequences of the courts rejecting the exclusivity of the disability-based view in cases of undue influence. In three-party cases, where the individual exercising influence is not the person with whom his victim enters into a transaction, thinking about the law as imposing inherently breachable duties allows for the granting of a remedy against the party with influence. A purely disability-based view of the law does not.

All other things being equal, where a loss is suffered because of an influenced party's interaction with a third party, there are two people that influenced party might wish to sue. The first is the party with influence over him. The second is the third party. On a solely disability-based view of the law, no remedy is available against the party with influence. By being in a position of influence, he is disabled, as against the party over whom he holds that position, from asserting rights acquired by exercising his influence. However, in such a case, he has not acquired any rights because of his unlawful conduct; only the third party has. A remedy against the third party might be available, but, unless the impugned interaction was a gift,²⁰⁰ only in limited circumstances when his conscience can be said to be affected in a definable way.²⁰¹

In contrast, as in *Bovingdon* itself, awarding a remedy against a party with influence in a three-party case is perfectly possible on a duty-based conception of the law. Generally speaking, as with any other civil wrong, the fact that the loss against which relief is sought was suffered as a result of a transaction with a third party is irrelevant to the question of whether the wrongdoer is liable for it.²⁰²

The liability of a non-influencing third party is less clear. As Ridge has noted, the question of whether a claim for equitable compensation for undue influence can lie against a third party 'has not received direct attention'²⁰³ from either judges or commentators. Nonetheless, as a matter of principle, and absent any accessorial liability on their part, unless such a third party can be said to have owed the claimant a duty not to enter into a tainted transaction with him, it

²⁰⁰ *Bridgeman v Green* (1757) Wilm. 58.

²⁰¹ See *O'Sullivan v Management Agency and Music Ltd.* (n 117) (on rescission in all non-gift three-party undue influence cases except those involving suretyship); *Royal Bank of Scotland Plc v Etridge (No 2)* (n 129) (on suretyship).

²⁰² See, for example, *Conarken Group Ltd & Anor v Network Rail Infrastructure Ltd* [2011] EWCA Civ 644 (on contract); and *Total Liban SA v Vitol Energy SA* [2001] Q.B. 643 (on tort).

²⁰³ P Ridge, 'Third Party Volunteers and Undue Influence' (2014) 130 LQR 112, 116.

is hard to see how such a claim might be brought. Indeed, that is the position in deceit,²⁰⁴ which might provide a good analogy.

iii. The Reason for Change

The analysis put forward in this Section raises the question of why the change in approach it identifies has started to occur at this time. In my view, the answer is essentially the same as the reason why a similar change began within the law of fiduciaries 100 years previously.²⁰⁵ Judges are responding to what they perceive to be remedial necessity.

As said above, as it has hitherto been arranged, the law of undue influence has left gaps in the protection it affords those over whom others have influence. In three-party cases where rescission is impossible, for example, there was no form of relief open to claimants who may very well have been the victims of egregious abuses of power.²⁰⁶ Moreover, as shown by the increase in academic attention to it,²⁰⁷ one context in which these gaps have become apparent is the disposal of property by the elderly. England has an ageing population, and *Hart* and *Bovingdon* are both decisions in which, had the judges not changed the way they thought about the law of undue influence, the exploitation of a vulnerable elderly person would have gone unchecked. To my mind, the reason why the judges in both those cases embraced the wrongs-based view was to fill one of these increasingly socially unacceptable gaps.

Support for this argument can be found in the relevant judgments. In *Hart*, Sir William Blackburne was happy to explain his decision to depart from the disability-based view on just that basis. He said:

‘I can think of no reason in principle why the court should not be able ... to grant compensation to those injured by the exercise of undue influence. It would seem quite wrong that [the defendant], however unconscious she may have been of the undue

²⁰⁴ See, for example, *Bradford Third Equitable Benefit Building Society v Bowers* [1941] 2 All ER 205, 220.

²⁰⁵ See Chapter 6, Section II.

²⁰⁶ See, for example, *Royal Bank of Scotland Plc v Etridge (No 2)* (n 129).

²⁰⁷ See, for example, F Burns, ‘The Elderly and Undue Influence Inter Vivos’ (2003) 23 LS 251; B Sloan, ‘Due Rewards or Undue Influence? – Property Transfers Benefitting Informal Carers’ [2011] RLR 37.

influence that she was exerting on her mother, should be entitled to benefit to any degree from ... her conduct'.²⁰⁸

In *Bovingdon*, Simon Monty QC was harsh in his criticism of the second defendant and expressly linked that to the fact that he had taken calculated advantage of an old and vulnerable man.²⁰⁹

A second (potentially overlapping) reason may relate to more general structural inadequacies within the law of succession. There is little on the face of the judgment *Hart* to support this. However, it is perhaps implicit within it. What is more, in other jurisdictions, the development of tortious relief in cases in which some of a will's intended beneficiaries cause a testator to enter into transactions which frustrate the intention manifested in that testator's will, is specifically ascribed to the need to combat the 'injustice' resulting from the lack of an established remedy in their respective succession doctrines.²¹⁰

IV. Conclusion

The purpose of this Chapter was to conclude the stories of the law of fiduciaries and the law of undue influence started in Chapter 5 and continued in Chapter 6. Its main argument was that, because the same type of conceptual shift which previously occurred within the former may have started to take place within the latter, albeit on a much smaller scale, there could now be a sense in which parts of both doctrines are re-converging as a matter of underlying principle.

With respect to fiduciaries, this Chapter argued that since its introduction, the wrongs-based view has become a well-established feature of the law. Despite a century of legal development, not least the decision of the House of Lords in *Hedley Byrne v Heller*, the idea that a fiduciary is subject to a duty not to act in conflict of interest has not been repudiated. Instead, it has been consolidated and then expanded upon, and is having effects in a much wider range of cases than just those with facts analogous to *Nocton v Lord Ashburton*. There is thus a real sense in which acting in conflict of interest is now an equitable wrong. In addition, one consequence of

²⁰⁸ *Hart v Burbidge* (n 170) [142].

²⁰⁹ See, for example, *Bovingdon v Belcher* (n 171) [14] or [21].

²¹⁰ See JCP Goldberg and RH Sitkoff, 'Torts and Estates: Remediating Wrongful Interference with Inheritance' (2013) 65 *Stan L Rev* 335, 392, citing *Peralta v Peralta* 131 P.3d 81 (N.M. Ct. App. 2005).

this appears to be that some judges have started to overlook the disability-based analysis and those remedies based on it.

Turning to the law of undue influence, this Chapter has demonstrated that while, for almost the entire period under consideration, the courts adhered exclusively to a “good man” theory of Equity-style disability-based view, in the last seven years this has started to change. For reasons of remedial necessity, the idea that individuals in positions of influence are merely disabled from asserting rights acquired by way of exercising their influence, is now occasionally looked beyond. A handful of recent cases can only be accounted for on the basis that the judges in them have taken a party with influence to be subject to a duty not to exercise his influence. There may therefore be a sense in which the exercise of undue influence is also now an equitable wrong.

There are good reasons for appreciating all these points. They support this thesis’ general argument that, as a matter of modern law, the hegemony once enjoyed by the disability-based view over both the law of fiduciaries and the law of undue influence has come to an end. They also support its proposition that the former is, and the latter may be, in something of a theoretically hybrid state. Parts of each reflect the idea that certain individuals in positions of power are merely disabled, as against those over whom they hold their power, from asserting rights acquired by acting in a certain proscribed way. Other parts suggest, or may suggest, that those individuals are subject – probably in addition – to a duty, as against the same persons, not to act in that way.

Theoretical hybridisation is important. As has been shown in relation to fiduciaries, its advent has had major practical implications, not least with respect to what remedies are available to claimants alleging that they have been the victims of conflicts of interest. Awards of equitable compensation are now widely available. However, challenges have been made to the general availability of proprietary relief. As regards undue influence, there is now the possibility of pecuniary relief in three-party cases, at least where rescission is unavailable. Accepting the arguments put forward in this Chapter should help one make sense of some of the apparently substantial contradictions presented by some of the subsisting authorities constituting both doctrines.

Conclusion

I. The Problem Restated

Few areas of law are more in need of a coherent explanation than the modern law of fiduciaries and the modern law of undue influence. Given the examples contained in this thesis' Introduction,¹ two final pairs of contrasting statements should suffice. As regards fiduciaries, Lord Millett stated extrajudicially:

'Common law treats a breach of [duty] as a wrong and awards damages as compensation for loss suffered in consequence. ... Equity, in the exercise of its exclusive jurisdiction over [fiduciaries], does not award compensation for loss. ... It does not treat the defendant as a wrongdoer [but] makes him account as if he has acted properly throughout'.²

Conversely, Burrows has said:

'A sure test for whether ... the law is characterising particular conduct as constituting a breach of duty ... is that compensation [is] an available remedial measure ... if loss is caused [by it]. Applying that test, ... there are equitable wrongs [including] breach of fiduciary duty. [The same] functions are performed by the remedies for equitable wrongs as by the remedies for torts'.³

¹ See Chapter 1, Section I.

² P Millett, 'Proprietary Restitution' in S Degeling and J Edelman (eds), *Equity in Commercial Law* (Lawbook Co 2005) 310.

³ A Burrows, *Remedies for Torts, Breach of Contract, and Equitable Wrongs* (4th edn, Oxford University Press 2019) 11-12.

Turning to undue influence, compare Ho's claim that 'the doctrine ... is [not] inherently incompatible with loss-based awards',⁴ with the view expressed in *Snell* that:

'An independent jurisdiction to order a party exercising undue influence [to pay compensation] would ... be difficult to justify'.⁵

II. The Aim of this Work

This thesis sought to improve the general understanding of the nature and function of the law of fiduciaries and the law of undue influence by accounting for the seemingly inconsistent authorities which underpin such discordant analyses. More specifically, it attempted to show that the cases which constitute the two doctrines are under a certain theoretical tension. Left unacknowledged, this tension, being both fundamental and having wide-ranging implications, is too often an obstacle to the proper appreciation of each jurisdiction.

It was my argument that most judges and commentators take an incomplete view of the principles which underlie each of the two areas of law. With some exceptions,⁶ they perceive them as grounded on one of two different conceptual bases: one involving the imposition of disabilities, the other involving duties, and they do not accept that different parts of either doctrine must be explained in a different way. Consider, for example, Lord Blackburn's holding in *Erlanger v New Sombrero Phosphate Co*,⁷ that: '[Where there is a conflict of interest] a Court of Equity [cannot] give damages, and, unless it can rescind [a transaction which that conflict procured], can give no relief',⁸ and Lord Neuberger MR's statement in *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd*,⁹ that:

⁴ L Ho, 'Undue Influence and Equitable Compensation' in P Birks and F Rose (eds), *Restitution and Equity, Volume One: Resulting Trusts and Equitable Compensation* (Mansfield Press 2000) 194.

⁵ J McGhee (ed), *Snell's Equity* (34th edn, Sweet & Maxwell 2019) 8-039.

⁶ See, for example, C Mitchell, 'Equitable Compensation for Breach of Fiduciary Duty' (2013) 66 CLP 307; *Gwembe Valley Development Co Ltd v Koshy* [2003] EWCA Civ 1048.

⁷ *Erlanger v New Sombrero Phosphate Co* (1878) 3 App. Cas. 1218. See, alternatively, *Bentley v Craven* (1853) 18 Beav. 75, 76; LS Sealy, 'Some Principles of Fiduciary Obligation' (1963) 21 CLJ 119; *Agnew v Länsförsäkringsbolagens AB* [2001] 1 A.C. 223, 265; W Winder, 'Undue Influence in English and Scots Law' (1940) 56 LQR 97.

⁸ *Erlanger v New Sombrero Phosphate Co*. (n 7) 1278.

⁹ *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2011] EWCA Civ 347. See, alternatively, A Burrows, 'We Do This at Common Law but That in Equity' (2002) 22 OJLS 1; Ho (n 4).

‘The mere fact that [a] breach of [fiduciary] duty enabled [the defendant] to make a profit should not, of itself, be enough to give [his principal] a proprietary interest in that profit’.¹⁰

The problem with monist approaches is that they render it impossible to fully appreciate the two doctrines’ respective operations. As a matter of fact, albeit to varying degrees, they are each currently in a theoretically hybrid state; they both display some characteristics of being duty-based and some characteristics of being disability-based in their nature.

Within the law of fiduciaries, for example, awards of equitable compensation have been thought possible in cases where the judges have specifically adopted a duty-based analysis of the law.¹¹ In contrast, there is a reason to think that constructive trusts of bribes and secret commissions are – where appropriate – only available as of right if one adopts a disability-oriented view.¹² When it comes to the law of undue influence, equitable compensation has been awarded in three-party cases (where rescission is impossible) as a result of the courts adopting a duty-based conception of the law.¹³ However, there are two-party cases in which, all other things being equal, as a consequence of the disability-based approach otherwise worthy claimants are denied such relief.¹⁴ Adopting a dualist view is therefore essential.

III. The Quality of the Dualist View

Overall, this thesis constitutes an argument that taking a dualist approach to the theoretical underpinnings of each of the law of fiduciaries and the law of undue influence is not just a valuable way of perceiving their structures but also an accurate one. This is because, in contrast to many other accounts, my work explains the nature and function of both doctrines principally by reference to their respective histories. It does not draw primarily on external factors – such

¹⁰ *Sinclair Investments (UK) Ltd. v Versailles Trade Finance Ltd.* (n 9) [52].

¹¹ See, for example, *Nocton v Lord Ashburton* [1914] A.C. 932; *Swindle v Harrison* [1997] P.N.L.R. 641.

¹² See, for example, *Attorney General of Hong Kong v Reid* [1994] 1 A.C. 324; *Sinclair Investments (UK) Ltd. v Versailles Trade Finance Ltd.* (n 9).

¹³ See, for example, *Bovingdon v Belcher* [2014] EWHC 599 (Ch).

¹⁴ See, for example, *Mahoney v Purnell* [1996] 3 All E.R. 61.

as economic theory,¹⁵ or particular moral precepts¹⁶ – which do not appear to have directly informed either of their developments. Of course, that is not to say that such analyses are not, in their own way, potentially useful. However, it is to say that, compared to that which has just been posited, those studies are lacking in at least one respect.

The link between the quality of the dualist view and a sound understanding of the development of each of the jurisdictions under consideration derives from the fact that their presently hybrid states are provably the products of their pasts. The way in which the courts have understood each area of law has changed over time. Moreover, and as a result, they both now display various otherwise superficially inconsistent characteristics. These features manifested themselves at different stages of the two doctrines' growths, and despite subsequent conceptual advances have not yet been replaced. It is thus only by taking a long view of each subject that their current structures can be properly appreciated.

IV. Chapter Summary

Chapter 2 contained an examination of “fraud” in its jurisdictional sense, at least insofar as that term had such a meaning as a matter of 18th Century Equity. At that time, “fraud” was one of the three great heads of Equity’s jurisdiction. Statute aside, for its judges to intervene in any matter, a claimant would have to show that there was some fraud, a trust, or some accident involved in his case.¹⁷ Chapter 2 also established that, as a matter of 18th Century Equity, “fraud” in its jurisdictional sense was wide enough to cover two different legally operative occurrences: “actual fraud” and “constructive fraud”.

¹⁵ See, for example, RH Sitkoff, ‘An Economic Theory of Fiduciary Law’ in AS Gold and PB Miller (eds), *Philosophical Foundations of Fiduciary Law* (Oxford University Press 2014); RRW Brooks, ‘The Economics of Fiduciary Law’ in EJ Criddle, PB Miller and RH Sitkoff (eds), *The Oxford Handbook of Fiduciary Law* (Oxford University Press 2019).

¹⁶ See, for example, I Samet, ‘Fiduciary Loyalty as Kantian Virtue’ in AS Gold and PB Miller (eds), *Philosophical Foundations of Fiduciary Law* (Oxford University Press 2014); J Penner, ‘Fiduciary Law and Moral Norms’ in EJ Criddle, PB Miller and RH Sitkoff (eds), *The Oxford Handbook of Fiduciary Law* (Oxford University Press 2019).

¹⁷ See, for example, *Lord Bath v Sherwin* (1706) Prec. Ch. 261.

Chapter 3 was about the 18th Century law of “actual fraud” (or, at least, those aspects of it covered by Equity rather than Law). It showed that the term referred to all knowingly made and reckless misrepresentations, and all failures to disclose information made in breach of a duty to do so. What constituted “actual fraud” is interesting in and of itself, but for my purposes the main reason for establishing it was instrumental. In the first half of the 19th Century, both the law of fiduciaries and the law of undue influence developed to replace parts of the law of “constructive fraud”, and one cannot accurately determine what “constructive fraud” entailed until one understands what constituted “actual fraud” contemporaneously.

Chapter 4 covered “constructive fraud” itself. It demonstrated that, across the 18th Century, the field encompassed by that term concerned just one definable ground of intervention. “Constructive fraud” was therefore both a limited and unitary phenomenon. In a departure from existing orthodoxies, Chapter 4 also showed that “constructive fraud” involved no more and no less than (what it called) the “abuse of interpersonal power”. An abuse of interpersonal power occurred when:

- 7) One party (D) had a power – either legal or factual – over another (C),
- 8) C entered a “one-sided transaction” with either D or a third party (TP),
and
- 9) There was a causal link between an exercise of D’s power and C’s entry into that transaction.

Because the law of fiduciaries and the law of undue influence both developed out of it, establishing an appreciation of the 18th Century law of “constructive fraud” was of foundational importance to advancing this thesis in general.

Chapter 5 explained why the 18th (and early 19th) Century law of “constructive fraud” looked the way it did. More specifically, it examined the legal theory which underpinned it: the “good man” theory of Equity. Significantly, the “good man” theory was one which, in this context at least, mandated the imposition of disabilities on those whose conduct it sought to regulate. Those in positions of interpersonal power were disabled, as against those over whom they held their power, from asserting rights acquired by exercising it.¹⁸

¹⁸ See, for example, *York Buildings Co v Mackenzie* (1795) 3 Paton 378.

Understanding the “good man” theory was an essential precondition to accepting this thesis’ central argument. Knowledge of it helps one make sense of the past and of various parts of the law today. As Chapter 5 demonstrated, in the first half of the 19th Century, the law of “constructive fraud” was replaced by several substantively distinct doctrines including the nascent law of fiduciaries and the nascent law of undue influence. However, both these areas of law appear also to have initially conformed to the “good man” theory. Thus, although the law of “constructive fraud” itself ceased to be applied, the underlying theory which animated it survived and shaped fundamentally the two areas of law under this thesis’ consideration.

Chapter 6 charted the development of the law of fiduciaries and the law of undue influence from the second half of the 19th Century to the first half of the 20th. It showed that, throughout that period, the judges deciding most cases of fiduciary misfeasance remained faithful to the disability-based view mandated by the “good man” theory of Equity. It also explained that, for identifiable reasons, there were at least three occasions on which the courts chose to engage with an alternative approach.¹⁹ Rather than thinking about fiduciaries as merely disabled, as against their principals, from asserting rights acquired as a result of acting in conflict of interest, the courts in those cases conceived of them as subject to a duty, as against their principals, not to behave in that way. Significantly, just as the relevant judges hoped, this imported the possibility that compensatory remedies could be awarded against fiduciaries acting in default. A wrongs-based view of this part of Equity thereby emerged.

Chapter 6 also demonstrated that, for the law of undue influence, the turn of the 20th Century was a period of conspicuous theoretical continuity. There was no case raising it in which, in substance, the disability-based view was departed from. Consequently, this period saw the start of a process of partial conceptual divergence between the two doctrines under this thesis’ consideration.

The story of both the law of fiduciaries and the law of undue influence was completed in Chapter 7. It examined their conceptual developments from the middle of the 20th Century up to the present day. With respect to the former, it explained that the small-scale change noted in

¹⁹ See *Cavendish Bentinck v Fenn* (1887) 12 App. Cas. 652; *Re Leeds and Hanley Theatres of Varieties Ltd* [1902] 2 Ch. 809; *Nocton v Lord Ashburton* (n 11).

Chapter 6 has been consolidated, and that awards of equitable compensation for so-called breach of fiduciary duty are now commonplace and relatively uncontroversial. It also demonstrated that the wrongs-based view which they reflect has started to have wider effects within that jurisdiction. In recent years, for instance, and perhaps missing the point that law of fiduciaries is probably in a state of *overlapping* theoretical hybridisation, a challenge to the availability of constructive trusts as a remedy for an acquisitive act of fiduciary misfeasance – something uncontroversial on a disability-based view – was made on the basis that, on its own, a breach of duty does not justify such a response. Indeed, as the rise of the wrong-based view continues, it is possible that there will be more mistakes of the same kind made in the future.

As regards undue influence, Chapter 7 argued that, while for almost the entire period under its consideration that doctrine continued to rest solely on its original conceptual basis, in the last seven years this has started to change. The settled position was that all those with influence were merely disabled, as against those over whom they held their influence, from asserting rights acquired by exercising it. However, a small number of recent authorities can only be accounted for on the basis that the judges deciding them viewed the parties with influence before them as subject – (almost certainly) in addition – to duties not to exercise their influence.²⁰ In some cases at least, then, there may be a sense in which, like acting in conflict of interest, the exercise of undue influence is now an “equitable wrong”. Indeed, if that is correct, something of a partial conceptual re-convergence between those two parts of Equity may be underway.

V. Wider Debates

How does the information disclosed in this thesis fit with some of the wider debates which exist in relation to, amongst other things, the law of fiduciaries and the law of undue influence? After all, although they are independent doctrines, along with areas of law like the law of confidentiality and the law of stewardship,²¹ both form part of Equity’s more general jurisdiction over personal interactions.

²⁰ See *Hart v Burbidge* (n 13); *Bovingdon v Belcher* (n 13).

²¹ Discussed in Chapter 1, Section V, Subsection *iii*.

i. Equity's Use of Legal Fictions

There is a narrow but potent disagreement over Equity's reliance on legal fictions. Several commentators have argued that, both generally and as part of the law of fiduciaries in particular, such devices are frequently employed. Swadling has claimed that the maxim "Equity looks upon as done that which ought to be done" involves a fiction because, at least insofar as it applies in conflict of interest cases, the courts are involved in 'nothing more than a denial of the truth'.²² Shmilovits' definition of a legal fiction is more nuanced than this,²³ but he too identifies the same maxim as involving such a device.²⁴

Opinions are divided as to whether Equity's use of fictions is acceptable. Shmilovits' view is that it can be, and he describes as 'beneficial'²⁵ the fiction which he thinks underlies: "Equity treats as done that which ought to be done". Swadling is more sceptical. Writing about equitable fictions in general, he has identified a range of risks their existence gives rise to. They are, he argues, 'an obstacle to rational analysis'.²⁶ In *AIB Group (UK) Plc v Mark Redler & Co Solicitors*,²⁷ a leading stewardship authority, Lord Toulson took an equally robust view. He said:

'There is something wrong with a ... law which makes it necessary to create fairy tales'.²⁸

Insofar as the debate concerning Equity's use of legal fictions is premised on the notion that, in instructing its courts to "look upon as done...", at least one aspect of the law of fiduciaries involves such a fiction, it is in fact fundamentally misplaced. As said in Chapter 5, properly understood, the relevant maxim constitutes no more than a context-specific application of the "good man" theory of Equity.²⁹ Furthermore, as Chapter 5 also established, neither the "good man" theory nor the disability-based reasoning it entails involve the denial of reality.³⁰ Both

²² W Swadling, 'Constructive Trusts and Breach of Fiduciary Duty' (2012) 18 T&T 985, 988.

²³ See L Shmilovits, 'The Declaratory Fiction' (2020) 31 KLJ 59, 66-69.

²⁴ *ibid.* 82.

²⁵ *ibid.*

²⁶ W Swadling, 'The Fiction of the Constructive Trust' (2011) 64 CLP 399, 432.

²⁷ *AIB Group (UK) Plc v Mark Redler & Co Solicitors* [2015] A.C. 1503.

²⁸ *ibid.* [69].

²⁹ See Chapter 5, Section II, Subsection *i*, 3.

³⁰ See Chapter 5, Section II, Subsection *i*, 5 and 6.

Swadling and Shmilovits are therefore wrong to include it within the scope of their respective claims.

Swadling's understanding of the "looks upon..." maxim seems to be that, when it is deployed, it provides that a right acquired by one party 'is deemed in equity to be in [his counterparty], though the reality, i.e. the position at Law, is that it is still in the [the first party]'.³¹ This offends common sense, he explains, because where a fiduciary acts unlawfully the only person he ever acquires rights for is himself.³²

Yet this is not what the cases indicate is actually happening in situations when the maxim applies. As Chapter 5 made clear, when an individual such as a fiduciary is treated as if, at all times, he has exercised his powers properly, he is subject to an equitable disability.³³ That encumbrance provides that, *as against his principal*, he is incapable of *enforcing* rights acquired as a result of acting in conflict of interest.³⁴ Thus, in any case where there is an unlawful rights acquisition, Equity does not deny the fact that it has occurred. If one is limited in how he can enforce a right, he must have it (or at least be capable of acquiring it). Likewise, fiduciary law does not treat anyone else as if they were *Legally* entitled to those rights. This is plain from the fact that, *as against third parties*, a fiduciary is perfectly capable of enforcing his new entitlements.³⁵ He may enter binding contracts in relation to them, and thereby validly dispose of them.³⁶

The only claim Equity makes is that, as against his principal, a fiduciary may not enforce his new rights, something which opens up the possibility of his principal bringing a claim to strip him of those rights or their value.³⁷ Indeed, more generally, being subject to an (equitable) liability to convey a right to another does not mean that, in the meantime, one does not have

³¹ Swadling (n 26) 423.

³² Swadling (n 22) 998.

³³ See, for example, *Grand Junction Canal Company v Dimes* (1850) 2 H. & Tw. 92, 100.

³⁴ See, for example, *Aberdeen Railway Co v Blaikie Brothers* [1843-60] All ER Rep 249; *Bowes v City of Toronto* (1858) 11 Moo. P.C. 463.

³⁵ See, for example, *Aberdeen Town Council v Aberdeen University* (1877) 2 App. Cas. 544.

³⁶ See, for example, *Re Leeds and Hanley Theatres of Varieties Ltd.* (n 19); *Attorney General of Hong Kong v Reid* (n 12).

³⁷ See *In re Caerphilly Colliery Company* (1877) 5 Ch. D. 336, 340-341. I am thus cautious of Lionel Smith's account of fiduciary liability, grounded on the concept of attribution, see Smith, 'Constructive Trusts and the No-Profit Rule' (2013) 72 CLJ 260. This analysis justifies the imposition of positive rights in a principal's favour for a reason beyond the need to prevent a fiduciary from exercising his powers improperly.

that right or the ability to grant it.³⁸ In the end, then, the best that can be said about the operation of the “good man” theory is to refer to Maitland: ‘Equity [comes] not to destroy the law, but to fulfil it’.³⁹ There may be legal fictions, and Equity may deploy them from time to time. However, at least in the context of fiduciary law, disability-based reasoning does not engage them.

ii. Is Equity Special?

A wider but no less contentious debate concerns whether there is anything special about Equity, or at least those parts of it concerned with personal interactions (rather than proprietary interests). Some, including Burrows, argue that in general there is not, and so that where there are ‘inconsistencies’ between Equity and Law, ‘it is important to remove [them and] thereby [produce] a ... harmonized [legal system]’.⁴⁰ His stated priorities are ‘coherence in the law and ... like cases being treated alike’.⁴¹ He therefore thinks that, in developing the law, ‘it is legitimate for the courts to reason from common law to equity’.⁴²

In contrast, there are others who say that, for good reason, Law and Equity are, at least in certain respects, distinct. They thus believe that some seemingly analogous parts of both jurisdictions have in fact quite different bases. This means that, while it might not be impossible for there to be cross-fertilisation between these two parts of the legal system, real care must be taken in drawing parallels. In a direct response to Burrows, for instance, Lord Millett has said extrajudicially that:

‘Those who would extend the common law ... into those areas which have hitherto been the province of equity’s exclusive jurisdiction ignore the fundamental difference between the ... two [bodies of law]’.⁴³

In my view, all turns on two different but connected points. The first relates to how one conceptualises the nature of the relationship between Common Law and Equity. Do they

³⁸ See, for example, *Saunders v Vautier* (1841) 4 Beav. 115.

³⁹ F Maitland, *Equity: A Course of Lectures* (AH Chaytor and WJ Whittaker eds, 2nd edn, CUP 1936) 17.

⁴⁰ Burrows (n 9) 4.

⁴¹ *ibid.*

⁴² *ibid.*

⁴³ Millett (n 2) 310.

perform similar roles, or have fundamentally different functions? The second relates to how one understands the way in which both jurisdictions achieve their designated ends.

On the first point, Lord Millett adopts the classical position, derived ultimately from Aristotle.⁴⁴ Law, he has stated, '[provides] certainty', while Equity '[gives] the necessary flexibility and adaptability to enable justice to be done'.⁴⁵ Henry Smith has posited a more specific version of the same proposition:

'The law's generality results in exploitable gaps in between the law and its purpose. These gaps give an opening to opportunists, which equity seeks to close'.⁴⁶

From these remarks, the idea of a categorical distinction between rules of Law and rules of Equity is easy to appreciate. The former exists to provide general regulation, the latter to temper some of the least desirable consequences of having such regulation. Equity is thus law about Law, or, as Smith has put it: a form of 'second-order', or 'metlaw'.⁴⁷ Indeed, if this is so, it may be surprising if the two sets of rules *did* operate in substantially the same way, or if many material analogies could be drawn between them.

Burrows takes the opposite view. He thinks that both Law and (most of, if not all,) Equity contribute to one general body of regulations, and thus involve rules which operate on the same plane. Rather than performing different functions, each jurisdiction is approaching the same type of problem albeit from historically distinct directions. This explains his observation that there are many areas 'where common law and equity can happily sit alongside one another',⁴⁸ and his support for widespread reasoning by analogy between them. It also explains his wish that English lawyers cease to be 'slaves to history'.⁴⁹

⁴⁴ See Aristotle, *The Nicomachean Ethics* (D Ross tr, Oxford University Press 1980) 133.

⁴⁵ Millett (n 2) 309.

⁴⁶ HE Smith, 'Why Fiduciary Law Is Equitable' in AS Gold and PB Miller (eds), *Philosophical Foundations of Fiduciary Law* (Oxford University Press 2014) 264.

⁴⁷ HE Smith, 'Fiduciary Law and Equity' in EJ Criddle, PB Miller and RH Sitkoff (eds), *The Oxford Handbook of Fiduciary Law* (Oxford University Press 2019) 746. See, also, HE Smith, 'Equity as Meta-Law' (2021) 130 Yale LJ 1050.

⁴⁸ Burrows (n 9) 4.

⁴⁹ *ibid.*

It is with respect to the second point that the information contained in this thesis becomes relevant. This is because if one takes any form of exceptionalist view, one leaves open space for Equity to work in a fundamentally different way to Law. There is room for a theory like the “good man” theory which provides that certain individuals are treated as if, at all times, they have performed their Legal duties and exercised their powers properly. There can be the disability-based reasoning which the second limb of that proposition entails. Indeed, this explains Lord Millett’s otherwise opaque extrajudicial remark that: ‘Equity is not a set of rules but a state of mind’.⁵⁰

Alternatively, if one considers the Common Law and Equity to have essentially the same purpose, one is pushed towards the position that they should function in materially the same way. This is where a more general wrongs-based view of English private law – or, at least, that part of it concerning persons, not property – comes into play, an analysis which experienced an early apotheosis in Blackstone’s *Commentaries*.⁵¹ In 2000, Birks demonstrated that Blackstone was in fact over-claiming and that even Law itself is capable of containing rules premised on something other than wrongdoing.⁵² Nevertheless, that does not alter the fact that the default body of personal regulations in private law involves duties and therefore wrongs.⁵³

On a wrongs-based view of the law, the main difference between the rules of Common Law and Equity appears to be historical. As Burrows puts it:

‘To describe a rule ... as common law [is] to say that it [has] its ... roots in the law administered in the common law courts prior to 1873. To describe a rule ... as equitable [is] to [make an analogous claim about] the Court of Chancery’.⁵⁴

These words admit no concession to the idea that the judges tasked with deciding cases either at Law or in Equity might approach the same type of legal problem in different ways. In

⁵⁰ P Millett, ‘The Common Lawyer and the Equity Practitioner’ in D Clarry (ed), *The UK Supreme Court Yearbook, Volume 6: 2014-2015 Legal Year* (Appellate Press 2015) 175.

⁵¹ See W Blackstone, *Commentaries on the Laws of England*, vol 1 (1st edn, 1765) §117-118.

⁵² See P Birks, ‘Rights, Wrongs, and Remedies’ (2000) 20 OJLS 1.

⁵³ NJ McBride, *The Humanity of Private Law: Part I: Explanation* (Hart Publishing 2018) 40.

⁵⁴ Burrows (n 9) 2.

McFarlane’s terms, on non-exceptionalist view, ‘it makes no sense for common law and equity to give different answers to the same question’.⁵⁵

Ultimately, given what this thesis has established, it is easy to see why the law of fiduciaries and, to a lesser extent, the law of undue influence, have become flashpoints in this debate. As Chapter 5 demonstrated, both initially conformed to the “good man” theory of Equity and so operated in such a way as to support the exceptionalist view. However, as Chapters 6 and 7 explained, various parts of both jurisdictions have since embraced a different conceptual approach. Some judges now perceive fiduciaries and parties with influence as subject – (probably) in addition – to equitable duties. This change might be thought to support Burrows’ position because *to some extent* it involves Equity aping the Common Law. Moreover, reflecting on developments within the related law of confidentiality, one might also suppose that the more each of the two doctrines under this thesis’ consideration become wrongs-based, the louder the voices of those who support this side of the argument will become.⁵⁶

Nevertheless, going forward, care must be taken to avoid falling into the trap of forgetting that an underlying disability-based analysis almost certainly still exists. The risk of adopting a hard-line non-exceptionalist view could be that the courts overlook the fact that, although parts of Equity are developing functional similarities to Law, this does not necessarily mean that they are also losing any of their distinctly equitable characteristics. Indeed, as Chapter 7 explained, when that occurs, some arguably important remedial possibilities end up being lost. It may be that there are good arguments against the existence a disability-based analysis of fiduciary law, but it should not be rejected simply because of oversight.

iii. The Wider Availability of Disgorgement

Linked to the previous debate, a more practically oriented disagreement exists over the availability of accounts of profit in cases of Legal wrongs (other than those concerning

⁵⁵ B McFarlane, ‘Understanding Equitable Estoppel: From Metaphors to Better Laws’ (2013) 66 CLP 267, 278.

⁵⁶ Following Lord Nicholls’ speech in *Campbell v MGN Ltd* [2004] 2 AC 457, the leading textbooks now unambiguously claim breach of confidence to be a civil wrong. See, for example, Burrows (n 3) 12-13; M Jones, *Clerk & Lindsell on Torts* (23rd edn, Sweet & Maxwell 2020) 26-01-26-04. Writing about equivalent decisions in the United States, some have described this change as ‘one example of a relatively successful evolution from equity to tort’. See JCP Goldberg and HE Smith, ‘Wrongful Fusion: Equity and Tort’ in JCP Goldberg, HE Smith and PG Turner (eds), *Equity and Law* (Cambridge University Press 2019) 327.

intellectual property rights). As a matter of House of Lords/Supreme Court authority, an account is available in response to a breach of contract, but only in limited circumstances.⁵⁷ There has also been some support expressed in the Court of Appeal for that remedy's award in cases of breach of statutory duty,⁵⁸ yet nothing more as a matter of precedent, nor in relation to other torts.

Virgo claims that the current position is too restrictive. He argues that, all other things being equal, accounts of profit should be available in all cases of wrongdoing. He is prepared to recognise limitations on their operation in any particular case. However, those conditions would be general in their application, 'unaffected by the nature of the wrong which has been committed'.⁵⁹ Burrows takes a similar view. He argues that restricting the availability of accounts of profit to wrongs which 'have their roots in equity ... is not a policy justification', and that 'the role of an account ... should be expanded to reverse gains made by any dishonestly committed tort'.⁶⁰ Indeed, considering the point made about the law of confidentiality in Subsection *ii*, above, it is interesting to note that Burrows invokes recent wrongs-based developments within that area to support his position:

'Given than an account of profits is commonplace for the equitable wrong of breach of confidence, it surely cannot be long before [the courts are asked] whether an account ... can be awarded for the tort of privacy, which [grew] out of breach of confidence'.⁶¹

The central objection to these arguments is manifested in *Halifax Building Society v Thomas*.⁶² There Peter Gibson LJ held that an account of profits was not available for deceit on the basis that: 'Fraud is not in itself a sufficient factor to allow [a claimant] to require [a defendant] to account to [him]'.⁶³ 'There is no decided authority that comes anywhere near [suggesting otherwise]',⁶⁴ he added.

⁵⁷ See *Attorney General v Blake* [2001] 1 A.C. 268; *Morris-Garner v One Step (Support) Ltd.* [2018] UKSC 20 [64]-[82].

⁵⁸ See *Devenish Nutrition Ltd v Sanofi-Aventis SA* [2009] Ch. 390.

⁵⁹ G Virgo, 'Gain-Based Remedies' in G Virgo and S Worthington (eds), *Commercial Remedies: Resolving Controversies* (Cambridge University Press 2017) 310.

⁶⁰ Burrows (n 3) 341-342.

⁶¹ *ibid.* 342.

⁶² *Halifax Building Society v Thomas* [1996] Ch. 217.

⁶³ *ibid.* 228.

⁶⁴ *ibid.* 227.

In my view, the best interpretation of his Lordship's words is not as resting on a hoary historical distinction between Law and Equity. Indeed, to think so could be to miss the point, made above, that the difference between the Common Law and (at least some parts of) Equity is functional, not purely historical. The better reading of the judge's words is as emphasising the particular substantive position of a person who commits deceit, as opposed that of someone against whom an account of profits would generally be available, including a fiduciary or a confidant.

As said in Chapter 1, the law imposes a primary Legal duty on all persons not to make fraudulent misrepresentations.⁶⁵ The law does not impose a primary disability, whether Legal or equitable, to the same effect. Furthermore, the Legal remedies for deceit respond to a breach of duty.⁶⁶ In contrast, as this thesis has demonstrated, the important point about accounts of profit, at least insofar as they occur within the law of fiduciaries, is that they are justified by reference to the existence of primary (equitable) disabilities. Since its inception, a wrongs-based analysis of fiduciary law has arisen such that it is also possible to characterise acting in conflict of interest as an (equitable) wrong. However, as Chapter 7 explained, that does not mean that in a case of fiduciary misfeasance accounts of profit arise in response to such a wrong.⁶⁷

Consequently, both Virgo and Burrows' arguments might be based on false premises. What is more, this could mean that their respective conclusions are invalid. They are both missing the point that there is a fundamental distinction between the types of encumbrance in issue in the cases they are trying to analogise. As Peter Gibson LJ put it vis-à-vis deceit in *Thomas*: 'fraud [viz. a defendant's breach of duty] is not *in itself* a sufficient factor to allow [a claimant] to require [a defendant] to account to [him]'.⁶⁸ Fraudsters are only duty-bound not to act in the way they do. All other things being equal, then, there is no principled reason why the same remedies should be available when they act inconsistently with their encumbrances as there is when a fiduciary does.

⁶⁵ See Chapter 1, Section V, Subsection *ii*.

⁶⁶ The Legal disability which facilitates the rescission of any transaction procured by fraud is a *secondary* disability, arising in response to the defendant's wrong. It prevents the defendant from enforcing that transaction, as against the claimant.

⁶⁷ See Chapter 7, Section II, Subsection *ii*.

⁶⁸ *Halifax Building Society v Thomas* (n 62) 228 (emphasis added).

Of course, none of this is to say that it would be impossible for the law to develop in such a way as to establish the more widespread availability of accounts of profit in cases involving breaches of Common Law duty. Indeed, that may very well be desirable. However, if that change is to be affected by way of an analogy with areas like fiduciary law, running a superficial wrongs-based comparison would not be enough. Extending the operation of primary disabilities into the law of tort (and contract) would be a radical and surely controversial step. The introduction of a disability-based conception of, for instance, deceit, must therefore be justified in its own terms.⁶⁹

VI. Potential Developments

The theoretical shifts described in Chapters 5, 6, and 7 may still be underway. There is no particular reason to think that, at least insofar as they relate to the law of fiduciaries and the law of undue influence, the disability-based view will not remain in relative decline and the wrongs-based view will not continue to ascend. This means that going forward it is possible that the courts will be faced with more questions over what are currently settled parts of both doctrines.

i. Exemplary Remedies

A narrow question which might surface relates to the availability of exemplary monetary remedies for either breach of fiduciary duty or undue influence. This is because many cases, especially those involving fiduciaries, could provide an appropriate occasion for such an award.⁷⁰

Traditionally the non-availability of exemplary remedies in Equity followed *a fortiori* from the absence of *any* loss-based monetary relief. Indeed, even at Common Law, it is settled that exemplary damages can only be granted ‘if, [and] only if, the sum [the judge has] in mind to award as compensation ... is inadequate to punish [the defendant] for his outrageous conduct,

⁶⁹ There is separate question of whether, in general, gain-based damages should be available in response to wrongs. However, that is a different issue to that concerning the drawing of analogies with certain parts of equity.

⁷⁰ See *Cook v Evatt (No 2)* [1992] 1 NZLR 676, 706; W Gummow, ‘Compensation for Breach of Fiduciary Duty’ in TG Youdan (ed), *Equity, Fiduciaries and Trusts* (Carswell 1989) 79.

to mark [his] disapproval of [it] and to deter [the defendant] from repeating it'.⁷¹ What is more, as James LJ once noted, the view was that:

‘[A court of Equity had] no jurisdiction ... to punish [a defendant] by making him account for more than that which he actually received. [It was] not a Court of penal jurisdiction’.⁷²

Nonetheless, it is trite law that exemplary remedies are granted ‘to punish [a] defendant for his ... wrongful conduct’.⁷³ Thus, notwithstanding the well-known rules which, on top of this basic proposition, limit the availability of such relief,⁷⁴ the possibility of an exemplary award might be thought to flow logically from the characterisation of any event as involving a breach of duty.⁷⁵ Further, Equity itself already has a long-standing jurisdiction to grant exemplary relief in cases involving genuine (legal) wrongs.⁷⁶

ii. *Remoteness, Mitigation, and Contributory Fault*

Perhaps the most practically significant question which could arise relates to how awards of equitable compensation for both breach of fiduciary duty and the exercise of undue influence are quantified. As the law stands, all that is clear as a matter of authority is that there must be a ‘but for’ causal link between either cause of action and the loss for which a claimant is seeking satisfaction.⁷⁷ Indeed, in this respect, grants of equitable compensation in either circumstance resemble awards of damages for deceit.⁷⁸ Yet, by analogy with other claims in tort, particularly negligence, it is possible that defendants will begin to argue in favour of introducing rules on remoteness, mitigation, and contributory fault. Indeed, some commentators have already begun to support these ideas.

⁷¹ *Rookes v Barnard* [1964] AC 1129, 1227-1228.

⁷² *Vyse v Foster* (1872-73) L.R. 8 Ch. App. 309, 333.

⁷³ *Burrows* (n 3) 360.

⁷⁴ See *Rookes v Barnard* (n 71); *Kuddus v Chief Constable of Leicestershire Constabulary* [2002] 2 AC 122.

⁷⁵ See *Burrows* (n 3) 536-537.

⁷⁶ See, for example, *Smith v Day* (1882) 21 Ch. D. 421, 428.

⁷⁷ See, for example, *Swindle v Harrison* (n 11); *Bovingdon v Belcher* (n 13).

⁷⁸ See, for example, *Smith New Court Securities Ltd v Citibank NA* [1997] A.C. 254.

Davies perceives a strengthening of ‘the link between equitable compensation and compensation at common law’,⁷⁹ and argues that, as ‘compensation requires *some* rules of remoteness’, ‘equitable compensation *must* establish [such] principles’.⁸⁰ Similarly, albeit only in relation to the law of fiduciaries, Lionel Smith has said:

‘As soon as [a claim is brought for loss caused,] issues of remoteness arise because there are limits to the responsibility that we can rightly impose on someone for the causal outcomes of a breach of duty’.⁸¹

In Davies’ view, the appropriate analogy is, in part, with negligence. ‘It would be possible’, he says, ‘for equity ... to adopt different approaches depending on whether or not [a] breach of [fiduciary] duty was deliberate’.⁸² Smith is more circumspect, asserting only that ‘the law may rightfully give different answers to [the question of remoteness] in relation to different kinds of wrongful act’.⁸³ However, he adds that ‘any such differences [must be] attributable to the nature of the ... wrongful acts in question, and not simply to whether they are [Legal] or equitable’.⁸⁴

Both scholars also see a place for a rule on mitigation. Davies, for instance, considers the proposition that the victim of a wrong ‘must not act in an unreasonable manner which [will] exacerbate his losses’⁸⁵ as applicable to all cases of wrongdoing, not just those of negligence.⁸⁶ He even perceives some role for a doctrine of contributory fault on the basis that ‘equity seeks a just result, and [that] “he who seeks equity should do equity”’.⁸⁷

Ultimately, it is beyond the scope of thesis to engage with the question of whether these suggestions should be adopted in the future. However, it is appropriate to make three points in relation to them.

⁷⁹ PS Davies, ‘Compensatory Remedies for Breach of Trust’ (2016) 2 CJCL 65, 94.

⁸⁰ *ibid.* 103 (emphasis added).

⁸¹ L Smith, ‘The Measurement of Compensation Claims against Trustees and Fiduciaries’ in E Bant and M Harding (eds), *Exploring Private Law* (Cambridge University Press 2010) 373.

⁸² Davies (n 79) 104.

⁸³ Smith (n 81) 373.

⁸⁴ *ibid.*

⁸⁵ Davies (n 79) 106.

⁸⁶ See, alternatively, Smith (n 81) 373.

⁸⁷ Davies (n 79) 109.

Firstly, it is not clear why tort rather than contract should provide the appropriate standard from which Equity should draw any analogies. It is true that (most) torts involve a breach of duty,⁸⁸ but so too do all breaches of contract.⁸⁹ In addition, both breach of contract and (at least) breach of fiduciary duty involve acting inconsistently with *voluntarily imposed* encumbrances.⁹⁰ Given that there are differences between the rules relating to the assessment of damages for breach of contract and for torts including negligence,⁹¹ judges should be careful to consider the nature of the duty violated in any case before pressing ahead with a wholesale importation of negligence-oriented rules on quantification. The fact that a cause of action involves wrongdoing does not necessarily indicate how a payment of compensation in response to it should be calculated.

Secondly, the introduction of limits on the extent of awards of equitable compensation for either breach of fiduciary duty or the exercise of undue influence may ‘work a subversion of fundamental principle’.⁹² Fiduciary relationships and relationships of influence are so sensitive that Equity has already taken care to remove them from the normal flow of private law regulation and imbue them with particularly robust levels of protection. As Gummow noted extrajudicially:

‘While negligence is concerned with the taking of reasonable care, a fiduciary has more expected of him. His [encumbrance] is one of undivided and unremitting loyalty’.⁹³

As Chapters 6 and 7 have explained, the reason why judges have chosen at various times to engage with a wrongs-based view of both the law of fiduciaries and the law of undue influence has been to provide more complete redress to particularly deserving categories of claimant. It has not been to reduce the overall level of protection afforded to principals or those under the

⁸⁸ See PH Winfield, *The Province of the Law of Tort* (Cambridge University Press 1931) 32; R Stevens, *Torts and Rights* (OUP 2009) 2.

⁸⁹ See *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827, 848-849.

⁹⁰ See P Millett, ‘Restitution and Constructive Trusts’ (1998) 114 LQR 399, 404-405; J Edelman, ‘When Do Fiduciary Duties Arise’ (2010) 126 LQR 302. It is possible that the law has developed to allow for fiduciary relationships to arise regardless of a powerholder’s consent, see L Smith, ‘Parenthood Is a Fiduciary Relationship’ (2020) 70 U Toronto L J 395. However, even if that is correct, the majority of fiduciary encumbrances are still voluntarily assumed.

⁹¹ See, for example, *The Wagon Mound (No 1)* [1961] A.C. 388; *The Achilleas* [2009] 1 A.C. 61.

⁹² Gummow (n 70) 86.

⁹³ *ibid.*

influence of others. Indeed, this is one of the many reasons to think that, however the duty-based analyses have developed, they coexist with disability-based conceptions of the law. Thus, insofar as importing concepts like remoteness, mitigation, and contributory fault into these doctrines would risk lessening the effective level of protection each of them provides, judges must tread with caution. As Mitchell has noted (with reference to the law of fiduciaries), it is possible that the courts ‘might still decide that in order to incentivize loyal behaviour [they] will not impose any remoteness cut-off on the loss that a principal can recover’.⁹⁴ Whilst there is still independent value in the notions of a fiduciary relationship and a relationship of influence, such a choice should not be denied to the courts unthinkingly. Losing sight of the theoretically hybrid nature of both areas of law increases the risk that this will happen.

The final point is that the further away from traditional principle awards of equitable compensation go, the more likely it is that the various doctrines which have come into existence to balance the respective entitlements and expectations of litigating parties in relation to disability-based claims will be forgotten. The doctrine of laches, for example, and the principle embodied by the maxim “he who comes to Equity must come with clean hands”, may well be inconsistent with the unbending position of the Common Law that terms may not be imposed on a party suing, such that ‘if [a claimant] be entitled to a verdict, the law must take its course’.⁹⁵ Insofar as any of these doctrines have a role in achieving justice between the parties to a fiduciary relationship or a relationship of influence,⁹⁶ they ought not to be put aside in haste. Again, the danger of forgetting about the disability-based approach is that this is exactly what will happen.

⁹⁴ Mitchell (n 6) 331.

⁹⁵ *Deeks v Strutt* (1794) 5 Term Rep. 690, 693.

⁹⁶ See, for example, *Baker v Read* (1854) 18 Beav. 398; *Allcard v Skinner* (1887) 36 Ch. D. 145.

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